RUSSELL

ON

CRIMES AND MISDEMEANORS

VOL. II.

SEVENTH EDITION

00936599

A TREATISE

ON

CRIMES AND MISDEMEANORS

BY

SIR WM. OLDNALL RUSSELL, KNT.

Late Chief Justice of Bengal

IN THREE VOLUMES

VOL II.

SEVENTH EDITION

BY

WILLIAM FEILDEN CRAIES

Of the Inner Temple and Western Circuit

Barrister-at-Law, Editor of "Archbold's Criminal Pleading," etc.

AND

LEONARD WILLIAM KERSHAW

Of the Inner Temple

Barrister-at-Law, Assistant Registrar of the Court of Criminal Appeal

WITH

CANADIAN NOTES

BY

ALFRED B. MORINE, K.C.

Of the Bar of Nova Scotia, Newfoundland and Ontario

6165

LONDON

STEVENS AND SONS, LIMITED, 119 AND 120 CHANCERY LANE

SWEET AND MAXWELL, LIMITED, 3 CHANCERY LANE

TORONTO

CANADA LAW BOOK COMPANY, LIMITED

PHILADELPHIA

CROMARTY LAW BOOK COMPANY, LIMITED

1910

KD 7869
R8
1910
C.2
V.2

VOLUME II.

Page 1210 (*l*). *After* Powell *v.* Hoyland *read* 6 Ex. 70.
„ 2077 (*p*). *After* R. *v.* Hinley *read* 1 Cox, 12.
„ 2083, line 1. *For* R. *v.* Murray *read* R. *v.* Lunny.
„ 2117 (*e*). *After* R. *v.* Harris *read* 2 Harg. St. Tr. 1038; 7 How. St. Tr. 926.
„ 2150 (*h*). *For* R. *v.* Williams *read* R. *v.* Wilbain.
„ 2343 (*e*). *After* R. *v.* Horne *read* 20 How. St. Tr. 651.

Copyright (Canada) 1910, by The Canada Law Book Company, Ltd.

TABLE OF CONTENTS

OF

THE SECOND VOLUME.

BOOK X.

OF OFFENCES AGAINST PROPERTY, PUBLIC OR PRIVATE.

CHAPTER		PAGE
I.	Of Burglary	1065
	Section I. Definition of Offence	1065
	„ II. The Breaking and Entering	1066
	„ III. The Dwelling House	1075
	„ IV. The Time	1091
	„ V. The Intent to commit a Felony	1092
	„ VI. The Indictment, Trial, &c.	1096
	„ VII. Being armed, &c., at night with Intent to break into Houses, &c.	1101
II.	Of Sacrilege, or Breaking into a place of Divine Worship, and committing Felony therein	1105
III.	Of House-breaking	1109
IV.	Of Stealing in a Dwelling-house, any person therein being put in fear	1111
V.	Of Stealing in a Dwelling-house to the value of Five Pounds or more	1115
VI.	Of Breaking, &c., and committing Felony in a Building within the Curtilage	1119
VII.	Of Breaking, &c., and committing Felony in any School-house, Shop, Warehouse or Counting-house	1123
VIII.	Of Breaking into any House, &c., with intent to commit Felony	1125
IX.	Of Robbery and Stealing from the Person and Assaults with intent to Rob, and of Threats and Threatening Letters	1127
	Section I. Of Robbery	1127
	„ II. Of Stealing from the Person	1155
	„ III. Of Threats and Threatening Letters	1156

CHAPTER		PAGE
X.	Of Larceny	1177
	Section I. The Taking and Carrying away necessary to constitute Larceny	1178
	„ II. The Taking *Animo Furandi*	1184
	„ III. The Taking *Lucri Causa*	1204
	„ IV. The Taking of the goods must be *Invito Domino*	1207
	„ V. Obtaining Possession by Fraud *Animo Furandi*	1209
	„ VI. Taking goods, &c., obtained by mistake	1240
	„ VII. Taking by persons having only a bare charge or special use of the goods, and by Bailees	1243
	„ VIII. Taking the property of Husband or Wife, by, or with consent of, the other Spouse	1251
	„ IX. Goods in respect of which Larceny may be committed	1256
	(*a*) Goods part of the freehold	1256
	(*b*) Written Instruments	1262
	(*c*) Animals, Birds, and Fish	1275
	(*d*) Electricity, Gas, and Water	1280
	„ X. Ownership of Goods	1280
	„ XI. Arrest, Indictment, and Trial	1295
	„ XII. Punishment	1313
	„ XIII. Restitution of Stolen Property	1313
XI.	Of Stealing Cattle, &c.	1321
XII.	Of Stealing Dogs, Birds, &c.	1325
XIII.	Of Stealing and Destroying Deer	1327
XIV.	Of Unlawfully Taking or Killing Game, Hares or Rabbits, &c.	1331
XV.	Of Unlawfully Taking or Destroying Fish	1351
XVI.	Of Stealing in any Vessel in Port, or upon any navigable River, &c., or in any Creek, &c., and of plundering Shipwrecked Vessels	1355
XVII.	Of Larceny by Clerks and Servants, and Persons who have the Custody of Goods as Servants, and not the Legal Possession	1359
XVIII.	Of Embezzlement by Clerks and Servants	1375
	Section I. Statutes in Force	1375
	„ II. Who are Clerks or Servants	1378
	„ III. Receipt of Money, &c., for, or in the name or on account of, the Master	1390
	„ IV. What amounts to Embezzlement	1393
	„ V. Indictment, Trial, Venue	1401
XIX.	Of Fraudulent Conversion of Property	1407
XX.	Of Falsification of Accounts by Clerks and Servants, &c.	1417

CHAPTER		PAGE
XXI.	Of Embezzlement by Officers and Servants of the Banks of England and Ireland, and by Public Officers, or by the Police	1421
XXII.	Of Larceny, Embezzlement, &c., of Postal Packets and Money Orders, and of other Offences against the Post Office Acts	1427
	Section I. Statutes in Force	1427
	(*a*) Letters, Money Orders, &c.	1427
	(*b*) Telegrams	1433
	,, II. Decisions on Former Post Office Acts	1435
XXIII.	Of Larceny and Embezzlement of Naval and Military Stores	1445
XXIV.	Of Larceny, &c., of Articles in Process of Manufacture	1447
XXV.	Of Larceny by Tenants and Lodgers	1449
XXVI.	Of Frauds by Bankrupts and Debtors	1451
XXVII.	Of Receiving Goods Stolen, &c.	1465
	Section I. Common Law and Statutes in Force	1465
	,, II. Who is a Receiver—Distinction between Receiver and Principal	1468
	,, III. Form of Indictment—Venue	1476
	,, IV. Trial—Evidence	1480
XXVIII.	Of Taking a Reward for Helping to the Discovery of Stolen Property	1489
XXIX.	Of Unlawfully Receiving or Having Possession of Public Stores	1493
XXX.	Of Receiving Goods Stolen from Ships; and of Receiving Goods Stolen on the River Thames	1499
XXXI.	Of Cheats, Frauds, False Tokens, and False Pretences	1501
	Section I. Of Cheats and Frauds punishable at Common Law	1501
	,, II. Of False Pretences punishable under the Larceny Act, 1861	1514
	(*a*) What is a Chattel or Valuable Security within the Statute	1515
	(*b*) What are False Pretences	1516
	(*c*) The Intent to Defraud	1562
	(*d*) Indictment, Trial, Evidence	1565
	,, III. Of Cheats and Frauds punishable by other Statutes	1587
XXXII.	Of Forgery	1599
	Section I. The making or alteration of a written instrument necessary to constitute Forgery	1600
	,, II. The written instruments in respect of which Forgery may be committed	1637
	,, III. The Intent to Defraud	1642

CHAPTER		PAGE
	Section IV. Indictment, Trial, Evidence, and Punishment	1650
	„ V. Enactments as to Forgery generally	1677
XXXIII.	Of Forging, &c., Records, Judicial Process, and Evidence	1683
XXXIV.	Of Forgeries relating to the Public Funds, and the Stocks of Public Companies	1691
XXXV.	Of Forging Bank-notes, and of making Plates for Bank-notes, &c.	1699
XXXVI.	Of Forging East India Securities, Debentures, &c.	1705
XXXVII.	Of Forging and Transposing Stamps	1709
XXXVIII.	Of the Forgery of Official Papers, Securities, and Documents	1719
XXXIX.	Of the Forgery of Private Papers, Securities, and Documents	1741
XL.	Of Demanding Property upon Forged Instruments	1761
XLI.	Of False Personation	1763
XLII.	Of Malicious Damage to Property	1771
XLIII.	Of Malicious Damage to Buildings	1775
	Section I. Arson at Common Law	1775
	„ II. Setting Fire to Buildings and Goods therein	1778
	„ III. Damage to Buildings, &c., by Explosives	1791
	„ IV. Damage to Buildings, &c., by Tenants	1791
XLIV.	Of Malicious Damage to Ships, Dockyards, &c.	1793
	Section I. Burning or Destroying Ships, Dockyards, &c.	1793
	„ II. Damaging Ships or Wrecks	1796
	„ III. Exhibiting False Signals, &c.	1797
XLV.	Of Malicious Damage to Crops, Plants, Woods, Trees, Heaths, Stacks, &c.	1799
	Section I. Setting fire to Crops, Woods, Heath, Stacks, &c.	1799
	„ II. Damaging Trees, Shrubs, or Underwood	1801
	„ III. Damaging Plants, Roots, Fruits, and Vegetable Products, Hopbinds, &c.	1803
XLVI.	Of Malicious Damage to Mines	1805
	Section I. Setting Fire to Mines	1805
	„ II. Damaging Mines, &c.	1805
XLVII.	Of Malicious Damage to Articles in Course of Manufacture, and to Implements and Machinery	1809
XLVIII.	Of Malicious Damage to Sea Banks, &c., or to the Dams, &c., of Rivers, Canals, Fishponds, &c., or to Fisheries	1815

CHAPTER PAGE

XLIX. Of Malicious Damage to Bridges, Toll Bars, Fences, &c. 1819

L. Of Malicious Damage to Telegraphs, Electric Lines, &c. 1821

LI. Of Malicious Damage to Works of Art, Monuments, &c. in Museums, Churches, Public Places, &c. 1823

LII. Of Killing and Maiming Cattle and other Animals . 1825

LIII. Of Malicious or Wilful Damage to Real or Personal Property not otherwise Provided for . 1829

BOOK XI.

OF PUBLIC NUISANCES AND OFFENCES RELATING TO TRADE.

I. Of Public Nuisances in General 1833

II. Of Eavesdroppers, Common Scolds, and Night-walkers 1841

III. Of Nuisances to Public Health 1843

Section I. General 1843

„ II. Introducing or Spreading Infectious Disease 1843

„ III. Unwholesome Food or Drink 1847

IV. Of Nuisance by Trade or Business 1849

Section I. Nuisance by Noise and Vibration 1849

„ II. Nuisance by Stench, Smoke, &c. 1850

„ III. Acts or Omissions causing Public Danger . 1855

V. Of Offences relating to Dead Bodies 1861

VI. Of Obscenity and Indecency 1875

Section I. Obscene Libels 1875

„ II. Indecent Exhibitions 1882

„ III. Indecent Exposure 1883

VII. Of Nuisances by Causing Disorder 1887

Section I. General Principles 1887

„ II. Unlicensed Public Entertainments . . . 1891

„ III. Bawdy Houses 1892

„ IV. Gaming and Betting, and Gaming and Betting Houses 1895

„ V. Prosecution of Disorderly Houses . . . 1902

„ VI. Bets with and Loans to Infants 1903

„ VII. Lotteries 1905

VIII. Of Offences with respect to Trade Disputes and Wages 1909

Section I. Acts in Restraint of Trade 1909

CHAPTER PAGE

Section II. Offences connected with disputes between Employers and Workmen 1909
„ III. Hindering the Exportation or Circulation of Corn or Interfering with the Loading, &c., of Ships 1915
„ IV. Offences against the Truck Acts 1917

IX. Of Forestalling, Regrating, Ingrossing, Monopolies, and Patents, &c. 1919
Section I. Forestalling, &c. 1919
„ II. Monopolies 1920
„ III. Offences relating to Patents and Trade Marks 1921

BOOK XII.

PROCEDURE, APPEAL, COSTS, AND REWARDS.

I. Of the Prosecution of Indictable Offences 1923
Section I. Who may Prosecute 1923
„ II. Vexatious Indictments 1926
„ III. Limitations of Time for Prosecution . . . 1930
„ IV. Courts in which Indictments may be preferred 1932

II. Of Criminal Pleadings 1935
Preliminary 1935
Section I. General Rules as to Pleading 1935
„ II. Joinder of several Counts or several Offences in an Indictment 1952
„ III. Positive and Negative Averments 1954
„ IV. Indictments for Offences committed after previous Convictions 1958
„ V. Conviction of Offence other than the full Offence charged in the Indictment. . . 1962
„ VI. Surplusage 1969
„ VII. Amendment 1971
„ VIII. Pleas 1979

III. Proceedings at the Trial 1997
Section I. Traversing or Postponing Trial 1997
„ II. Opening, Summing Up, and Reply. . . . 1998
„ III. Judgment on Conviction of Felony or Misdemeanor tried on a Record of the High Court (K. B. D.). 2002

CHAPTER		PAGE
IV.	CRIMINAL APPEAL	2005
Section	I. Former Modes of Review, &c., obsolete in England	2005
„	II. Venire de Novo, Arrest of Judgment and Certiorari	2006
„	III. Present Modes of Appeal	2007
	(*a*) Crown Cases Act, 1848	2007
	(*b*) Criminal Appeal Act, 1907	2009
V.	COSTS IN CRIMINAL CASES	2039
Section	I. General Provisions	2039
„	II. Order for Payment of Costs by Defendant or Prosecutor	2042
„	III. Supplemental Provisions	2043
„	IV. Costs of Defence of Poor Prisoners	2048
„	V. Costs of Removed Indictments	2048
VI.	REWARDS AND COMPENSATION	2051

BOOK XIII.

OF EVIDENCE.

I.	OF THE NATURE AND KINDS OF EVIDENCE	2055
Section	I. Direct and Circumstantial Evidence	2056
„	II. Primary and Secondary Evidence	2065
„	III. Hearsay	2079
„	IV. Dying Declarations	2084
„	V. Other forms of Hearsay	2094
„	VI. Statements against interest by Deceased Persons	2094
II.	OF THE ADMISSIBILITY OF EVIDENCE	2097
Section	I. Evidence confined to the points in issue	2097
„	II. Acts forming part of the same transaction	2101
„	III. Acts not forming part of the incriminated transaction	2108
„	IV. Evidence of Character	2116
III.	OF WRITTEN EVIDENCE	2121
Section	I. Public Documents	2121
„	II. Private Documents	2147
IV.	OF CONFESSIONS, ADMISSIONS AND DEPOSITIONS	2155
Section	I. Confessions and Admissions	2155
„	II. Depositions and Statements at the Preliminary Inquiry	2212
	(*a*) Statutes in force	2212
	(*b*) Statements made by the Accused before Examining Justices	2217

CHAPTER		PAGE
Section II.	(*c*) Taking Depositions	2225
	(*d*) Form of Deposition—Signing same	2229
	(*e*) Deposition admissible when witness dead or so ill as not to be able to travel	2232
	(*f*) Other cases in which Depositions admissible	2235
	(*g*) Depositions when admissible upon trial for a different offence	2237
	(*h*) Proof of Depositions at trial.	2241
,, III.	Depositions and Statements before Coroners	2244
,, IV.	Bedside Depositions	2246
,, V.	Depositions taken on Commission or Abroad	2248
,, VI.	Inspection and Copies of Depositions	2252
V.	Of Witnesses, their Attendance, Competency, Examination and Privilege	2255
Section I.	Preliminary	2255
,, II.	Attendance	2255
,, III.	What witnesses are competent	2260
,, IV.	How many witnesses are necessary	2293
,, V.	Swearing the witnesses	2295
,, VI.	Examination of witnesses	2299
	(*a*) Examination in chief	2300
	(*b*) Cross-examination and impeaching credit of witnesses	2308
	(*c*) Re-examination	2325
	(*d*) Recalling witnesses	2326
	(*e*) Rebutting evidence	2327
	(*f*) Impeaching witnesses character by direct proof	2329
,, VII.	Privilege of witness not to answer certain questions	2331

A TREATISE

ON

CRIMES AND MISDEMEANORS.

BOOK THE TENTH.

OF OFFENCES AGAINST PROPERTY, PUBLIC OR PRIVATE.

CHAPTER THE FIRST.

OF BURGLARY.

SECT. I.—DEFINITION OF OFFENCE.

ACCORDING to the older authorities, burglary at common law might be committed by feloniously breaking and entering (1) a church, (2) the walls or gates of a town, (3) a private house (*a*). Church breaking is now punishable by statute (*b*). Few towns have walls or gates to be broken, and for present purposes the common law definition of burglary is *breaking and entering the dwelling-house of another in the night, with intent to commit some felony within the same, whether such felonious intention be executed or not* (*c*). Where the entry is without breaking, the offender may be convicted under 24 & 25 Vict. c. 96, s. 54, *post*, p. 1101.

(*a*) Staundf. P.C. 30. 22 Ass. pl. 95. Britt. c. 10. Dalt. c. 99. Crompt. 31. Spelm. Gloss. tit '*Burglaria*.' In 3 Co. Inst. 64, Coke gives as a reason for considering the breaking and entering the church as a burglary, that the church is *domus mansionalis omnipotentis Dei*; but Hawkins says that he does not find this nicety countenanced by the more ancient authors; and that the general tenor of the old books seems to be that burglary may be committed in breaking houses, or churches, or the walls, or gates of a town. 1 Hawk. c. 38, s. 17. In 4 Bl. Com. 224, it is stated that breaking open a church is undoubtedly burglary. And see R. *v.* Nicholas, 1 Cox, 218; R. *v.* Baker, 3 Cox, 581.

(*b*) *Post*, p. 1105.

(*c*) 3 Co. Inst. 63. 1 Hale, 549. Sum. 79. 1 Hawk. c. 38, s. 1. 4 Bl. Com. 224. 2 East, P.C. 484. Burn's, Just. tit. 'Burglary,' s. 1. The word *burglar* is in mediæval Latin *burgisor*, *burgator* or *burgulator*. Spelman says burglars were so called *quod dum alii per campos latrocinantur eminus, hi burgos pertinacius effringunt, et deprædantur*. The crime, however, appears to have been noticed in our earliest laws, and in Anglo-Saxon and in Scots law the crime is styled *Hamesocn* (*hamesucken*). It is said to have been capital by the laws of Canute and Hen. I. Ll. Canuti, c. 61. Ll. Hen. I. c. 13. 1 Hale, 547, citing Spelm. Gloss. tit. 'Hamsecken,' and ibid. tit. 'Burglaria.' See Pollock & Maitland, Hist. Eng. Law, i. 491. Steph. Hist. Cr. L. ii. 56, iii. 150. Hue and cry was levied for burglary under the Stat. de Officio Coronatoris (4 Ed. 1). In the earlier stages of English law *hus-brice* or *burgh*

Sect. II.—Breaking and Entering.

The indictment charges that the accused feloniously and burglariously broke and entered (*felonice et burglariter fregit et intravit*).

Breaking in.—To constitute the offence, there must be both *breaking* and *entering* (*d*), and both must be in the night-time, but not necessarily on the same night (*e*). Where *breaking* is proved but *entry* is not, the accused may be convicted of an attempt to commit burglary (*f*).

Where entry is proved but breaking in is not, the accused may be convicted of a felony within 24 & 25 Vict. c. 96, s. 54, *post*, p. .

If a man enters a house by a door or window, which he finds open, or through a hole which was made there before, and steals goods; or draws goods out of a house through such door, window, or hole, he is not guilty of burglary (*g*). There must either be (1) an actual breaking of some part of the house, in effecting which some actual force is employed; or (2) a breaking by construction of law, *i.e.* an entrance obtained by threats, fraud, or conspiracy.

A cellar window, which was boarded up, had in it a round aperture of considerable size, to admit light into the cellar. Through this aperture one of the prisoners thrust his head, and, by the assistance of the other prisoner, he thus entered the house, but the prisoners did not enlarge the aperture at all. It was held that this was not a sufficient breaking (*h*). An entry through a hole left in the roof of a brewhouse, part of a dwelling-house, for the purpose of light, was held not a sufficient breaking. Bosanquet, J., said: 'Entry by the chimney stands upon a very different footing; it is a necessary opening in every house, which needs protection; but if a man choose to leave an opening in the wall or roof of his house, instead of a fastened window, he must take the consequences. The entry through such an opening is not a breaking' (*i*).

An actual breaking of the house may be by making a hole in the wall; by forcing open the door; by putting back, picking, or opening the lock with a false key; by breaking the window; by taking a pane of glass out of the window, either by taking out the nails or other fastenings,

brice and burglary (*burgeria*) were hardly distinguished (Britton, i. c. 42). The circumstance of *time*, which is now of the very essence of 'burglary,' does not seem to have been material; and the malignity of the crime was supposed to consist merely in the invasion on the right of habitation, to which the laws of England have always shown an especial regard, herein agreeing with the sentiments of ancient Rome, as expressed in the words of Cicero: *Quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium? Hic aræ sunt, hic foci—hoc perfugium est ita sanctum omnibus, ut inde abripi neminem fas sit.* The learned editor of Bacon's Abridgment says that his researches had not enabled him to discover at what particular period *time* was first deemed essential to the offence; but that it must have been so settled before the reign of Edw. VI. as in the fourth year of that king it is expressly laid down that it shall not be adjudged burglary, *nisi ou le infreinder del meason est per noctem* (Bro. tit. 'Corone,' pl. 185), and that, two years before, *per noctem* is introduced (Id. pl. 180), as of course, in the mention of the offence. 1 Bac. Abr. tit. 'Burglary,' 539 (ed. 1807). And see 3 Co. Inst. 65.

(*d*) 1 Hawk. c. 38, s. 3. 1 Hale, 551. 4 Bl. Com. 226.

(*e*) 1 Hale, 551. 4 Bl. Com. 226, and *post*, p. 1091.

(*f*) R. *v.* Spanner, 12 Cox, 155, Bramwell, B., after consulting Martin, B.

(*g*) 3 Co. Inst. 64. 1 Hawk. c. 38, s. 4. 1 Hale, 551, 552. 4 Bl. Com. 226.

(*h*) R. *v.* Lewis, 2 C. & P. 628, Vaughan, B.

(*i*) R. *v.* Spriggs, 1 M. & Rob. 357.

or by drawing or bending them back, or by putting back the leaf of a window with an instrument. And even drawing or lifting up the latch (*j*), where the door is not otherwise fastened; turning the key where the door is locked on the inside; or unloosing any other fastening which the owner has provided, will amount to a breaking (*k*).

Where the prisoner got into the prosecutor's cellar, by lifting up a heavy grating, and into his house by forcing open a window which opened on hinges, and was fastened by two nails, which acted as wedges, but would open by pushing, the judges held the forcing open the window to be a sufficient breaking (*l*).

Where a pane of glass had been cut for a month, but there was no opening whatever, as every portion of the glass remained exactly in its place, and the prisoner was both seen and heard to put his hand through the glass, this was held a sufficient breaking (*m*).

The prisoner entered a house by pushing down the upper sash of a window, which had no fastening, and was kept in its place by the pulley weight only. There was an outer shutter, but it was not put to. All the judges were unanimous that pushing down the sash was a breaking (*n*).

So raising a window, which is shut down close, but not fastened, is a breaking, although there is a hasp, which could have been fastened to keep the window down (*o*).

If a window is partly open, but not sufficiently to admit a person, the raising it higher, so as to admit a person, is not a breaking (*p*). But where a square of glass in a kitchen window, through which the prisoners entered, had been previously broken by accident, and half of it was out at the time when the prosecutor left the house, and the aperture was sufficient to admit a hand, but not to enable a person to put his arm in, so as to undo the fastening of the casement, and one of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done he removed the fastening of the casement; the judges were unanimously of opinion that this was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window (*q*). And a person, who, finding a hole in a door or pane of glass, puts his hand in through the hole to remove the fastening of the door or window, and so gains admittance into the premises, breaks into the house (*r*).

Chimney.—A person who with intent to commit felony in a dwelling-house gets into it by creeping down the chimney, is held to have broken into the house on the ground that the house is as much closed as the nature of things will permit (*s*). Where the prisoner got in at the top of a chimney, and got down to just above the mantel-piece of a room

(*j*) R. *v.* Owen, 1 Lew. 35, Bayley, J., whether it be an outer or inner door; and see R. *v.* Lawrence, 4 C. & P. 231, and R. *v.* Jordan, 7 C. & P. 432.

(*k*) 1 Hale, 552. 3 Co. Inst. 64. Sum. 80. 1 Hawk. c. 38, s. 6. 2 East, P.C. 487.

(*l*) R. *v.* Hall, R. & R. 355.

(*m*) R. *v.* Bird, 9 C. & P. 44, Bosanquet, J.

(*n*) R. *v.* Haines, R. & R. 451.

(*o*) R. *v.* Hyams, 7 C. & P. 441, Park, and Coleridge, JJ.

(*p*) R. *v.* Smith, 1 Mood. 178.

(*q*) R. *v.* Robinson, 1 Mood. 327.

(*r*) Ryan *v.* Shilcock, 7 Ex. 72.

(*s*) Crompt. 32 (*b*). Dalt. c. 99, p. 253. 1 Hawk. c. 38, s. 6. 2 East, P.C. 485. There was at one time a doubt on this point. 1 Hale, 552.

on the ground floor, ten of the judges held that this was a breaking and entering of the dwelling-house, on the ground that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the lowering himself down the chimney was an entry within the dwelling-house (*t*).

A mill was under the same roof, and within the same curtilage as the dwelling-house. Through the mill there was an open entrance, or gateway, capable of admitting waggons, and intended for the purpose of loading them more easily with flour by means of a large aperture or hatch, over the gateway, communicating with the floor above. This aperture was closed by folding doors with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening; so that persons on the outside, under the gateway, could push them open at pleasure, by a moderate exertion of strength. The prisoner entered the mill in the night, by so pushing open the folding doors, with the intention of stealing flour; and Buller, J., held this to be a sufficient breaking (*u*).

The prisoner entered into a cellar, by raising up a flap-door, which let down, and had from time to time been fastened with nails, when the cellar was not wanted to keep coals in: and the jury found upon the evidence that it was not nailed down on the night the prisoner entered; it was held, on a case reserved, that there was a sufficient breaking (*v*).

Walls.—The book, 22 Assiz. 95, in which burglary is defined as the breaking of houses, churches, *walls*, courts, or gates, in time of peace, is referred to by Hale as seeming to lead to the conclusion, that where a man has a wall about his house for its safeguard, if a thief should in the night-time break such wall, or the gate thereof, and finding the doors of the house open, should enter the house, it would be burglary; though it would be otherwise if the thief should get over the wall of the court, and so enter through the open doors of the house (*w*). But the doctrine referred to by Hale was anciently understood only as relating to the walls or gates of a city; and did not support his conclusion, when he applied it to the wall of a private house (*x*). And the distinction between breaking and coming in over the gate or wall is spoken of as being over-refined; for if the gate or wall is part of the mansion, for the purpose of burglary, and is enclosed as much as the nature of the thing will admit of, it seems immaterial whether it is broken or overleaped (*y*), and if it is not part of the mansion-house for this purpose, then whether it is broken or not is immaterial, as in neither case will the act amount to burglary (*z*).

A box, used as a shutter-box, which partly projected from the wall of the house, and adjoined one side of the window of the shop, which

(*t*) R. *v.* Brice, R. & R. 450. Two judges dissented.

(*u*) R. *v.* Brown, 2 East, P.C. 487.

(*v*) R. *v.* Russell, 1 Mood. 377. This case seems to overrule R. *v.* Lawrence, 4 C. & P. 231, where the breaking was out of the house. See R. *v.* Callan. MS. Bayley, J., and R. & R. 157.

(*w*) 1 Hale, 559.

(*x*) Note (*n*) to 1 Hale, 559 (ed. 1800).

(*y*) See the cases as to chimneys, *supra*.

(*z*) 2 East, P.C. 488; and see R. *v.* Bennett, MS. Bayley, J., and R. & R. 289, and R. *v.* Davis, MS. Bayley, J., and R. & R. 322, *post*, p. 1122.

side of the window was protected by wooden panelling, lined with plates of iron, was held not to be part of the dwelling-house (*a*).

The breaking requisite to constitute a burglary is not confined to the *external* parts of the house, but may be of an *inner* door, after the offender has entered through a part of the house which he has found open. Thus, if A. enters the house of B. in the night-time, through an open outer door, or an open window, and, when within the house, turns the key of a chamber door, or unlatches it, with intent to steal, this will be burglary (*b*). So where the prisoners went into a house to eat, and taking their opportunity, slipped up stairs, picked open the lock of a chamber door, broke open a chest, and stole plate, it was agreed that the picking open the lock of a chamber door ousted them of their clergy, though the breaking open the chest would not have done so (*c*). And it is also burglary if a servant in the night-time opens the chamber door of his master or mistress, whether latched or otherwise fastened, and enters for the purpose of committing murder or rape, or any other felony (*d*); or if any other person, lodging in the same house, or in a public inn, opens and enters another's door, with such intent (*e*). It has been questioned whether, if a lodger in an inn, in the night-time, opens his chamber door, steals goods, and goes away, the offence would be burglary; on the ground of his having a kind of special property and interest in his chamber, and the opening of his own door being therefore no breaking of the innkeeper's house (*f*).

The breaking open of a chest, or box, by a thief who has entered by means of an open door or window, is not burglary, because such articles are no part of the house (*g*). But the breaking of cupboards, and other things of a like kind, affixed to the freehold, has been considered more doubtful. Thus, the judges, upon a special verdict, were divided on the question, whether breaking open the door of a cupboard let into the wall of the house was burglary or not (*h*). Hale, C.J., says, that such breaking is not burglary at common law (*i*). And Foster, J., says: 'In questions between the heir or devisee, and the executor, those fixtures may, with propriety enough, be considered as annexed to, and parts of the freehold. The law will presume, that it was the intention of the owner, under whose

(*a*) R. *v.* Paine, 7 C. & P. 135, Denman, C.J., Park, J., Bolland, B., Sir J. Cross. 'The whole facts in the report are inserted. It is not stated whether the box had any communication with the inside of the house, or whether the breaking was such as to make an opening into the inside of the house.' C. S. G.

(*b*) 1 Hale, 553. 1 Hawk. c. 38, s. 6. R. *v.* Johnson, 2 East, P.C. 488.

(*c*) Anon. 1 Hale, 524.

(*d*) R. *v.* Edmonds, Hutt. 20; Kel. (J.) 67; 1 Hale, 554; where a servant was held guilty of burglary who unlatched the stair-foot door, and went with a hatchet to kill his master. In 1 Hale, 354, 355, it is suggested that for a servant to *unlatch* a door and turn a key in a door of his master's house, the opening being within his trust, is not burglary; but that it is burglary if he *breaks open* a door in the house, such breaking not being within his trust.

(*e*) 1 Hale, 553, 554. 4 Bl. Com. 227. R. *v.* Binglose [1689]. MS. Denton, cited 2 East, P.C. 488. R. *v.* Gray, 1 Str. 481. Sum. 82, 84. Bac. Abr. tit. 'Burglary' (A). R. *v.* Wenmouth, 8 Cox, 348, Keating, J., where a servant burst open the door of a shop in the night in order to steal money from the till.

(*f*) 1 Hale, 554. But upon this it is observed, that if another person should open such lodger's door burglariously, it must be laid to be the mansion of the innkeeper, and that a guest may commit larceny of the things delivered to the innkeeper's charge. 2 East, P.C. 488, and see R. *v.* Wheeldon, *post*, p. 1070.

(*g*) 1 Hale, 523, 524, 554. 1 East, P.C. 488, 489.

(*h*) Fost. 108, citing MS. Denton.

(*i*) 1 Hale, 527.

bounty the executor claims, that they should be so considered; to the end that the house might remain to those who, by operation of law, or by his bequest, should become entitled to it, in the same plight he put it, or should leave it, entire and undefaced. But in capital cases, I am of opinion that such fixtures which merely supply the place of chests, and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use' (*j*).

Breaking out.—The doubts at one time felt as to whether it was burglary to *break out* of a house which had been entered without breaking (*k*) have been removed by legislation. By s. 51 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), 'whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house, shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary' (*l*).

If a person commits a felony in a house, and breaks out of it in the night-time, this is a burglary, within the above section, although he might have been lawfully in the house. If, therefore, a lodger has committed a larceny in the house, and in the night-time even lifts a latch to get out of the house with the stolen property, this is a burglary (*m*).

Breaking by Construction of Law.—A breaking may also be by construction of law, where an entrance is obtained by threats, fraud, or conspiracy.

1. *By Threats.*—Where in consequence of violence commenced or threatened in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door, and the thief enters, such entry will amount to a breaking in law (*n*). Where the evidence was, that those within the house were forced by threats and intimidation, to let in the offenders, Thomson, B., told the jury, that if such opening proceeded from the intimidation of those who were without, and from the force that had been used, knocking at and breaking the windows, calling out and insisting upon the door being opened, and firing guns, thus inducing the persons within to open the door, it was as much a breaking by those who made use of such intimidation to prevail upon them so to open it, as if they had actually burst the door open (*o*). But if, upon a bare assault upon a house, the owner flings out his money to the thieves, it will not be burglary (*p*); though to take up the money in the owner's presence would be robbery (*q*). And though the assault were so

(*j*) Fost. 109. See 2 East, P.C. 489.

(*k*) By Lord Holt and Trevor, C.J., in R. *v.* Clarke, 2 East, P.C. 490. Hale (1 H. P. C. 554) says: 'If a man enter in the night-time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape: this, I think, is not burglary, against the opinion of Dalt. c. 99, p. 253 (new edit. p. 487), out of Sir Francis Bacon; for *fregit et exivit, non fregit et intravit.*' Bacon thought it was burglary. Elem. 65.

(*l*) Taken from 7 & 8 Geo. 4, c. 29, s. 11 (E), and 9 Geo. 4, c. 55, s. 11 (I). The earliest legislation on this subject was 12 Anne, st. 1, c. 7, s. 3.

(*m*) R. *v.* Wheeldon, 8 C. & P. 747, Erskine, J.

(*n*) Crompt, 32 (*a*). 1 Hale, 553. 2 East, P.C. 486.

(*o*) R. *v.* Swallow, Thomson, B. York, January, 1813. MS. Bayley, J. 1 Hawk. c. 38, s. 7, is to the same effect.

(*p*) 1 Hawk. c. 38, s. 3.

(*q*) Sum. 81. 2 East, P.C. p. 486.

considerable as to break a hole in the house; yet if there were no entry by the thief, but only a carrying away of the money thrown out to him by the owner, the offence would be robbery and not burglary (*r*).

2. *By Fraud.*—If thieves, having an intent to rob, raise hue and cry, and bring the constable, to whom the owner opens the door, and they, when they come in, bind the constable and rob the owner, it is burglary (*s*). And, upon the same principle, getting possession of a dwelling-house by means of a fraudulent ejectment obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be within the statute then in force against breaking the house, and stealing the goods therein (*t*). So if a man goes to a house under pretence of having a search warrant, or of being authorised to make a distress, and by these means obtains admittance, this, if done in the night-time, is a sufficient breaking and entering to constitute burglary, or if done in the day-time, house-breaking (*u*).

Where thieves came to a house in the night-time, with intent to commit a robbery, and knocked at the door, pretending to have business with the owner, and, being by such means let in, robbed him, they were held guilty of burglary (*v*). And where some persons took lodgings in a house, and afterwards, at night, while the people were at prayers, robbed them; it was considered, that the entrance into the house being gained by fraud, with an intent to rob, the offence was burglary (*w*). For the law will not endure to have its justice defrauded by such evasions (*x*).

On an indictment for burglary it appeared that the prisoner was acquainted with the house, and knew that the family were in the country; and that upon meeting with the boy who kept the key, she desired him to go with her to the house; and, by way of inducement, promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in, *in the night-time;* upon which she sent him for the pot of ale, and, when he was gone, robbed the house, and went away. She was held guilty of burglary (*y*).

3. *By Conspiracy.*—On an indictment of two for burglary, it appeared that one was a servant in the house where the offence was committed; that in the night-time he opened the street door, let in the other, and shewed him the sideboard, from whence the other prisoner took the plate; that he then opened the door, and let the other out; did not go out with him,

(*r*) 1 Hale, 555, but he says, that some have held it burglary, though the thief never entered the house; and that it is reported to have been so adjudged by Saunders, Chief Baron, Crompt. 31 *b*. Hale subjoins to this doctrine *tamen quære*, and certainly, as a part of the statement of the case is, that there was *no entry* into the house, and as an entry is, as will presently be shown, as essential a part of the offence as the breaking, it seems difficult to discover the ground on which it could have been ruled to be burglary. The editor of Hale (ed. 1800) states in a note, that it was adjudged by Montague, Chief Justice of the C. B., and that Saunders only related it.

(*s*) 3 Co. Inst. 64. 1 Hale, 552. Sum. 81. Crompt. 32 *b*. Kel. (J.) 44, 82. 1 Hawk. c. 38, s. 10. 4 Bl. Com. 226.

(*t*) R. *v.* Farre, Kel. (J.) 43. See 2 East, P.C. 660; 2 Leach, 1062.

(*u*) Per Cur. in R. *v.* Gascoigne, 1 Leach, 284.

(*v*) R. *v.* Le Mott, Kel. (J.) 42. 1 Hawk. c. 38, s. 8.

(*w*) R. *v.* Cassy, Kel. (J.) 62, 63. 1 Hawk. c. 38, s. 9, referred to by the Court, in giving judgment in R. *v.* Semple, 1 Leach, 424.

(*x*) 1 Hawk. c. 38, s. 9. 4 Bl. Com. 227. 2 East, P.C. 485.

(*y*) R. *v.* Hawkins, 1 East, P.C. 485, cited from MS. Tracy, 80, and MS. Sum. See also Fost. 38.

but went to bed. All the judges were of opinion, that both men were guilty of burglary (*z*).

On an indictment against Johnson and Jones for burglary and stealing plate, it appeared that the prosecutor's groom met Jones, who proposed to him to rob his master of his plate, and that they agreed to meet again on a future day. The groom in the meantime told a constable, and agreed to act under the direction of the police in order to detect Jones. He accordingly met Jones, and also Johnson, and it was arranged that the groom should get the other servants out of the way, and admit the prisoners on a future evening. On that evening several constables were secreted in the house, and the groom then went and fetched Johnson to the house; the groom lifted the latch of the kitchen door, and let Johnson in. Johnson went upstairs, and, as he was about to open the door of the room where the prosecutor's iron chest was deposited, he was secured by the police, and locked up in a room. A few minutes afterwards the groom brought Jones to the house, and let him in by opening the door for him. Jones went into the back kitchen, and took from it the plate basket containing the plate in question. It was held that there was no such breaking as to constitute a burglary, for though the groom appeared to concur with the prisoners, he really did not so concur, and, in acting under the directions of the police, he must be taken to be acting under the directions of the prosecutor, and therefore the prisoners went in at a door which was lawfully open. Neither of the prisoners therefore was guilty of burglary, and, as Johnson was in custody at the time the plate was taken by Jones, he was not guilty of the larceny; but Jones was convicted of stealing the plate (*a*).

Entering.—Any entry, either with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient (*b*). Thus, where the prisoners, in the night-time, cut a hole in the window-shutters of the prosecutor's shop, which was part of his dwelling-house, and putting his hand through the hole, took out watches and other things, which hung in the shop, within his reach, this was held burglary (*c*). So, if a thief breaks the window of a house in the night-time, with intent to steal, and puts in a hook or other engine, to reach out goods; or puts a pistol in at the window with intent to kill; this is burglary, though his hand is not within the window (*d*). And, where thieves came in the night to rob A., who perceiving it opened his door, went out, and struck one of the thieves with a staff, when another of them, having a pistol in his hand, and perceiving persons in the entry ready to interrupt them, put his pistol within the door, over the threshold, and shot, in such manner that his

(*z*) R. *v.* Cornwall, 2 Str. 881. 1 Hawk. c. 38, s. 14. 19 St. Tr. 782 (n). See also 1 Hale, 553. 1 Hawk. c. 38, s. 14. 4 Bl. Com. 227. In Dalt. c. 99, p. 253 (later ed. p. 487), it is supposed only to be larceny in the servant; but, Hale says, it seems to be burglary in both, for if it be burglary in the thief, it must needs be so in the servant, because he is present and aiding the thief to commit a burglary.

(*a*) R. *v.* Johnson, C. & M. 218, Maule, J., and Rolfe, B. Johnson was afterwards convicted as an accessory before the fact.

(*b*) 3 Co. Inst. 64. 1 Hale, 555. Sum. 80. 1 Hawk. c. 38, s. 11, 12. 1 And. 115. Lamb. c. 7, p. 263. Fost. 108. 4 Bl. Com. 227. Bacon, Ab. tit. 'Burglary' (B).

(*c*) R. *v.* Gibbon, Fost. 107, 108.

(*d*) 3 Co. Inst. 64. 1 Hale, 555. Sum. 80.

hand was over the threshold, but neither his foot nor any other part of his body, this was held burglary (*e*).

Though it is admitted that a person by putting a pistol in at a window with intent to kill, makes a sufficient entry, to constitute a burglary, yet it has been questioned whether if he shoots from outside the window, and the bullet comes in, the entry would be sufficient (*f*). It has, however, been held that to discharge a loaded gun into a house is a sufficient entry (*g*). And it seems difficult to make a distinction between this kind of implied entry, and entry by means of an instrument introduced within the window or threshold, for the purpose of committing a felony; unless it be that the one instrument by which the entry is effected is held in the hand, and the other discharged from it: but no such distinction is anywhere laid down in terms (*h*).

The mere introduction of an instrument, in the act of breaking the house, is not an entry unless it is for the purpose of committing a felony in the house (*i*). The prisoners had bored a hole with a *centre-bit* through the panel of a house door, near one of the bolts by which it was fastened; and some pieces of the broken panel were found within the threshold of the door; but it did not appear that any instrument, except the point of the *centre-bit*, or that any part of the bodies of the prisoners had been within the house, or that the aperture made was large enough to admit a man's hand. The court held this not to be a sufficient entry (*j*).

Where a glass window was broken, and the window opened with the hand, but the shutters in the *inside* were not broken, it was ruled to be burglary (*k*). Introducing the hand between the glass of an outer window and an inner shutter has been held a sufficient entry to constitute burglary, on the ground that as the glass of the window is the outer fence, whatever is within the glass is within the house (*l*). And, where in breaking a window in order to steal something in the house, the prisoner's finger went within the house, this was held a sufficient entry to constitute burglary. The prisoner had been apprehended before he could put in his hand to steal anything (*m*).

A glass sash window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, which were about an inch thick; after the sash was thrown up, a crow-bar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found

(*e*) 1 Hale, 553. Crompt. 32 (*a*). 2 East, P.C. 490.

(*f*) 1 Hale, 555, where it is said that this seems to be no entry, to make a burglary: but a *qu.* is added. And see 1 Anders. 115.

(*g*) 1 Hawk. c. 38, s. 11. It seems to have been ruled by Ellenborough, C.J., that a person discharging a gun from the outside of a field, into it, so that the shot must have struck the soil, was guilty of breaking and entering the field. See Pickering *v.* Rudd, 4 Camp. 220. 1 Stark. 58.

(*h*) 1 East, P.C. 490.

(*i*) *V. ante*, p. 1072.

(*j*) R. *v.* Hughes, 1 Leach, 406. 1 Hawk. c. 38, s. 12. 2 East, P.C. 491. R. *v.* Tucker, 1 Cox, 73, seems the other way; but the report is not satisfactory, and no authority was cited.

(*k*) R. *v.* Roberts, 2 East, P.C. 487. It was so ruled by Ward, C.B., Powis and Tracy, JJ., and the Recorder; and they thought this the extremity of the law: and, on a subsequent conference with the other Judges, Holt, C.J., and Powell, J., doubting, and inclining to another opinion, no judgment was given.

(*l*) R. *v.* Bailey, MS. Bayley, J., and R. & R. 341. R. *v.* Perkes, 1 C. & P. 300.

(*m*) R. *v.* Davis, R. & R. 499.

on the inside of the shutters; and upon a case reserved, the judges held that this was not an entry, as it did not appear that any part of the prisoner's hand was within the window (*n*).

Where the prisoner had lifted up the sash of a window, and, for the purpose of doing so, his hand was within the room of the house, but there was no further proof of entry; it was contended that if the hand was there for the mere purpose of opening the sash, there was no sufficient entry. Talfourd, J., said: 'We have been looking into the authorities, and it seems sufficient if the hand, or any part of the person, is within the house for any purpose.' Patteson, J., said: 'Where an instrument is used, the law appears to be different; there the instrument must be within the premises, not only for the purpose of making an entry, but also for the purpose of effecting the contemplated felony; as where a hook is introduced for the purpose of taking away goods, or a pistol put in for the purpose of killing the inmates of the house, there the entry is sufficient; but if the instrument is merely used for the purpose of making an entry, then the proof of the entry fails. We think there is sufficient evidence here' (*o*).

On an indictment for burglary it appeared that a lodger looking out of her window saw the legs of a man dangling in the air, and hanging as if out of the shop window below, which she could not quite see; on being called to, the man sprang to the ground and ran away. When the shop window was examined, two panes of glass were found broken, the pieces lying inside the frame, and a quantity of lead work was cut away, causing an opening through which a man's head and shoulders might easily be thrust. Nothing had been taken out of the shop, and there was no other evidence to show that any part of the man's person had been within the shop window. Coltman, J., directed an acquittal on the ground that there was not sufficient evidence of an entry (*p*).

Two prisoners were convicted on an indictment charging them with burglariously breaking and entering the dwelling-house of the prosecutor, with intent to steal, and stealing a flitch of bacon. One of the prisoners lodged in the prosecutor's house. The window-shutter was in the night-time opened from the inside of the house. The casement of the window was taken out and the bacon was most probably put through the window to B., by whom it was carried away from the prosecutor's premises to B.'s house. It did not appear that L. went out of the house, or that B. ever entered the house. Best, J., after conferring with the judges of the Court of King's Bench, thought that there was no evidence of entering the house, and therefore recommended a pardon on condition of transportation for seven years, as the prisoners were properly convicted of larceny (*q*).

On an indictment for burglary it appeared that the loft of the house had two doors, one in the roof, the other communicating with the room

(*n*) R. *v.* Rust, 1 Mood. 183.

(*o*) R. *v.* O'Brien, 4 Cox, 398.

(*p*) R. *v.* Meal, 3 Cox, 70. The prisoner was then indicted for attempting to commit the burglary, and Coltman, J., left it to the jury whether he had actually entered the house, and they found that he had.

(*q*) R. *v.* Burr, MS. 3 Burn's, J. (ed. D. & W.) 93.

below : there was no evidence to shew that the door in the roof had been broken open, but the other had been wrenched off its hinges ; there was no proof, however, of any entry having been made through that door ; and it was held that the charge of burglary was not proved ; for the entry must be consequent upon the breaking (*r*).

The rules as to principals in the second degree, and aiders and abettors, apply to burglary and other felonies ; and make the breaking and entering by one the act of all the persons engaged in the transaction, and *present* while the fact is committed (*s*). So that if A., B., and C. go upon a common design to commit burglary in the house of D., and A. only actually breaks and enters the house, B. stands near the door but does not enter, and C. stands at the lane's end, &c., to watch, they are all in law principals in the burglary (*t*).

Neither will the offence be the less the act of the party from his having effected the entry and the stealing by means of an infant under the age of discretion. Thus, if A., a man of full age, breaks a house and puts in a child of seven or eight years old, who takes goods out, and delivers them to A., who carries them away, this is burglary in A., though the child who made the entry be not guilty by reason of his infancy (*u*).

Sect. III.—The Dwelling-House.

The breaking and entering must be of a *mansion* or *dwelling-house*. The latter term is now generally adopted in indictments for burglary. In treating of such dwelling-house, it will be proper to inquire, first, as to what shall be so considered ; secondly, how far it must be inhabited ; and, thirdly, as to the person to be deemed the owner of it ; for the ownership should be correctly stated in the indictment, although any mistake in this respect would probably now be amended under 14 & 15 Vict. c. 100, s. 1 (*v*).

What is a Dwelling-house.—Every house for the dwelling and habitation of man is taken to be a house in which burglary may be committed (*w*). And a portion only of a building may come under this description. Thus where, upon an indictment for burglary, it appeared that the prosecutor rented and inhabited certain rooms of a house, namely, a shop and parlour, in which the burglary was committed, but that the owner did not inhabit any part of the house, and only occupied the cellar, it was held that the shop and parlour were to be considered as the dwelling-house of the prosecutor (*x*). Sets of chambers in a college, or an inn of court, are for all purposes considered as distinct dwelling-houses ; being often held under distinct titles, and, in their nature and manner of occupation, as unconnected with each other, as if they were under separate roofs (*y*). A loft, situated over a coach-house and stables, in a public

(*r*) R. *v.* Davis, 6 Cox, 369, Gurney, Com., after consulting Cresswell, J.

(*s*) *Ante*, Vol. i. pp. 106 *et seq.*

(*t*) 1 Hale, 555.

(*u*) 1 Hale, 555. *V. ante*, Vol. i. pp. 52, 104.

(*v*) *Post*, Vol. ii. p. 1972.

(*w*) 3 Co. Inst. 64.

(*x*) R. *v.* Rogers, 1 Leach, 89, 428. 2 East, P. C. 506. The points respecting different mansions in the same house, will be considered presently, in treating of the *ownership* of the mansion-house.

(*y*) 1 Hale, 522, 556. 1 Hawk. c. 38, s. 18. 4 Bl. Com. 225. 2 East, P.C. 505. R. *v.* Evans, Cro. Car. 473. This case was quoted and approved in Att.-Gen. *v.* Mutual Tontine Westminster Chambers Association (1876), 1 Ex. D. 471, at pp. 477–485.

mews, and converted into lodging-rooms, has also been held to be a dwelling-house. The prosecutor, who was a coachman, rented the rooms at a yearly rent; but he had never paid any rent; and the rooms were not rated in the parish books as dwelling-houses, but as appurtenant to the coach-house and stables: the way to the coach-house and stables was down a passage out of the public mews, to a staircase which led to these rooms, and the entrance to which staircase was through a door, which was never fastened, but there was a door at the top of the staircase to the rooms, which was locked at night and was broken by the prisoner. The case having been reserved, the judges were of opinion that the place where the prosecutor inhabited was a dwelling-house (*z*).

Burglary cannot be committed by breaking into any enclosed ground, or booth, or tent, erected in a market, or fair, though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices; and the lodging of the owner in so frail a tenement no more makes it burglary, to break it open, than it would be to uncover a tilted wagon in the same circumstances (*a*).

A permanent building of mud and brick on the Down at Weyhill, which was only used as a booth, for the purposes of the fair, for a few days in the year, had wooden doors, and windows bolted inside. The prosecutor rented it for the week of the fair, and he and his wife slept there every night of the fair, during one night of which the offence was committed; it was held that this was a sufficient dwelling-house for the purpose of burglary (*b*).

Curtilage.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 53, 'no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other' (*c*). But the breaking and entering any building within the curtilage of a dwelling-house, and stealing therein, is specially punishable under s. 55 (*d*).

Shops.—Though a shop may be, and usually is, a parcel of the dwelling-house to which it is attached; yet if the owner of the dwelling-house lets the shop to a tenant who occupies it by means of a different entrance from that belonging to the dwelling-house, and carries on his business in it, but never sleeps there, it is not a place in which burglary can be committed, if there be no internal communication with the other part of the house; for it is not parcel of the dwelling-house of the owner, who occupies the other part, being so severed by lease; nor is it the dwelling-house of the lessee, when neither he nor any of his family ever sleep there (*e*). But if there be an internal communication, burglary, it

(*z*) R. *v.* Turner, 1 Leach, 305; 2 East, P.C. 492.

(*a*) 1 Hale, 557. 1 Hawk. c. 18, s. 35. 4 Bl. Com. 226. 1 East, P.C. 492.

(*b*) R. *v.* Smith, 1 M. & Rob. 256.

(*c*) Taken from 7 & 8 Geo. IV. c. 29, s. 13 (E) and 9 Geo. IV. c. 55, s. 13 (I). See Greaves' Crim. Law Cons. Acts (2nd ed.) 144. Before this legislation buildings regarded as parcel of a dwelling-house though not under the same roof were the subject of burglary. This rule included barns, stables, &c., and also outhouses within the curtilage or same common fence. See 3 Co. Inst. 64. 1 Hale, 558, 559. Sum. 82. 1 Hawk. c. 38, ss. 21, 25. 2 East, P.C. 493. 4 Bl. Com. 225.

(*d*) *Post*, p. 1119.

(*e*) 1 Hale, 557, 558. Kel. (J.) 83, 84. Com. 225, 226. 2 East, P.C. 507.

seems, may be committed. Thus, where a man let part of his house, including a shop, to his son, and there was a distinct entrance into the part so let, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, it was held that a conviction for burglary in the shop, laid to be the dwelling-house of the father, was right, upon the ground that the part of the house let to the son continued to be part of the dwelling-house of the father, by reason of the internal communication (*f*).

Burglary may be committed in a shop or other premises (severed from a dwelling-house) if the lessee, or his tenant, usually or often passes the night in such premises (*g*).

A case was put under the old law of burglary, whether, if the owner and occupier of a dwelling-house let a part of it, namely, a chamber and a cellar, to a tenant, the only passage to the cellar being out of the street, and the cellar were broken open in the night, it would be burglary; and it was supposed that it would not, on the ground that the cellar must be considered as severed by the lease, and had no communication with the rest of the house (*h*). Upon this, however, it was observed, that the cellar would be no more severed from the house by the lease than the chamber, in which a burglary might be committed, and laid to be in the mansion of the owner and occupier of the dwelling-house, there being but one common entrance to him and the lodger. But it was admitted, that if the cellar alone were let, clearly no burglary could be committed in it (*i*). This distinction seems to have been accepted in R. *v.* Gibson (*j*). S. owned and resided in a house to which adjoined a shop, built close to the house. There was no internal communication between the house and the shop, and no person slept in the shop, and the only door to the shop was in the court-yard before the house and the shop, which yard was enclosed by a brick wall, three feet high, including both the house and shop. S. let the shop, together with some apartments in the house to H., from year to year. There was only one common door to the house, which communicated as well to S.'s as to H.'s apartments. A gate, fastened by a latch in the wall of the court-yard, next the road, served as a communication both to the house and shop. G. broke and entered the shop by night and was indicted and convicted for burglary in the dwelling-house of S. The judges were all of opinion that the indictment was well laid, in describing the shop as the dwelling-house of S. (who dwelt in one part of the building), it being within the same building, and under the same roof,

(*f*) R. *v.* Sefton, MS. Bayley, J., and P. & R. 202. As to the meaning of dwelling-house in connection with poor law settlement, see R. *v.* North Collingham, 1 B. & C. 578. R. *v.* Ditcheat, 9 B. & C. 176. R. *v.* Macclesfield, 2 B. & Ad. 870.

(*g*) 1 Hale, 558.

(*h*) Kel. (J.) 83, 84.

(*i*) 2 East, P.C. 507.

(*j*) 2 East, P.C. 508; 1 Leach, 357. In R. *v.* Thompson, 1 Lew. 32, the prisoner entered a loft, beneath which were four apartments, inhabited as a dwelling-house, but which did not communicate with the loft in any manner whatever; and on the side of the dwelling-house was a shop, which was not used as a dwelling, and which did not communicate with the four chambers; between this shop and the loft there was a communication by a ladder; the dwelling and shop both opened into the same fold. Holroyd, J., on the authority of R. *v.* Gibson, held the loft to be a dwelling-house.

and there being but one outer door, especially as it was within one curtilage or fence (*k*); and that the shop being let with a part of the house inhabited by H., still continued to be part of the dwelling-house of S., although there was no internal communication between them. But it was admitted, that if the shop had been let by itself, H. not dwelling therein, burglary could not have been committed in it; for then it would have been severed from the house.

The prisoner was indicted for burglary. The house entered consisted of two long rooms, another room used as a cellar and wash-house on the ground floor, and of three bedrooms upstairs, one of them over the wash-house. The bedroom over the house place communicated with the bedroom over the wash-house, but there was no internal communication between the wash-house and any of the other rooms in the house: the whole building was under the same roof. The door of the wash-house opened into a back yard. The prisoner broke into this wash-house, and was breaking through the wall between the wash-house and the house place, when he was detected. The question whether the wash-house was, for the purpose of burglary, part of the dwelling-house, was submitted to the judges, who differed in opinion upon it, and seven of them thought that it was part of the dwelling-house, but the other five that it was not, and the conviction was affirmed (*l*).

Upon an indictment for burglary, it was proved that behind the dwelling-house there was a pantry; to get to the pantry from the dwelling-house it was necessary to pass through the kitchen, into a passage; at the end of the passage there was a door, and outside the door, on the left hand, was the door of the pantry; when the passage door was shut, the pantry door was excluded and open to the yard. But the roof or covering of the passage projected beyond the door of the passage, and reached as far as the pantry door. There was no door communicating directly between the pantry and the house, and the two were *not under the same roof*. The roof of the pantry was 'tea-fall,' and leant against the wall of an inner pantry, in which there was a latchet window, common to both, and which opened betwixt them, but there was no door of communication between them. The inside pantry was under the same roof as the dwelling-house. The prisoners entered the outer pantry by a window, which looked towards the yard, having first cut away the hair-cloth which was nailed to the window frame. Taunton, J., was of opinion that the pantry was not a part of the dwelling-house, it not being under the same roof, nor included within the passage by which it was approached; and, consequently, that no burglary was committed by breaking and entering therein (*m*).

Upon an indictment for burglary, it appeared that the prisoner broke into the dairy of the prosecutor. This dairy adjoined a kiln; one of the walls of the kiln supporting one end of the dairy, and the kiln adjoining the dwelling-house, one end of the kiln being supported by one of the walls of the dwelling-house. There was no internal

(*k*) As to this part of the ruling, see s. 53, *ante*, p. 1076.

(*l*) R. *v.* Burrowes, 1 Mood. 274. The argument turned on 7 & 8 Geo. IV. c. 29, s. 13, repealed, but re-enacted as 24 & 25 Vict. c. 96, s. 53, *ante*, p. 1077.

(*m*) R. *v.* Somerville, 2 Lew. 113, decided on 7 & 8 Geo. IV. c. 29, s. 13 (rep.).

communication between the dwelling-house and the dairy; and to get from the dwelling-house to the dairy a person must go by a door from the dwelling-house into the yard, and from the yard by another door into the dairy. The kiln and the dairy were not under the same roof with the dwelling-house, and the roofs of the kiln and dairy were lower than the roof of the dwelling-house. Wilde, C.J., held that this dairy was not part of the dwelling-house, so that a burglary could not be committed in it (*n*).

Upon an indictment for stealing in a dwelling-house, it appeared that the place where the felony was committed was a bedroom over a stable, between which and the prosecutor's house there was not any direct communication; there was a wash-house under the same roof as the house, though there was no internal communication between the one and the other; but the stable was a separate building, neither under the same roof, nor communicating with it by means of any other building, and it was held that this was not a stealing in the dwelling-house (*o*).

J. B. lived in Epsom, and his kitchen, larder, brew-house, and wash-house were across a public passage nine feet wide; he had an awning over this passage to protect what was brought across; one of his servants, a boy, slept over the brew-house, and that was the sleeping-place allotted him by J. B. The boy's room was broken into, and upon a case reserved, the great majority of the judges thought that it was not parcel of the dwelling-house in which J. B. dwelt, because it did not adjoin to it, was not under the same common roof, and had no common fence; but thought that it was a *distinct* dwelling-house of J. B.'s, and that as the indictment described it as his dwelling-house, the conviction was right (*p*).

An outhouse which has a communication with a dwelling-house within the meaning of s. 53 of the Larceny Act, 1861 (*q*), may be parcel of the house, though held under a distinct title, if it be within the curtilage, or under the same roof, and actually enjoyed as parcel of the dwelling-house, in point of fact, and under such circumstances as would, apart from the difference of title, constitute it parcel of the dwelling in point of law (*r*).

Inhabitancy.—Unless the owner has taken possession of the house by inhabiting it personally, or by some one of his family, it is not his dwelling-house so as to be the subject of burglary (*s*).

S. bought a house with the intention of residing in it, and moved into it some of his furniture and effects, to the value of about ten pounds. The house was put under the care of a carpenter for the purpose of being repaired; but S. had not himself entered into the occupation of any part of it, nor did any part of his family, nor any person whatever, sleep therein. While the house was in this condition, it was broken open in the night-time; and the judges were of opinion that it could not be

(*n*) R. *v.* Higgs, 2 C. & K. 322.

(*o*) R. *v.* Turner, 6 C. & P. 407, Vaughan, B.

(*p*) R. *v.* Westwood, R. & R. 495.

(*q*) *Ante*, p. 1076.

(*r*) See 2 East, P. C. 494, questioning a contrary opinion expressed. 1 Hale, 559. Cf. 2 Stark. Ev. (3rd ed.), 279, n. (*z*).

(*s*) In 1 Hawk. c. 38, s. 18, it is said that a house which one has hired to live in and brought part of his goods into, but has not yet lodged in, is one in which burglary may be committed. The point is mentioned in Kel. (J.) 46, but not as having been decided, *ideo quære legem* being subjoined.

considered as a dwelling-house, being entirely uninhabited; and that, therefore, there could be no burglary (*t*).

So where the tenant of a house, when the former tenant had quitted, put all his furniture into it, and frequently went thither, in the daytime, but neither himself, nor any of his family had ever slept there; it was ruled that burglary could not be committed therein (*u*).

On an indictment for burglary in the dwelling-house of H., it appeared that the house was newly built and finished in every respect, except the painting, glazing, and the flooring of one garret; and that a workman, who was constantly employed by H., slept in it for the purpose of protecting it, but that no part of H.'s domestic family had taken possession of it. It was held not to be the dwelling-house of H. (*v*).

So where the prosecutor had lately taken the house broken open; neither he nor any of his family had slept there, but on the night in which it was so broken, and for six nights before, he had procured two hair-dressers, who were not in any sense his servants, to sleep there for the purpose of taking care of his effects deposited therein; it was held that the house was not the dwelling-house of the prosecutor (*w*).

The same rule applies where the owner of a house has no intention of residing in it himself, and merely puts some person to sleep there at nights till he can get a tenant. Upon an indictment for stealing goods to the value of forty shillings in the *dwelling-house* (*x*), it appeared that P. was a brewer living in Milbank-street, and owner of a public-house in Palace-yard, in which the offence was committed. The house was, at the time of the offence, shut up, and in the day-time entirely uninhabited; but a servant of P.'s was put to sleep in it at night, for the protection of the goods, until some other publican should take possession of it. There were in the house a number of articles of furniture, which P. had purchased of the former tenant, with a view to accommodate the person to whom he might let it, but with no intention of residing in the house himself, either personally, or by means of any of his servants. The judges were of opinion, that as P. never intended to inhabit the house, it could not, in contemplation of law, be considered as his dwelling-house; and that it would have been no burglary if the house had been broken into in the night (*y*).

Where the owner of the house has never, by himself or by any of his family, slept in it, though he has used it for his meals, and all the purposes of his business, it is not his dwelling-house, so as to make the breaking

(*t*) R. *v.* Lyons, 1 Leach, 185. The case is rather differently reported in 2 East, P.C. 497, where it is stated that no goods were in the house at the time it was broken open, and that the judges were therefore also of opinion that it was no burglary, because, as the indictment charged an intent to steal, it must mean to steal the goods then and there being, and that nothing being in the house, nothing could be stolen (see R. *v.* Ring, *post*). But it is also further stated, that it seemed to be the sense of the judges, and Eyre, B., declared it to be his opinion, that although some goods might have been put into the house, yet if neither the party nor any of his family had inhabited it, it would not be a mansion-house in which burglary could be committed.

(*u*) R. *v.* Hallard, 2 East, P.C. 498; 2 Leach, 701, n. (*a*), Buller, J., and R. *v.* Thompson, 2 East, ibid.; 2 Leach, 771, Grose, J.

(*v*) R. *v.* Fuller, 2 East, P.C. 498; 1 Leach, 186, n. (*b*).

(*w*) R. *v.* Harris, 2 Leach, 701; 2 East, P. C. 498.

(*x*) Under 12 Anne, stat. 1, c. 7 (rep.).

(*y*) R. *v.* Davies, 2 Leach, 876. 2 East, P.C. 499.

thereof burglary. A shopkeeper took a house, and in it carried on his business, and dined, entertained his friends, and passed his days there, and had bedding upstairs; but always slept at his mother's, two doors off, and had no servant sleeping in the house. An indictment for burglary described this as his dwelling house, but the judges held that it could not be deemed his dwelling-house (*z*).

Temporary Absence Animo Revertendi.—When the owner of the house has once entered into possession and occupation by himself, or by some of his family, the house will not cease to be his dwelling-house on account of any occasional or temporary absence, even though no person is left in it (*a*). Thus if A. and all his family are absent for a night or more from his dwelling-house, burglary may be committed in their absence. So if A. has two mansion-houses, and is sometimes with his family at one, and sometimes at the other, breaking into one of them in the night-time, in the absence of the family, will be burglary (*b*). And if A. has a chamber in a college, or inn of Court, where he usually lodges in term time; and, in his absence in the vacation, the chamber is broken open, the same rule applies (*c*).

The owner of a house, in which he dwelt, went on a journey, meaning to return, and sent his family out of town, and left the key with a friend to look after the house. After he had been gone a month, no person being in the house, it was broken open in the night and robbed. A month afterwards, the owner returned with his family, and again dwelt there. This breaking was held to be burglary (*d*).

But in cases of this kind there must be an intention on the part of the owner to return to his house, *animus revertendi*; for if the owner has quitted without any intention of returning, the breaking of a house so left will not be burglary (*e*). The prisoners were indicted for a burglary in the dwelling-house of F. F. used the house in question as a country house in the summer time, his chief residence being in London. About the end of the summer before the offence was committed, he removed with his whole family to London, and brought away a considerable part of his goods. In the November following the house was broken open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value, leaving no bed or kitchen furniture, nor any thing else for the accommodation of a family. Being asked whether, at the time he so disfurnished his house, he had any intention of returning to reside there, he declared that he had not come to any settled resolution, whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The offence with which the prisoners were charged was committed in the January following. The

(*z*) R. *v.* Martin, MS. Bayley, J.; and R. & R. 108.

(*a*) Fost. 77. 1 Hale, 556. 3 Co. Inst. 64. Bac. Abr. tit. 'Burglary' (E.).

(*b*) 1 Hale, 556. Sum. 82.

(*c*) Id. ibid.

(*d*) R. *v.* Murry, per Holt, C.J., Treby, J., and four other judges, 2 East, P.C. 496, cited also in Fost. 77 (from MS. Denton and Chapple), as a case upon a burglary in the house of Mr. Nicholls. In R. *v.* Kirkham, 2 Stark. Ev. 279 (3rd ed.), Wood, B., held that the offence of stealing in a dwelling-house had been committed, although the owner and his family had left six months before, having left the furniture, and intending to return.

(*e*) Fost. 77. 4 Bl. Com. 225.

Court were of opinion that the prosecutor having left his house, (after disfurnishing it in the manner before mentioned,) without any settled resolution of returning, but rather inclining to the contrary, the house could not, under these circumstances, be deemed his dwelling-house at the time the fact was committed (*f*).

So, if a man leaves his house meaning not to live in it again, but to use it as a warehouse only, and has persons, not of his family, to sleep in it to guard the property, the house cannot be described as his dwelling-house (*g*).

House inhabited by a Servant and his Family.—On an indictment for burglary in the dwelling-house of B., it appeared that the place broken into was a shop, parcel of a dwelling-house, which B. had inhabited. B. had left the dwelling-house, and never meant to live in it again, but retained the shop, and let the other rooms to lodgers. After some time he had put a servant and his family into two of the rooms lest the place should be robbed, and they lived there. It was held that putting in a servant and family to live was very different from putting them in merely to sleep, and that the habitation by the servant and his family was a habitation by B., and that the shop was to be considered as part of B.'s dwelling-house (*h*).

Casual Inhabitancy.—Mere casual use of a tenement as a lodging, or its use only upon some particular occasions, is not such inhabitancy as will constitute it a dwelling-house in which burglary can be committed (*i*). Thus, the fact of a servant having slept in a barn on the night in which it was broken open, and for several nights before, he being put there for the purpose of watching thieves, was agreed to make no sort of difference in the question, whether the offence was burglary or not (*j*). And the circumstance of a porter lying in a warehouse, *to watch goods*, which is only for a particular purpose, does not make it a dwelling (*k*). The question of burglary in such barn or warehouse will remain, just as if no person had slept in them, to be disposed of by the principles which have been before discussed, as to their being or not being *parcel* of a dwelling-house (*l*).

A point of some nicety arises in the case of an executor putting servants into the house of his testator, but not going to live there himself. A case of this kind occurred, which is thus stated. A. died in his house, and B., his executor, put servants into it, who lodged in it, and were on board wages; but B. never lodged there himself. Upon an indictment for burglary, the question was, whether this might be called the dwelling-house of B. The Court inclined to think it might, because the servants lived there (*m*). It was not necessary to decide the point in that case, as it turned out on the evidence that there was not a sufficient breaking of the house; and perhaps it would be difficult to reconcile the opinion to which the Court is said to have inclined, with some of the decided cases

(*f*) R. *v.* Nutbrown, 2 East, P.C. 496. Fost. 76.

(*g*) R. *v.* Flannagan, R. & R. 187.

(*h*) R. *v.* Gibbons, Easter T. 1821, MS. Bayley, J., and R. & R. 442.

(*i*) 2 East, P.C. 497.

(*j*) R. *v.* Brown, 2 East, P.C. 497, 501.

(*k*) R. *v.* Smith, by ten of the judges, cited from Lord King's MS. 96, and Serjeant Forster's MS. in 2 East, P.C. 497.

(*l*) *Ante*, pp. 1076 *et seq.*

(*m*) R. *v.* Jones, from Chapple's MS. 2 MS. Sum. 305, cited in 2 East, P.C. 499.

and principles upon this subject, if the facts were that the executor did not contemplate any occupation of the house by himself, and that he merely put the servants there for the purpose of taking care of the house and furniture, till they should be properly disposed of according to his trust (*n*).

Ownership of the Dwelling-House.—It remains further to inquire as to the person who is to be deemed the *owner* of a dwelling-house, in order to be able to state correctly in the indictment the name of the party, in whose dwelling-house the burglary is alleged to have been committed. Exact statement of ownership has been rendered less essential since burglary ceased to be capital, and owing to the latitude permitted as to amendment under the Criminal Procedure Act, 1851 (*o*).

From the decided cases it seems that the material point to be ascertained will be, whether the ownership remains with the actual owner of the dwelling-house and is exercised by him, either by his own occupation, or by that of other persons on his account, or whether the actual owner has given such an interest to other persons, in the whole or in parts of the dwelling-house, as to constitute an ownership in such other persons.

Married Women.—The owner of a dwelling-house may exercise his ownership by his own personal occupation, or by the occupation of any persons who by law are deemed to be part of his family. At common law it was necessary to allege that a house, occupied by a married woman, was the dwelling-house of the husband, even where the woman lived separate from her husband and had herself made the agreement with the landlord and herself paid the rent (*p*). So where she lived upon property which had been hers before marriage and was vested in trustees, she having hired the house and paid the rent (*q*). And also where the husband was separated from his wife but allowed her to live in a house belonging to him, in which he had never lived, and she lived there in adultery with another man (*r*), and also where the husband was in prison undergoing a sentence for felony (*s*).

Under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman is capable of acquiring, holding, and disposing of, any real or personal property as her separate estate, in the same manner as if she were a *feme sole* without the intervention of any trustee (sect. 10), and she has, subject to certain restrictions as regards her husband, the same civil and criminal remedies for the protection of her separate property as if such property belonged to her as a *feme sole*. If therefore a house in which a burglary is committed is the wife's separate property and in her occupation, it should be described in the indictment as her property (*t*).

(*n*) See R. *v.* Davies, *ante*, p. 1080.
(*o*) *Post*, Vol. ii. p. 1972, and see R. *v.* Murray [1906], 2 K. B. 385.
(*p*) R. *v.* Farre, Kel. (J.) 43, 44, 45. See R. *v.* Smyth, 5 C. & P. 201, Tenterden, C.J. See also 1 Hawk. c. 38, s. 18.
(*q*) R. *v.* French, R. & R. 491.
(*r*) R. *v.* Wilford, R. & R. 517.
(*s*) R. *v.* Whitehead, 9 C. & P. 429.
(*t*) Under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), a married woman deserted by her husband may obtain a protection order for her earnings or property (s. 21). Under such an order, or in cases of judicial separation, she stands in the same position as to property as a *feme sole;* and see 2 East, P.C. 504.

Servants.—The owner of a dwelling-house may occupy it by means of servants. Thus, where the servant of a family, and his family, lived in a cottage adjoining his master's house, which he took by agreement with his master, when he went into service, but for which he paid no rent, only an abatement was made in his wages, on account of his family going to reside in the cottage; all the judges (with the exception of Buller, J., who doubted) held that this was no more than a licence to the servant to lodge in the cottage, and not a letting of it to him; and that the cottage therefore continued part of the dwelling-house of the former (*u*).

So, too, where the prisoners were indicted for a burglary in the dwelling-house of partners who carried on the business of banking and also a brewery concern on the ground floor of a house. No one slept in these rooms, in one of which the burglary was committed. A servant in the employment of the partners, at weekly wages, lived with his family in the upper rooms. The only means of direct communication between the upper and lower rooms was by means of a trap door and a ladder, but there were separate entrances to both sets of rooms from without. The judges held that the servant was not a tenant, but inhabited only in the course of his service, and that the house was well laid in the indictment to be the dwelling-house of the partners (*v*).

The same rule of the occupation of the servant being that of the master will hold with respect to all persons standing in the relation of servants, and not having exclusive possession nor paying rent. Therefore apartments in the King's palaces, or in the houses of noblemen for their stewards or chief servants, must be laid as the mansion-house of the King or nobleman (*w*). So where a house at Chelsea was broken into, which was used as an office under government, called the Invalid Office, the rent and taxes of which were paid by the government, it was held that the indictment was wrong in laying it as the house of the person who occupied the whole upper part of it (*x*). An indictment for a burglary in the Custom-house rightly describes it as the dwelling-house of the King, as he occupies it by his servants (*y*). An indictment for burglary in the dwelling-house of the East India Company was held good, the house being inhabited by the servants of that company (*z*), as was an indictment for breaking into the mansion-house of the master, fellows, and scholars of Bennet College, Cambridge, the fact being that the prisoner broke into the buttery of the college (*a*). So where a house belonged to the African Company, and one Storey, an officer of the company, and many other officers of the company had separate apartments in the house, it

(*u*) R. *v.* Brown, 2 East, P.C. 501. See also Bertie *v.* Beaumont, 16 East, 33. R. *v.* James, *post*, p. 1087; and R. *v.* Courtenay, 5 Cox, 218.

(*v*) R. *v.* Stockton, 2 Taunt. 339. R. *v.* Stock, R. & R. 185; 2 Leach, 1015. A house, the joint property of partners in trade, and in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of them resides in it. R. *v.* Athea, 1 Mood. 329.

(*w*) 1 Hale, 556, 557. 2 East, P.C. 500. R. *v.* Williams, 1 Hale, 522. R. *v.* Burgess, Kel. (J.) 27.

(*x*) R. *v.* Peyton, 1 Leach, 324. 2 East, P.C. 501. In Bac. Abr. tit. 'Burglary' (E.). in the notes there is a *qu.* in whose house stealing in the Invalid Office at Chelsea should be laid.

(*y*) R. *v.* Jordan, 7 C. & P. 432, Gaselee, J., and Gurney, B.

(*z*) R. *v.* Picket, 2 East, P.C. 501.

(*a*) R. *v.* Maynard, 2 East, P.C. 501.

was held that Storey's apartment could not be called his mansion-house (*b*); and an indictment charging the stealing of plate, the goods of T. Howse, in his dwelling-house, was held to be wrongly framed, it appearing that T. Howse was house-steward of the Junior United Service Club, living and sleeping on the premises and being in charge of the plate (*c*). Where a servant has part of a house for his own occupation and the rest is reserved by the master, the part reserved cannot be considered part of the master's dwelling-house. The Governor of the Birmingham Workhouse was appointed under contract for seven years and was to have the chief part of a house for his own and his family's occupation, but the guardians reserved for themselves some rooms, one of which was broken into: it was held that the indictment which described this room as the governor's dwelling-house was wrong (*d*).

The rule that occupation by a servant is inhabitancy by his master does not apply where a servant occupies the house in his own right, either at a yearly rental or otherwise, and such house should not then be described as the master's house. G. & Co. had a house and building where they carried on their trade; M., their servant, lived with his family in the house, and paid £11 per annum for rent and coals, such rent being much below the value; G. & Co. paid the rates and taxes. One of the buildings having been broken into, the indictment charged a burglary to have been committed in the dwelling-house of G. & Co., but the judges held that as M. stood in the character of a tenant and G. & Co. might have distrained upon him for rent and could not have arbitrarily removed him, M.'s occupation could not be deemed their occupation and that the conviction as to the burglary was wrong (*e*).

The tolls of a gate between Leeds and Wakefield were let to Ward, who employed Ellis to collect them, and Ellis lived for that purpose in a house belonging to the trustees and he received a weekly sum from Ward: the judges were unanimous that the house was rightly described, in an indictment for burglary, as the house of Ellis (*f*).

A Mr. Sylvester, an agent to a company of blanket manufacturers, kept a blanket warehouse in Goswell-street, and resided, together with his wife and children, in the house over the warehouse. There was an internal door from the warehouse to the dwelling-house. All the blankets belonged to the company, consisting of sixty or more persons at Witney, in Oxfordshire, none of whom slept on the premises. The lease of the premises was in the company and the whole rent of both dwelling-house and warehouse was paid by them. Sylvester acted as their servant or agent, and received payment for his services, part of which consisted in his being allowed to live in the house rent free. The Court

(*b*) R. *v.* Hawkins, 2 East, P.C. 485, 501; Fost. 38. The jury was discharged of this indictment. Another was preferred, laying the breaking-in the mansion house of the company.

(*c*) R. *v.* Ashley, 1 C. & K. 198, Law, Recorder.

(*d*) R. *v.* Wilson, MS. Bayley, J., and R. & R. 115. See also R. *v.* Frowen, 4 Cox, 266, where Platt, B., held that a workhouse was properly described as the dwelling-house of the Guardians of the Poor of the Union, and seems to have thought that the description of it as the dwelling-house of the master of the workhouse was wrong.

(*e*) R. *v.* Jarvis, MS. Bayley, J., 1 Mood. 7.

(*f*) R. *v.* Camfield, MS. Bayley, J., and 1 Mood. 42.

held that the house was essentially and truly the dwelling-house of Sylvester (*g*).

Bunyon, the secretary of the Norwich Union and Life Office, lived as secretary in a house, the rent and the taxes of which were paid by the company, but no one else except Bunyon and his family lived in the house, and the part of the house where the company's business was carried on was equally accessible to Bunyon and his family as any other part of the house. Upon an indictment for breaking and entering the part of the house where the business was carried on, it was ruled by the Recorder, whose decision was upheld by the judges, that the house was properly described as Bunyon's house as he and his family and servants were the only persons who dwelt there; they and they alone were liable to be disturbed by burglary; but the judges would not say that it might not have been described as the company's house (*h*). So where a gardener occupied, as gardener, a cottage in his master's garden, and paid no rent, but had the key of the cottage and had complete control over it, it was held that the cottage was well described as the dwelling-house of the servant, though the indictment would not have been bad if it had laid the house as that of the master (*i*).

Caretakers.—Where a policeman was allowed to live in a house in order to take care of it, and a wharf adjoining, it was held that the house was properly described as the dwelling-house of the policeman (*j*). But where upon an indictment for burglary in the dwelling-house of Bird, it appeared that Bird worked for one Woodcock, who did business as a carpenter for the New River Company and put Bird in to take care of the house and mills adjoining, which belonged to the company, and that Bird received no more wages before he lived there, nor had any agreement for any, the Court considered the indictment as not properly laid (*k*).

Upon an indictment for housebreaking describing the house in one count as the dwelling-house of Mary Moulder and in another as the dwelling-house of G. B. P. Primm, it appeared that Moulder had been put into the house to take care of it, till it could be let, and she was to

(*g*) R. *v.* Margetts, 2 Leach, 930, Graham, B., and Grose, J. It is also stated that the Court further gave as a reason for their judgment that 'the punishment for burglary was intended to protect the *actual occupant* from the terror of disturbance during the hours of darkness and repose, but that it would be absurd to suppose that the terror, which is of the essence of this crime, could from the breaking and entering in this case have produced an effect in Witney in Oxfordshire.' But the accuracy of this reasoning may perhaps be questionable, cf. R. *v.* Picket and R. *v.* Hawkins, *ante*, pp. 1084, 1085. There is a note to R. *v.* Margetts which states that Grose, J., 'asked whether there had not been a prosecution for a burglary in some of the Halls of the City of London, in which it was clear that no part of the corporation resided, but in which the clerks of the company generally lived, and Mr. Knapp informed the Court that his father was clerk to the Haberdashers' Company, and resided in the Hall which was broken into; and in that case the Court held it to be his father's house.'

(*h*) R. *v.* Witt, 1 Mood. 248. The Recorder observed: 'If the principle stated in Margetts' case be correct, namely, that the punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose, how could this possibly operate upon this company, had the house been broken and entered in the night with intent to murder upon the person of Bunyon, or any of his family or servants.'

(*i*) R. *v.* Rees, 7 C. & P. 568, Denman, C.J. See also R. *v.* Ballard & Everall. Worcester Lent Ass. 1830. MSS. C. S. G. and R. *v.* Jobling, post, p. 1088.

(*j*) R. *v.* Smith, cited in R. *v.* Rawlins, 7 C. & P. 150.

(*k*) R. *v.* Rawlins, 7 C. & P. 150, Vaughan and Gaselee, JJ.

have coals for firing found by Primm; she paid no rent for the house. She had been occasionally a servant for Primm for thirty or forty years and done work for him for which she had always been paid. It was objected that the house was not the dwelling-house of Moulder but of Primm. Littledale, J.: 'I think the evidence is sufficient to support the first count. The prosecutrix has had the exclusive occupation of the house, and although there are very nice distinctions between the cases, I think this was her dwelling-house. She was not put in as a servant to take care of the furniture and goods, which has generally been the case where such questions have arisen' (*l*).

Apartments occupied by Guests at an Inn.—Where persons are staying in a house or inn as guests or by sufferance, or otherwise, having no fixed or certain interest in any part of it, and a burglary is committed in any of their apartments, the indictment should lay the offence as committed in the dwelling-house of the owner or keeper of the house or inn or in the mansion of the proprietor of the house (*m*). It has been suggested that if a lodger in an inn goes to his room to bed, and afterwards in the night rises, opens his door, steals goods in the house, and goes away, that his act would not be burglary as he had a kind of special interest and property in his room, and therefore that the opening of his own door was no breaking of the innkeeper's house (*n*). But the foundation on which this opinion of Hale proceeds cannot easily be reconciled with the doctrine which he admits on the same page, and also in a subsequent part of his work, namely, that if A. had opened the chamber of B., another lodger in the inn, to steal his goods, it would have been burglary; and that though a lodger has a special interest in his own room, yet a burglary committed in it must be laid as in the dwelling-house of the innkeeper (*o*). And this doctrine is also at variance with the view expressed in a later case, that a guest has not even the possession of a room in an inn for himself, but that it remains still in the possession of the host (*p*).

A Jew pedlar came to a public-house to stay all night, and fastened the door of his bed-chamber. The prisoner, pretending to the landlord that the pedlar had stolen his goods, under this pretence, with the assistance of the landlord and others, forced open the chamber door with intent to steal the goods mentioned in the indictment; and stole them. Adams, B., doubting whether the bed-chamber could properly be called the dwelling-house of the pedlar, as stated in the indictment, the case was submitted to the judges, who all thought that though the pedlar had for that night a special interest in the bed-chamber, yet that it was merely for a particular purpose, namely, to sleep there that night as a travelling guest, and not as a regular lodger; that he had no *certain* and *permanent* interest in the room itself, but that both the property and the possession of the room remained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in that room, even for the goods then in question, which he could not be, unless the room were

(*l*) R. *v.* George James, Gloucester Lent Ass. 1830, MSS. C. S. G. R. *v.* Brown, *ante*, p. 1084, no was relied upon in support of the objection.

(*m*) 1 Hawk. c. 38, s. 26. 1 Hale, 557.

(*n*) Ibid. 554.

(*o*) 1 Hale, 554, 557.

(*p*) In 2 East, P.C. 503, it is said that 'this deserves to be well weighed before any final resolution upon the point.'

deemed to be in his possession. They thought also, that the landlord might have gone into the room when he pleased, and would not have been a trespasser to the guest; and that, upon the whole, the indictment was insufficient (*q*). If the landlord had been an accomplice in the act of the prisoner, it seems that his offence would not have been burglary; for though it has been said that if the host of an inn break the chamber of his guest in the night to rob him it is burglary (*r*), that doctrine is questioned; and there seems to be no distinction between that case and the case of an owner residing in the same house breaking into the room of an inmate having the same outer door as himself, which is not burglary (*s*).

Tenant at Will.—If the owner of a house suffers a person to live in it rent free, it may be stated to be that person's house; he is tenant at will. The lessee of a house suffered his son-in-law to live in it, who failed and left it; but one of the son-in-law's servants continued in it. The lessee died, and the house was given up to the landlord, whose steward suffered the servant to continue in the house, and the only goods in it belonged to the servant. Upon an indictment for breaking the house in the day-time, the house was laid to be the servant's, and upon the point being saved, the judges thought that it was rightly laid, as the servant was there not as a servant, but as tenant at will (*t*). G., a workman in a colliery, had fifteen shillings a-week, and a cottage for himself and family, free of rent and taxes: he occupied chiefly for his own benefit, and not for his master's. An indictment for burglary described this as the dwelling-house of G., and Holroyd, J., thought that it might be considered, as to third persons, either as the master's house or the workman's; and the point being reserved, the judges held that it might be described as the workman's and that the conviction was right (*u*).

On an indictment for burglary in the house of W. it was proved that he had become insolvent, and his daughter had taken the house in which the burglary was committed, and that he and his wife lived there, the latter carrying on a business in connection with the daughter, who resided many miles distant. The furniture belonged to the daughter, but the father paid the taxes. Erle, J., held that it was rightly laid as the dwelling-house of the father (*v*).

Lodgings.—There seems at one time to have been a difference of opinion upon the point whether burglary in the apartment of a lodger should be laid to be committed in the dwelling-house of the lodger or of the owner (*w*); but it is now settled, that if the owner who lets out apartments in his house to other persons sleeps under the same roof, and has but one outer door at which he and his lodgers enter, all the apartments of such lodgers are parcel of the one dwelling-house of the owner (*x*);

(*q*) R. *v.* Prosser, 2 East, P.C. 502, Adams, B.

(*r*) Dalt. c. 151, p. 342.

(*s*) 2 East, P.C. 502. Kel. (J.) 84.

(*t*) R. *v.* Collett, MS. Bayley, J., and R. & R. 498.

(*u*) R. *v.* Jobling, MS. Bayley, J., and R. & R. 525. See *ante*, p. 1086, and the cases post, p. 1775, 'Arson.'

(*v*) R. *v.* Bridges, 1 Cox, 261.

(*w*) 1 Hale, 556. Kel. (J.) 83, 84. 1 Hawk. c. 38, s. 27. Bac. Abr. tit. 'Burglary' (E), notes. R. *v.* Ditcheat, 9 B. & C. 176.

(*x*) Where a lodger occupied one room in a house, the landlady keeping the key of the outer door, it was held that this could not be described as his dwelling-house. Monks *v.* Dykes, 4 M. & W. 567. But it would be

but that if the owner does not himself dwell in the same house, or if he and his lodgers enter by different outer doors, the apartments so let out are the dwellings, for the time being, of each lodger respectively (*y*).

A burglary was committed in a house belonging to N., who did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week. J. had two apartments in the house; namely, a sleeping-room up one pair of stairs, and a workshop in the garret; which he rented by the week as tenant at will of N. The workshop was broken open by the prisoner. It was held by ten judges, that as N., the owner of the house, did not inhabit any part of it, an indictment charging the burglary in the dwelling-house of J. was good (*z*). So upon an indictment for robbery in a dwelling-house (*a*), where it appeared that the house was let out in lodgings to three families, with only one outer door, which was common to all the inmates. One family rented the parlour on the ground floor, and a single room up one pair of stairs; and the parlour on the ground floor was the part of the house broken open; all the judges held that the offence was well laid in the indictment, as having been committed in the dwelling-house of the particular inmate (*b*). On an indictment for burglary in the dwelling-house of R., it appeared that C. rented of the landlord a shop and other rooms in a house, and R. rented in the same house another shop and all the other rooms of the landlord also; that the staircase and passage were in common, and the shops opened into the passage, which was enclosed, and was part of the house; and all the taxes were paid by C. The prisoner had broken open the passage door of R.'s shop. The judges had no doubt but that this was rightly described as the house of R. (*c*).

The owner of a house let the whole of it in apartments to different persons, and did not inhabit any part himself. One of the inmates rented the bottom part of the house, namely, a shop, a parlour and a cellar, but the owner had taken back the cellar and made an allowance to the inmate of ten shillings a year, which was deducted from the rent.

otherwise if a house were divided into several chambers with separate outer doors, ibid. Fenn *v.* Grafton, 2 Bing. (N. C.) 617. This subject has been much discussed from the point of view of the registration of voters, in controversies as to whether particular persons are entitled to the franchise as lodgers or as occupiers. See Kent *v.* Fittall [1906], 1 K.B. 60; [1908] 2 K.B. 933; [1909] 1 K.B. 215. Douglas *v.* Smith [1907], 2 K.B. 568.

(*y*) 4 Bl. Com. 225. Lee *v.* Gansel, 1 Cowp. 1. 2 East, P.C. 505, adopting the doctrine in Kel. (J.) 83, 84. And in R. *v.* Rogers, 1 Leach, 90, is the following note by the editor: 'I have been favoured with the following opinion of Holt, C.J., upon this subject, from the manuscript notes of Parker, C.B.—If inmates have several rooms in a house, of which rooms they keep the keys, and inhabit them severally with their families, yet, if they enter into the house at one outer door with the owner, those rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner. Mr. Tanner, an ancient clerk of the court, said, that the constant opinion and practice had been according to the opinion of Kelynge, C.J., which opinion was cited by Holt, C.J., upon this occasion at the Old Bailey October Sessions, 1701.'

(*z*) R. *v.* Carrell, 1 Hawk. c. 38, s. 32; 1 Leach, 237; 2 East, P.C. 506. The judges relied on R. *v.* Rogers, 1 Leach, 90, *post*, p. 1090. The two other judges (Eyre, B., and Buller, J.), who thought that it was not the mansion-house of J., were of opinion that it might have been laid to have been the mansion-house of N.; to which some of the other judges inclined, if it were not the mansion of J.

(*a*) Under 3 & 4 W. & M. c. 9 (rep.).

(*b*) R. *v.* Trapshaw, 1 Leach, 427: 2 East, P. C. 506. 1 Hawk. c. 38, s. 30.

(*c*) R. *v.* Bailey, MS. Bayley, J., and 1 Mood. 23.

The entrance to the house was by a common outer door from the street. On an indictment for burglary by breaking into the shop and parlour, laying the offence to have been committed in the dwelling-house of the inmate, nine of the judges agreed that this was proper; that it could not have been laid to be the dwelling-house of the owner, as he did not inhabit any part of it, but only occupied the cellar; but that it would have been otherwise if the owner had occupied any part of the house (*d*).

Apartments where Actual Severance, and no Internal Communication.—Where there is an actual severance of a house in fact, by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, *e.g.* in the case of flats, separate and distinct dwelling-houses in law will be constituted (*e*).

On an indictment for burglary in the dwelling-house of S. and K. it appeared that S. and K. were in partnership, and lived next door to each other. The two houses had formerly been one house only, but had been divided for the purpose of accommodating the respective families of each partner, and were then perfectly distinct and separated from each other, there being no communication from the one to the other without going into the street. The house-keeping, servants' wages, &c., were paid by each partner respectively, but the rent and taxes of both houses were paid jointly out of the partnership fund. The prisoner was servant to S., and it was in his house that the burglary was committed. Upon these facts, it was held that although the two houses were the joint property of both partners, yet they were the separate and respective dwellings of each, and that the burglary ought to have been laid as committed in the house of S. only (*f*).

On an indictment for stealing in the dwelling-house of M., the evidence was that M. and G. were partners; that M. was the lessee of the whole premises, and paid all the rent and taxes for them, and G. had an apartment in the house, and allowed M. a certain sum for board and lodging and also a certain proportion of the rent and taxes for the shop and warehouses. The felony was committed in the shop. It was contended that G., under these circumstances, had a joint possession of the shop and warehouses, and that the indictment should have been framed accordingly, but on a case reserved, the judges were of opinion that the indictment was right (*g*).

If a house is let to A., and a warehouse under the same roof, with an inner communication to A. and B., the warehouse cannot be described as the dwelling-house of A. (*h*).

Owner of a House breaking open Apartments.—Where the owner

(*d*) R. *v.* Rogers, 1 Leach, 89; 1 Hawk. c. 38, s. 29; 2 East, P.C. 506.

(*e*) 2 East, P.C. 504.

(*f*) R. *v.* Jones, 1 Leach, 537: 2 East, P.C. 504; 1 Hawk. c. 38, s. 34. In Tracy *v.* Talbot, 2 Salk. 532 (a distress for poor rate), Holt, C.J., ruled that if two several houses are inhabited by several families who have but one common entrance for both; yet, in respect of their origin, both houses continue rateable severally, for they were at first several houses; and if one family goes, one house is vacant. But if one tenement be divided by a partition, and inhabited by different families, namely, the owner in one and a stranger in another, these are several tenements, severally rateable while they are thus severally inhabited; but if the stranger and his family go away, it becomes one tenement.

(*g*) R. *v.* Parminter, 1 Leach, 537, note (*a*).

(*h*) R. *v.* Jenkins, MS. Bayley, J., and R. & R. 244. See R. *v.* Hancock, R. & R. 171.

of a house lets out apartments in it to lodgers, but continues to inhabit some part of the house himself, if the house has but one outer door common to him and his lodgers, such apartments must be considered as parcel of his dwelling-house (*i*); and it is considered that if he breaks the apartments of his lodgers in the night and steals their goods, the offence is not burglary, on the ground that a man cannot commit burglary by breaking into his own house (*j*).

Sect. IV.—The Time.

Burglaries cannot be committed by day, but only by night (*k*).

The Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 1), provides that, '*for the purposes of this Act*, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day (*l*).

The breaking and entering need not both be done in the same night; for if thieves break a hole in a house one night, with intent to enter another night and commit a felony, and come accordingly another night and commit a felony through the hole they so made the night before, this is burglary, for the breaking and entering were both by night, though not on the same night (*m*). It is said, that if the breaking is in the day-time and the entering in the night, or the breaking in the night and entering in the day, it will not be burglary (*n*). But the authority upon which this opinion appears to have been based (*o*) does not fully prove the point for which it is cited, but only furnishes a resolution to the effect, that if thieves enter in by night through a hole in the wall, which was there before, it is not burglary, without stating who made the hole, and of course does not cover the case of a hole made by the thieves themselves in the day-time, with intent to enter more securely at night (*p*). And it is elsewhere given as a reason why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves broke and entered in the night when they entered; for that the breaking makes not the burglary till the entry (*q*); which reasoning, if applied to a breaking in the day-time, and entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entering also a burglary.

(*i*) *Ante*, pp. 1088, 1089.

(*j*) 2 East, P.C. 506. Kel. (J.) 84.

(*k*) 4 Bl. Com. 224. Anciently the day was accounted to begin only at sun-rise, and to end immediately upon sun-set; but it was afterwards settled as the better opinion that if there were daylight or twilight enough begun or left whereby the countenance of a person might be reasonably discerned, it was no burglary. But this did not extend to moonlight. 3 Co. Inst. 63. 1 Hale, 550, 551. Sum. 79. 1 Hawk. c. 38, s. 2. Bac. Ab. tit. 'Burglary' (D). 4 Bl. Com. 224. 2 East, P.C. 509.

(*l*) Taken from 7 & 8 Geo. IV. c. 29, s. 4, the words in italics being substituted for the words, 'so far as the same is essential to the offence of burglary,' as there are other cases besides burglary to which this section extends. By 43 & 44 Vict. c. 9, s. 1: 'Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred to shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time and in the case of Ireland, Dublin mean time.'

(*m*) 1 Hale, 551. *Ante*, p. 1066. R. *v.* Smith, MS. Bayley, J., and R. & R. 417.

(*n*) 1 Hale, 551.

(*o*) Crompt. 33 *a*, *ex* 8 Edw. IV., cited 1 Hale, 551.

(*p*) Note (*k*) to 1 Hale, 551 (ed. 1800). 2 East, P.C. 509.

(*q*) 1 Hale, 551.

Upon an indictment for housebreaking against J., S., and M., it appeared that J. and S. accompanied M., who was to secrete himself in the house to commit the robbery, and that the door being latched, they assisted him in gaining admission by opening an umbrella to screen him from observation while he entered, but they went away soon after he had got in and were not seen near the place again until after the robbery had been committed. It was objected that there was no evidence to affect J. and S. as principals, for they were not present at the fact. Gurney, B., said, 'We have considered the objection, and we are of opinion that, assuming the evidence to be true (which is the way to try the question of law), if J. and S. were present at the commencement, they must be considered as guilty of the whole. There has been a case of burglary where the breaking was one night and the entry the next, and the judges have decided that a party who was present at the breaking, and not present at the entering, was guilty of the whole. We consider this a much stronger case than that' (*r*).

Sect. V.—The Intent to Commit a Felony.

To constitute burglary at common law, the act of breaking and entering the dwelling-house in the night must be done 'with intent to commit some felony within the same (*s*), whether such felonious intent be executed or not' (*t*). And where the breaking is a breaking out of the dwelling-house in the night, there must have been a previous entry with intent to commit a felony, or an actual committing of a felony in such dwelling-house (*u*).

If the intention of the entry be either laid or proved to have been only for the purpose of committing a *trespass*, the offence will not be burglary. Therefore an intention to beat a person in the house is not sufficient to sustain the indictment; for though killing or murder may be the consequence of beating, yet if the primary intention were not to kill, the intention of beating will not make burglary (*v*). But if a felony is actually committed, this fact is *prima facie* pregnant evidence of an intent to commit it; and a man who commits one sort of felony in attempting to commit another, cannot excuse himself upon the ground that he did not intend the commission of that particular felony (*w*).

The prisoner was indicted for burglary, in breaking and entering the stable of one B., part of his dwelling-house, in the night, with a felonious intent to kill a gelding of one A. there being. The prisoner had cut the sinews of the gelding's fore leg to prevent its running in a race, in consequence of which it died. Parker, C.B., directed an acquittal on the ground that the prisoner intended not to commit felony by killing the horse, but a trespass only to prevent his running, and that, therefore, it was no burglary (*x*).

The prisoner was employed to sell goods, and receive the money for

(*r*) R. *v.* Jordan, 7 C. & P. 432. Gaselee, J., and Gurney, B.

(*s*) 3 Co. Inst. 65. 1 Hale, 559, 561. Sum. 83. Kel. (J.) 47. 1 Hawk. c. 38, s. 36. Bac. Abr. tit. 'Burglary' (F). 4 Bl. Com. 227.

(*t*) *Ante*, p. 1065.

(*u*) *Vide* 24 & 25 Vict. c. 96, s. 51, *ante*, p. 1070.

(*v*) 1 Hale, 561.

(*w*) 1 Hale, 560. 2 East, P.C. 509, 514, 515. Kel. (J.) 47.

(*x*) R. *v.* Dobbs, 2 East, P.C. 513, Parker, C.B. Under 24 & 25 Vict. c. 97, s. 40, *post*, p. 1825, the unlawful and malicious wounding of cattle is felony.

his master's use. In the course of the trade he sold goods, for which he received a hundred and sixty guineas, none of which he put into the till, nor in any way gave into his master's possession, but deposited ten guineas of the sum in a private place in the chamber where he slept, and carried off the remaining hundred and fifty on leaving his service, from which he decamped before the embezzlement was discovered. He left a trunk containing some of his clothes, as well as the ten guineas, behind him, but afterwards, in the night, broke open his master's house, and took away with him the ten guineas which he had so deposited in the private place in his bed-chamber. This was held not to be burglary, because the taking of the money was no felony; for although it was the master's money in *right*, it was the servant's money in *possession*, and the original act was no felony (*y*).

The prisoners were indicted for a burglary in the dwelling-house of M., the intent being laid to steal the goods of one H. H., who was an excise officer, had seized some bags of tea in a shop belonging to S., as being there without a legal permit, and had removed them to M.'s, where he lodged. The prisoners and many other persons broke open M.'s house in the night, with intent to take this tea. It was not proved that S. was in company with them; but the witnesses said, that they supposed the tea to belong to S.; and supposed that the fact was committed either in company with him or by his procurement. The jury found that the prisoners in fact intended to take the goods on the behalf of S. All the judges were of opinion that the indictment was not supported; as however outrageous the conduct of the prisoners was, in so endeavouring to get back S.'s goods, still there was no intention to steal (*z*).

On an indictment for burglary with intent to steal certain mortgage deeds, it was held that assuming the intent to be to steal the deeds uncancelled they were valuable securities and *choses in action* and were wrongly described as 'goods and chattels' (*a*).

Where two poachers went to the house of a gamekeeper who had taken a dog from them, and believing him to be out of the way broke the door and entered, and on an indictment for burglary it appeared that their intention was to rescue the dog, and not to commit a felony; Vaughan, B., directed an acquittal (*b*). On an indictment for burglary

(*y*) R. *v.* Dingley, cited by Const, *arguendo* in R. *v.* Bazeley, 2 Leach, 840, 841, where he mentions it as cited by Sir B. Shower, in his argument in the case of R. *v.* Meeres, 1 Show. 53 (89 E. R. 443). Mr. Const further said that he had been favoured with a manuscript report of it, extracted from a collection of cases in the possession of the late Mr. Reynolds, clerk of the arraigns at the Old Bailey, under the title of R. *v.* Dingley, by which it appeared that the special verdict was found at the Easter Sessions, 1687, and argued in the King's Bench in 1688, and in which it was said to have been determined that this offence was not burglary, but trespass only. See the case cited also as R. *v.* Bingley, 1 Hawk. c. 38, s. 37, and as a case, Anon. in 2 East, P.C. 510.

(*z*) R. *v.* Knight, 2 East, P.C. 510. Some of the judges held that if the indictment had been for breaking the house with intent feloniously to rescue goods seized &c., which was made felony by 19 Geo. II. c. 34 (*rep.*), it would have been burglary. But they agreed that even in that case some evidence would have been necessary on the part of the prosecutor as to the goods being uncustomed, in order to throw the proof that the duty was paid on the prisoners: but that the goods being found in oil cases or in great quantities in an unentered place would have been sufficient for that purpose.

(*a*) R. *v.* Powell, 2 Den. 403: 21 L. J. M. C. 78.

(*b*) Anon. Math. Dig. C. L. 'Burglary,' 48. See R. *v.* Holloway, 5 C. & P. 524.

with intent to commit larceny, the evidence was, that three persons attacked the house and broke a window both in front and at the back. The occupier of the house got up and placed himself by the wall near the window and contended with them with a spade for some time, when they went away. There was no evidence of actual entry, but there was evidence that the prisoners had ample opportunity to enter and plunder, if they were disposed. It was submitted for the prisoners, that there was no evidence to go to the jury; Parke, J., 'There is evidence; it is for the jury to say, whether they went there with an intent or not. Persons do not in general go to houses to commit trespasses in the middle of the night; it is matter of observation that they had the opportunity, and did not commit the larceny, but it is for the jury to say, whether, from all the circumstances, they can infer that or any other intent' (*c*).

On an indictment for burglary with intent to steal the goods of W. S., it appeared that the prisoner broke a pane of glass, and put in a knife, and pushed back the window fastener, after which he pulled the sash of the window down; he was then disturbed. Alderson, B., held that, though there was a sufficient entry, 'there was no evidence of the intent laid in the indictment. It is the immediate intent with which the entry is effected, that is the material one, and not a remote intent having no immediate connection with that entry' (*d*).

It makes no difference whether the felony intended is so at common law, or by statute; for whenever a statute makes an offence felony, it incidentally gives it all the properties of a felony at common law (*e*).

The felony really intended must be laid in the indictment, and proved as laid. Proof of intent to commit a felony will not support an indictment charging a felony actually committed. Thus, where upon an indictment for burglary and stealing goods, it appeared that there were no goods stolen, but that the burglary was with intent to steal, it was held that the indictment was not supported by the evidence (*f*). So, if it be alleged, that the entry was with intent to commit one sort of felony, and it appears by the evidence that it was with intent to commit another, it will not be sufficient (*g*). Where the charge is of a felony intended to be committed by stealing goods, the property in the goods should be correctly stated. Thus, where an indictment charged a burglary in the house of one D., 'with intent to steal the goods of the said W.'; and it appeared that no such person as W. had any property in the house, but that in fact the name W. had been inserted by mistake in the indictment instead of D., though Lawrence, J., before whom the prisoner was tried, inclined to think that the mistake was not material as to the burglary, a majority of the judges were afterwards of opinion that in an indictment of this description it was necessary to shew to whom the property belonged

(*c*) Anon. 1 Lew. 37.

(*d*) R. *v.* Tucker, 1 Cox, 73. It is for the jury to determine whether the intent is proved. R. v. Farnborough [1895], 2 Q. B. 484; 64 L. J. M. C. 270.

(*e*) 1 Hawk. c. 38, s. 38. 4 Bl. Com. 228. Bac. Abr. tit. 'Burglary' (F). 2 East, P.C. 511. R. *v.* Locost, Kel. J. 30. R. *v.* Gray, 1 Str. 481. R. *v.* Knight, *ante*, p. 1093. There are some early opinions to the contrary, see 1 Hale, 562. Crompt. 32. 2 East, P.C. 511.

(*f*) 2 East, P.C. 514. R. *v.* Vandercomb, 2 Leach, 708.

(*g*) 2 East, P.C. 514.

in order to render the charge complete; and the words, 'of the said W.' being material, could not be rejected as surplusage (*h*).

Where the prisoners were indicted for breaking and entering the dwelling-house of H. and stealing therein certain goods his property, but the evidence shewed that though the house belonged to H., the goods stolen were the separate property of his wife, and an application to amend the indictment was refused; it was held upon a case reserved that the conviction of stealing the goods of H. could not be sustained (*i*).

Where an indictment alleged that the prisoners broke and entered a church 'with intent the goods and chattels therein being' to steal, it was moved in arrest of judgment that it ought to have stated whose property the goods were; but it was held that it was unnecessary; for, in indictments for burglary, it is not usual, in stating the intent to steal, to specify the ownership, but merely to state the intent to steal 'the goods then being in the dwelling-house' (*j*). So where an indictment alleged that the prisoners the dwelling-house of R. P., 'unlawfully did break and enter, and then and there unlawfully were in the said dwelling-house of the said R. P., with intent the goods and chattels in the said dwelling-house then and there being, then and there feloniously to steal, take and carry away,' and the prisoners were found guilty, it was objected that the indictment was bad, as it did not state whose goods the prisoners intended to steal; but Erskine, J., having consulted Wightman, J., held the indictment was sufficient (*k*).

But if the indictment charges a burglary with intent to commit a felony, it will be supported by evidence of a felony actually committed (*l*). And in all cases where a felony has actually been committed, it is enough to allege the commission of it; as that is sufficient evidence of the intention (*m*). But the intent to commit a felony, and the actual commission of it, may both be alleged; and in general this is the better mode of statement (*n*). For where this is done, the prisoner may be convicted of the burglary with intent to commit the felony though he be acquitted of the felony, or convicted of the felony though he be acquitted of the burglary. An indictment for burglary alleged that the prisoner 'the

(*h*) R. *v.* Jenks, Macdonald, C. B., Buller, J., and Lawrence, J. (2 Leach, 774; 2 East, P. C. 514), where it is said that 'this it seems is not like the case of laying a robbery in the dwelling-house of A., which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery.' In R. *v.* Exminster, 6 A. & E. 598, a similar mistake in a surname was held not to vitiate an assignment of an apprentice. In R. *v.* Rudge, Gloucester Spr. Ass. 1841, Coleridge, J., seemed clearly of opinion that an indictment for murder, which alleged an assault on *Martha* Sheddon, and that the prisoner 'the said *Margaret* Sheddon, did strike, &c.,' was not therefore, bad. And see R. *v.* Crespin, 11 Q.B. 913. C. S. G. Such a mistake would now be amendable under 14 & 15 Vict. c. 100, s. 1, *post*, Vol. ii. p. 1972.

(*i*) R. *v.* Murray [1906], 2 K.B. 385. The Court said that the indictment could and should have been amended, under 14 & 15 Vict. c. 100, s. 1.

(*j*) R. *v.* Nicholas, 1 Cox, 218. Denman C.J., Alderson, B., and Coltman, J. See R. *v.* Clarke, 1 C. & K. 421, *post*, p. 1096.

(*k*) R. *v.* Lawes, 1 C. & K. 62. A better objection would have been that the indictment did not allege that the prisoners broke and entered with intent to steal. The words 'with intent, &c.,' do not necessarily refer to the breaking and entering; and if confined to the being in the dwelling-house, no offence is charged.

(*l*) R. *v.* Locost, Kel. (J.) 30, an indictment for a burglary with intent to commit a rape, and evidence of a rape actually committed.

(*m*) 1 Hale, 560. 2 East, P.C. 514. R. *v.* Furnival, R. & R. 445.

(*n*) 1 Hale, 559. R. *v.* Furnival, *supra*.

dwelling-house of B. burglariously did break and enter, with intent the goods and chattels in the same dwelling-house then and there being feloniously and burglariously to steal,' and then and there stole a quantity of articles of the goods and chattels of the said B. B. was the tenant of the house; but she and two other ladies lived in it in common, each of the three contributing an equal amount to the establishment, and the articles stolen had been bought by B.; but at the end of the year they would be paid for by the three ladies when they divided the expenses of the establishment. It was objected that the articles were the goods of the three ladies; but it was held that, to support the indictment, it was sufficient to prove that the prisoner broke and entered the house in the night-time with intent to steal the goods there *generally*, and therefore the evidence supported the indictment (*o*).

An indictment alleged that the prisoner burglariously broke and entered a dwelling-house 'with intent one D., in the said dwelling-house then being, violently and against her will then and there feloniously to ravish and carnally know,' and that the prisoner then and there in the said dwelling-house feloniously did wound the said D., then being in the said dwelling-house. The Court overruled an objection taken that the indictment ought to have alleged the intent to ravish in the said dwelling-house, and not merely 'then and there' (*p*).

Different intents may be stated in the indictment. Thus, where the first count of an indictment for burglary laid the fact to have been done with intent to steal the goods of A.; and the second count laid it with intent to murder A.; it was objected, upon a general verdict of guilty, that there were two several capital charges in the same indictment, tending to deprive the prisoner of the challenges to which he would have been entitled if there had been distinct indictments, and also tending to perplex him in his defence; but the indictment was held good, on the ground that it was the same fact and evidence, only laid in different ways (*q*).

Sect. VI.—The Indictment, Trial, &c.

The indictment should state the fact to have been done in the night (*r*). Where an indictment for burglary alleged that the prisoners broke into a dwelling-house 'about the hour of eleven in the night,' it was contended that it ought to have been alleged that the offence was committed between the hours of nine o'clock at night and six o'clock the following morning. Patteson, J., said, 'I think it immaterial whether the time be mentioned or not. The night is the material allegation; and even if the night had not been stated, I think it would, perhaps, be sufficient if the indictment charged the offence to have been done "burglariously." That would

(*o*) R. *v.* Clarke, 1 C. & K. 421. Coleridge, J., and Parke, B.

(*p*) R. *v.* Watkins, C. & M. 264. Coltman, J. The prisoner was acquitted of the burglary, or the point would have been reserved.

(*q*) R. *v.* Thompson, 2 East, P.C. 515.

(*r*) 1 Hale, 549. *Ante*, p. 1091. R. *v.* Waddington. Burn's Just. tit. 'Burglary,' s. 1. 2 East, P.C. 513. In 2 Hale, 179, it is said that the indictment ought to be *tali die circa horam decimam in nocte ejusdem diei felonicè et burglariter fregit*; but that according to some opinions *burglariter* carries a sufficient expression that it was done in the night.

do' (*s*). It is not necessary that the evidence should correspond with the allegation as to the hour, if it shews the fact to have been committed in the night (*t*).

The offence must be laid to have been committed in a *dwelling-house* (*u*). It is not sufficient to lay it generally as having been committed in a house (*v*).

Indictments for burglary or offences in dwelling-houses, shops, &c., should state the name of the owner of the dwelling-house and of the parish in which it is situate (*w*), but mis-statements may be amended (*x*). On an indictment for burglary in a church it is enough to describe it as the parish church of the parish to which it belongs, or otherwise to indicate its situation and character (*y*).

In R. *v.* Napper (*z*), on an indictment for stealing in a dwelling-house, it stated that the prisoner, on, &c., at Liverpool, one coat of D. J., of the value of 40*s.*, in the dwelling-house of W. T., then and there being, then and there feloniously did steal. It was held (upon a case reserved) that the indictment shewed sufficiently that the dwelling-house was situate at Liverpool. Where an indictment for burglary alleged that the prisoners 'late of the parish of Norton-juxta-Kempsey, in the county of Worcester,' 'at Norton-juxta-Kempsey aforesaid the dwelling-house of T. Hooke there situate' feloniously did break and enter, &c., and it appeared that Norton-juxta-Kempsey was a chapelry and perpetual curacy; it was objected that the indictment ought to have stated that Norton was a chapelry or described it in some other manner: but Patteson, J., held that R. *v.* Napper was a sufficient authority to shew that this indictment was good (*a*).

Venue.—Since the Criminal Law Act, 1826 (7 Geo. IV. c. 64), s. 12 (*b*), if any felony or misdemeanor is committed within five hundred yards of the boundary of a county, the offenders may be tried in the adjoining county. An indictment for burglary, found by the grand jury for the county of Hereford, alleged the burglary to have been committed 'at the parish of E. B. in the county of Gloucester, within five hundred yards of the boundary of the county of Hereford.' Upon the arraignment of the prisoners at Hereford, it was objected that the indictment was bad, on the ground that 7 Geo. IV. c. 64, s. 12, only applied to larceny, and other transitory felonies, and not to felonies which were local in their

(*s*) R. *v.* Thompson, 2 Cox, 377.

(*t*) 2 East, P.C. 513.

(*u*) *Ante*, pp. 1075 *et seq.*

(*v*) 1 Hale, 550. In R. *v.* Garland, 1 Leach, 144, an outhouse having been broken open, the indictment was for breaking and entering the dwelling-house; and in R. *v.* Dobbs, 2 East, P. C. 512, 513, the indictment was for breaking and entering the stable of J. B., part of his dwelling-house.

(*w*) The Courts do not now require the accuracy insisted upon when the offences were capital. For the older rules, see 2 East, P. C. 513. 1 Chit. Cr. L. 215 *et seq.* 3 Chit. Cr. L. 1096. R. *v.* Cole, Moore (K.B.), 466. 1 Hale, 558. 2 East, P.C. 513. R. *v.* White, 1 Leach, 252; 2 East, P.C. 513. R. *v* Woodward, 1 Leach, 253 (n.). 2 Stark. Cr. Pl. 437, note (*z*). R. *v.* Richards, 1 M. & Rob. 177. Park and Gaselee, JJ. R. *v.* St. Mary, Leicester, 1 B. & Ald. 327. R. *v.* Countesthorpe, 2 B. & Ad. 487. Walford *v.* Anthony, 8 Bing. 75. R. *v.* Wright, 1 A. & E. 434. R. *v.* St. John, 9 C. & P. 40, Parke, B., and Bosanquet, J. R. *v.* Frowen, 4 Cox, 266. R. *v.* Perkins, 4 C. & P. 363. R. *v.* Howell, 1 Cox, 190.

(*x*) Under 14 & 15 Vict. c. 100, s. 1, *post*, Vol. ii. p. 1972.

(*y*) 1 Hale, 556. 1 Hawk. c. 38, s. 17. 2 East, P.C. 512, and *post*, p. 1105.

(*z*) MS. Bayley, J., and 1 Mood. 44.

(*a*) R. *v.* Brookes, C. & M. 544, and MSS. C. S. G.

(*b*) *Ante*, Vol. i. p. 20.

nature; but it was held that the indictment was good; the effect of the section being to give adjoining counties concurrent jurisdiction over one thousand yards; the words 'dealt with' applied to justices of the peace, who had consequently jurisdiction over five hundred yards in the county adjoining to that in which they were qualified to act; the words 'inquired of' applied to the grand jury; 'tried' to the petit jury; and 'determined and punished' to the courts of sessions and assize (*c*).

The terms of art usually expressed by the averment 'feloniously and burglariously did break and enter' are essentially necessary to the indictment. The word *burglariously* cannot be expressed by any other word or circumlocution; and the averment that the prisoner *broke and entered*, is necessary, because breaking without entering, or entering without breaking, is not burglary (*d*).

An indictment upon 7 & 8 Geo. IV. c. 29, s. 11 (rep.), for 'breaking out' of a dwelling-house after committing a felony therein, must have averred that the prisoner broke out of the house, and a statement that the prisoner did 'break to get out,' or did 'break and get out,' was held insufficient (*e*).

Intent.—The intent must be expressly alleged in the indictment, and proof must be given either that the party committed a felony in the dwelling-house, or that he broke and entered the house with intent to commit a felony therein (*f*). And it seems to be better first to lay the intent and then to state the particular felony, if a felony has actually been committed. For though where an indictment charges that the prisoner 'the dwelling-house of A. B. feloniously and burglariously did break and enter, and the goods of A. B. then and there feloniously and burglariously did steal, take, &c.,' it comprises two offences, namely, burglary and larceny, and the prisoner may therefore be acquitted of the burglary, and found guilty only of the larceny; yet it seems he cannot be found guilty of the burglary if he be acquitted of the larceny, on the ground that when the offence is so charged the larceny constitutes part of the burglary (*g*). It is therefore better to charge the prisoner with breaking, &c., with intent feloniously and burglariously to steal, &c., and to add also the particular felony, as upon such an indictment he may be convicted of a simple burglary, though acquitted of the felony (*h*).

We have already seen that different intents may be stated in the indictment, and such a mode of proceeding, by laying the same fact in different ways, may be rendered expedient by the particular circumstances of the case (*i*).

Property.—It is sufficient to lay the property in the name of a person who is bailee of it. On an indictment for breaking and entering the house of K., and stealing a watch, the property of M., M. proved that the house was taken by K., and that the witness carried on the business

(*c*) R. *v.* Ruck, Hereford Spr. Ass. 1829, Parke, J., MSS. C. S. G. See R. *v.* Mitchell, 2 Q.B. 636, *ante*, Vol. i. p. 20.

(*d*) 1 Hale, 550. 2 East, P.C. 512. *Ante*, pp. 1066, 1072.

(*e*) R. *v.* Compton, 7 C. & P. 139. Vaughan and Patteson, JJ. The section is re-enacted as 24 & 25 Vict. c. 96, s. 51, *ante*, p. 1070.

(*f*) 1 Hale, 550. *Ante*, pp. 1092 *et seq.*

(*g*) 1 Hale, 559, 560.

(*h*) 1 Hale, 560. See also *ante*, p. 1095.

(*i*) *Ante*, p. 1096.

of a silversmith for the benefit of K. and his family, but had himself no share in the profits, and no salary, but had power to dispose of any part of the stock, and might, if he pleased, take money from the till as he wanted it, but should inform K. that he had so done. M. sometimes bought goods for the shop, and sometimes K. did so. Upon this evidence it was held that M. was a bailee of the stock, and that the property might properly be laid in him (*j*).

On an indictment for burglary and stealing a ham and three loaves, it appeared that what was described as ham was pork which was in the process of curing, and had not yet become ham, and this was traced to the possession of the prisoner shortly after the burglary; and Alderson, B., held that, though the description in the indictment failed, yet the prosecutor might trace into the possession of the prisoner the pork or anything else which had been taken from the house at the same time, and the jury might presume the taking of one article from the possession of another (*k*).

Where upon an indictment for burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking or any larceny, subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed. It was proposed to give evidence of a larceny by the prisoners, of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the Court refused to receive the evidence. They said, that the charge contained in the indictment of burglariously breaking and entering the house, and stealing the goods, might unquestionably be modified, by shewing that the prisoners stole the goods without breaking open the house; but that the charge proposed to be introduced went to connect the prisoners with an *antecedent* felony committed before three o'clock on the day mentioned, at which time it was clear that they had not entered the house; that the transactions were distinct; and that it might as well be proposed to prove any felony, which those prisoners might have committed in that house seven years before (*l*).

Where a larceny was charged in the same indictment with a burglary, it was held that the prisoner might be found not guilty of the burglary and convicted of the larceny (*m*). Thus, where the prisoners were acquitted of the burglary, upon an indictment for a burglary and a larceny, and found guilty of stealing in the dwelling-house to the amount of forty shillings, it was held that they were excluded from their clergy, though there was no separate count in the indictment on 12 Anne, c. 5 (now repealed). The judges were of opinion that the indictment contained every charge that was necessary in an indictment upon that statute (*n*).

In this case the finding of the jury was 'Not guilty of breaking and entering the dwelling-house in the night, but guilty of stealing the box and money (£60) in the dwelling-house,' and formerly it appears to have

(*j*) R. *v.* Bird, 9 C. & P. 44, Bosanquet, J. 'It is not stated in the report by whom the house was occupied.' C. S. G.

(*k*) R. *v.* Purcell, 1 Cox, 107.

(*l*) R. *v.* Vandercomb, 2 Leach, 708.

(*m*) *Ante*, p. 1095.

(*n*) R. *v.* Withal, 1 Leach, 88; 2 East, P.C. 517.

been doubted whether, where the words 'not guilty of the burglary' were a part of the finding of the jury, the prisoner was not by necessary consequence acquitted of the felony also (*o*). But in a more recent case where the indictment was for a burglary and larceny, and the verdict was 'not guilty of the burglary, but guilty of stealing above the value of forty shillings in the dwelling-house'; and the entry by the officer was in the same words; the judges held the finding sufficient to warrant a capital judgment. They agreed that if the officer were to draw up the verdict in form, he must do it according to the plain sense and meaning of the jury; and that the minute was only for his future direction (*p*).

Upon an indictment for burglary and larceny against two, one may plead guilty of the burglary and larceny, and the other be found guilty of the larceny only. Upon an indictment against M. and two others for burglary and stealing in the dwelling-house to the value of forty shillings, M. pleaded guilty to the whole, and the other two were found guilty of stealing in the dwelling-house to the amount of forty shillings, but acquitted of the burglary. A case was reserved upon the question how the judgment should be entered, and seven of the judges thought that it might be entered against all the three prisoners; against M. for the burglary and capital larceny, and against the other two for the capital larceny. Burrough, J., and Hullock, B., thought otherwise, but Hullock, B., thought that if a *nolle prosequi* were entered as to M. for the burglary, judgment might be entered against all the three for the capital larceny. The seven judges thought that there might be cases in which, upon a joint larceny by several, the offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny without knowing of the previous breaking (*q*).

Three persons were indicted for burglary, with intent to steal certain articles named in the indictment, which contained only one count. The evidence against two of them was, that they broke and entered and stole some hens; the evidence against the third was, that he stole a sack of flour, from the same house, in conjunction with the other two, but there was no evidence that he was a party to the burglary. Parke, J., thought that upon this indictment the two first could not be convicted of burglary, and the other of larceny. He expressed doubts, but thought the jury had better convict all three of larceny in stealing the sack of flour; he was rather of this opinion, as the stealing the sack of flour,

(*o*) R. *v.* Comer, 1 Leach, 36; 2 East, P.C. 516.

(*p*) R. *v.* Hungerford, 2 East, P.C. 518. Many of the judges thought that an entry, 'not guilty of the breaking and entering in the night, but guilty of the stealing, &c.,' would be more correct. But it appeared upon inquiry to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict 'not guilty of murder, but guilty of manslaughter;' or 'not guilty of murder, but guilty of feloniously killing and slaying;' and yet murder includes the killing.

(*q*) R. *v.* Butterworth, MS. Bayley, J., and R. & R. 520. 'An analogous case is the conviction of one for murder, and another for manslaughter on an indictment for murder.' C. S. G. It had been suggested in an earlier case that on an indictment of several for burglary and larceny, the jury could not find one guilty of burglary and another of larceny. R. *v.* Turner, 1 Sid. 171. 2 East, P.C. 519.

to which the third man was a party, was not in the contemplation of the other two when they committed the burglary, but was an afterthought (*r*).

Punishment of Burglary.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 52, 'Whosoever shall be convicted of the crime of burglary shall be liable . . . to be kept in penal servitude for life . . .' (*s*). The offence was at common law a felony within benefit of clergy (*t*), which was ousted by statutes now repealed.

By sect. 54, 'Whosoever shall enter any dwelling-house in the night with intent to commit any felony therein (*u*), shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . .' (*s*).

By the Burglary Act, 1896 (59 & 60 Vict. c. 57), s. 1 (1), 'A court of quarter sessions shall, notwithstanding anything in the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), have jurisdiction to try a person charged with burglary,' and by sect. 2 (2), 'A justice of the peace when committing for trial a person charged with burglary shall, nevertheless, commit him for trial before a court of assize unless, owing to the absence of any circumstances which make the case a grave or difficult one, he thinks it expedient in the interests of justice to commit for trial before a court of quarter sessions; and the Assizes Relief Act, 1889 (52 & 53 Vict. c. 12), shall apply.'

Sect. VII.—Being armed, &c., at Night with Intent to Break into Houses, &c.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 58 (*v*), 'Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night (*w*) having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock key, crow, jack, bit, or other implement of house-breaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling-house or other building whatsoever with intent to commit any felony therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .' (*x*).

(*r*) Anon. 1 Lew. 36.

(*s*) The omitted words are repealed (1892, 1893, S. L. R.). The minimum term of penal servitude is now three years, and instead of penal servitude, imprisonment with or without hard labour for not over two years may be awarded. 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*t*) 3 Co. Inst. 63, 65. 4 Bl. Com. 228.

(*u*) Where, on a trial for burglary, the breaking or committing the felony in the house is not proved, a conviction may take place under this section, if the evidence so warrants.

(*v*) Taken from 14 & 15 Vict. c. 19, s. 1. The distinction between this section and s. 54, *supra*, as far as relates to being in a dwelling-house with intent to commit a felony, is this, that under s. 54 the entry must be proved to have been in the night; but under this section proof that the prisoner was in the dwelling-house by night with intent to commit felony is enough, and it is unnecessary to prove whether he entered by day or by night.

(*w*) Defined *ante*, p. 1091.

(*x*) For not more than five nor less than three years, or imprisonment with or without hard labour for not more than two years. 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

Where persons were continuously watched from five a.m. in the 'night' until after seven a.m., and were then arrested and house-breaking implements were found on one of them, it was held that this constituted 'being found by night' (*y*).

Sect. 59 (*z*). 'Whosoever shall be convicted of any such misdemeanor as in the last preceding section mentioned, committed after a previous conviction, either for felony or such misdemeanor, shall on such subsequent conviction be liable . . . to be kept in penal servitude for any term not exceeding ten years . . .' (*a*).

As to the form of indictment and procedure under this section, see *post*, Vol. ii. pp. 1959 *et seq.*

Instruments capable of being used for House-breaking.—On an indictment charging the prisoner with being found by night in possession of certain instruments of house-breaking, to wit, one pair of pincers, ten keys, and one piece of iron, it appeared that the prisoner was found by night in possession of a number of house-door keys and a pair of pincers, all of which were of an ordinary description, such as are commonly used for lawful purposes, but which were capable from their nature of being used for purposes of house-breaking; it was objected that the articles were not any of those mentioned in 14 & 15 Vict. c. 19, s. 1 (rep.), but it was left to the jury to say whether the articles might be used for the purpose of house-breaking, and whether, at the time the prisoner was found in possession of them, he intended to use them as instruments of house-breaking, and the jury having found him guilty it was held that the conviction was right; for any instrument capable of being used for the purpose of house-breaking, where the prisoner has it in his possession for the purpose of house-breaking, was within the statute (*b*).

Where several persons are engaged in a common purpose of house-breaking, and one only is in possession of house-breaking implements, all may be found guilty, for the possession of one is the possession of all (*c*).

Where on an indictment for having in possession without lawful excuse certain implements of house-breaking, the jury found the prisoner guilty of the possession without lawful excuse, but that there was no evidence of an intent to commit a felony, and the indictment omitted the words 'with intent to commit felony;' it was held that the omission did not render the indictment bad, and that it was not necessary to prove an intent to commit a felony (*d*).

In R. *v.* Jarrald (*e*), an indictment under sect. 58 alleged that the prisoners were found by night armed with a loaded gun, with intent

(*y*) R. *v.* Stevenson [1905], 69 J. P. 84, County of London Sessions (W. R. McConnell, K.C., Chairman).

(*z*) Taken from 14 & 15 Vict. c. 19, s. 2.

(*a*) Nor less than three years, or to imprisonment, as under s. 58, 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted parts of s. 59 were repealed in 1892 (S. L. R.).

(*b*) R. *v.* Oldham, 2 Den. 472: 21 L. J. M. C. 134. Maule, J., thought that the Act was wrongly punctuated, and that there ought to have been a comma after picklock. A piece of linen with treacle on it, used for the purpose of preventing noise from broken glass, has been held to be an instrument of house-breaking within this section. R. *v.* Percival [1905], 69 J. P. Rep. 320. In this case the Court ruled to the above effect; the question ought to have been left to the jury.

(*c*) R. *v.* Thompson, 11 Cox, 362.

(*d*) R. *v.* Bailey, Dears. 244: 23 L. J. M. C. 13.

(*e*) 9 Cox, 507: L. & C. 301: 32 L. J. M. C. 258.

then to break and enter a building, to wit, a malting, and to commit a felony therein. The prisoners were found in a field adjoining to three separate maltings, and were going in a direction which would lead them to any one of the three. The maltings were in the occupation of three different persons. It was objected that the indictment ought to have stated the ownership of the building, and where it was situate, and, on a case reserved, it was contended that a particular intent must be alleged and proved. Cockburn, C.J., 'The first question is, what is the offence created by the Legislature. According to the contention for the Crown, any man found by night with a dangerous or offensive weapon, or some instrument from which it is impossible to doubt that he is going to break into some house or building, is guilty of a misdemeanor. I do not think that is so, and I am of opinion that there must be a definite intention to break into some particular house. As to whether there must be an intention to commit a particular felony, upon that point I say nothing. It is not enough to say that a man intended to break into a house generally. The rules of criminal pleading must not be lost sight of, and it must not be forgotten that there is no opportunity of getting a new trial in criminal cases on the ground of surprise, or that if the defendant had had a better knowledge of what the nature of the offence charged was, he might have been able to meet it. The jury and the prisoner ought to know the precise offence charged against the prisoner, and as this does not appear on the indictment, I think the conviction cannot be sustained.' Pollock, C.B., 'If a man is found at night with a pair of pistols and burglarious instruments upon him, under circumstances that there can be no doubt that he is out for a criminal purpose, the statute never intended that such a case as that should be the subject of penal servitude.' Williams, J., 'I think it is necessary to specify the ownership and situation of the premises the defendant intended to break into.' Crompton, J., 'I think that the indictment is good only in case it shews an intention to break and enter some definite dwelling-house or building, and to commit some definite felony therein' (*f*).

(*f*) Bramwell, B., concurred. 'With all deference it is submitted that this decision is clearly erroneous. The ground on which Cockburn, C.J., rests the decision of the first point is answered by the second clause of s. 58, under which the mere possession, without lawful excuse, of any instrument of house-breaking in the night, constitutes the offence, without any intent to commit any felony at all (R. *v.* Bailey, *supra*): and this offence is plainly one step further from the attempt to commit a felony than where the intent to commit some felony exists, though the particular felony is not yet fixed. The case put by Pollock, C.B., is clearly within the second clause as far as "burglarious instruments" are concerned, even without the purpose there specified. The very section itself, therefore, negatives the ground on which the decision of the first point was rested. It is to be remembered, too, that 14 & 15 Vict. c. 19 (from which s. 58 is taken), was "an Act for the better prevention of offences," and the preamble recited that "it was expedient to make further provision for the prevention of burglary and other offences in the night;" and how those offences can be better prevented than by nipping the intent in the bud before it has assumed a definite and specific object it is difficult to conceive; and it cannot be doubted that this decision, instead of promoting the object of the Act in this respect, is substantially a repeal of it; for it is hardly conceivable that, in the majority of cases, it will be possible to prove an intent to commit any particular felony.

'As to the second point, viz., the rules of criminal pleading, these seem, in this case, to have been misconceived. It is quite a mistake to suppose that these rules require the specification of particulars where it is impracticable to specify them. Wherever this is the case, the rules allow general or other statements instead. The names of the inhabitants of counties or parishes need

never be stated. Where the name of an individual is not known, he may be described as unknown; and—what is precisely apposite to the present case—where a criminal purpose is intended, but the offenders have not proceeded far enough to fix the particular individuals to be victimised, they need not be particularly named: thus where a conspiracy was entered into to injure persons who should on a future day purchase stock, it was held that it was unnecessary to specify the particular persons intended to be injured. (*R. v.* De Berenger, 3 M. & S. 67. And see R. *v.* King, 7 Q.B. 782, in error.) These cases are exactly in point with a case like this, where the prisoners intended to commit a felony in one of three buildings, but had not yet made up their minds in which it should be; and if the prisoners in this case had been indicted for conspiring to commit a felony, it is quite clear the particular felony need not have been specified. An indictment for having possession of counterfeit coin, with intent to utter it, never specifies the persons to whom it was intended to be uttered.

'This section was framed partly from 5 Geo. IV. c. 85, s. 4, under which persons frequenting certain places, "with intent to commit felony," are summarily punishable. No objection has ever been taken to any conviction under that Act on the ground that the felony intended was not specified; and in R. *v.* Brown, 17 Q.B. 833; *In re* Jones, 7 Ex. 586; Sewell *v.* Taylor, 7 C. B. (N. S.) 160; and *In re* Davis, 2 H. & N. 149, the only statement was, "with intent to commit felony," and the attention of the Court was expressly called, in two of those cases, to this expression; for it was objected that the word "there" ought to have been added to it. It seems, also, to be now settled that, in an indictment for burglary, it is unnecessary to state whose goods the prisoner intended to steal. [R. *v.* Clarke, 1 C. & K. 421.] As to the prisoner being informed by the indictment of the charge he has to meet; practically, the prisoner is much better informed of the charge by the depositions, and, if in any case there be any real doubt as to what the precise charge is, the Court always orders particulars of the charges to be delivered to the prisoner.' C. S. G.

CANADIAN NOTES.

BURGLARY.

Sec. 1.—*Definition of Offence.*

Breaking Dwelling-house by Night.—See Code sec. 457.

Breaking Dwelling-house by Night when Armed.—See Code sec. 457(2).

To "break" means to break any part, internal or external, of a building, or to open by any means whatever (including lifting, in the case of things kept in their places by their own weight), any door, window, shutter, cellar-flap or other thing intended to cover openings to a building, or to give passage from one part of it to another. Code sec. 335(*c*).

An entrance into a building is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by him, is within the building. And every one who obtains entrance into any building by any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, shall be deemed to have broken and entered that building. Code sec. 340.

To effect an entrance to a dwelling-house by further lifting a partly open window is not a "breaking" within sec. 335(*c*). R. v. Burns, 7 Can. Cr. Cas. 95, 36 N.S.R. 257.

Where an indictment for burglary charges only the breaking and entering with intent and does not charge a breaking out of the dwelling-house, and the evidence shews that two windows had been disturbed sufficiently to allow of an entrance, one of them being previously closed and the other partly open, but it does not appear by which of them the entrance was made, it is error to instruct the jury that an entrance by either is sufficient, and the misdirection is a substantial wrong to the accused entitling him to a new trial. *Ibid.*

Being Found in Dwelling-house by Night.—See Code sec. 462.

On an indictment for being unlawfully in a dwelling-house by night with intent to assault, a written verdict of "guilty" of being in the house unlawfully, also "guilty of assault," is a good verdict of guilt on the charge, as the assault necessarily includes the intent. To complete the offence of being unlawfully in a dwelling-house with intent to assault, it is sufficient that the intent originated after the

entry, and that the assault was threatened by the accused in his efforts to escape from the house after being discovered therein. Semble, the verdict as to intent while in the house is not affected by the circumstance that the same count of the indictment charged also the entering of the house with intent to make the assault. The King v. Higgins, 10 Can. Cr. Cas. 456, 38 N.S.R. 328.

Breaking Shop, etc., and Committing Indictable Offence Therein.—See Code sec. 460.

Breaking Shop, etc., with Intent to Commit Indictable Offence Therein.—See Code sec. 461.

A building occupied with, and within the same curtilage with, any dwelling-house shall be deemed to be part of the said dwelling-house if there is between such building and dwelling-house a communication, either immediate or by means of a covered and inclosed passage, leading from the one to the other, but not otherwise. Code sec. 339.

If a person, with intent to steal something out of a shop or store, opens a door leading into it by lifting the latch or turning the knob and then enters the store, although during business hours, for the purpose of carrying out such intention, he may be convicted of shop-breaking under Code sec. 461. R. v. Smith, 17 Man. R. 282.

Having House-breaking Instruments by Night.—See Code sec. 464.

Being Disguised by Night with Intent to Commit an Indictable Offence.—See Code sec. 464.

Punishment after Previous Conviction.—See Code sec. 465.

CHAPTER THE SECOND.

OF SACRILEGE (*a*), OR BREAKING INTO A PLACE OF DIVINE WORSHIP AND COMMITTING FELONY THEREIN.

BREAKING and entering a church by night with intent to commit felony therein appears to be burglary at common law (*b*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 50 (*c*), 'Whosoever shall break and enter any church, chapel (*d*), meeting-house or other place of divine worship, and commit *any felony* (*e*) therein, or being in any church, chapel, meeting-house, or other place of divine worship shall commit *any felony* therein and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*f*).

Under this enactment the time of breaking in is immaterial.

In R. *v.* Wheeler (*g*), upon an indictment for breaking into a parish church, and stealing two surplices and a scarf, it appeared that the surplices and scarf were stolen from a box kept in the church tower. This tower was built higher than the church, and had a separate roof, but it had no outer door, the only way of going into it being through the body of the church, from which the tower was not separated by a door or partition of any kind. It was objected that the stealing these articles deposited in the tower was not sacrilege; but it was held that a tower, circumstanced as this tower was, must be taken to be part of the church, and that the stealing of these articles in the tower was a stealing in the church within the meaning of 7 & 8 Geo. IV. c. 29, s. 10 (rep.).

An indictment alleged that the prisoners broke and entered a church, and stole the sacramental plate. The plate was kept in a chest in the vestry; the vestry had in old time been in the porch of the church, and when the church was altered the porch was turned into the vestry room: it had never been used for vestry purposes, but only for the robing of the clergyman, and the custody of the sacramental plate; it had a door

(*a*) The earlier enactments against sacrilege (23 H. VIII. c. 1; 1 Ed. VI. c. 12; 7 & 8 Geo. IV. c. 29, s. 12) are repealed.

(*b*) *Ante*, p. 1065.

(*c*) Framed from 7 & 8 Geo. IV. c. 29, s. 10 (E) and 9 Geo. IV. c. 55, s. 10 (I). The words, 'meeting-house, or other place of divine worship,' were in the Irish and not in the English Act.

(*d*) The word 'chapel' in 7 & 8 Geo. IV. c. 29, s. 10, meant a chapel where the rites and ceremonies of the Church of England were performed, and did not include the chapels of dissenters. R. *v.* Warren, 6 C. & P. 335 (n.). R. *v.* Richardson, 6 C. & P. 335. R. *v.* Nixon, 7 C. & P. 442. The present section is framed to include every place of religious worship.

(*e*) As to breaking into a place of worship *with intent to commit a felony* therein, see *post*, p. 1125.

(*f*) Or not less than three years, or to imprisonment with or without hard labour for not more than two years. 54 & 55 Vict. c. 69, s. 1. *Ante*, Vol. I, pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*g*) 3 C. & P. 585, Parke, J.

opening into the body of the church, and another door opening into the churchyard, but this latter door was always kept locked on the inside. The vestry window had been broken, and an entrance gained thereby. Coleridge, J., held that this vestry was as much a part of the church for the purpose of this enactment as the nave (*h*).

The words 'any goods' in 1 Edw. VI. c. 12 (rep.), were held not to be confined to goods used for divine service, but to extend to articles used in the church to keep it in proper order, and it was considered that such articles were under the protection of the statute, whilst the church was in the course of being repaired, if they had not been brought in merely for the purpose of such repairs (*i*).

But the word 'chattel' in 7 & 8 Geo. IV. c. 29, s. 10 (rep.), did not include anything fixed to the freehold, for although sect. 44 made fixtures the subject of larceny, yet it did not say that fixtures should be considered as chattels (*j*).

Statement of Property.—The goods of a Dissenting chapel, vested in trustees, cannot be described as the goods of a servant, who has merely the care of the chapel and the things in it, to clean and keep them in order, though he have the key of the chapel, and no person except the minister have another key (*k*). But books belonging to a society of dissenters, and stolen from their chapel, may be described as the property of one of the members of the society by name 'and others.' Upon an indictment for stealing a bible and hymn-book, the property of B. and others, it appeared that the books had been presented to the Society of Wesleyan Methodists, from whose chapel they had been stolen, and they had been bound at the expense of the society; B. was one of the trustees of the chapel, and a member of the society, but no trust deed was produced; it was held that as B. was one of the society, the property of the books was well laid in him 'and others' (*l*).

Where the bells, books, or other goods belonging to a church are stolen, they may be laid in the indictment to be the goods of the parishioners (*m*). And, it is said, that he who takes away the goods of a chapel or abbey, in time of vacation, may be indicted, in the first case, for stealing *bona capellæ*, being in the custody of such and such; and, in the second, for stealing *bona domus et ecclesiæ*, &c. (*n*).

An indictment alleged that the prisoners broke and entered a church and stole a certain box, and a quantity of silver and copper coin being in the said church, and the property was laid in the first count in W. (who was one of the churchwardens of the parish) and another; and in the second count in N. (who was the vicar) and others; and in the last count in T. (who was one of the parishioners) and others. The prisoners were convicted of stealing only, and it was objected that the box was affixed to the freehold, and that there was no count properly framed for stealing

(*h*) R. *v.* Evans, C. & M. 298.

(*i*) R. *v.* Rourke, R. & R. 386.

(*j*) R. *v.* Nixon, 7 C. & P. 442. R. *v.* Baker, 3 Cox, 581. The present section extends to any felony.

(*k*) R. *v.* Hutchinson, R. & R. 412.

(*l*) R. *v.* Boulton, 5 C. & P. 537, Park, J. See 14 & 15 Vict. c. 100, s. 1, as to amending indictments, *post*, Vol. ii. p. 1972.

(*m*) 1 Hale, 512. 2 Hale, 181. 1 Hawk. c. 33, s. 45. 2 East, P. C. 651.

(*n*) 1 Hale, 512. 2 Hale, 181. 1 Hawk. c. 33, s. 45. 2 East, P. C. p. 651. All which rest on the Year Book, 7 Edw. IV. pl. 1, p. 14.

a fixture, and there was no count laying the property in the vicar, in whom the freehold of the church was vested. The box was a very ancient box firmly fixed by two screws at the back to the outside of a pew, in the centre aisle of the church, and by a third screw to a supporter beneath, and over the box was an ancient board with the inscription painted thereon, 'Remember the Poor.' There were two locks to the box, but no evidence was given to shew in whose custody the keys were kept, nor was there any evidence that the money had ever been taken out by the churchwardens or any other person for the purpose of being distributed, although it was proved that both silver and copper had from time to time been dropped in the box. It was contended that the churchwardens could have no property, as churchwardens, in this money; that in no view of the case could the vicar and any others have the property; and that, even if it belonged to the parishioners (which it was argued could not be the case), the property should have been laid in them as parishioners; but, upon a case reserved, the judges were unanimously of opinion that the prisoners were properly convicted on the second count. They thought that the box might be presumed, in the absence of any evidence to the contrary, to have been placed in the church pursuant to Canon 84 (*o*), and that the money therein placed was constructively in the possession of the vicar and churchwardens, who jointly are not a corporation, and therefore were properly described in the second count (*p*).

(*o*) Cf. the Canons of 1603, which require the churchwardens to have a strong chest set in the most convenient place 'to the intent that the parishioners may put into it their alms for their poor neighbours.'

(*p*) R. *v.* Wortley, 1 Den. 162.

CANADIAN NOTES.

Breaking place of Worship and Committing Indictable Offence Therein.—See Code sec. 455.

Breaking Place of Worship with Intent to Commit any Indictable Offence Therein.—See Code sec. 456.

CHAPTER THE THIRD.

OF HOUSE-BREAKING.

HOUSE-BREAKING, as distinguished from burglary, is forcible invasion of the dwelling-house, &c., of another in the daytime.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 56 (*a*), 'Whosoever shall break and enter any dwelling-house, *school-house*, shop, warehouse, or counting-house, and commit *any felony* therein, *or being in any dwelling-house, school-house, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*b*).

As to breaking, &c., with intent to commit felony, see *post*, p. 1125.

As to buildings within the curtilage of a dwelling-house, see *post*, p. 1119.

Sect. 56 differs from the former and repealed enactments by making the commission of any felony in the house (instead of merely larceny) an element in the offence. The breaking and entering necessary to constitute an offence against sect. 56 seems to be such breaking and entering, as if committed by night, would constitute burglary (*c*).

Thus, where the prisoner burst open an inner door in the inside of a house, and so entered a shop in order to steal money from the till, it was held that this was a sufficient breaking to support an indictment for house-breaking (*d*).

When the felony charged to have been committed is larceny it is not necessary to prove that the chattels, &c., were taken out of the house.

The least removal of the goods from the place where the thief found them, though they are not carried out of the house, is sufficient, as in other larcenies (*e*). Upon an indictment for house-breaking, where the prisoner, after having broken into the house, took two half-sovereigns out of a bureau, in one of the rooms, but being detected, threw them under the grate in that room; it was held, that if they were taken with a felonious intent, this was a sufficient removal of them to constitute the offence (*f*).

(*a*) Taken from 7 & 8 Geo. IV. c. 29, ss. 12, 15 (E) and 9 Geo. IV. c. 55, ss. 12, 15 (I), with the alterations and additions indicated by italics. Cf. s. 51, *ante*, p. 1070, as to burglary.

(*b*) Nor less than three years, or to be imprisoned with or without hard labour for not over two years. 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. 1, pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*c*) See the rulings on former similar enactments, 1 Hale, 522, 523, 526, 548. 2 Hale, 352, 353. 1 Hawk. c. 34, ss. 2, 3. 2 Hawk. c. 33, ss. 88, 92. Fost. 108. 2 East, P.C. 631, 636, 638.

(*d*) R. *v.* Wenmouth, 8 Cox, 348.

(*e*) 2 East, P.C. 639.

(*f*) R. *v.* Amier, 6 C. & P. 344, Park, J., decided on 7 & 8 Geo. IV. c. 29 (rep.).

A person present at the breaking and entering, but not at the stealing, is guilty of the whole offence (*g*).

An indictment for house-breaking is good, if it alleges that the prisoner broke and entered the dwelling-house, and the goods of A. B. 'in the said dwelling-house then and there being found, then and there (omitting "in the said dwelling-house") feloniously did steal' (*h*).

Dwelling-house has the same meaning with reference to house-breaking as with reference to burglary (*i*).

The ownership and situation of the dwelling-house should be stated, as in burglary (*j*). But errors of description can be amended (*k*).

A chamber in one of the Inns of Court was held to be a dwelling-house within 39 Eliz. c. 15 (rep.) (*l*).

Upon an indictment for burglary and stealing if it is proved that the prisoner broke and entered, but not in the night-time, he may be convicted of house-breaking if any goods are stolen (*m*). So on an indictment for house-breaking and stealing goods therein, if it be not proved that the prisoner broke into the house, he may be convicted of larceny (*n*).

(*g*) R. *v.* Jordan, 7 C. & P. 432, Gaselee, J., and Gurney, B.

(*h*) R. *v.* Andrews, C. & M. 121, and MS. C. S. G., Coleridge, J., overruling R. *v.* Smith, 2 M. & Rob. 115, which Coleridge, J., said Patteson, J., was himself since satisfied had been wrongly decided.

(*i*) *Ante*, p. 1075.

(*j*) See cases collected, *ante*, pp. 1083, 1097.

(*k*) Under 14 & 15 Vict. c. 100, s. 1, *post*, Vol. ii. p. 1972.

(*l*) R. *v.* Evans, Cro. Car. 473. See *ante*, p. 1075, note (*y*).

(*m*) R. *v.* Compton, 3 C. & P. 418, Gaselee, J.

(*n*) As to conviction of the attempt, see R. *v.* McPherson, D. & B. 197, and *ante*, Vol. i. p. 141.

CANADIAN NOTES.

OF HOUSE-BREAKING.

Breaking House by Day.—See Code sec. 458.

Breaking House by Day with Intent to Commit Indictable Offence Therein.—See Code sec. 459.

Breaking Shop and Committing Indictable Offence Therein.—See Code sec. 460.

The present sec. (460) includes not only breaking into a "shop" but into a warehouse, or into a counting-house, school-house, or any building within the curtilage of a dwelling-house, but not so connected therewith as to form part of it. See sec. 339.

Breaking Shop with Intent to Commit Indictable Offence Therein.—See Code sec. 461.

If a person with intent to steal something out of a shop or store opens a door leading into it by lifting the latch or turning the knob and then enters the store, although during business hours, for the purpose of carrying out such intention he may be convicted of shop-breaking under sec. 461. R. v. Smith, 17 Man. R. 282.

Being Armed by Day with Intent to Break any Dwelling-house.—See Code sec. 463.

Having House-breaking Instruments in Possession by Day.—See Code sec. 464.

Being Disguised by Day with Intent to Commit Indictable Offence.—See Code sec. 464.

Punishment after Previous Conviction.—See Code sec. 464.

CHAPTER THE FOURTH.

OF STEALING IN A DWELLING-HOUSE, ANY PERSON THEREIN BEING PUT IN FEAR (*a*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 61 (*b*), 'Whosoever shall steal any chattel, money, or valuable security (*c*) in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear (*d*), shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*e*).

As to buildings within the curtilage, see sect. 53, *post*, p. 1119. As to the meaning of dwelling-house, see *ante*, pp. 1075 *et seq.*

No *breaking* of the house is necessary to constitute this offence; and it would seem that property might be considered as stolen in the dwelling-house within the meaning of the statute, if a delivery of it out of the house should be obtained by threats, or an assault upon the house by which some person therein should be put in fear (*f*). But questions of difficulty may perhaps arise as to the degree of fear which must be excited by the thief. Where, however, the prosecutor, in consequence of the threat of an armed mob, fetched provisions out of his house and gave them to the mob, who stood outside the door, this was held not to be a stealing in the dwelling-house (*g*).

Menaces.—Upon 24 & 25 Vict. c. 96, s. 45 (*h*), which relates to demanding property 'with menaces or by force,' it has been held that the menaces must be of such a nature and extent as to unsettle the mind of the person on whom they operate, and to take away from his acts that element of free voluntary action which alone constitutes consent; and it is a question for the jury whether the evidence in any particular case comes within that principle (*hh*). There is, however, a marked distinction between the two sections. Under

(*a*) The former enactments (3 W. & M. c. 29, s. 1, 7 & 8 Geo. IV. c. 29, s. 12, and 7 Will. IV., & 1 Vict. c. 86, s. 5) are repealed.

(*b*) Taken from 7 Will. IV. & 1 Vict. c. 86, s. 5.

(*c*) See s. 1, *post*, p. 1267.

(*d*) The words in 7 & 8 Geo. IV. c. 29, s. 12, were, 'any person therein being put in fear,' which might be without any menace or threat. C. S. G. See R. *v.* Little, 1 Lew. 201. 2 East, P.C. 635.

(*e*) Nor less than three years, or to imprisonment with or without hard labour for not over two years. 54 & 55 Vict. 69, s. 1. *Ante*, Vol. i. pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*f*) *Vide ante*, p. 1071. 2 East P.C. 623.

(*g*) R. *v.* Leonard, Cheshire Special Com. 1842. Archb. C. P. (23rd ed.) 640. It is submitted, with all deference, that this decision is erroneous; the law looks on an act done under the compulsion of terror as the act of the person causing that terror just as much as if he had done it actually with his own hands. Any asportation, therefore, of a chattel under the effects of terror is in contemplation of law the asportation of the party causing the terror. C. S. G.

(*h*) *Post*, p. 1159.

(*hh*) R. *v.* Walton, L. & C. 288, *post*, p. 1163.

sect. 61, not only must menaces be used, but they must put some one 'in bodily fear;' but under sect. 45, if menaces are used with the intent there specified, no one need be put in fear.

H. and M. were indicted for stealing two pistols and a watch in a dwelling-house, and by menaces putting L. and E., then being in the house, in bodily fear; and a second count charged them with stealing in the house to the value of £5. H. pleaded guilty. The prisoners and four others went to the house in the evening, some of them having their faces blackened, and others having crape over their faces. H. and the four other men went into the house, and ordered the servant boy and maid to sit to the wall with their backs to them, and on no account to look round. A lady ran to the rectory for assistance, and E. ran to the rescue, and was caught by both shoulders by a man, who said, 'You are the very man we want,' and forced him gently forward without hurting him or trying to hurt him, to the front door, where he was received by a man with crape over his face and a pistol in his hand, who made him sit down in the hall, with his face to the wall, and ordered him to make no noise. There he found by his side two or three more of his neighbours, who, on coming to the rescue, had been caught and treated in the same way. In the meantime some other of the robbers ransacked the house, and, when that was done, E. was taken out of the house into the dairy, and three men, with pistols in their hands, taking him for the master of the house, required him to tell where the money was. He said he was a stranger. One of them proceeded to search his pockets; another said, 'Blow out his brains, and do not waste time.' He was a little frightened at this, and at the sight of the pistols. His pockets were searched, and £20 taken from him. M. when arrested admitted that he was at the robbery, but said that he merely met the parties outside, and handed them to the front door, and denied that he knew of the violence or the robbery of E., and said that he had told the others that if they hurt any one he would leave them. Two pistols and a watch were stolen from the house. L., the servant, said he was not alarmed when he was put against the wall. Williams, J., said, 'The question is, whether M. took such a part as to be responsible for the acts of the others. If you think he was one of the party who went to rob, and was there standing at the door to render assistance, then he is responsible for the robbery equally with the persons actually taking the money; so if their common purpose was by their conduct to inspire terror, then the prisoner is responsible for the acts of the others. If you think there was a common purpose to rob, you will say so; and if you think there was a common purpose to use threats, you will say so. As to the first question, to which the second count applied, there cannot be any doubt, if you believe the evidence. Then as to the first count, the prisoner's own statement put it beyond a doubt that the plan was to put the persons' faces to the wall. You will say whether that is not an intention to obtain money by threats. Then comes the question whether the witnesses were not put in bodily fear. The threat to blow out E.'s brains was done outside the house. That alone is not sufficient within the words of the statute; but it is a circumstance from which you may infer the line of conduct inside the house. You cannot doubt that such conduct, and the use of such language, must

inspire fear, however unwilling the witnesses may be to admit they were terrified' (*i*).

It was decided upon 3 Will. & Mary, c. 9 (rep.), that the indictment must expressly allege that some person in the house was put in fear by the prisoner. But the judges held that, though the indictment contained no such allegation, the prisoner was properly convicted of the larceny (*j*). So where a prisoner was indicted for house-breaking and stealing in the house goods of more than five shillings value, and the indictment did not state whether any person was in the house, the judges were unanimously of opinion that although clergy was taken away equally whether any person was in the dwelling-house or not, the property stolen being above five shillings in value (either under 39 Eliz. c. 15, or 3 Will. & Mary, c. 9, s. 1), yet the indictment ought to shew upon which charge the case was founded and which charge the prisoner had to meet and that the prisoner was therefore entitled to his clergy (*k*).

(*i*) R. *v.* Murphy, 6 Cox, 340. It is not stated, but it is presumed, that the pistols and watch were worth £5, and that the money stolen from E. was not taken into account.

(*j*) R. *v.* Etherington, 2 Leach, 671; 2 East, P.C. 635.

(*k*) R. *v.* Marshall, 1 Mood. 158

CHAPTER THE FIFTH.

OF STEALING IN A DWELLING-HOUSE TO THE VALUE OF FIVE POUNDS OR MORE (*a*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 60 (*b*), 'Whosoever shall steal in any dwelling-house any chattel, money, or valuable security to the value in the whole of five pounds or more, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . (*c*).

'Dwelling-house' in this section appears to have the same meaning as in cases of burglary (*d*). As to buildings within the curtilage, see *post*, p. 1119.

The situation of the house and the name of the owner should be stated as in cases of burglary (*e*).

The repealed enactments, 12 Anne, c. 7 (*f*), and 7 & 8 Geo. IV. c. 29, s. 12, were construed as applying only to property deposited in a house so as to be under the protection of the house and deposited therein for safe custody (as the furniture, money, or plate, kept in the house), and not to property immediately under the eye or personal care of a person who happened to be in the house (*g*). The question whether the property was under the protection of the house or of the person seems to have been for the Court and not for the jury (*h*). Money stolen from under the pillow of a person sleeping in the dwelling-house was held not to be within the Act of Anne (*i*). Where a person on going to bed placed his clothes or money *by* the bedside or on a table in the room, they were

(*a*) The former enactments on this subject (12 Anne, c. 7; 7 & 8 Geo. IV. c. 29, s. 12 (E), 9 Geo. IV. c. 55, s. 12 (I)) are repealed.

(*b*) Taken from 7 & 8 Geo. IV. c. 29, s. 12 (E) and 9 Geo. IV. c. 55, s. 12 (I).

(*c*) Nor less than three years, or to be imprisoned with or without hard labour for not over two years (54 & 55 Vict. c. 69, s. 1; *ante*, Vol. i. pp. 211, 212). The omitted words were repealed in 1892 (S. L. R.).

(*d*) See R. *v.* Davies, 2 East, P. C. 644, and cases cited *ante*, pp. 1075 *et seq.*

(*e*) *Vide ante*, p. 1096, and as to amendment, 14 & 15 Vict. c. 100, s. 1, *post*, Vol. ii. p. 1972.

(*f*) This Act made it felony without benefit of clergy to steal money &c. of the value of 40*s.* or more *being* in any dwelling-house.

(*g*) R. *v.* Owen, 2 Leach, 572; 2 East, P.C. 645. 1 Hawk. c. 36, s. 6.

(*h*) R. *v.* Thomas, Carr. Supp. (3rd ed.) 295. In some of the cases there is a disposition to draw the line by reference to the question whether the owner of the property is awake or asleep. R. *v.* Taylor, R. & R. 418. R. *v.* Hamilton, 8 C. & P. 49, *infra*.

(*i*) Anon., 2 Stark. Cr. Pl. 467, note (*a*). Mr. Starkie adds: 'But Ward was convicted and received sentence of death in a similar case, *cor.* Bayley, J., Lancaster Sum. Ass. 1814. *Note.* Ward was a guest at an inn.' In R. *v.* Challenor Dick. Q. S. (5th ed.) 245, where a guest at an inn placed his small clothes containing his money under his head in bed and they were stolen, the theft was held not to be within the Act of Anne. Park, J., said that Ward's case, *supra*, might have turned on some peculiar circumstances.

considered to be under the protection of the house and not of the person (*j*). Where a person, in possession of a large sum of money, was deluded by a ring-dropper, who pretended to have found a purse, to go into a public-house, and share its contents, and there induced to lay his money on the table, when the ring-dropper immediately took up the money, and carried it off, the offence was held not to be within the Act of Anne (*k*). And a like ruling was given on an indictment for stealing a bank-note of the value of £25, in the dwelling-house of one A., on which it appeared that the prisoner lodged in Mrs. A.'s house, and that, on the day on which the offence was committed, she wanting to get the note changed, sent her servant with it to his apartments, to request him to give her change for it; when the prisoner, after examining his purse, and saying that he had not gold enough about him for the purpose, but that he would go to his bankers and get it changed, left the house with the note in his hand, and never returned (*l*).

Two boxes, belonging to D., who lodged at No. 38, R. street, were delivered at No. 33 in the same street, where the prisoner lodged, by a porter (but whether by accident or collusion with the prisoner was not proved), and the occupier of the house, No. 33, took them in and paid the porterage, supposing them to be for the prisoner, whose name she did not know, as he had recently taken his lodging with her. Shortly afterwards when the prisoner came she told him of the arrival of the boxes, and of the porterage she had paid, when he said it was all right and he would pay her again. The boxes were put into his room, and he went out two or three times in the course of the evening, carrying bundles each time, and when he went out the last time he did not return again. The boxes were found entirely ransacked. The jury found the prisoner guilty, but upon a doubt whether these goods were sufficiently under the protection of the house to bring the case within the Act of Anne, the point was submitted to the judges, who held that the goods were under the protection of the dwelling-house, and that the capital conviction was therefore proper (*m*).

A man may be convicted of stealing, in his own dwelling-house, property of the value of £5 belonging to others and there deposited (*n*).

Value.—To constitute an offence within sect. 60, property of the value of £5 must be stolen at one time or as part of one continuous transaction (*o*).

(*j*) R. *v.* Hamilton, 8 C. & P. 49, decided on 7 & 8 Geo. IV. c. 29, s. 12, Parke, B., and Patteson, J. 'It is said in a note to this case, "it would appear that had the prosecutor been awake instead of asleep, in R. *v.* Taylor (R. & R. 418), the property was sufficiently within his personal control to render the stealing of it stealing from the person;" but it is not stated in the report of R. *v.* Taylor that the prosecutor was asleep, though probably that might be the case.' C. S. G.

(*k*) R. *v.* Owen, *ante*, p. 1115. The same point was again decided in R. *v.* Castledine, O. B. Oct. 1792, which was also referred to the judges; and again in R. *v.* Watson. See 2 Leach, 574. 2 Leach, 640; 2 East, P.C. 645, 646, and 680, 681.

(*l*) R. *v.* Campbell, 2 Leach, 564; 2 East, P.C. 644.

(*m*) R. *v.* Carroll, 1 Mood. 89. Cf. R. *v.* Mucklow, 1 Mood. 160. *Post*, p. 1240, tit. 'Larceny.'

(*n*) R. *v.* Bowden, 2 Mood. 385. The theft was of jewellery left by the prosecutor in the prisoner's house. The case was under 7 & 8 Geo. IV. c. 29, s. 12, which is in the same terms as the present enactment. The Act of Anne was held not to apply to theft by a man in his own dwelling-house. R. *v.* Thompson, 1 Leach, 338; 2 East, P.C. 644.

(*o*) See R. *v.* Shepherd, L. R. 1 C. C. R. 118, decided on 24 & 25 Vict. c. 96, s. 32.

Thus, where the prisoner, who was the servant of the prosecutor, had at different times purloined his master's property to a very considerable amount, but it did not appear that he had ever taken to the amount of forty shillings at any one particular time; the Court held that the case was not within the Act of Anne (*p*).

But where property was stolen at one time to the amount of forty shillings, and a part of it only, not amounting to forty shillings, was found upon the prisoner, and produced at the trial, the Court left it to the jury to say whether the prisoner had not stolen the rest of the things which the prosecutor lost, as well as those which had been produced (*q*). Upon an indictment (*r*) for stealing lace in the dwelling-house to more than the value of £5, it appeared that the prisoner sent the lace, which was in several distinct pieces, in a parcel from his master's shop, and no one piece of lace was worth £5; it was suggested that *in favorem vitæ* the judge would take it that the pieces of lace might have been stolen at different times. Bolland, B., 'I cannot assume that to have been so; we find that the lace is all sent in one parcel, and all brought out of the prosecutor's house at once; and unless you give some evidence to shew that it was stolen at different times, you do not raise your point; but even if you did, I should think it would be of no avail; for on the last Winter Circuit it appeared that a person at Brighton stole goods in the same way that you wish me to suppose that this person did; for it was shewn that he stole the articles, one or two at a time, and under the value of £5, but that he carried them out of his master's house all together, the articles amounting in all to more than £5 value, and Garrow, B., after much consideration, held that as the articles were all brought out of the house together, it was a capital offence' (*s*).

In ascertaining the value of the articles stolen, the jury may use that general knowledge which any man can bring to the subject. On an indictment for stealing a watch and seals of the value of £7, a witness having sworn that the property, in his opinion, was worth that sum, the jury inquired if they were at liberty to put a value on the property themselves. Parke, B., said, 'if a gentleman is in the trade he must be sworn as a witness; that general knowledge which any man can bring to the subject may be used without; but if it depends upon any knowledge of the trade, the gentleman must be sworn' (*t*).

An indictment for stealing in the dwelling-house set out a number of articles with a certain value to each, but no one of them of the value of £5; the value of the whole was more than £5, but there was no distinct and substantive allegation that the articles so stolen were of the value of £5, it was objected that there ought to have been such a distinct allegation to bring the case within the statute, but the objection was overruled (*u*).

which deals with larceny, &c., of trees, &c., of the value of £5, and *vide* R. *v.* Thomas, 12 Cox. 54 (malicious damage).

(*p*) R. *v.* Petrie, 1 Leach, 294; 2 East, P.C. 740.

(*q*) R. *v.* Hamilton, 1 Leach, 348.

(*r*) Under 7 & 8 Geo. IV. c. 29, s. 12, of which s. 60 is a re-enactment.

(*s*) R. *v.* Jones, 4 C. & P. 217, Bolland, B. See R. *v.* Dyer, 2 East, P.C. 767, 768, and R. *v.* Atwell, ibid. C. S. G.

(*t*) R. *v.* Rosser, 7 C. & P. 648, Parke, B., and Vaughan, J.

(*u*) R. *v.* Stonehouse, 1 Cox, 69, Gurney, B.

On an indictment of several persons under sect. 60, for a joint offence, any one of them may be found guilty (*v*).

On an indictment for burglary and stealing goods to the value of £5 or more therein, the accused may be acquitted of the robbery or burglary and convicted under sect. 60, if the goods stolen were of the value of £5 (*w*). No separate count for the stealing is necessary (*x*). If the value of the goods stolen in a dwelling-house is under £5 the jury may convict of simple larceny without a special count (*y*).

(*v*) In R. *v.* Hempstead, MS. Bayley, J., and R. & R. 344, A. and B. were indicted under 12 Anne, c. 7, for stealing in the dwelling-house to the value of £6 10*s.*, and the jury found A. guilty as to part of the articles of the value of £6, and B. guilty as to the residue. The judges, upon a case reserved, held that judgment could not be given against both, but that upon a pardon or *nolle prosequi*, as to B. it might be given against A. The jury had found that there was no sufficient evidence that the accused were active in concert.

(*w*) R. *v.* Compton, 3 C. & P. 418, Gaselee, J.

(*x*) Ibid. and see 1 Hawk. c. 36, s. 6, larceny from the dwelling-house, s. 3, with reference to the Act of Anne. The rule would equally apply if the charge were of robbery in a dwelling-house, ibid. most of the judgments.

(*y*) R. *v.* Campbell, 11 Q.B. 799, 812. The indictment contained a count for stealing in a dwelling-house above the value of £5, and a count for simple larceny. The jury process was to try whether the prisoners were guilty of the felony aforesaid. This case turned on the questions (1) whether felony was a *nomen collectivum*, and (2) as to the proper form of the jury process, which is now abolished.

CHAPTER THE SIXTH.

OF BREAKING, ETC., AND COMMITTING FELONY IN A BUILDING WITHIN THE CURTILAGE.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 53 (*a*), 'No building although within the same curtilage (*a*) with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and enclosed passage leading from the one to the other.' By sect. 55 (*b*), 'Whosoever shall break and enter any building, and commit *any felony* therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, *or being in any such building shall commit any felony therein and break out of the same*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . (*c*).

As to breaking and entering buildings within the curtilage with intent to steal, see sect. 57, *post*, p. 1125.

Sect. 55, specifying as it does in express terms a building within the *curtilage* of a dwelling-house, appears not to apply to many of those buildings and outhouses, which, although not within any common inclosure or curtilage, were deemed by the old law of burglary, *parcel* of the dwelling-house, from their adjoining to such dwelling-house, and being in the same occupation. The inquiry will be simply whether the building in question is within the curtilage or homestall; but it may be useful to refer to some of the points formerly decided in cases of burglary, in which it became material to consider whether particular buildings were parcel of a dwelling-house, and the circumstance of their being situated within a common inclosure appears to have been treated as a material ingredient. It should be observed, however, that in several of these cases the particular buildings might possibly have been held to be *parcel* of the dwelling-house independently of that circumstance.

Where a goose-house opened into a yard of the prosecutor into which his house also opened, and the yard was surrounded partly by other

(*a*) Curtilage is defined as a 'garden, yard, or piece of void ground lying near to, or belonging to, the messuage (*Termes de la Ley*). In 'Shepherd's Touchstone,' 94, the further explanation is added to the above, 'something which would pass by conveyance of the messuage.' See Wright *v.* Wallasey Local Board, 18 Q.B.D. 783. Marson *v.* L. C. & D. Ry. Co. L. R. 6 Eq. 101.

(*b*) Taken from 7 & 8 Geo. IV. c. 29, s. 14 (E), and 9 Geo. IV. c. 55, s. 14 (I), with the additions italicised.

(*c*) Nor less than three years, or to imprisonment with or without hard labour for not over two years. 54 & 55 Vict. c. 6, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted were repealed in 1892. (S. L. R.)

buildings of the homestead, and partly by a wall, some of which buildings had doors opening into a lane at the back, as well as doors opening into the yard, and there was a gate in one part of the wall opening upon a road, the judges held that the goose-house was parcel of the dwelling-house (*d*).

Where the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined; all were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, &c., so as to be altogether an inclosed yard. The workshop had no internal communication with the house, and it had a door opening into the street, and its roof was higher than that of the dwelling-house. Upon an indictment for burglary, by breaking open in the night the street door of the workshop, the judges were unanimous that the workshop was parcel of the dwelling-house (*e*). The prosecutor had in one range of buildings a house which he occupied, a house which he let, and a warehouse, all of which opened into a yard surrounded by a wall, gates, and buildings. The tenant of the second house had certain easements in the yard, and his house was between the prosecutor's house and the warehouse, and the two houses had formerly been one. The prisoner was convicted of burglary in breaking into the warehouse, and, upon a case reserved, the judges were of opinion that the warehouse was part of the prosecutor's house; it was so before the house was divided, and it remained so notwithstanding the division (*f*).

It seems that a building which was not any parcel of a dwelling-house, by the old law of burglary, cannot be considered as a building within the curtilage under the present law. It will be material, therefore, to attend to the connection of the curtilage with some dwelling-house in which burglary might have been committed. By the express provision of the statute, the building within the curtilage must be *occupied with* the dwelling-house (*g*).

An indictment for burglary described the building broken, in the first count, as the dwelling-house of M.; in the second, as the dwelling-house of B.; and in the third, as the dwelling-house of N. The place broken into was a centre building, having two wings; in such centre building an extensive business was carried on, relating to different manufactories in which one A. was concerned with M., N., and several other persons; and also relating to two other manufactories in which A. was concerned on his own account. In part of one of the wings was the dwelling-house of M., and in the other part of the same wing, the dwelling-house of B., mentioned in the second count of the indictment, who was a workman of A.; but neither of such dwelling-houses had any internal communication with the centre building, except only, in the one occupied by B., a window, which looked into a passage that ran the whole length of the centre building. In the other wing was the dwelling-house of N., which also had no internal communication with the centre building. In the front of this building there was a terrace or front yard, fenced round

(*d*) R. *v.* Clayburn, R. & R. 360.
(*e*) R. *v.* Chalking, MS. Bayley, J., and R. & R. 334: and see R. *v.* Lithgo, R. & R. 357.
(*f*) R. *v.* Walters, MS. Bayley, J., and 1 Mood. 13.
(*g*) *Ante*, p. 1119.

in different ways, and at the end of the pile of buildings by a wall, with gates for horses and carriages, and a door for foot passengers. The prisoners entered by a door in the front yard, through which they went along the front of the building, and round it into another yard behind it, called the middle yard; from thence, through a door which had been left open, up a staircase in the centre building, where they broke open some of the rooms; having so entered the premises by the assistance of a servant of A., who acted as an accomplice for the purpose of effecting the apprehension of the prisoners. Upon a case reserved, the judges agreed that the prisoners were not guilty of burglary; upon the grounds that the centre building, being a place for carrying on a variety of trades, and having no internal communication with the adjoining houses, could not be considered as part of any dwelling-house; nor as under the same roof as the houses adjoining, though the roof of it had a connection with the roofs of the houses (*h*).

The premises broken were surrounded by a garden wall, the front wall of a factory, and the wall and gate of a stable yard; they were of the extent of rather more than an acre, and the house was in the centre. The only communication between the house and the factory was by one open passage inside the walls. In the factory the prosecutor, the occupier of the dwelling-house, carried on one business of his own, and another jointly with a partner, who lived elsewhere; and the rooms over the factory were used for the joint as well as the separate business. These rooms were broken into, and part of the separate property of the prosecutor, and also part of the joint property was stolen. Upon an indictment for burglary in the dwelling-house of the prosecutor, the judges held that these rooms were part of the prosecutor's dwelling-house (*i*).

Upon an indictment for breaking and entering a building 'within the curtilage,' it appeared that there was a large square inclosure at the back of a dwelling-house, surrounded on all sides by a barn, cow-sheds, a granary, pig-styes, and walls, and that within the larger inclosure there was a lesser inclosure, abutting on one side on the back of the dwelling-house, and on another on the pig-styes. The third and fourth sides were formed by a wall about four feet high, which separated it from the other part of the large inclosure, and the back-door of the house opened into the lesser inclosure, and out of it there was a gate through the wall into the larger inclosure, into which there was no door immediately leading from the house. Some corn was stolen out of the granary, which was on the opposite side of the large inclosure from the house. It was held that the whole of the larger inclosure was 'within the curtilage,' and not merely the lesser inclosure immediately at the back of the house, and consequently that the granary was a building within the curtilage (*j*).

As to an out-house being parcel of a dwelling-house when held under a distinct title, see *ante*, p. 1079.

The prosecutor had a dwelling-house, warehouses, and other buildings, and a yard. The entrance into the yard was through a pair of gates

(*h*) R. *v.* Egginton, 2 Leach, 913. 2 East, P.C. 494; 2 B. & P. 508.

(*i*) R. *v.* Hancock, MS. Bayley, J., and R. & R. 170.

(*j*) R. *v.* Wood, Stafford Spr. Ass. 1843. MSS. C. S. G. Wightman, J., after consulting Erskine, J. R. *v.* Gilbert, 1 C. & K. 84.

which opened into a covered way, over which were some of the warehouses. There was a loop-hole and crane over the gates, to admit of goods being craned up, and also a trap-door in the roof of the covered way. There was free communication from the warehouses to the dwelling-house. The prisoners opened the gates in the night with intent to steal, and entered the yard, but did not enter any of the buildings. Upon a case reserved, the judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house (*k*). So an area gate opening into the area only is not such part of the dwelling-house, that the breaking of the gate will be burglary, if there is any door or fastening to prevent persons in the area from entering the house, although such door or other fastening may not be secured at the time. The prisoners in the daytime opened an area-gate in a street, and entered the house through a door in the area which happened to be open, but which was always fastened when the family went to bed, and was one of the ordinary barriers against thieves. Having stolen in the house to the value only of thirty-nine shillings, a question was raised whether the breaking the area-gate was a breaking of the dwelling-house, and as there was no free passage in time of sleep from the area into the house, the judges held unanimously that the breaking was not a breaking of the dwelling-house (*l*).

(*k*) R. *v.* Bennett, MS.. Bayley, J., and R. & R. 289.

(*l*) R. *v.* Davis, MS. Bayley, J., and R. & R. 322.

CANADIAN NOTES.

OF BREAKING, ETC., AND STEALING IN A BUILDING WITHIN THE CURTILAGE.

See Notes to Chapters 1 and 3 of Book X.

CHAPTER THE SEVENTH.

OF BREAKING, ETC., AND COMMITTING FELONY IN ANY SCHOOL-HOUSE, SHOP, WAREHOUSE, OR COUNTING-HOUSE.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 56 (*a*), 'Whosoever shall break and enter any dwelling-house, *school-house*, shop, warehouse, or counting-house, and commit *any felony* therein, *or being in any dwelling-house, school-house, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same*, shall be guilty of felony, and being convicted thereof shall be liable, ... to be kept in penal servitude for any term not exceeding fourteen years . . . . (*b*).

Shop.—In R. *v.* Sanders (*c*) an indictment on 7 & 8 Geo. IV. c. 29, s. 15, and 1 Vict. c. 90 (both *rep.*), for breaking into a shop and stealing coals, it appeared that the prosecutor sold coal, and was also a blacksmith; the place from which the coal was stolen was a shop, being a room beyond the blacksmith's shop, into which persons went who bought the coal. Alderson, B., said: 'To come within the provisions of these Acts the place must be more than a mere workshop, it must be a shop for the sale of articles. A workshop, such as a carpenter's shop or a blacksmith's shop, would not be within the Acts.' But in R. *v.* Carter (*d*), on an indictment for breaking and entering a shop, the building in question appeared to be an ordinary blacksmith's shop, containing a forge and used as a workshop only, not inhabited nor attached to any dwelling-house, but secured by a door fastened from the outside and a window-shutter bolted within; Denman, C.J., declined to be governed by the preceding case, as in his opinion this building had been proved to be such as to fall within the meaning of the statute.

Warehouse.—Upon an indictment for breaking into and stealing goods in a warehouse, it appeared that the prosecutor occupied a shop, which he used for selling various kinds of goods. In a cellar under the shop, and entered by descending a flight of steps from the street, he kept such goods as he had not at the time occasion to expose for sale in his shop. There was no inner communication between the house and shop or either of them and the cellar. The goods were stolen out of the cellar. Rolfe, B., held that the cellar was a warehouse within the statute, that a warehouse, in common parlance, certainly meant a place where a man stored or kept his goods, which were not immediately wanted for sale; and that there was no reason to suppose that the

(*a*) Taken from 7 & 8 Geo. IV. c. 29, ss. 12, 15, (E) and 9 Geo. IV. c. 55, ss. 12, 15 (I), with the additions italicised.

(*b*) Nor less than three years, or to imprisonment with or without hard labour for not more than two years. 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted were repealed in 1892. (S. L. R.)

(*c*) 9 C. & P. 79.

(*d*) 1 C. & K. 173.

Legislature used the term in the statute in a sense repugnant to its ordinary meaning (*e*).

Counting-house.—Upon an indictment (under 7 & 8 Geo. IV. c. 29, s. 15 (rep.)), for breaking and entering a counting-house, and stealing therein, it appeared that the prisoner broke and entered a building part of extensive chemical works, which was commonly called the machine-house, and stole therein a sum of money. In this building there was a weighing machine, at which all goods sent out were weighed, and a book was kept, in which were entered all goods weighed and sent out. The account of the time of the men employed was taken, and their wages were paid there; the books in which their time was entered was brought to that building for the purpose of making the entries and paying the wages. At other times they were kept in another building called the office, where the general books and accounts of the concern were kept. The judges were unanimously of opinion that there was abundant evidence that this was a counting-house (*f*).

In R. *v.* Smith (*g*), Patteson, J., is reported to have ruled that an indictment upon 7 & 8 Geo. IV. c. 29, s. 15, must expressly aver that the prisoner stole the goods in the shop, and that it is not sufficient to aver that the prisoner broke and entered the shop, and the goods 'in the shop then and there being found feloniously did steal.' But upon this case being cited in R. *v.* Andrews (*h*), Coleridge, J., said he had spoken to Patteson, J., about it, and that that judge now thought the decision in R. *v.* Smith was not correct.

(*e*) R. *v.* Hill, 2 M. & Rob. 458. Rolfe, B., added that the same objection had been taken before, and both he and Parke, B., thought that there was nothing in it.

(*f*) R. *v.* Potter, 2 Den. 235; 20 L. J. M. C. 170.

(*g*) 2 M. & Rob. 115.

(*h*) C. & M. 121. *Vide ante*, p. 46. C. S. G.

CANADIAN NOTES.

Of Breaking, etc., in any School-house, Warehouse, Shop or Counting-house.—See Code secs. 460, 461.

Breaking Shop and Committing Indictable Offence Therein.—See Code sec. 460.

Breaking Shop with Intent to Commit Indictable Offence Therein.—See Code sec. 461.

A building occupied with and within the same curtilage with any dwelling-house shall be deemed to be part of said dwelling-house if there is between such building and dwelling-house a communication, either immediate or by means of a covered and inclosed passage, leading from the one to the other, but not otherwise. Code sec. 339.

If a person, with intent to steal something out of a shop or store, opens a door leading into it by lifting the latch or turning the knob and then enters the store, although during business hours, for the purpose of carrying out such intention, he may be convicted of shop-breaking under Code sec. 461. 17 Man. R. 282.

Punishment after Previous Conviction.—See Code sec. 465.

CHAPTER THE EIGHTH.

BREAKING INTO ANY HOUSE, ETC., WITH INTENT TO COMMIT FELONY.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 57 (*a*), 'Whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable . . . . to be kept in penal servitude for any term not exceeding seven years . . . . (*b*).

If on the trial of any indictment for burglary with intent to commit any felony, the breaking and entering is proved to have been before nine o'clock at night, the prisoner may be convicted under this section.

So too on an indictment for breaking into and committing a felony in any building mentioned in this section, if the evidence fail to prove the commission of the alleged felony, but prove the breaking and entering with intent to commit it, the prisoner can be convicted of an offence within this section, provided that the indictment, in addition to the allegation of the actual commission of the felony, contains an allegation that the breaking and entering was with intent to commit it. Where a prisoner was indicted under this section, for breaking and entering a shop with intent to commit a felony, and it appeared that he had broken a large hole into the roof of the shop, but there was no evidence that he had in any way entered the shop, it was held that he might be convicted of an attempt to commit the statutory felony (*c*).

(*a*) The offences provided for in this section were only misdemeanors at common law.

(*b*) Nor less than three years, or to imprisonment with or without hard labour for not over two years (54 & 55 Vict. c. 69, s. 1), *ante*, vol. i., pp. 211, 212. The omitted words were repealed in 1892 (S. L. R.).

(*c*) R. *v.* Bain, L. & C. 130. See 14 & 15 Vict. *c.* 100, s. 9, *post*, p. 1966.

CANADIAN NOTES.

OF BREAKING INTO ANY HOUSE WITH INTENT TO COMMIT FELONY.

Breaking Place of Worship with Intent.—Code sec. 456.

Breaking House by Day with Intent.—Code sec. 459.

Breaking Shop with Intent.—Code sec. 461.

If a person, with intent to steal something out of a shop or store, opens a door leading into it by lifting the latch or turning the knob and then enters the store, although during business hours, for the purpose of carrying out such intention, he may be convicted of shop-breaking under sec. 461. R. v. Smith, 17 Man. R. 282.

Being Armed by Day with Intent.—See Code sec. 463.

Being Armed by Night with Intent.—See Code sec. 464.

Being Disguised by Day with Intent.—See Code sec. 464.

Being Disguised by Night with Intent.—See Code sec. 464.

Punishment after Previous Conviction.—See Code sec. 465.

CHAPTER THE NINTH.

OF ROBBERY AND STEALING FROM THE PERSON AND ASSAULTS WITH INTENT TO ROB, AND OF THREATS AND THREATENING LETTERS.

SECT. I.—OF ROBBERY (*a*).

Common Law.—Robbery is an aggravated species of larceny (*b*) defined as 'felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear' (*c*).

Statutes.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 40 (*d*), 'Whosoever shall rob any person, or shall steal any chattel, money, or valuable security (*e*) from the person (*f*) of another shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . (*g*).

By sect. 41, 'If upon the trial of any person upon any indictment for robbery, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished, in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried (*gg*).

Sect. 42 (*h*), 'Whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this Act) be liable . . . to be kept in penal servitude . . . (*i*).

Sect. 43 (*j*), 'Whosoever shall, being armed with any offensive weapon

(*a*) The former enactments now repealed as to robbery were 7 & 8 Geo. IV. c. 29 (E); 9 Geo. IV. c. 55 (1); 7 Will. IV. and 1 Vict. c. 87.

(*b*) R. *v.* Peat, 1 Leach, 228. R. *v.* Rapier, 1 Leach, 320.

(*c*) 2 East, P. C. 707. R. *v.* Hickman, 1 Leach, 280. 4 Bl. Com. 243. 1 Hawk. c. 34. 1 Hale, 532. 3 Co. Inst. 68, and see *ante*, p. 1111.

(*d*) Taken from 7 Will. IV. and 1 Vict. c. 87, s. 5.

(*e*) Defined s. 1, *post*, p. 1267.

(*f*) *Vide post*, p. 1155.

(*g*) Nor less than three years, or to be imprisoned with or without hard labour for not over two years (54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212). The words omitted were repealed in 1892 (S. L. R.).

(*gg*) Taken from 14 & 15 Vict. c. 110, s. 11.

(*h*) Taken from 7 Will. IV. & 1 Vict. c. 87, s. 6.

(*i*) For not more than five nor less than three years, or to imprisonment with or without hard labour for not more than two years (54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212). The omitted words were repealed in 1892 (S. L. R.).

(*j*) 'Taken from 7 Will. IV. & 1 Vict. c. 87, ss. 2, 3, with a change of the punishment, which under sect. 2 was capital. The words "stab" and "cut" are omitted, because the word "wound" includes them.' C. S. G.

or instrument, rob, or assault with intent to rob, any person, or shall, together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*k*).' On conviction of a male offender under this section he may be sentenced to whipping (*l*).

The Felonious Taking.—The gist of the offence of robbery is the taking by force and terror, not the value of the property taken : a penny as well as a pound forcibly extorted makes a robbery (*m*). Thus the taking of a slip of paper, which contained a memorandum of a sum of money due to the prosecutor, has been held sufficient (*n*). Something of some value must be taken (*o*), otherwise the offence will be only an assault with intent to rob ; but the value need not be estimable by any known coin, even a farthing (*p*).

The taking must be from another of property in his peaceable possession to do with what he pleases. The prisoner had obtained a note of hand from one Courtoy by threatening with a knife held to his throat to take away his life ; and it appeared that the prisoner had furnished the paper and ink with which it was written, and that the paper was never out of her possession ; that the note did not on the face of it import either a general or a special property in the prosecutor ; and that it was so far from being of the least value to him, that he had not even the property of the paper on which it was written, as it appeared that both the paper and ink were the property of the prisoner, and the delivery of it by her to the prosecutor could not, under the circumstances, be considered as vesting it in him ; but that if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, so as to constitute the crime of robbery (*q*).

The prisoners were indicted (*r*) for feloniously demanding of G., with menaces, a deed and a valuable security. It appeared that they had decoyed the prosecutor into a house, and then forced him into a place, so constructed that no cries could be heard, where they pushed him down on a bench, and a chain was passed across his breast and a rope round his neck, and his legs were fastened with a cord to some staples in the ground ; whilst he was so fastened, two sheets of paper, pens, and ink,

(*k*) Or not less than three years, or to imprisonment with or without hard labour for not over two years. 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted words were repealed in 1892 (S. L. R.).

(*l*) 'Garrotters Act' 1863 (26 & 27 Vict. c. 44), set out *ante*, Vol. i. p. 216.

(*m*) 3 Co. Inst. 69. 1 Hale, 532. 1 Hawk. c. 34, s. 16. 4 Bl. Com. 243. 2 East, P.C. 707.

(*n*) R. *v.* Bingley, 5 C. & P. 602, Gurney, B.

(*o*) R. *v.* Phipoe, 2 Leach, 673, 689 : 2 East, P.C. 599.

(*p*) R. *v.* Morris, 9 C. & P. 349. Parke, B., and *post*, p. 1312. 'Larceny.' See also R. *v.* Clark, R. & R. 181.

(*q*) R. *v.* Phipoe, 2 Leach, 673. The form of the note was : 'Two months after date I promise to pay to Miss Maria Theresa Phipoe, or order, the sum of two thousand pounds sterling for value received. —John Courtoy, Oxendon-street.' See R. *v.* Hart, 6 C. & P. 106. The judges also considered that such a note could not be considered as a chose in action within 2 Geo. II. c. 25, s. 3, which made it felony to steal a chose in action. Such a case as R. *v.* Phipoe is now within 24 & 25 Vict. c. 96, s. 48, *post*, p. 1160.

(*r*) Under 7 & 8 Geo. IV. c. 29, s. 6 (rep.).

were brought to him, and he was compelled to write on the paper so brought to him a cheque for a sum of money, and a letter requesting certain deeds to be delivered to the bearer. These documents remained with him for half an hour while he wrote some letters, and it was contended that as they were in his possession during that time, the case was distinguishable from R. *v.* Phipoe (*supra*). Patteson, J. said: 'G. was chained and padlocked, a rope was put round his neck, and he could not move hand or foot except just to write; they bring him pens, ink, and paper, and he writes the orders: he had the papers, it was true, in his hands; but chained as he was, is it possible to conceive that he had such a peaceable possession of them as to be at liberty to do what he pleased with them? For that is the meaning of peaceable possession. I cannot perceive the difference between the case of Courtoy and the present, except that the latter is the stronger of the two. The ground of the decision in that case must govern the decision of the Court in this case. A robbery cannot be committed unless the person has the property in his peaceable possession to do with it as he chooses. If G. had brought the documents ready written, the case would have been different, but he does not write them until he is chained' (*s*).

By 'taking' is implied that the robber must get *possession* of the thing taken. So that if a man, having a purse fastened to his girdle, is assaulted by a thief, and the thief, in order the more easily to take the purse, cuts the girdle (*t*), or in struggling the girdle breaks (*u*), and the purse thereby falls to the ground, this is no taking; for the thief never had the purse in his possession. Upon the same principle, where it appeared that the prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him, and the prosecutor accordingly laid the bed on the ground, but the prisoner was apprehended before he could take it up, so as to remove it from the spot where it lay; the judges were of opinion that the offence of robbery was not completed (*v*). But if in the former case the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, this would have been a taking, though he had never taken it up again; for the purse would have been once in his possession(*w*). It is not necessary that the property should continue in the possession of the thief. Thus, where a robber took a purse of money from a gentleman, and returned it to him immediately, saying, 'If you value your purse, you will please to take it back, and give me the contents of it;' but was arrested before the gentleman had time to give him the contents of the purse; the Court held that there was a *sufficient taking* to complete the offence although the prisoner's possession continued only for an instant (*x*). And where, while a lady was stepping into her carriage, the prisoner snatched at her diamond ear-ring, and separated it from her ear by tearing her ear entirely through, but there was no proof of the ear-ring ever having been seen in his hand, and, upon the lady's arrival at home, it was found amongst the curls of her hair; it was held by all

(*s*) R. *v.* Edwards, 6 C. & P. 521, Patteson, J., and Bosanquet, J. See 24 & 25 Vict. c. 96, s. 48, *post*, p. 1160.
(*t*) 3 Co. Inst. 69.
(*u*) 1 Hale, 533.
(*v*) R. *v.* Farrell, 1 Leach, 322.
(*w*) 3 Co. Inst. 69. 1 Hale, 533.
(*x*) R. *v.* Peat, 1 Leach, 228.

the judges that there was a *sufficient taking* from the person to constitute robbery, as the ear-ring was in the possession of the prisoner separate from the lady's person, though but for a moment, and though he could not retain it, but probably lost it again the same instant (*y*).

Robbery, when once actually completed by taking the property of another into the possession of the thief, cannot be purged by any subsequent re-delivery (*z*). Thus, if A. requires B. to deliver his purse, and he delivers it accordingly, when A., finding only two shillings in it, gives it him again, yet this is a *taking* by robbery (*a*).

Constructive Taking.—Not only a taking in fact, but a taking in law, is sufficient to constitute a robbery (*b*). It has been held, that if thieves attack a man to rob him, and, finding little or nothing about him, force him by menace of death to swear to fetch them money, which he does accordingly, and delivers it to them while the fear of the menace still continues upon him, and they receive it, this is a sufficient taking in law (*c*). And if upon A. assaulting B., and bidding him to deliver his purse, B. refuses to do so, and then A. begs B. to give or lend him money, and B. does so accordingly, under the influence of fear, the taking will be complete (*d*). For where the thief receives money, &c., by the delivery of the party, either while the party is under the terror of an actual assault, or afterwards while the fear of menaces made use of by the thief continues upon him, such thief, in the eye of the law, takes the property from the party just as much as if he had actually taken it out of his pocket (*e*).

The taking must in all cases be accompanied with a felonious intent, or *animus furandi*, which is a question of fact for the jury (*f*). If a man *animo furandi*, says, 'Give me your money,'—'Lend me your money,'—'Make me a present of your money,' or words of the like import, they are equivalent to the most positive order or demand; and, if anything is obtained in consequence, such a taking will be within the definition of robbery (*g*). In the following case, though the original assault was clearly with a felonious intent, the taking of the goods was held to be no more than a trespass. A. assaulted B. on the highway with a felonious intent, and searched B.'s pockets for money, but finding none, he pulled off the bridle of B.'s horse, and threw that and some bread, which B. had in pannels, about the highway, but did not take anything from B. It was resolved, upon a conference with all the judges, that this was not robbery, because nothing was taken from B. (*h*). But a better reason for the decision seems to be, that the particular goods were not taken 'with a felonious intent,' as surely there was a sufficient taking and separation of the goods from the person (*i*).

Taking under a bona fide Claim of Right.—Upon an indictment for

(*y*) R. *v.* Lapier, 1 Leach, 320. And see R. *v.* Simpson, Dears. 421, *post*, p. 1156.

(*z*) 1 Hawk. c. 34, s. 2.

(*a*) 1 Hale, 533.

(*b*) 3 Co. Inst. 68. 1 Hale, 532.

(*c*) Id. ibid. 2 East, P.C. 714.

(*d*) 1 Hale, 533.

(*e*) 2 East, P.C. 711, 714. And see further as to cases of this kind, *post*, p. 1137, *et seq.*, where 'the putting in fear' is spoken of.

(*f*) See R. *v.* Farnborough [1895], 2 Q.B. 484; 64 L. J. M. C. 270.

(*g*) By Willes, J., delivering the opinion of the judges in R. *v.* Donnally, 1 Leach, 196. R. *v.* Donolly, 2 East, P.C. 715, and see *post*, p. 1134.

(*h*) Anon., 2 East, P.C. 662.

(*i*) 2 East, P.C. 662.

robbing G. of three wires and a pheasant, it appeared that the prisoner had set the wires, in one of which a pheasant was caught. G., a gamekeeper of the manor where the wires were set, took up the wires and the pheasant, and put them in his pocket. The prisoner soon after came up, and said, 'Have you got my wires?' G. replied that he had, and a pheasant that was caught in them. The prisoner then asked G. to give the pheasant and wires to him, which G. refused; whereupon the prisoner lifted up a large stick, and threatened to beat G.'s brains out if he did not give them up. G., fearing personal violence, did so. For the prosecution it was contended that the prisoner had no property either in the wires or the pheasant. Vaughan, B., said, 'If the prisoner demanded the wires under the honest impression that he had a right to them, though he might be liable for a trespass in setting them, it would not be a robbery. The gamekeeper had a right to take them, and when so taken they never could have been recovered from him by the prisoner; yet still if the prisoner acted under the honest belief that the property in them continued in himself, I think it is not a robbery. If, however, he used it merely as a pretence, it would be robbery. The question for the jury is, whether the prisoner did honestly believe he had a property in the snares and pheasant or not' (*j*).

A creditor who assaults his debtor and compels him to pay his debt cannot be convicted of robbery, there being no felonious intent. The prisoner was indicted for robbing the prosecutor of a cheque and some money. It appeared that the prosecutor owed the prisoner money and had promised to pay him £5. He was drinking at the inn kept by the prisoner when the latter pressed him for payment, and, on refusal, induced him to go into a private room. The prisoner there repeated his demands for money, knocked the prosecutor down, and tried to take it from him. The prosecutor said if he would let him get up he would give him a cheque for £4, which he had about him, and did so. The prisoner, however, repeated his demand for money, declared he would have it, and knocked the prosecutor down again, and his money dropped out of his pockets, but it was not known what became of it; Erle, C.J., said he thought the jury could hardly convict of a felonious robbery. It was rather an assault by a creditor on a debtor to enforce payment of a debt, an unlawful proceeding, but very unlike felony. The essence of the offence charged was the felonious intent, and that it was impossible to find on these facts (*k*).

The prisoner was indicted for assaulting S., with intent to rob him. S.'s father had been at a fair a few days before the alleged offence, and a person had there given him eleven sovereigns for the purpose of buying a horse; and the father had put the money in his pocket and refused to give it back. The person who gave him the money, in company with the prisoner, assaulted the father and endeavoured to get the money out of his pocket. S. came up, and said that the person who gave his father the money was the man that had robbed one Cotterell at Leek fair, and thereon that person ran away. The prisoner called the next day at S.'s father's, and demanded the eleven sovereigns; but the father refused

(*j*) R. *v.* Hall, Gloucester Lent. Ass. 1828, 3 C. & P. 409, and MSS. C. S. G. See similar cases, *post*, p. 1189, tit. 'Larceny.'

(*k*) R. *v.* Hemmings, 4 F. & F. 50.

to give him them, and said he would give them to the man from whom he had received them, if he would come and ask for them. Afterwards the prisoner saw S. receive at Leek fair seven sovereigns for a cow that he had sold, and said, 'Pay me the eleven sovereigns you owe me,' and then knocked S. down, and put his hand into S.'s pocket where he had seen the sovereigns placed, but was prevented from getting them. Parke, B., held that there was too much semblance of a right to claim the sovereigns to justify proceeding for the felony (*l*).

Taking under Colour of Purchase.—Though it is clear that if a person by force, or threats, compels another to give him goods, and by way of colour obliges him to take, or offers *less* than the value, it is robbery (*m*); yet it has been doubted whether forcing a dealer to sell his wares, and giving him the full value of them, is robbery (*n*). Where a traveller met a fisherman with fish, who refused to sell him any, and by force and putting in fear took away some of his fish, and threw him money much above the value of it, judgment was respited, because of the doubt whether the intent were felonious on account of the money given (*o*). It is suggested, however, with much reason, that questions of this kind should properly be referred to the consideration of the jury; and that the circumstance of the full value or more being offered at the time should be left to them as evidence that the intention of the party was not fraudulent, and so not felonious. For though it does not necessarily follow as a conclusion of law, that if the value of the thing taken is offered to be paid at the time, the intent is, therefore, not felonious: yet such a circumstance would be pregnant evidence in the negative (*p*). But cases where the owner is induced to part with his property at *less* than its value, by fear of the violence of any individual, or of the outrages of a mob, come under a different consideration, and constitute a sufficient taking with a felonious intent (*q*).

Taking in the Presence of the Owner.—The taking need not be immediately *from the person* of the owner; it will be sufficient if it be *in his presence* (*r*). Therefore if A., upon being assaulted by a thief, throws his purse or cloak into a bush, and the thief takes it up and carries it away; or if, while A. is flying from the thief, he lets fall his hat, and the thief takes it up and carries it away, such taking, being done in the presence of A., will be sufficient (*s*). And if a man's servant is robbed of his master's goods in the sight of his master, this seems to be robbery of the master (*t*). So, if the thief having first assaulted A. takes away his horse standing by him; or having put him in fear, drives his cattle, in his presence, out of his pasture, he may be properly said to take such property

(*l*) R. *v.* Boden, 1 C. & K. 395. These cases accord with the Roman Law. 'Qui aliquo errore ductus, rem suam esse existimans, et imprudens juris, eo animo rapuerit, quasi domino liceat etiam per vim rem suam auferre a possessoribus, absolvi debet; cui scilicet conveniens est nec furti teneri eum qui eodem hoc animo rapuerit.' Just. Inst. Lib. iv. Tit. 2, s. 1.

(*m*) R. *v.* Simons, 2 East, P.C. 712, where the prisoner took wheat worth 8*s.* and forced the owner to take 13½*d.* for it, threatening to kill her if she refused.

(*n*) 1 Hawk. c. 34, s. 14. 4 Bl. Com. 244.

(*o*) The Fisherman's case, 2 East, P.C. 661.

(*p*) 2 East, P.C. 662. Cf. R. *v.* Farnborough, *ante*, p. 1130.

(*q*) *Post*, pp. 1139 *et seq.*

(*r*) 1 Hale, 533. 1 Hawk. c. 34, s. 6. R. *v.* Francis, 2 Str. 1015.

(*s*) 3 Co. Inst. 68. 1 Hale, 533.

(*t*) R. *v.* Wright, Style, 156, Rolle, C.J.

from the person of A.; for he takes it openly and before his face while under his immediate and personal care and protection (*u*). And where on an indictment for robbery and stealing from the person it was proved that the prosecutor, who was paralysed, received, whilst sitting on a sofa in a room, a violent blow on the head from one prisoner, whilst the other prisoner went and stole a cash-box from a cupboard in the same room; it was held that the cash-box being in the room in which the prosecutor was sitting, and he being aware of that fact, it was virtually under his protection; and it was left to the jury to say whether the cash-box was under the protection of the prosecutor at the time it was stolen (*v*). But the property must be taken *in the presence of* the owner; and where it appeared upon a special verdict that some thieves gently struck the prosecutor's hand, whereby some money, which he had taken out from his pocket to give change, fell to the ground, and that, upon his offering to take it up, the thieves threatened to knock his brains out, upon which he desisted from taking up the money, and the thieves then and there *immediately* ' took it up; a great majority of the judges held, that even by this statement it was not sufficiently expressed in the special verdict that the thieves took up the money in the sight or presence of the owner, and that they could not intend it, though there seemed to have been evidence enough to have warranted such a finding (*w*). Where robbers, by putting in fear, made a waggoner drive his waggon from the highway in the day-time, but did not rob the goods till night, much doubt appears to have been entertained; some having held it to be a robbery from the first force, but others having considered that the waggoner's possession continued till the goods were actually taken, unless the waggon were driven away by the thieves themselves (*x*).

On an indictment for robbery, it appeared that the prosecutor gave his bundle to his brother to carry for him, and while the brothers were going along the road the prisoners assaulted the prosecutor, upon which his brother laid down the bundle in the road, and ran to his assistance, and one of the prisoners then ran away with the bundle. Vaughan, B., intimated an opinion that under these circumstances the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed. Highway robbery was a felonious taking of the property of another by violence against his will, either from the person or in his presence; the bundle in this case was not in the prosecutor's possession. If these prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it? (*y*).

Force, &c.—The taking must not, it would seem, precede the violence

(*u*) 1 Hale, 533, and 1 Hawk. c. 34, s. 6. 4 Bl. Com. 243.

(*v*) R. *v.* Selway, 8 Cox, 235. The Common Serjeant, after consulting Crowder, J., and Channell, B.

(*w*) R. *v.* Francis, 2 Str. 1015. R. *v.* Grey, 2 East, P.C. 708. In R. *v.* Francis, the judges clearly thought it a case of grand larceny, and therefore would not discharge the prisoners, but directed a new indictment to be preferred, considering themselves confined to the doubt of the jury, whether there was a sufficient taking and that they could not give judgment for a larceny.

(*x*) 2 East, P.C. 707.

(*y*) R. *v.* Fallows, 5 C. & P. 508, Vaughan, B. The prisoners were convicted of simple larceny. *Quære*, whether if the indictment had been for robbing the brother, who was carrying the bundle, it might not have been sustained, as it was the violence of the

or putting in fear; or, rather, a subsequent violence or putting in fear will not make a *precedent* taking, effected clandestinely, or without either violence or putting in fear, amount to robbery. Thus, where a thief clandestinely stole a purse, and, on its being discovered in his possession, denounced vengeance against the party if he should dare to speak of it, and then rode away, the offence was held to be larceny only, and not robbery, as the words of menace were used after the taking of the purse (*z*). But, if the purse had been obtained by means of the menace, the offence would have amounted to robbery (*a*). Under the existing statutes, if the stealing precedes the force the offence is not robbery, but may be stealing from the person (*b*).

Against the Will.—In robbery, as in larceny (*c*), the taking must be against the will of the possessor of the property.

S. and several others, in order to obtain for themselves the rewards given by Act of Parliament for apprehending robbers on the highway, concerted a plan by which a robbery might be effected upon S. by B., one of the confederates, and two strangers procured by B. S. was a party to the agreement to part with his money and goods under colour and pretence of a robbery; and for that purpose, and in pursuance of this consent and agreement, went to a highway and waited there till the colourable robbery was effected. The judges were of opinion that S. had not been robbed because his property was not taken against his will (*d*).

The Violence or Putting in Fear.—The words of the definition, as given at the beginning of the chapter (p. 1127), are in the alternative, 'violence *or* putting in fear;' and taking the property by *either* of these means *against the will* of the party is sufficient to constitute robbery (*e*). The principle, indeed, of robbery is violence; but it has been often held, that *actual* violence is not the only means by which a robbery may be effected, but that it may also be effected by fear, which the law considers as *constructive* violence (*f*).

It appears to have been sometimes considered that fear is a necessary ingredient in all cases of robbery, even in those effected by actual violence (*g*); but if so, it will be presumed. And there are cases in which fear can hardly be supposed to have existed; thus if a man is knocked down without previous warning and stripped of his property while senseless he cannot with propriety be said to be put in fear, and yet that would undoubtedly be robbery (*h*).

prisoners that made him put it down, and it was taken in his presence. See R. *v.* Wright, *ante*, p. 1132. C. S. G.

(*z*) R. *v.* Harman, 1 Hale, 534. 1 Hawk. c. 34, s. 7.

(*a*) By Lord Mansfield in R. *v.* Donolly, 2 East, P.C. 726.

(*b*) See R. *v.* Smith, 1 Lew. 301, Park, J.

(*c*) *Vide post*, p. 1177.

(*d*) R. *v.* M'Daniel, Fost. 121, 128, 19 St. Tr. 745. R. *v.* Norden, *post*, p. 1138, was cited on the part of the Crown; but Mr. Justice Foster remarks upon it as distinguishable upon many grounds, Fost. 129.

(*e*) 2 East, P.C. 708, and the authorities there cited. Fost. 128.

(*f*) R. *v.* Donnally, 1 Leach, 196. R. *v.* Donolly, 2 East, P.C., 727. R. *v.* Reane, 2 Leach, 619; 2 East, P.C. 735.

(*g*) Fost. 128, where the learned writer says, that there are opinions in the books which seem to make the circumstance of fear necessary, but that he had seen a good MS. note of Lord Holt to the contrary, and that he was himself very clear that the circumstances of actual fear at the time of the robbery need not be strictly proved.

(*h*) Fost. 128. 4 Bl. Com. 244. 2 East, P.C. 711.

The Degree of Violence.—Where the taking is effected by 'violence,' a sudden taking or snatching away from a person unawares is not 'robbery' (*i*), but only stealing from the person (*post*, p. 1155). But if any injury is done to the person, or there be any previous struggle by the party to keep possession of the property before it be taken from him, or some force used to obtain possession from him, there will be a sufficient actual 'violence.' Thus, where an ear-ring was snatched from a lady's ear, and the ear torn through, and blood drawn by the force used, it was held to be robbery (*j*). So, where a heavy diamond pin, with a cork-screw stalk, twisted very much in a lady's hair, which was close frizzed and strongly crêped, was snatched out, and part of the hair torn away at the same time, the violence used was held sufficient to constitute robbery (*k*). And where the prisoner snatched at a sword hanging at a gentleman's side, and the gentleman perceiving him get hold of the sword, instantly laid tight hold of the scabbard, which occasioned a struggle between them, in which the prisoner got possession of the sword, and took it away; the Court held that it was a robbery (*l*). Where the prosecutor's watch was fastened to a steel chain, which went round his neck, the seal and chain hanging from his fob, and the prisoner laid hold of the seal and chain, and pulled the watch from the fob; but the steel chain still secured it; upon which the prisoner, by two jerks, broke the steel chain, and made off with the watch; the judges were unanimous that this was a robbery, as the prisoner did not get the watch at once, but had to overcome the resistance made by the steel chain, and used actual force for that purpose (*m*). Where a prisoner ran up against a person, for the purpose of diverting his attention while he picked his pocket, the judges held that the force was sufficient to make it a robbery, it having been used with that intent (*n*).

Accidental Violence.—But where the prosecutrix had tied a basket by the handles to the rail of a cart in which she was riding, and the prisoner tried to lift off the basket by stealth, but the string prevented him, and the prosecutrix stretched out her arm to lay hold of the basket, and just at that moment the prisoner cut the string through with a knife, and at the same time inflicted a wound on the wrist of the prosecutrix, the pain and fright consequent on which caused her to withdraw her hand, and leave him in possession of the basket, with which he made off; Alderson, B., held the case was not one of robbery, because to constitute the crime

(*i*) R. *v.* Macauley, 1 Leach, 287. R. *v.* Baker, id. 290. R. *v.* Robins, 1 Leach, 290 note (*a*). R. *v.* Steward, 2 East, P.C. 702. R. *v.* Horner, 2 East, P.C. 703. In R. *v.* Gnosil, 1 C. & P. 304, Garrow, B., said, 'The mere act of taking being forcible will not make this offence highway robbery; to constitute the crime of highway robbery the force used must be either before or at the time of the taking, and must be of such a nature as to shew that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen; thus, if a man walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.' Cf. R. *v.* Walls, 2 C. & K. 214, Patteson, J.

(*j*) R. *v.* Lapier, 1 Leach, 300, *ante*, p. 1130.

(*k*) R. *v.* Moore, 1 Leach, 335.

(*l*) R. *v.* Davies, 2 East, P.C. 709; 1 Leach, 290.

(*m*) R. *v.* Mason, MS. Bayley, J., and R. & R. 419.

(*n*) Anon., mentioned by Holroyd, J. 1 Lew. 300.

of robbery, there must be intentional violence and force, and the wound appeared to have been inflicted undesignedly and by mere accident (*o*).

Violence Coupled with Pretence of Legal Right.—M., who was taking cheeses along the highway in a cart, was stopped by H., who insisted upon seizing them for want of a permit. This was a mere pretence, no permit being necessary. After some altercation, M. and H. agreed to go before a magistrate to determine the matter; and during M.'s absence, other persons riotously assembled on account of the dearness of provisions, and, in confederacy with H., for the purpose, carried away the goods. It was objected (upon an action against the hundred, on the Statutes of Hue and Cry), that this was no robbery, because there was no force. Hewitt, J., overruled the objection, and left the case to the jury, who were of opinion that H.'s conduct, in insisting upon seizing the cheese for want of a permit, was a mere pretence for the purpose of defrauding M., and found that the offence was robbery; which was afterwards confirmed by the Court of King's Bench (*p*). The conclusion that the acts done in this case amounted to robbery must have been grounded upon the consideration that the first seizure of the cart and goods by H. was by violence, and while the owner was present (*q*).

In R. *v.* Gascoigne (*r*), the prosecutrix was brought before a magistrate by the prisoner, into whose custody she had been delivered by a headborough, who had arrested her under a warrant, upon a charge of assault. The magistrate, having examined the complaint, ordered the prosecutrix to find bail; but advised the parties to make the matter up and become good friends. The prisoner, who was an under-servant to the turnkey of the New Prison, Clerkenwell, and acted occasionally as a runner to the police office, but had no regular appointment either as constable or other peace officer, nor had in particular any order to carry the prosecutrix to prison (*s*), took her to an adjacent public-house, where her husband was waiting in expectation that she would be discharged. The husband requested that the prisoner would wait a short time, while he went to procure bail, and immediately left the house. As soon as he was gone, the prisoner began to treat the prosecutrix very ill, and locked her up and threatened to carry her immediately to prison. She was terrified, and producing a shilling from her pocket, offered to give it him, or even to give him half-a-crown, if he would comply with her request; but he refused, and immediately handcuffed her to a man whom he had in custody on a charge of assault, and who, as the prisoner alleged, had before rescued himself. The prisoner then shoved her and her companion into a coach, which he ordered to drive to the New Prison. He then came into the coach; and put a handkerchief to the mouth of the prosecutrix, and forcibly took from her the shilling, which she continued to hold in her hand. He then asked her if she had any more money in her pocket. She exclaimed that she had no more money; but the man who was handcuffed to her rattled the handcuff against the side of her pocket,

(*o*) R. *v.* Edwards, 1 Cox, 32.
(*p*) Merriman *v.* Chippenham Hundred, 2 East, P.C. 709.
(*q*) 2 East, P.C. 709, note (*a*).
(*r*) 1 Leach, 280; 2 East P.C. 709.
(*s*) In the report of this case in East, it is said that the prisoner alleged that the magistrate made out a warrant of commitment for the prosecutrix, but that it was not produced.

and the prisoner put his hand into her pocket, and took out three shillings. In about ten minutes after he had so taken the three shillings, he stopped the coach at a public-house, called for some gin, drank some himself, gave the coachman a glass, and offered the prosecutrix a glass, which she several times refused, but at last drank, upon his insisting she should do so (*t*); he then gave the shilling which he first took from her to pay for the gin, and took sixpence in change. As the prisoner had promised to carry her back the prosecutrix made no complaint at the public-house, but said, that if the prisoner would carry her back he might keep the other three shillings which he had taken from her. The prisoner, however, proceeded with her to the New Prison. He paid a shilling, or one shilling and sixpence for the coach; but returned no part of the money to the prosecutrix. Nares, J., who tried the prisoner, said that, in order to commit the crime of robbery, it was not necessary that the violence used to obtain the property should be by the common and usual modes of putting a pistol to the head, or a dagger to the breast; and that a violence, though used under a colourable and specious pretence of law, or of doing justice, was sufficient, if the real intention was to rob; and left the case to the jury, with a direction that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty. The jury found that the prisoner had a felonious intent of getting whatever money the prosecutrix had in her pocket, and that the putting her into the state described in the evidence was only a colourable means of putting his felonious intention into execution. The twelve judges unanimously held that as it was found by the verdict that the prisoner had an original intention to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence was clearly a robbery.

B. assaulted a woman with intent to ravish her, and she, without any demand from him, offered him money, which he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, until he was interrupted. This was held to be robbery by a considerable majority of the judges; on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original intent was to commit rape (*u*).

The Putting in Fear.—Where the taking is effected by constructive violence, or putting in fear, the fear excited may be of injury (1) to the person, (2) to property, (3) to reputation.

The extortion of property by fear is robbery by putting in fear, though the property may be taken as a colourable gift (*v*). So that if a

(*t*) In the report of this case in Leach, it is said that he induced her to drink a glass by repeating his promise that she should not be detained.

(*u*) R. *v.* Blackham, 2 East, P.C. 711.

(*v*) *Ante*, pp. 1130 *et seq.*

man, whether with or without an offensive weapon, but with such circumstances of terror as indicate a felonious intention, asks alms from a person who gives to him through fear of violence, it will be robbery; and so it will be if the thief, after having first made an assault, ceases to use force, and asks money for alms, which is given him by the party attacked, while there remains a reasonable ground for the continuance of the fear excited by the assault (*w*). And if thieves come to rob A., and, finding little about him, force him, by menace of death, to swear to bring them a greater sum, which he does accordingly, this is robbery, if the fear of that menace continued upon him at the time he delivered the money (*x*).

1. *Fear of Personal Injury.*—The fear of injury to the *person* is that which is commonly excited on the commission of this offence; and obtaining property by this means is robbery, though there is no great degree of terror or affright in the party robbed. It is enough if the fact be attended with such circumstances of terror, such threatening, by word or gesture, as, in common experience, are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person (*y*). On an indictment for robbery, it appeared that the prisoners and their companions hung around the prosecutor's person in the streets, so as to render all attempts at resistance hazardous, if not vain, and rifled him of his watch and money, but it did not appear that any force or menace was used. It was held that this was a robbery; for if several persons so surround another, as to take away the power of resistance, that is force (*z*). And it is not necessary that actual fear should be strictly and precisely proved; as the law, *in odium spoliatoris*, will presume fear, where there appears to be a just ground for it (*a*).

N., having been informed that one of the early stage-coaches had been frequently robbed near the town by a single highwayman, resolved to endeavour to apprehend the robber. For this purpose he put a little money and a pistol into his pocket, and attended the coach in a post-chaise, till the highwayman came up to the company in the coach, and to him, and presenting a weapon demanded their money. N. gave him the little money he had about him, and then jumped out of the chaise with the pistol in his hand, and, with the assistance of some others, took the highwayman. This was held to be a robbery of N. (*b*).

Fear of Injury to another Person.—Where a case was put in argument of a man walking with his child, and delivering his money to another person, upon a threat that, unless he did so, the other would destroy his child, Hotham, B., said, that he had no doubt that it would

(*w*) 2 East, P. C. 711. 4 Bl. Com. 244. *Ante*, pp. 1130 *et seq.*

(*x*) *Ante*, p. 1130. Fitzh. Coron. pl. 464. 3 Co. Inst. 68. 1 Hale, 532. In 2 East, P. C. 714, the reason given by Hawkins (1 Hawk. c. 34, s. 1) for this doctrine, and which would seem to lead to the conclusion that it would be robbery in such case, though the party delivered the money solely under the mistaken conscientious compulsion of his oath, is denied. And from note (*a*) in East, P. C. ibid., it seems that the delivery of the money was an act more immediately consequent upon the menace and oath than would appear from the statement of the case as given in the text from 3 Co. Inst., and 1 Hale.

(*y*) Fost. 128. 4 Bl. Com. 243, 244. R. *v.* Donolly, 2 East, P. C. 715, 728. R. *v.* Donnally, 1 Leach, 197.

(*z*) R. *v.* Hughes, 1 Lew. 301, Bayley, J.

(*a*) Fost. 128. 2 East, P. C. 711.

(*b*) R. *v.* Norden, Fost. 129.

be a robbery (*c*). And in R. *v.* Reane (*d*), Eyre, C.J., said, that a man might be said to take by violence, who deprived the other of the power of resistance, by whatever means he did it; and that he saw no sensible distinction between a personal violence to the party himself, and the case put by one of the judges, of a man holding another's child over a river, and threatening to throw it in unless he gave him money.

Upon an indictment for robbing the wife of A., it appeared that the money was obtained from the wife by a threat to accuse her husband of an unnatural offence, and the money so obtained was the property of her husband. Littledale, J., said, that to make a case of this description a robbery, the intimidation should be on the mind of the person threatened to be accused, and the apprehension of the wife was of a different character (*e*).

2. *Fear of Injury to Property.*—The cases in which robbery has been committed by means of a fear of injury to the *property* of the party are principally those in which the terror excited was of the probable outrages of a mob.

The prisoner, who was a ringleader in some riots, came with about seventy companions to the house of the prosecutor, and said that they would have from him, the same as they had had from his neighbours, namely, a guinea, or else they would tear his mow of corn, and level his house. He gave them a crown to appease them; when the prisoner swore that he would have five shillings more, which the prosecutor, being terrified, gave him. They then opened a cask of cider by force, drank part of it, and ate the prosecutor's bread and cheese; and the prisoner carried away a piece. The indictment contained two counts, one for robbing the prosecutor of ten shillings in his dwelling-house, by assault and putting him in fear, and the other for putting the prosecutor in fear, and taking from him in his dwelling-house a quantity of cider, pork, and bread. It was held robbery in the dwelling-house (*f*).

During the Gordon riots in London, in 1780, a boy with a cockade in

(*c*) R. *v.* Donolly, 2 East, P.C. 718.

(*d*) 2 East, P.C. 735, *post*, p. 1146.

(*e*) R. *v.* Edward, 1 M. & Rob. 257, 5 C. & P. 518. R. *v.* Knewland, 2 Leach, 721 (*post*, p. 1141), seems to support the view of the learned judge that if this was not robbery, it was only a misdemeanor. But it seems to deserve consideration whether as 'the law considers the fear of losing character by such an imputation as equal to the fear of losing life itself, or of sustaining other personal injury'; [per Ashhurst, J., delivering the judgment in R. *v.* Knewland] it might not well be contended that the fear of such a charge being made against a husband would operate as strongly on the mind of the wife as *any* threat of personal violence, or even of death to him could possibly do; and especially as 'the bare idea of being *thought* addicted to so odious and detestable a crime is of itself sufficient to deprive the injured person of all the comforts and advantages of society; a punishment more terrible, both in apprehension and reality, than even death itself,' [per Ashhurst, J., ibid.] and therefore, the threat of making such a charge must operate in the strongest possible manner on the mind of the wife, indeed much more forcibly than any threat of injury to any property could possibly do. It should be observed, that in R. *v.* Knewland it was contended on the trial that if the fear was not sufficient to constitute the crime of robbery, the prisoners might be convicted of larceny, if they obtained the money fraudulently, with a felonious design to convert it to their own use; but this point was neither noticed by the Court on the trial, nor by the twelve judges upon the case reserved; indeed, the only question submitted to them seems to have been whether the circumstances were sufficient to constitute the crime of robbery. C. S. G. See 24 & 25 Vict. c. 97, s. 47, *post*, p. 1159.

(*f*) R. *v.* Simons, 2 East, P.C. 731; as to punishment of that offence, *vide ante*, p. 1111.

his hat knocked violently at the prosecutor's door, who thereupon opened it, when the boy said to him, 'God bless your honour, remember the poor mob.' The prosecutor told him to go along; on which he said, 'Then I will go and fetch my captain,' and went away. Soon afterwards the mob, to the number of a hundred, armed with sticks, &c., came, headed by the prisoner, who was on horseback, and whose horse was led by the same boy. On their coming up, the bystanders said, 'You must give them money,' and the boy said, 'Now I have brought my captain'; and some of the mob said, 'God bless this gentleman, he is always generous.' The prosecutor then said to the prisoner, 'How much?' to which the prisoner answered, 'Half-a-crown, sir'; upon which the prosecutor, who had before only intended to give a shilling, gave the prisoner half-a-crown. The mob then gave three cheers, and went to the next house. This was held to be robbery (*g*).

In another case, arising out of the same riot, the prosecutor swore that the prisoner and another man entered into his dwelling-house; and, upon being asked by him what they wanted, the prisoner, having a drawn sword in his hand, said with an oath, 'Put one shilling into my hat, or I have a party that can destroy your house presently'; upon which he gave him a shilling. It was also sworn by another witness, that the prisoner also said, that if the prosecutor 'would keep the blood within his mouth, he must give the shilling.' This offence was also ruled to be robbery (*h*).

The prosecutor had corn belonging to other persons in his possession when the prisoner came to him, together with a great mob marching in military order. One of the mob said, that if he would not sell they were going to take it away; and the prisoner said that they would give thirty shillings a load, and if he would not take that, they would take the corn away; upon which the prosecutor sold corn for thirty shillings, which was worth thirty-eight shillings. This was ruled to be robbery (*i*).

On an indictment for robbing G., it appeared that the prisoners, with a man unknown, went to the house of G. Upon G. coming out, they pulled off their hats, and shouted, 'Church and King'; upon which G. did the same, and advanced towards the prisoners in much alarm, when the stranger accosted him and said, 'I am come out of friendship to you, G., to let you know your house is marked to come down to-morrow morning at two o'clock. I am the head of the mob; they are two thousand strong; I must have something to make my men drink; I can bring two or three hundred in an hour's time, or keep them back.' G. said, 'As to something to drink, you shall have anything you have a mind for.' The stranger then said, 'I must have money.' G. offered him half-a-crown, which he rejected with contempt; upon which G. asked what he wanted? and he replied that he must have twenty guineas; and upon G. telling him that he had not so much in the house,

(*g*) R. *v.* Taplin, 2 East, P.C. 712.
(*h*) R. *v.* Brown, 2 East, P.C. 731.
(*i*) R. *v.* Spencer, 2 East, P.C. 712, Buller, J. As to cases where the owner has been compelled to part with his property under colour of a purchase, see *ante*, p. 1132.

said, that if G. did not give him something handsome for his men to drink, his house should come down. G. said that he might have nine or ten guineas; which he asked to see. While G. was taking his purse out of his pocket, one of the prisoners told him he might depend upon it that the stranger was the head of a mob, with other discourse of a similar kind as to his power; and particularly that he was the first man who had entered every house that had been destroyed. This expression so struck G. that he immediately took the money, which amounted to nine guineas and a half, out of his purse, and gave it to the stranger; who counted it, and demanded something to drink; when they all went into G.'s house and had some liquor: after which, in going away, they assured G. that he should be protected. There was no evidence that the prisoners had any of the money at the time; but it appeared that a small share of it was given to them afterwards. G., in giving his evidence, said that he was greatly alarmed, but not for his person; that no injury was threatened to his person; but that, when he delivered his money, his apprehension was, that if he had refused to do so, the men would have gone to B., and have returned with other persons, and pulled down his house and plundered it. The jury found the prisoners guilty, saying, that they were satisfied that G. did not deliver his money from any apprehension of danger to his life or person, but from an apprehension that, if he refused, his house would at some future time be pulled down, as the prisoners and the stranger threatened, in the same manner as other houses in B. had been before; and, the facts of the case being afterwards submitted to the judges, for their opinion, whether the evidence amounted to robbery, a majority of them held that it did (*k*).

3. *Fear of Injury to Reputation* (*l*).—Fear of injury to reputation seems never to have been deemed sufficient to support an indictment for robbery at common law, unless excited by means of insinuations against, or threats to destroy the character of the party robbed, by accusing him of sodomitical practices.

In R. *v.* Knewland (*m*), the prisoners, assisted by other persons, got the prosecutrix into a house, under pretence of an auction being carried on there, forced her to bid for a lot which was immediately knocked down to her, and then, upon her not producing the money to pay for it, threatened that she should be taken to Bow Street, and from thence to Newgate, and be imprisoned till she could raise the money. After these threats had been used, a pretended constable was introduced, who said to the prosecutrix, 'Unless you give me a shilling you must go with me,' upon which she was induced to give the pretended constable a shilling; and the prosecutrix parted with the shilling, being in bodily fear of going to prison, as a means of obtaining her liberty, and to avoid being carried to Bow Street and to Newgate, and not out of fear or apprehension of any other personal force or violence. The judges, after argument, and a minute discussion of the circumstances of the case, were

(*k*) R. *v.* Astley, 2 East, P.C. 729. A note is appended to this case (1803 ed.) 'Qu. If the threat of burning down a man's dwelling-house by a mob do not in itself convey a threat of personal danger to the occupiers.'

(*l*) See also sects. 44–49 of the Larceny Act, 1861, and the cases cited thereunder, *post*, pp. 1158 *et seq.*

(*m*) 2 Leach, 721; 2 East, P.C. 732.

of opinion that they were not sufficient to constitute the crime of robbery. They thought that the threat used of taking the prosecutrix to Bow Street, and from thence to Newgate, was only a threat to put her into the hands of the law, which she might have known would have taken her under its protection and set her free, as she had done no wrong; that an innocent person need not in such a situation be apprehensive of danger; and, therefore, that the terror arising from such a source was not sufficient to induce an individual to part with property, so as to amount to robbery. And they said, it was a case of simple duress for which the party injured might have a civil remedy by action, which could not be if the fact amounted to felony (*n*).

But as imputations of being addicted to sodomitical practices would be sufficient to deprive the injured person of all the comforts and advantages of society, and would inflict a punishment more terrible than death, both in apprehension and reality, the fear of losing character by such an imputation was considered as equal to the fear of sustaining personal injury, or even of losing life itself (*o*).

In R. *v.* Jones (*p*) an indictment for highway robbery, the prosecutor and the prisoner, not being at the time at all acquainted, pressed together with a great crowd, into the upper gallery of the play-house at Covent Garden, after which the prisoner took his seat by the side of the prosecutor. When the play was over the prisoner followed the prosecutor out of the house, and proposed to him to have something to drink, to which the prosecutor assented, and they went together to an adjoining public-house. In a few minutes, and after they had drunk some porter, the prisoner turned towards the prosecutor and asked him what he meant by the liberty he had taken with his person in the play-house. The prosecutor said, that he knew of no liberties being taken; when the prisoner replied, 'Damn you, sir, but you did; and there were several reputable merchants in the house who will take their oaths of it.' The prosecutor, much alarmed, immediately rose from his seat, paid for the porter, and went out of the house, saying to the prisoner, that he did not know what he meant. The prisoner followed him into the street, where there was a considerable crowd, and hallooed out, 'Damn you, sir, stop! for if you offer to run, I will raise a mob about you'; and then seizing him violently by the arm exclaimed, 'Damn you, sir! this is not to be borne! you have offered an indignity to me, and nothing can satisfy it!' The prosecutor, terrified by these expressions, and the manner in which they were uttered, replied, 'For God's sake, what do you want, what would you have me do?' to which the prisoner said in a lower tone of voice, 'A present—a present—you must make me a present.' The prosecutor asked him, 'A present of what?' upon which the prisoner said, 'Come, come, what money have you? How much can you give me now?' The prosecutor gave him three guineas and some silver. The prisoner said, it was not enough and demanded more. During the whole of this

(*n*) It appears from the report in East, that Ashhurst, J., Hotham, B., Perryn, B., and Buller, J., were absent. But the opinion of the judges was afterwards delivered by Ashhurst, J., who did not state that he in any way dissented.

(*o*) R. *v.* Knewland, 2 Leach, 731, Ashhurst, J.

(*p*) 1 Leach, 139; 2 East, P.C. 714.

conversation the prisoner held the prosecutor fast by the arm, and thereby defeated several efforts which he made to get away; and at length, when he suffered the prosecutor to walk on, still accompanied him, keeping tight hold of his arm, down another street. At length the prisoner loosed his arm, but did not leave him; and as he refused to tell his name, or where he lived, followed him to the door of his lodgings. Early the next morning the prisoner called at his lodgings, and frightened the prosecutor out of a further sum of forty pounds. The prosecutor swore that at the time he parted with his money he understood the threatened charge to be the imputation of sodomy; that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance; and that the violence with which the prisoner had detained him in the street had put him in fear for the safety of his person. The case was left to the jury, with a direction to consider whether the prosecutor parted with his money under the impression of fear; and the jury found the prisoner guilty, declaring that they thought that such an accusation would strike a man with as much or more terror than if he had a pistol at his head. The point was afterwards considered by the judges; and they were of opinion, that the conviction for a highway robbery was proper; that in order to constitute robbery, there was no occasion to use weapons, or real violence; and that taking money from a man in such a situation as rendered him not a free man (as if a person so robbed were in fear of a conspiracy against his life or character) was such a putting in fear as would make the taking of his money under that terror a robbery (*q*). They cited with approval R. *v.* Brown (*r*). In that case there was some actual violence used in the assault, and a laying of hands on the party; and in R. *v.* Jones, there was, as has been seen, a continual force and violence, and a threat to deliver the party up to the mob as a sodomite, besides the fact of laying hold of the arm; circumstances which were afterwards urged as giving a peculiar character to those cases, and as making them distinguishable from one in which no such circumstances should exist (*s*).

But in the case next to be cited, R. *v.* Donnally (*ss*), actual violence was held immaterial when the fear excited was of loss of character. The prosecutor, while passing through Soho Square in the evening was accosted by the prisoner, whom he had never seen before. The prisoner desired that he would give him a present. The prosecutor said, 'For what?' The prisoner answered, 'You had better comply, or I will take you before a magistrate and accuse you of an attempt to commit an unnatural crime.' The prosecutor then gave him half-a-guinea, which the prisoner said was not sufficient; but the prosecutor had no more in his pocket. On the next day but one, the prosecutor met the prisoner again in Oxford Street, who made use of the same threats as before; telling the prosecutor that he knew what had passed in Soho Square, and that unless he would give him more money, he would take him before a magistrate and accuse him

(*q*) R. *v.* Jones, 1 Leach, 139; 2 East, P. C. 714.

(*r*) 2 East, P.C. 715, Eyre, Recorder citing a still earlier case, R. *v.* Harrold.

(*s*) See the judgments of Perryn, B., and Blackstone, J., in R. *v.* Donolly, 2 East, P.C. 717, 718, 721, and the judgment of the Court, as delivered by Willes, J., 1 Leach, 195 (R. *v.* Donnally).

(*ss*) 2 East, P.C. 716.

of the same attempt; adding that it would go hard against him unless he could prove an *alibi*. The prosecutor then went to the shop of a grocer, the prisoner following him, and staying on the outside of the door; and the prosecutor, being in the shop, took a guinea out of his pocket, gave it to the grocer, and desired that he would give it to the man at the door, which the grocer did, and the prisoner then went away. The prosecutor stated that he was exceedingly alarmed on both occasions, and under that alarm gave the money; that he was not aware what were the consequences of such a charge, but apprehended that it might cost him his life. The jury were directed to consider first, whether they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger; and, secondly, if they should not think that the prosecutor apprehended that his life was in danger, then, whether the money was not obtained by means of the prisoner's threats, and against the will of the prosecutor; for if it were, even in that case, though he were not in fear of his life, the crime would amount to robbery. The jury found the prisoner guilty, and said that they were satisfied that the prosecutor delivered up his money through fear, and under an apprehension that his life was in danger. The question was submitted to the judges, who, after argument, all agreed that it amounted to robbery (*t*). Willes, J., delivered the result of their deliberations. He said that the facts of the case shewed that there was the necessary felonious intention in the prisoner to rob the prosecutor; and that it was impossible to raise a doubt that there was a sufficient taking from the prosecutor's person. With respect to the putting in fear, it is not necessary to lay a putting in fear in the indictment; and the circumstance of actual fear need not be proved upon the trial; for if the act be laid to be done violently and against the will, the law *in odium spoliatoris* will presume fear. There need not be actual violence, a reasonable fear of danger caused by constructive violence being sufficient; and that where such terror is impressed upon the mind as does not leave the party a free agent, and he delivers his money in order to get rid of that terror, he may clearly be said to part with it against his will, so as to constitute robbery. That no actual danger is necessary, as a man may commit a robbery without using any offensive weapon, as by using a tinder-box or candlestick instead of a pistol. And that when a villain comes and demands money, no one knows how far he will proceed. The learned judge then referred to the facts and circumstances of the case as sufficient to bring it within these rules of law. He then observed, upon the argument urged by the counsel for the prisoner, that this was a fraudulent taking and not a taking by violence; and said, that in many cases fraud would supply the place of violence, as in burglary, where, though it was necessary to charge a breaking in the indictment, yet there might be a constructive breaking by a person fraudulently getting admission into a house by colour of law, or under pretence of taking lodgings, or of having business (*u*). But he said, that the judges did not determine the case entirely on this ground, but were of opinion that there was proof of a

(*t*) The judges' opinions are given in 2 East, P.C. 716 to 726.

(*u*) *Ante*, pp. 1071 *et seq.*

constructive violence, which they thought was sufficient; and that they were all of opinion that enough was proved in this case for the jury to find the prisoner guilty of robbery (*v*). This doctrine appears to have been acted upon in subsequent cases, in one of which the party delivered his money solely from fear of losing his character.

In R. *v.* Hickman (*w*), the indictment was for robbing one M. of two guineas. The prosecutor had some employment in the palace of St. James's, and an apartment there in which he was accustomed to sleep, and the prisoner was occasionally a sentinel on guard at the palace. One night the prosecutor treated the prisoner with some bread and cheese and ale, in his room. About a fortnight afterwards, very late in the evening, the prosecutor was going upstairs to his apartment, when he heard somebody close behind him, and, on turning round, saw that it was the prisoner, who said, 'It is me. I am come for satisfaction; you know what passed the other night; you are a *sodomite;* and if you do not give me satisfaction, I will go and fetch a sergeant and a file of men, and take you before a justice.' The prosecutor then asked him what money he must have, when the prisoner said, 'I must have three or four guineas.' The prosecutor gave him two guineas, which was all he had, and promised to give him another guinea the next morning; and the prisoner took the two guineas, saying, 'Mind, I don't *demand* anything of you.' The next morning he came and received the other guinea; and, in a few days after, upon making an application for more money upon the same pretence, he was apprehended. The prosecutor swore that he was very much alarmed when he gave the prisoner the two guineas, and did not very well know what he did; but that he parted with his money under an idea of preserving his character from reproach, and not from the fear of personal violence. The jury found the prisoner guilty; and that the prosecutor parted with his money, against his will, through a fear that his character might receive an injury from the prisoner's accusation; but as some doubt was entertained whether the case was within the principle upon which Donnally's proceeded, it was submitted to the consideration of the judges; and their opinion was afterwards delivered by Ashhurst, J., to the following effect: 'Some doubts having been entertained as to the opinion of the twelve judges, in the case of Donnally (*x*), the learned judge who tried the prisoner thought it properthat the present case should, likewise, be referred to their consideration. They have, accordingly, conferred upon it; and, they are of opinion that it does not *materially* differ from the case of Donnally; for that *the true definition of robbery is the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the party unwillingly to part with his property; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference;* for to most men the idea of losing their fame and reputation is equally, if not more, terrific than the dread of personal injury. The principal ingredient

(*v*) R. *v.* Donnally, 1 Leach, 193. R. *v.* Donolly, 2 East, P.C. 715 to 728. The prisoner was not executed and some doubts prevailed as to his case, see R. *v.* Hickman, 1 Leach, 279.

(*w*) 1 Leach, 278; 2 East, P.C. 728. R. *v.* Staples, ibid.

(*x*) *Supra.*

in robbery is a man's being *forced* to part with his property; and the judges are unanimously of opinion, that, upon the principles of law, and the authority of former decisions, a threat to accuse a man of having committed the greatest of all crimes is, as in the present case, a *sufficient force* to constitute the crime of robbery, by putting in fear' (*y*).

This case seems to have gone to the full extent of the doctrine upon which it proceeded, and must be considered as in some measure qualified by subsequent decisions.

In the first of these, R. *v.* Reane (*z*), R. was indicted for a highway robbery, and taking nineteen guineas and a shilling; and W. was charged, in the same indictment, as an accessory before the fact. The evidence was, that the prosecutor met R. in the street. He was an entire stranger to the prosecutor; but he asked for money, saying that he was in great distress; and, upon the prosecutor's refusing to give him any, went away muttering expressions of anger and discontent. On the next day he again met the prosecutor in the street, and repeated his request for money; and, on being refused, said, 'You shall be the worse for it.' Eleven days afterwards, he again accosted the prosecutor in the street, and told him that he had taken indecent liberties with him in the park, and that it had been seen and could be proved by a third person. The prosecutor, with a violent exclamation, asked him what he meant; to which he made no reply, but walked away. On the next day the prosecutor received a letter from him containing similar charges, and mentioning his place of residence; in consequence of which the prosecutor, having consulted with a friend, appointed to meet him in the street to hear what he had to say. He accordingly met him there, when R. said, that if the prosecutor did not give him money he could prove his having committed indecencies with him in the park, as a third person had seen it; upon which the other prisoner, W., joined them, saying, 'Yes, I saw you.' The prosecutor exclaimed that it was a horrid abominable falsity; upon which W. said, 'You have great interest with the Government; I shall be glad of a place as a clerk, either in the customs or excise.' The prosecutor said that he would apply for one, upon which W. went away. R. then said, 'You have given that man a certainty; I will have a certainty also'; upon which the prosecutor told him that he should. On the following morning R. met the prosecutor by appointment, and told him that he had considered the matter, that he must have twenty pounds in cash, and a bond for fifty pounds a year; upon which the prosecutor, in pursuance of a plan which he had previously concerted with his friend, told him that he could not give them to him then, but that if he would wait a few days he would bring him the money and the bond. The prosecutor, on his next interview with R., offered him the twenty pounds; but he refused to take the money without the bond, upon which the prosecutor fetched the bond, and gave it, together with nineteen guineas and a shilling, to R., who carried both the bond and the money away with him, saying, that he would not give the prosecutor any further trouble. It was

(*y*) R. *v.* Hickman, 1 Leach, 278; 2 East, P.C. 728.

(*z*) 2 Leach, 616; 2 East, P.C. 734.

objected on behalf of the prisoners that this proof was defective; as in order to constitute robbery there must be violence, or fear of danger, to the person or character; and that such violence, or fear, must exist *at the time* when the property is parted with; but the case was left to the jury, who found the prisoner guilty; upon which the opinion of the judges was taken. At the first conference the judges (Buller, J., being absent) were inclined to think that this was not robbery, as there was neither violence nor fear at the time the prosecutor parted with his property. Eyre, C.J., observed, 'That it would be going a step further than any of the cases to hold this to be robbery. That the principle of robbery was violence; and where the money was delivered through fear, that was constructive violence. That the principle he had acted upon, in such cases, was to leave the question to the jury, whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand. Therefore, when the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoners, he negatived the robbery. That this was different from Norden's case (*a*), where there was actual violence; for here there was neither actual nor constructive violence. A man might be said to take by violence who deprived the other of the power of resistance, by whatever means he did it.' The judges thought the matter deserving of further consideration; but they ultimately adhered to the opinion to which they had at first inclined; and held (Buller, J., being absent) that the conviction was wrong; as there was no violence either actual or constructive (*b*).

In R. *v.* Jackson (*bb*), J., S., and M. were indicted, in 1802, for robbing one W. in the dwelling-house of one R. The evidence of the prosecutor was, that while he was threshing in his father's barn, the prisoners S. and M. came to him, and asked if W. lived there, to which he answered that he was the man. They then asked him if he remembered lying with two soldiers some time before; and upon his saying that he did, they said that one of the soldiers named J., had said that he had abused him; and that J. was then come over to an adjoining place, and would certainly follow the law, unless he would come and make it up with him; but that, if he went there, and made it up with J., there would be no more of it. The prosecutor answered that he knew nothing of the sort, but that he would go and hear what J. had to say. S. and M. then went away; and the prosecutor followed them to a public-house, kept by R., where he also found the prisoner J., and another soldier. Some conversation took place in a private room, when J. preferred the same charge against the prosecutor of his having unnaturally abused him; which was positively denied by the prosecutor. At last J. told the prosecutor that if he would pay him the expenses, there should be no more of it; and upon the prosecutor saying that he was willing to pay anything in reason, M. and S. made out a sort of account, by setting down in writing the following articles as mentioned by J.:—'Doctor, £1 11*s.* 6*d.*; for abusing me £1 8*s.*; M., 10*s.*; S., 5*s.*; the other soldier, 2*s.* 6*d.*;' the total was £3 17*s.*; but they asked to have four guineas. The prosecutor said he

(*a*) *Ante*, p. 1138. [(*b*) 1 East, P.C. *Addenda*, xxi. (*bb*) Ibid. xxii. xxiv.

had no such money: but upon their insisting upon having it, he said he would try to get it from his parents; and asked one of them to accompany him, which S. accordingly did. The prosecutor swore that he was much frightened and hurried, and did not know what best to do. He went, however, accompanied by S., to his mother's; and, under the pretence of a soldier having been hurt, obtained from her four guineas. On their return to the public-house, the prosecutor stopped at the house of A., and prevailed upon A. to go along with him. A. inquired what was the matter; and, upon being informed by S., declared his disbelief of the charge, and said that if it were his own case he would not pay the money; upon which S. said, that if the prosecutor did not pay the money it would cost him £50 or £100, or perhaps his neck; that he was himself a constable, and would go for a warrant the next morning. This language frightened the prosecutor very much. When the prosecutor, S., and A. got to the public-house, J., M., and the other soldier were in the same room in which the prosecutor had left them. The prosecutor sat down, and after a few minutes, laid the four guineas upon the table, and asked who would take it; upon which they all said 'J.,' but S. took it up; and amongst them they returned back six shillings to the prosecutor, half-a-crown of which was said to be for his friend's expenses (meaning A.). The prosecutor asked for a receipt; but M. said his friend would do as well: and S. made some inquiries as to the doctor to whom J. had applied, but received only evasive answers. The jury found the prisoners guilty; but on a doubt whether the case did not go somewhat beyond those which had been previously decided, and principally, because the prosecutor had a friend present during the transaction, the case was submitted to the judges, and a majority of them were of opinion that it did not amount to robbery, though the money was taken in the presence of the prosecutor, and the fear of losing his character were upon him. Most of such majority thought that, in order to constitute robbery, the money must be parted with *from an immediate apprehension of present danger, upon the charge being made*, and not, as in this case, where the parties had separated, and the prosecutor had time to deliberate upon it, and apply for assistance: and had applied to a friend, by whom he was advised not to pay it, and who was actually present at the very time when it was paid; which circumstance, they thought, had the appearance rather of a composition of a prosecution than of a robbery, and seemed like a calculation whether it were better to lose his money than risk his character. And one of the judges who agreed that it was not robbery, thought that there was not such a *continuing fear* as could operate *in constantem virum* from the time when the money was demanded until it was paid; as, in the interval, the prosecutor had taken advice, and might have procured assistance. Those judges who thought the case did amount to robbery, considered the question as concluded by the finding of the jury, that the prosecutor had parted with his money through fear continuing at the time, which fell within the definition of robbery, which had been long adopted and acted upon: and they said that it would be difficult to draw any other line. They thought, also, that this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or others for

assistance; the money being given to prevent the public disclosure of the charge (*c*).

Hickman's case was again observed upon, in R. *v.* Elmstead (*d*). The prisoner went twice to the house where the prosecutor lived in service, and called him a sodomite and b——. The prosecutor took him each time before a magistrate, who discharged the prisoner. On leaving the magistrate, the prisoner followed the prosecutor, again called him a sodomite and b——, and asked him to make him a present, said he would never leave him till he had pulled the house down, but if he did make him a handsome present, he would trouble him no more. He asked four guineas, and the prosecutor being frightened for his reputation, and from fear of losing his situation, gave him the money. He gave the money from the great apprehension and fear he had of losing his situation. The prisoner was convicted before Hotham, B. (Le Blanc, J., and Chambre J., being present), but upon a doubt in the Privy Council, the opinion of the judges was taken. Most of the judges thought that this was within Hickman's case, and nine of them (*e*) seemed to think Hickman's case binding, but the three others (*f*) thought it not law (*g*).

But in R. *v.* Cannon (*h*), the prisoners had been with the prosecutor at ten o'clock in the morning, and had threatened to prefer the charge of an attempt to commit an unnatural crime, if he did not give them £10. One of them pretended to be an assistant police officer, and to him the prosecutor had given £10 the night before. The prosecutor fixed to meet them the next morning at nine o'clock, but they came again that night at nine, and said they could not wait, and that, as the prosecutor had not £10 about him, they must take him to Bow Street. He then agreed to go, and they called a coach, and he got in. They then said if he would procure the money they would not prefer the charge. He went to a friend's, and got £10, and gave it to them. He was there about five minutes. The prisoners went to the house with him, and waited for him in the street. Upon the trial, the prosecutor said he was under the apprehension of being carried by force into custody, but that he did not give the money under the impression of danger to his person. The prisoners were convicted, and, upon a case reserved, ten of the judges held that the calling the coach, and getting in with the prosecutor, was a forcible constraint upon him, and sufficient to constitute a robbery, though he had no apprehension of further injury to his person; but five (*i*) of the judges thought that some degree of force or violence was

(*c*) See 1 East, P. C. *Addenda*, xxi., xxiv., marg., where it is questioned whether the decision did not, in a great measure, overrule the case of Hickman, *supra*. But the circumstances of these cases materially differ; and, in Hickman's case, the two guineas were given *immediately* upon the charge being made, and there was no previous application to any friend, or other person, from whom advice or assistance might have been procured.

(*d*) Mich. T. [1802], MS. Bayley, J.

(*e*) Chambre, Le Blanc, Rooke, Thomson, Grose, Heath, Hotham, M'Donald, and Lord Alvanley.

(*f*) Graham, Lawrence, and Lord Ellenborough.

(*g*) Lord Ellenborough thought that the prosecutor's principal inducement in the present case to part with his money was the fear of a loss of his place, and his lordship said that he should feel no difficulty in recommending a pardon, and it seems that the prisoner was pardoned.

(*h*) R. & R. 375.

(*i*) Ellenborough, C.J., M'Donald, C.B., Lawrence, Chambre, and Graham.

essential, and that the mere apprehension of danger to the character would not be sufficient to constitute the offence. Five others of the judges seemed to think it would (*k*).

In R. *v.* Egerton (*l*), where the point came again under the consideration of the judges, it appears to have been settled that fear of loss of character and service, upon a charge of sodomitical practices, is sufficient to constitute robbery, though the party has no fear of being taken into custody, or of punishment. The prisoner saw the prosecutor, a servant, whom he knew, at his master's door, and applied to him for £5, saying money he would have, and that of the prosecutor. He then demanded £1, and said that if he did not instantly get it he would go in to the prosecutor's master and swear that the prosecutor wanted to take diabolical liberties with him. Then hearing some money jingle in the prosecutor's pocket he demanded it, and the prosecutor gave it him, being one shilling and some half-pence. He then inquired about the prosecutor's clothes, and swore that money he would have, or the value, before he left the house, upon which prosecutor fetched him up a coat, and he then went away. The prosecutor stated in his evidence that he gave the property for fear of his character and place, that his fear was, that the prisoner would go in to his master, but that he had no fear of being taken into custody, or of punishment. The prisoner was convicted, and, upon a case reserved, all the judges, except Graham, B., thought that this was within Hickman's case, and that they were bound by that case, and could not properly depart from it. Richards, C.B., Bayley, J., and Holroyd, J., expressed their opinions that Hickman's case was right, because the charge conveyed such a degree of terror as might be expected to overpower a firm and constant mind. None of the other judges, except Graham, B., intimated a contrary opinion. And the conviction was affirmed.

It is equally a robbery to extort money by threatening to accuse of an unnatural crime, whether the party so threatened has been guilty of such crime or not (*m*).

But parting with property upon the charge of an unnatural crime will not make the taking a robbery, if it is parted with, not from fear of loss of character, but for the purpose of prosecuting the offender. The prisoner applied to Fry to lend him 10*s*., and upon his refusal threatened to charge him with an unnatural crime, and got from him £1 10*s*. Fry parted with it from an anxiety that his master's family might not be disturbed, and in expectation that he might secure the prisoner; and he immediately stated the circumstances to his master, and to a friend, and planned with them what he should do in case of the prisoner applying again. The prisoner did apply again; and Fry fixed to meet him, marked some money, engaged a constable, and having met the prisoner, gave him the money, and had him apprehended; he parted with this money in order that he might prosecute, because he knew himself innocent, and not from the threats. Upon a case reserved, the judges held that this

(*k*) Heath, Grose, Thomson, Le Blanc, and Wood.

(*l*) MS. Bayley, J., and R. & R. 375.

(*m*) R. *v.* Gardner, 1 C. & P. 479, Littledale, J. *Vide post*, p. 1160, note (*u*).

taking did not constitute a robbery, and the prisoner was recommended to a limited pardon (*n*).

Threatening to procure witnesses to support a charge already made is not a threatening to accuse of an indictable offence (*o*).

Assaults with Intent to Rob.—24 & 25 Vict. c. 96, s. 42, *ante*, p. 1127, which provides for the punishment of assaults on any person with intent to rob, has not the words 'such person' which occurred in the old Act, 7 Geo. II. c. 21. And consequently the decisions under that Act, that the assault must be on the person intended to be robbed, appear not to apply (*p*).

It is not necessary to establish an actual demand of money, &c., before the assault, in order to prove that the assault was with intent to rob (*q*).

But the intent to rob is a natural element of the offence, and should be definitely alleged in the indictment (*r*).

By 24 & 25 Vict. c. 96, s. 41 (*ante*, p. 1127, taken from 14 & 15 Vict. c. 100, s. 9), the jury may convict of assault with intent to rob, if the evidence fails to prove robbery.

An indictment stated that the prisoners on T. T. feloniously together made an assault and him in bodily fear together feloniously did put, and certain money from his person together feloniously and violently did steal. The actual robbery of the money was not proved, in consequence of the absence of the prosecutor; but the prisoners were convicted of feloniously assaulting the prosecutor with intent to rob him, and the jury found that this felonious assault was committed by the prisoners together. Upon a case reserved, it was held that where the robbery is charged as a simple robbery, the jury may find that the prisoner committed a simple assault with intent to rob; and where an aggravated robbery is charged, the jury may find an aggravated assault (*s*).

The prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him. The jury found them guilty of an assault, but negatived the intent charged. Held, that the prisoners could not, upon this indictment and finding, be convicted of a common assault (*t*).

Principals and Accessories.—The general rules which prevail in other cases of principals and accessories, apply also in the case of robbery (*u*). Thus if several persons come to rob a man, and they are all present, and

(*n*) R. *v.* Fuller, MS. Bayley, J., and R. & R. 408.

(*o*) R. *v.* Gill, 1 Lew. 305. The indictment was upon 4 Geo. IV. c. 54, s. 5. (rep). Bayley, B., seemed also to think that a threat to prosecute would amount to a threat to accuse.

(*p*) *e.g.* R. *v.* Thomas, 1 Leach, 330; 1 East, P.C. 417, 418. Assault on a post-boy with intent to rob the person in the post chaise.

(*q*) R. *v.* Trusty, 1 East, P.C. 418, where two men rushed out from a hedge upon the prosecutor, one presented a pistol and told him to stop. On his calling for assistance both threatened to blow his brains out if he called any more, but neither made any demand for money. Cf. R. *v.* Sharwin, ibid., 421. These cases were decided on 7 Geo. II. c. 21 (rep.) and put an end to doubts expressed in earlier cases as to the need of proving such demand. See 1 East, P.C. 416, 417, 418. 1 Hawk. c. 55, s. 3, and R. *v.* Parfait, 1 Leach, 19.

(*r*) R. *v.* Monteth, 2 Leach, 702; 1 East P. C. 420. Cf. R. *v.* Remnant, 5 T.R. 169; 2 Leach, 583. 1 Hawk. c. 55, s. 8.

(*s*) R. *v.* Mitchell, 2 Den. 468. This decision renders it quite unnecessary to alter the forms of indictment (as, indeed, the Court said) by alleging an assault with intent to commit the robbery alleged. See the note, Dears. 19.

(*t*) R. *v.* Woodhall, 12 Cox, 240. Denman, J. See also R. *v.* Sandys, 1 Cox, 8.

(*u*) See *ante*, Vol. i. pp. 104 *et seq.*

one only actually takes the money it is robbery in all (*v*). So if A., B., and C. come to commit a robbery, and A. stands sentinel at a corner to watch if any person should come, and B. and C. commit the robbery, it will be robbery in A. also, though he was at a distance from them, and not within view (*w*).

Where three men went out to rob, and attacked a man who made his escape, and while two of them were engaged with that man the third robber rode off and robbed another person in the same highway, without the knowledge of the two other robbers, and out of their view, and then returned to them; it appears to have been held, that all of them were guilty of this robbery, as they came together with an intent to rob, and to assist one another in so doing (*x*).

It appeared in evidence that the two prisoners accosted the prosecutor as he was walking along the street, by asking him, in a peremptory manner, what money he had in his pocket. Upon his replying that he had only twopence-halfpenny, one of the prisoners immediately said to the other, 'If he really has no more, do not take that,' and turned, as if with an intention to go away; but the other prisoner stopped the prosecutor, and robbed him of the twopence-halfpenny, which was all the money he had about him. The prosecutor could not say which of them it was that had used this expression, nor which of them that had taken the halfpence from his pocket. The Court held that both prisoners must be acquitted; for if two men assault another, with intent to rob him, and one of them, before any demand of money, or offer to take it is made, repents of what he is doing, and desist from the prosecution of such intent, he cannot be involved in the guilt of his companion, who afterwards takes the money; for he changed his evil intention before the act which completes the offence was committed.

The prisoner who did not take the money was entitled to acquittal, and as the prosecutor could not say which prisoner took the money, neither could be convicted (*y*).

Indictment (*z*), **Trial, &c.**—The indictment for simple robbery is for a common law offence, though the punishment is defined by statute (*a*). It must state an assault upon the person; and that such assault was made *feloniously* (*b*). It is usual to describe the taking in the following

(*v*) 1 Hale, 533. 1 Hawk. c. 34, s. 5.

(*w*) 1 Hale, 534, 537.

(*x*) 1 Hawk. c. 34, s. 5. R. *v.* Pudsey, 1 Hale, 533, 537. This ruling rests on the view that the particular robbery was committed in execution of a common purpose existing in all the offenders at the time of commission. In R. *v.* Hyde, 1 Hale, 537, where several men rode out to rob, but one ultimately rode a different way. He was held not responsible for a robbery afterwards committed by the others, on the view that he repented of or at least did not pursue the common criminal design. *Vide ante*, Vol. i. pp. 112 *et seq.*

(*y*) R. *v.* Richardson, 1 Leach, 387, Buller, J. The Court also said that it was like the Ipswich case, where five men were indicted for murder, and it appeared, on a special verdict, that it was murder in one, but not in the other four, but it did not appear which of the five had given the blow which caused the death; and it was ruled that as the man could not be clearly and positively ascertained, all of them must be discharged.

(*z*) For precedents see Archb. Cr. Pl. (23rd ed.) 523–530.

(*a*) The former discussions about the conclusion of the indictment and the use of the words 'by force and arms' are rendered unimportant by 14 & 15 Vict. c. 100, 524, *post*, p. 1935. As to old practice see R. *v.* Lennox, 2 Lew. 268. R. *v.* Trapshaw, 1 Leach, 427.

(*b*) R. *v.* Pelfryman, 2 Leach, 563; 2 East P. C. 783. Where an indictment

manner: 'certain goods, &c., of the said A. B., from his person and against his will, then and there feloniously and *violently* did steal, take, &c.' But the word *violently* is not essentially necessary.

In R. *v.* Smith (*c*), it was objected that the indictment did not shew that the taking was done *violenter*, and that the prisoner was, therefore, entitled to his clergy, for which the authority of Hale was cited (*d*): but all the judges agreed that the word *violenter* was not a technical term essentially necessary in the indictment: and that if it appeared, upon the whole, that the fact was committed with violence, it was sufficient to constitute a robbery. And with respect to the authority cited, they said that Hale, in the passage referred to, was inaccurate in his expression; that the definition which he gave of robbery was a felonious taking from the person with violence; and that if the fact were so described in the indictment, as to answer the definition, it came up to Hale's own doctrine (*e*). It is considered as uncertain whether the indictment should charge that the party was put in *fear;* though, as such statement is usual, it will be more safe to insert it (*f*). But, in general, no technical description of the fact is necessary, if upon the whole it plainly appears to have been committed with violence against the will of the party (*g*). And where the taking has been by a putting in fear by means of threats to charge the party with sodomitical practices, the indictments appear to have been for robberies in the usual form (*h*).

Where the indictment is under s. 43, *ante*, p. 1127, the circumstances of aggravation accompanying the robbery or assault with intent should be specifically stated, *e.g.*, that 'A. & B, together, or that A. together with another person or persons unknown, did, &c.'

Upon an indictment for robbery it appeared that the prisoner committed the act together with others, who were not apprehended, but it was not so charged in the indictment; and the question was, whether, in order to bring him within the higher penalty, it ought not to have been especially averred. Patteson, J., said, 'Where several are indicted for committing the offence it is not necessary to aver that they were together; but if one be indicted alone, who committed the act with others it is proper that it should be so averred' (*i*). But where an indictment

was held bad which omitted to charge the assault as felonious, though it went on to allege that the prosecutor was feloniously put in corporal fear and danger of his life.

(*c*) 2 East, P.C. 783.

(*d*) 1 Hale, 534, where it is said that the indictment must run *quod vi et armis apud B. in regia via ibidem, &c., 40s. in pecuniis numeratis felonice et violenter cepit a persond;* and, therefore, if the word *violenter* be omitted in the indictment, or not proved upon the evidence, though it were in *altâ viâ regiâ et felonice cepit a persond*, it is but larceny, and the offender shall have his clergy. Dy. 244 *b.* H. 17 Jac. in B. R. 2 Rolle. Rep. 154, are cited.

(*e*) 2 East, P.C. 783.

(*f*) 2 East, P.C. 783. It is not necessary that the indictment should charge that the party robbed was put in fear if it is stated that the prisoner acted *violenter*, and that the party was robbed *contra voluntatem*. Per Foster, J., 19 St. Tr. 806.

(*g*) 2 East, P.C. 783, 708.

(*h*) R. *v.* Jones, 2 East, P.C. 714. 1 Leach, 139, *ante*, p. 1143, and the other cases of a similar nature, cited *ante*, p. 1144, *et seq.*

(*i*) R. *v.* Raffety, 2 Lew. 271. In R. *v.* Doran, 2 Lew. 272 (*n*), the same very learned judge ruled the same way. 'Assuming this ruling to be correct, it may admit of doubt whether it be prudent in an indictment against several, merely to allege that they robbed the prosecutor, because, in case only one were convicted, it may well be doubted whether judgment for the more severe punishment could be given against him. The offence is one consisting of number, and in this respect like a riot; and there it has been held that if all but two be acquitted no judgment can be given

for robbery against two persons had been found at Sessions, and transmitted to Assizes, Maule, J., doubted whether the indictment, in order to exclude the jurisdiction of the Sessions (*j*), ought not to have had the word 'together' in it, and said 'I should have thought that it was necessary, if it had not been for the dictum of my brother Patteson in Raffety's case (*k*); supposing that to be so, then this would be a good indictment' (*l*).

It is not now necessary to allege that the robbery was committed in or near the King's highway (*m*).

Description by her maiden name of a woman who had married between the date of the robbery and the trial was held not to vitiate the indictment (*n*). At common law in the case of robbery from a married woman it was usual and sufficient to lay the ownership of the property taken in the husband (*o*): but since the Married Woman's Property Act, 1882, the wife may be described as the owner.

Where a servant is robbed of property received by him on account of his master, it would seem that ownership should be laid on the servant. In R. *v.* Rudick (*p*), Alderson, B., said, 'It is difficult to see how such an offence as embezzlement could have been part of our criminal law if the possession of the servant of property, which had never come to the hands of the master, were construed to be the possession of the master. If it were, every servant who converted to his own use property received by him for his master would be guilty of larceny' (*q*).

Robbery of Two Persons at Once.—On an indictment for robbery which alleged that the prisoners assaulted G. and H., and stole from G. two shillings, and from H. one shilling and a hat, it appeared that the prisoners attacked G. and H. when they were walking together, and

against them. R. *v.* Sadbury, 1 Ld. Raym. 484, *ante*, Vol. i. p. 429. Perhaps the safer course would be to allege that A., B., and C., 'together with divers other evil-disposed persons,' committed the robbery (see R. *v.* Sadbury), and then if A. alone were convicted, but it was proved that he was in company with another, or others, he might, it is conceived, receive judgment for the higher punishment.' C. S. G. Cf. R. *v.* Plummer [1902], 2 K.B. 339.

(*j*) *i.e.* by warranting transportation (penal servitude) for life. See 5 & 6 Vict. c. 38, s. 1. It should be observed that the statute does not debar the grand jury at sessions from finding the bill and that in the particular case the Court of Assize had jurisdiction to try the transmitted indictment. But the case is of interest on the point whether the omission of the word 'together' renders the charge one of simple robbery.

(*k*) *Supra.*

(*l*) R. *v.* Ramsden, 1 Cox, 37, Maule, J., added, 'The prisoners are now convicted, and if anything more is to be done upon it, I shall consider what is the best course to take.' The prisoners were then sentenced to fifteen and ten years' transportation respectively, a previous conviction having been proved against the one sentenced to the higher punishment. It does not, therefore, appear to be clear that Maule, J., did hold that the word 'together' was essential in all cases, though the marginal note states that he did. But it is certainly prudent in all cases to insert the word 'together' as it is in the statute, and may import a greater proximity than is necessary to constitute a principal in the second degree. See the cases, *ante*, p. 1151, C. S. G.

(*m*) The existing statutes contain no direct reference to 'highway' robbery. As to former rule see 1 Hale, 535, 536. 2 East, P.C. p. 784, 785.

(*n*) R. *v.* Turner, 1 Leach, 536.

(*o*) R. *v.* Sallows, 2 Cox, 63.

(*p*) 8 C. & P. 237.

(*q*) The jury were discharged as to this indictment, and a new indictment preferred laying the property in B. in one count, and in W. in another, and the prisoners were convicted upon it. 'There seems to be a distinction in such cases when the money is stolen from the servant, and where it is embezzled by him. See *post*, "Larceny," "Ownership of Goods," and "Larceny by Servants" and the property in this case seems to have been well laid in the master.' C. S. G.

robbed them both. Tindal, C.J., held that the prosecutor was not bound to elect on which robbery he would proceed. It was all one act and one transaction. The two prosecutors were assaulted and robbed at one and the same time; and there was no interval of time between the assaulting and robbing of one and the assaulting and robbing of the other (*r*).

Robbery and Wounding.—The prisoners were indicted under 7 Will. IV. & Vict. c. 87, s. 2 (*s*), for robbing L., and 'at the time' of the robbery wounding him. The prosecutor had been attacked by three or four men, one of whom struck him a blow on the head with a stick, and several other blows on the body, one of which broke a rib; he became insensible, and when he came to himself he was on the ground, and felt some one tearing his pockets: all his money was taken. Alderson, B., said, 'This indictment charges that the prisoners wounded "at the time" they committed the robbery; the evidence is that the wound was inflicted *before* the robbery. The Legislature having made the distinction between "at," "before," and "after," if it be necessary to lay it correctly, the evidence in this case has failed.' For the Crown it was submitted that 'at the time' must be construed to mean the whole period from the beginning to the end of the transaction; from the moment of the assault to the end of the robbery. Alderson, B., 'That would have been the construction I should have put upon the words "at the time," but for the express words used by the Legislature; but as in the statute those different words are used, it is necessary to prove the act in the precise way in which it is laid' (*t*).

In robbery, as in other compound or aggravated larcenies, the prisoner may be acquitted of the circumstances of aggravation, namely the fear of violence, and found guilty of stealing from the person or of simple larceny (*u*).

On an indictment for robbery, charging a wounding, the jury may acquit of the robbery and return a verdict of unlawful wounding (*v*).

As to the trial of robberies committed within the admiralty jurisdiction see 24 & 25 Vict. c. 96, s. 115 (*ante*, Vol. I. p. 40), and tit. 'Piracy,' *ante*, Vol. I. p. 265.

Sect. II.—Of Stealing from the Person.

Stealing from the person is punishable in the same manner as robbery under 24 & 25 Vict. c. 96, s. 40 (*w*).

To constitute stealing from the person, the thing taken must be completely removed from the person. Where the prosecutor's pocket-book was in the inside front-pocket of his coat, and the prosecutor felt a hand between his coat and waistcoat attempting to get the book out,

(*r*) R. *v.* Giddins, C. & M. 634.

(*s*) Repealed, but re-enacted almost *iisdem verbis* as 24 & 25 Vict. c. 96, s. 43, *ante*, p. 1127.

(*t*) R. *v.* Hammond, 1 Cox, 123. Alderson, B., advised that in future there should be three counts laying the offence in each way.

(*u*) 2 East, P.C. 784. But where a special verdict was found, which stated facts only amounting to larceny, as the only doubt referring to the Court was whether the prisoners were or were not guilty of the felony and robbery charged against them in the indictment; the judges thought that judgment of larceny could not be given upon such finding. They, therefore, remanded the prisoners to be tried upon another indictment. R. *v.* Francis, *ante*, p. 1133.

(*v*) 14 & 15 Vict. c. 19, s. 5.

(*w*) *Ante*, p. 1127.

and the prosecutor thrust his right hand down to his book, and in doing so brushed the prisoner's hand; the book was just lifted out of the pocket, an inch above the top of the pocket, but returned immediately into the pocket; it was held by majority of the judges, that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor; but the judges all agreed that the simple larceny was complete (*x*).

But removal of the property from the person by a hair's breadth is sufficient to constitute the offence (*y*). Upon an indictment for stealing a watch from a person it appeared that the watch was carried by the prosecutor in his waistcoat pocket, and the chain, which was attached to the watch at one end, was at the other end passed through a button-hole of his waistcoat, where it was kept by the watch-key turned, so as to prevent the chain slipping through. The prisoner took the watch out of the prosecutor's pocket, and forcibly drew the chain out of the button-hole; but his hand was seized by the prosecutor's wife; and it then appeared that, although the chain and watch-key had been drawn out of the button-hole, the point of the key had caught upon another button and was thereby suspended. It was contended that the prisoner was guilty of an attempt only; but the Court thought that, as the chain had been removed from the button-hole, the felony was complete, notwithstanding a subsequent detention by its contact with the button; and, upon a case reserved, it was held that the conviction was right. This case was in no respect like R. *v.* Wilkinson (*z*); for in that case there was at no moment the slightest severance from the person; but this was precisely similar to R. *v.* Lapier (*a*). The ear in that case is like the button-hole in this, and the curl is like the button below. The watch was no doubt temporarily, though but for a moment, in the possession of the prisoner (*b*).

Sect. III.—Of Threats and Threatening Letters.

Common Law.—It is said, that to disperse *bills of menace* threatening destruction to the lives or properties of those to whom they were addressed for the purpose of extorting money, is a common law misdemeanor, punishable by fine and imprisonment (*c*). Threats directed against persons immediately under the protection of the Court are punishable as contempt of Court (either *brevi manu* or on indictment or information) by fine and imprisonment; *e.g.* where a man threatens his adversary for suing him, a barrister or solicitor, for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in his custody, and properly executing his duty (*d*). And a precedent is

(*x*) R. *v.* Thompson, 1 Mood. 78.

(*y*) R. *v.* Simpson, Dears. 421; 24 L. J. M. C. 7.

(*z*) 2 East, P.C. 556, *post*, p. 1181.

(*a*) 1 Leach, 320, *ante*, p. 1130.

(*b*) R. *v.* Simpson, *ubi sup.* Jervis, C.J., said he thought the minority of the judges in Thompson's case, *supra*, were right; but the majority might have thought that the outer coat which covered the pocket formed a protection to the pocket-book. As to the distinction between stealing from the person and stealing in a dwelling house, *vide ante*, p. 1115, and R. *v.* Hamilton, 8 C. & P. 49, and other cases cited, *ante*, p. 1116.

(*c*) 1 Hawk. c. 53, s. 1. Reference is made to 1 Hale, 567.

(*d*) 4 Bl. Com. 126, and *ante*, Vol. i. pp. 537 *et seq.*

given of an indictment at common law against the attorney of a plaintiff in a cause for writing a letter to the attorney of the defendant, who had obtained a verdict on the evidence of his son, threatening to indict the son for perjury unless the defendant gave up the benefit of the verdict (*e*).

But it was held that threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling Fryar's Balsam without a stamp, in contravention of the provisions of the Medicines Stamp Act 1802 (42 Geo. III. c. 56), for the purpose of obtaining money to stay the prosecution, was not such a threat as a firm and prudent man might not be expected to resist, and, therefore, was not in itself an indictable offence *at common law*, although it was alleged that the money was obtained, no reference being made to any *statute* which prohibits such attempt. A count alleged that the defendant, intending to abuse the laws for the protection of the revenue, sent the following letter :—

'SIRS,

'I am applied to to prosecute an information against you for selling certain medicines without stamps. I have told the parties that all such informations must now be prosecuted by the public officer, and have advised them to let me write to you on the subject, and hear what you have to say. If I can be of any service to you in stopping them, you will write me accordingly, and I will get the best terms I can.'

Another count charged the defendant with corruptly attempting to extort £10 by threatening that a prosecution should be commenced for having sold Fryar's Balsam without a stamp. After argument in arrest of judgment, Lord Ellenborough, C.J., said, 'To obtain money under a threat of any kind, or to attempt to do it, is, no doubt, an immoral action ; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. Now, the threat used by the defendant at its utmost extent was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is not such a threat that a firm and prudent man might not, and ought not, to have resisted. . . . Then what authority is there for considering these as offences at common law ? The principal case relied on is that of R. *v.* Woodward (*f*), which was where the defendants, having another man in their actual custody at the time, threatened to carry him to gaol, upon a charge of perjury, and obtained money from him under that threat, in order to permit his release. Was not that an actual duress, such as would have avoided a bond given under the same circumstances ? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases, under the influence of such threats, may amount to robbery ; but not so in cases of threats of other kinds . . . But this is a case of threatening, and

(*e*) 2 Chit. Cr. L. 149. (*f*) 11 Mod. 137, more fully stated in 6 East, 133.

not of deceit; and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case, attended with duress, or, according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. The present case is nothing like any of those; it is a mere threat to bring an action, which a man of ordinary firmness might have resisted' (*g*).

It would seem, according to the rule laid down in this case, that an indictment lies at common law, for extorting money by actual duress, or by such threats as common firmness is not capable of resisting. Therefore, where money is extorted from a party by the threat of accusing him of an unnatural crime, and from the circumstances of the case the offence does not amount to robbery, there seems no reason to doubt but that it is indictable as a misdemeanor at common law (*h*).

Statutes.—By the Libel Act, 1843 (6 & 7 Vict. c. 96), s. 3, 'If any person shall publish or threaten to publish any libel upon any other person (*i*), or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing, of any matter (*j*) or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding *three* (*k*) years: Provided always, that nothing herein contained shall in any manner alter or affect any law now in force in respect of the sending or delivery of threatening letters or writings.' It would seem that a justification cannot be pleaded to publication of a libel with the above intents. (*Vide ante*, Vol. I. pp. 1057 *et seq.*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 44, 'Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received knowing the contents thereof, any letter or writing demanding (*l*) of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to

(*g*) R. *v.* Southerton, 6 East, 126, 140. But see R. *v.* Tomlinson, *post*, p. 1166, note (*w*).

(*h*) See a precedent in 3 Chit. Cr. L. 841.

(*i*) *i.e.* a defamatory libel, *vide ante*, Vol. i. pp. 1021 *et seq.*

(*j*) See R. *v.* Coghlan, 4 F. & F. 316. In R. *v.* Yates, 6 Cox, 441. Where one count charged the defendants with offering to prevent the publishing, and another with threatening to publish certain matters of the prosecutor with intent to extort money, and the defendants appeared to have attempted to obtain money from the prosecutor by leading him to believe that an information for an offence relating to the post-horse duties would be laid against him, and that they would prevent it if he paid them a sum of money, it was held that the evidence did not support the counts.

(*k*) This term seems not to be altered by 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*l*) A mere request, such as asking charity without imposing any conditions did not come within the sense or meaning of the word 'demand' in 9 Geo. I. c. 22 (rep.). R. *v.* Robinson, 2 Leach, 749, 2 East, P.C. 1110, Buller, J., but a letter signifying the intention to impute the crime of murder is a sufficient 'demand.' Ibid.

be imprisoned (*m*) . . . and, if a male under the age of sixteen years, with or without whipping ' (*n*).

The earlier Acts punishing this offence, 9 Geo. I. c. 22 and 27 Geo. II. c. 15, did not contain the word ' deliver ' (*o*).

Sect. 45 (*p*). ' Whosoever shall with menaces or by force demand (*l*) any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable (*m*) . . . to be kept in penal servitude . . . or to be imprisoned. . . .

Sect. 46. ' Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death, or penal servitude for not less than seven years (*q*), or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life (*r*) . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act ' (*s*).

Sect. 47. ' Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous (*t*) or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused,

(*m*) The words omitted were repealed in 1893 (S. L. R.). The minimum term of penal servitude is three years, the maximum term of imprisonment is two years, 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*n*) Taken from 7 & 8 Geo. IV. c. 29, s. 8 (E.), and 9 Geo. IV. c. 55, s. 8 (I.). The beginning of this section is made to correspond with the beginning of sect. 46, *infra*, of sect. 50 of the Malicious Damage Act [1861], and of sect. 16 of the Offences against the Person Act [1861], *post*, p. 1611. The alteration as to property, &c., was made that sects. 44, 45, 46 and 47 might correspond.

(*o*) R. *v.* Hammond, 1 Leach, 444; 2 East, P.C. 1119. Delivery of such letters was first made a misdemeanor by 30 Geo. II. c. 24 (ibid).

(*p*) Taken from 7 Will. IV. and 1 Vict. c. 87, s. 7.

(*q*) It is submitted that this means penal servitude for seven years or more. Since 54 & 55 Vict. c. 69, s. 1, there is no crime for which the *minimum* term of penal servitude exceeds three years.

(*r*) The words omitted were repealed in 1892 (S. L. R.). As to present punishment see note (*m*).

(*s*) *Vide ante*, Vol. i. p. 975. The beginning of the section is made to correspond with sect. 44 (*supra*), sect. 50 of the Malicious Damage Act, 1861, *post*, p. 1162, and sect. 16 of the Offences against the Person Act, 1861, *post*, p. 1161.

(*t*) In R. *v.* Gilgannon [1899], 63 J. P. 457, the prisoner was indicted under this section. From the prosecutor's evidence it appeared that the only charge the prisoner made against him was one of indecency (with a male). Wills, J., held that such a charge was not sufficient to support this indictment.

or from any other (*u*) person, any property, *chattel*, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned (*v*) . . . and, if a male under the age of sixteen years, with or without whipping' (*w*).

Sect. 48 (*x*). 'Whosoever, with intent to defraud or injure any other person, shall, by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony, or infamous crime as hereinbefore defined, compel or induce any person to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security, shall be guilty of felony, and being convicted thereof shall be liable, . . . to be kept in penal servitude for life . . . (*y*).

By sect. 49, 'It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person' (*z*).

'Property.'—By sect. 1, 'The term "property" shall include every

(*u*) Prisoner went to a boy's father, and said that the boy had committed an abominable offence upon a mare belonging to him. The prisoner said that if the father would not buy the mare of him for £3 10*s.*, he would accuse the boy. The prisoner also said the same to the boy's master. Failing in his attempt so to dispose of the mare, he preferred the charge against the boy, which was dismissed; held that the prisoner was guilty of threatening to accuse of an infamous crime within this section. R. *v.* Redman, 35 L. J. M. C. 89; 10 Cox, 159. On the trial of an indictment for threatening to accuse of an infamous crime in order to extort money, the guilt or innocence of the party accused is immaterial. R. *v.* Cracknell, 10 Cox, 408. R. *v.* Richards, 11 Cox, 43. *Vide ante*, p. 1150.

(*v*) The minimum term of penal servitude is now three years, and the maximum term of imprisonment with or without hard labour is two years. 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*w*) This section was framed for 7 & 8 Geo. IV. c. 29, s. 8 (E.), and 9 Geo. IV. c. 55, s. 8 (I.). 7 Will. IV. and 1 Vict. c. 87, s. 4, and 10 & 11 Vict. c. 85, s. 27.

(*x*) This section was new in 1861 and framed to meet such cases as R. *v.* Phipoe, 2 Leach, 673, and R. *v.* Edwards, 6 C. & P. 521, *ante*, p. 1129. The valuable security need not be negotiable, and the following document was held to be a valuable security within the section: 'London, July 19, 1875, I hereby agree to pay you £100 sterling, on the 27th instant, to prevent any action against me.' R. *v.* John, 13 Cox, 100, Brett, J.

(*y*) The words omitted were repealed in 1892 (S. L. R.). For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*z*) This section was new in 1861, and intended to meet cases where a letter sent by one person contains menaces of injury by another, and to remove the doubts occasioned by R. *v.* Pickford, 4 C. & P. 227, and see R. *v.* Smith, 1 Den. 510, 19 L. J. M. C. 80; and also to meet cases where property may be demanded by one person with menaces of violence or injury to be caused by another. As to intimidating a person with a view to compel him to abstain from doing or to do any act which he has a legal right to do or abstain from doing, see the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 7, *post*, Bk. xi. c. viii. In prosecutions where the prisoner is charged with demanding money, &c., by menaces, &c., with intent to steal, it would seem that an actual or express demand by words is not necessary. See R. *v.* Robinson, 2 Leach, 749; 2 East, P.C. 1110. The Court will, after the bill is found, upon the application of the prisoner, order the letter to be deposited with an officer in order that the prisoner's witnesses may inspect it. R. *v.* Harris, 6 C. & P. 105, Littledale, J., and Bolland, B.

description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and any thing acquired by such conversion or exchange, whether immediately or otherwise' (*a*).

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 16 (*b*), 'Whosoever shall *maliciously* send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten

(*a*) Taken from 20 & 21 Vict. c. 54, s. 17; but for the words 'the original subject of a trust' in that section, the words 'originally in the possession or under the control of any party' are substituted, in order to embrace other cases than those where 'a trust' has existed. So also, instead of 'the proceeds thereof respectively, and anything acquired by such proceeds,' the words 'anything acquired by such conversion or exchange, whether immediately or otherwise,' are used; so that, however many exchanges may have been made in the property, any fraudulent disposal of the proceeds ultimately obtained may be included within this section. The words 'goods, raw or other materials,' after 'personal property,' are omitted as manifestly falling within these terms.

(*b*) Framed from 4 Geo. IV. c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.

The words 'directly or indirectly cause to be received' are taken from 9 Geo. IV. c. 55, s. 8 (I), and introduced in order to prevent any difficulty which might arise as to a case falling within the words 'send, deliver, or utter.'

The words of 10 & 11 Vict. c. 66, s. 1, 'if any person shall knowingly send or deliver or utter to any other person,' were advisedly omitted, in order that every sending, delivering, uttering, or causing to be received may be included. If, therefore, a person were to send a letter or writing without any address by a person, with directions to drop it in the garden of a house in which several people lived, or if a person were to drop such a letter or writing anywhere, these cases would be within sect. 16. The present enactments make the offence to consist in sending, delivering, uttering, or directly or indirectly causing to be received any letter or writing, which contains a threat to kill or murder any person whatsoever, or to burn or destroy any house, &c., whatsoever, or to accuse any other person whatsoever of any crime, and it is wholly immaterial whether it be sent, &c., to any person or not, or whether it be sent, &c., to the person threatened, or to any other person. The cases, therefore, of R. *v.* Paddle, R. & R. 484; R. *v.* Burridge, 2 M. & Rob. 296; R. *v.* Jones, 2 C. & K. 398; 1 Den. 218; and R. *v.* Grimwade, 1 C. & K. 592; 1 Den. 30, are not to be considered as authorities on these sections so far as they decide that the letter must be sent, &c., to the party threatened.

In indictments under this and the preceding enactments as to writings, a count should be inserted alleging that the defendant uttered the writing without stating any person to whom it was uttered. Counts for uttering forged instruments never state the person to whom they were uttered, and they shew that such a count on this section would clearly be good. See R. *v.* Elsworth, 2 East, P.C. 989.

The words of 4 Geo. IV. c. 54, s. 3, were 'any letter or writing with or without any name or signature subscribed thereto, or with a fictitious name or signature'; but the words of 10 & 11 Vict. c. 66, s. 1, were 'any letter or writing' only, and the latter words are used in this clause, and it is clear that they are large enough to include any writing whatsoever.

The word 'maliciously' was unnecessarily introduced in the committee of the whole House of Commons, and renders this clause inconsistent with sect. 46 of the Larceny Act, 1861 (*ante*, p. 1159), and sect. 50 of the Malicious Damage Act, 1861 (*infra*).

4 Geo. IV. c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1, used the terms, 'knowingly send,' &c. This was a clear inaccuracy; for it would include every person who sent or delivered a letter, though he were ignorant of its contents; 'knowingly,' therefore, has been omitted, and 'knowing the contents thereof' substituted, which really expresses the intention of the clause. See R. *v.* Girdwood, *post*, p. 1162. C. S. G.

years (*c*) . . . and, if a male under the age of sixteen years, with or without whipping.'

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 50 (*d*), 'Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing (*d*), threatening to burn or destroy any house, barn, or other building, or any rick, or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw or other, agricultural produce, in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten years (*c*) . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping.'

Sending.—There are several decisions on the superseded statutes with reference to the evidence necessary to prove that the letter was sent within the meaning of the statutes, and sent with knowledge of its contents. Though the wording of the existing enactments is, as already stated, somewhat different, the following decisions are of some value as guides.

In R. *v.* Girdwood (*e*), the prosecutor proved the delivery by post at his house of a threatening letter and his tracing it to a woman, who swore that she received it from the prisoner's hands and immediately carried it to the post-office. And the servant of the post-office confirmed her account, and both swore to the identity of the letter, the direction being in a remarkable hand. The jury having found the prisoner guilty, the question was submitted to the consideration of the judges, whether there was sufficient evidence to be left to the jury of the prisoner's sending the letter, *knowing the contents*. The judges held that the conviction was right.

In R. *v.* Jepson (*f*), where the prisoners were indicted for 'sending' a letter, the proof was that the letter was in the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the yard of the prosecutor, whence it was taken by a servant of the prosecutor, and delivered to him. In R. *v.* Heming (*g*), the letter was in the handwriting of the prisoner, who sent it to the post-office, whence it was sent to the prosecutor in due course of post. In R. *v.* Lloyd (*h*), where the prisoner dropped the letter into a vestry room, whence the sexton had picked it up, and delivered it to the prosecutor, Yates, J., said that it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance, by which it might finally come to his hands.

(*c*) Nor less than three years or to be imprisoned with or without hard labour for not over two years, 54 & 55 Vict. c. 69, s. 1 (*ante*, Vol. i. pp. 211, 212). The words omitted were repealed in 1893 (S. L. R.).

(*d*) Taken from 4 Geo. IV. c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1. In 4 Geo. IV. c. 54, the words were 'his or their house.' As to the first two lines of this section see note (*b*), *ante*, p. 1161.

The section extends to letters threatening to burn any grain, hay, &c., in or under any building, or to kill, maim, or wound any cattle.

(*e*) 1 Leach, 142; 2 East, P.C. 1120.

(*f*) 2 East, P.C. 1115.

(*g*) Ibid. p. 1116, Chambre, J.

(*h*) Ibid. p. 1122. Cf. R. *v.* Wagstaff, R. & R. 398. R. *v.* Williams, 1 Cox, 16.

In R. *v.* Grimwade (*i*) the prisoner was charged with sending a letter to one B., threatening to burn his house. The letter was directed to 'Sir J. R.,' and was left by the prisoner at a gate on a public road near Sir J. R.'s house. It was picked up by a witness and forwarded by him to Sir J. R.'s house, and there opened by the steward, who read it, but instead of delivering it to Sir J. R., he handed it to a constable, who afterwards shewed the letter both to Sir J. R. and B. who occupied a house under Sir J. R. Alderson, B., directed the jury to consider whether, in leaving the letter as before described, the prisoner intended that it should not only reach Sir J. R., to whom it was directed, but that it should also reach B., saying that if they thought so, that would be a sending to B. A conviction by the jury on this direction was held right.

Where on an indictment (*j*) for sending a threatening letter to the prosecutor, the only evidence against him was his own statement that he should never have written the letter but for G.; Abinger, C.B., held that there was no evidence of the prisoner having sent the letter; as upon this evidence G. might have taken the letter or might have sent it himself, having made the prisoner write it; and there was no evidence of the prisoner having directed G. to take it (*k*).

Menaces.—Where the indictment (*l*) charged that the prisoner sent a certain letter demanding money with menaces, Maule, J., in the course of his summing up to the jury said, 'Is this a letter demanding money with menaces without any reasonable and probable cause? To ascertain this you must, of course, look to the letter itself, and to the situation of the parties. It may be that, under certain circumstances, an apparently innocent letter may convey a threat. It may be that no letter could be written which it might not be possible to prove by extraneous matter did not contain a threat. Now I can conceive a case where such a letter as this might be written:—"Sir, I trust you are well, and I shall be happy to meet you to-morrow." There I should consider myself called upon to withdraw such a letter from the jury, because it would be absurd to say such a letter contained a threat. But as it is impossible I can tell you that this letter may not contain a threat, I cannot decide that it is not a question for the jury.' . . . 'Evidence is to be given of the letter sent, and it is for the jury to say whether or not it contains a sufficient threat' (*m*).

In R. *v.* Walton (*n*), the prisoner was indicted under sect. 45 of the Larceny Act, 1861 (*ante*, p. 1159), for demanding money with menaces from B., and a second count charged larceny of the money. B. owed S. £2 for rent, and S. signed an authority to O., a bailiff, to make a distress for that rent. The agent's clerk went with the warrant to O.'s deputy, and they and the prisoner, a self-appointed bailiff, went to B.'s house, which was locked up. The authority was returned to O., who gave no instructions or authority to the prisoner to proceed in the matter of the distress. Afterwards the prisoners went to B.'s house and demanded the rent due to

(*i*) 1 Den. 30: 1 C. & K. 592. Where the letter is not correctly addressed it is for the jury to say whether it was intended for the person who received it. R. *v.* Carruthers, 1 Cox, 138. See R. *v.* Jones, 1 Den. 218.

(*j*) Under 4 Geo. IV. c. 54 (rep.).

(*k*) R. *v.* Howe, 7 C. & P. 268.

(*l*) Under 7 & 8 Geo. IV. c. 29, s. 8 (rep.).

(*m*) R. *v.* Carruthers, 1 Cox, 138.

(*n*) L. & C. 288: 9 Cox, 268.

S., stating that if it was not paid they had a warrant from a magistrate, and would break open the door and make the distress; but that if B. would pay them five shillings and sixpence for expenses, and sign an I O U for the debt, payable by instalments, they would be satisfied. One of the prisoners shook the door of the house. B. hesitated, and one of the prisoners left and returned with a policeman. Nothing was said as to what the policeman was to do. The policeman did not speak to B. The policeman had only been told that the prisoners had a distress to make. After the appearance of the policeman B. agreed to pay the five shillings and sixpence, and paid them that sum. He believed that they had authority to distrain. It was objected that no such menace as was contemplated by the Larceny Act, 1861, s. 45, was proved, and as to the second count that, if any offence was proved, it was obtaining money by false pretences. The objections were overruled, and the jury were told that the words and conduct of the prisoners, if they believed the facts, constituted a menace within the meaning of the statute. The jury said that they considered the statement made by the prisoners that they had a warrant signed by a magistrate (which was untrue), supported by their procuring a policeman to give them a supposed authority to break into the house, and shewed the intent by violently shaking the door, was a menace within the meaning of the Act, and found both prisoners guilty generally. A case was reserved upon which the following judgment was delivered by Wilde, J. 'The question turns upon the proper construction of the 24 & 25 Vict. c. 96, s. 45. There are many demands for money or property accompanied by menaces or threats, which are obviously not criminal nor intended to be made so. Thus in a case of disputed title to personal property, a man may threaten his opponents with personal violence if he does not relinquish the subject of the dispute, and he would not be within the intention of the statute (*o*). Other instances would offer themselves to a little consideration. Where, then, is the proper limit to the operation of this section? It is to be found in the words "*with intent to steal.*" There is no other restriction expressed. Nothing is said about "*violence*" in conjunction with menaces, still less of violence to the person as distinct from violence to property. There is no express limit, except in the words "with intent to steal." Now a demand for money with intent to steal, if successful, must amount to stealing. It is impossible to imagine a demand for money with intent to steal, and the money obtained upon that demand, and yet no stealing (*p*). The question then arises, what are the incidents attending the procurement of money or property by menace or threats necessary to constitute stealing? It is said in East (*q*), "the taking must in all cases be against or without the consent of the owner to constitute larceny or robbery." On the other hand it is said at the same place, "a colourable gift, which in truth was extorted by fear, amounts to a taking and a trespass."

(*o*) 'This is a faulty illustration. The case would not be within the statute because there would be no intention to steal, however violent the menaces might be.' C. S. G.

(*p*) 'This is a manifest error. If a man makes a frivolous demand of money without any pretence for the demand, and thereby obtains the money, this is clearly no larceny.' C. S. G.

(*q*) 2 East, P.C. 555.

These two passages, when taken together, appear to define the offence of stealing in the case of menaces. For if a man is induced to part with property, through fear or alarm, he is no longer acting as a free agent, and is no longer capable of the consent above referred to. Accordingly, in the cases cited in the argument (*r*), the threatened violence, whether to person or property, was of a character to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent. Now to apply this principle to the present case, a threat or menace to execute a distress warrant is not necessarily of a character to excite either fear or alarm. On the other hand, the menace may be made with such gesture and demeanor, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect: and this should be decided by the jury. Now in this case there was evidence very proper to be left to the jury to raise the above question. But the chairman left no such question to them, and directed them as a matter of law that the conduct of the prisoners (if believed) constituted a menace within the statute. Our judgment that this conviction cannot be sustained is founded entirely on this ground' (*s*).

In R. *v.* Robertson (*t*), the prisoner was indicted under sect. 45, for feloniously demanding, with menaces, five shillings from the prosecutor. The prisoner was a policeman on duty in uniform, and the prosecutor proved that he was going home in the night, and had spoken to a woman when the prisoner came up and said, 'You have been talking to a prostitute.' I said, 'I do not know who she is or what she is.' He said, 'You must go with me to Hotham Street, Bridewell.' I said, 'I had the care of three horses, and if he would go with me to my master, and leave the keys, I would go anywhere with him.' He said I was under a penalty of £1 and costs for talking to a prostitute in the streets, and that if I would give him 5*s*. I might go about my business. He pulled out a book to take my name. He asked my name, and said he would write it down. He did not write it down. He took the book out before he mentioned

(*r*) *Viz.* R. *v.* Parfait, 1 East, P.C. 416. R. *v.* Simons, 2 East, P.C. 731. R. *v.* Taplin, 2 East, P. C. 712.

(*s*) 'No notice was taken of the question raised on the second count. This decision requires reconsideration, as it obviously proceeds upon the fallacy of supposing it necessary that the menaces should be such that if property were obtained by them the offence would be larceny. Now the words of the section warrant no such construction. The words are "whosoever shall by menaces or by force, demand any property, &c., with intent to steal the same." Any menaces or any force, therefore, clearly satisfy the terms of the clause, provided there be an intent to steal. It might just as well be said that, on an indictment for assault with intent to rob, or for wounding with intent to murder, it was necessary to prove such an assault in the one case, or such a wounding in the other, as would be sufficient to effectuate the intent, and yet it has never been doubted that any assault, however slight, or any wound, however trivial, was sufficient, provided the intent were proved. In truth the criminality in these cases depends on the intent. The effect of this decision is to render the clause almost inoperative; for where the menaces have not obtained the money, it is plain a jury will be very reluctant to find that they were sufficient to obtain it. The whole offence consists in the acts and intent of the prisoner; and it is quite beside that to consider what the effect on the prosecutor might be.' C. S. G.

(*t*) L. & C. 483: 34 L. J. M. C. 35.

the 5*s*. I pulled out a half-crown and two-shilling piece, and he placed it in his right-hand pocket. The prisoner afterwards said, 'This is only a two-shilling piece; I must have the other sixpence.' It was objected, first, that as the money was obtained, the case was not within the section; second, that this was not a menace within the statute, as it was a threat to accuse of a non-existing offence; but, upon a case reserved, it was held, first, that the first objection was not unfounded, because part only of the 5*s*. demanded was obtained; and even if the whole had been obtained, R. *v.* Norton (*u*) shewed that that made no difference; second, that there was no ground for the objection that this was not a menace, because it was a threat to accuse of a non-existing offence. If a policeman states that he is acting under authority, and that it is his intention to exercise the authority which he professes to have unless money is given to him, that is a menace within the statute. The threat was within the plain words of the statute (*v*).

To constitute the offence of sending a letter demanding money with menaces within sect. 44 of the Larceny Act, 1861 (*ante*, p. 1158), it is not necessary that the menace should be a threat of injury to the person or property of the prosecutor, or a threat to accuse him of a crime. It is enough if there be a threat to accuse him of misconduct not amounting to an offence against the criminal law. So where the prisoner sent a letter to the prosecutor asking for money and saying that if he did not get it he would let the prosecutor's wife and his friends 'know of your doings with Kate Youde,' the Court held the conviction right. Lord Russell of Killowen, C.J., said, 'In the present case one can see the threat in the letter—a threat to disclose to the wife of the prosecutor alleged indecent behaviour on his part—and the injury so threatened might be much more serious than many cases of injury to person or property . . . I think that the word "menace" . . . may well be held . . . to include menaces or threats of a danger by an accusation of misconduct, though of misconduct not amounting to a crime and that it is not confined to a threat of injury to the person or property of the person threatened' (*w*).

In R. *v.* Taylor (*x*), the prisoner applied to the prosecutor for work, and being refused he asked for a shilling, and being again refused, he became very abusive, and threatened 'to burn up' the prosecutor. He then went into a neighbouring stack, and knelt down close to it, to strike a lucifer-match, but, discovering that he was watched, he blew out the match and went away. No part of the stack was burnt: and on an indictment for attempting to set fire to the stack, the jury were not satisfied

(*u*) 8 C. & P. 671.

(*v*) R. *v.* Walton (*ante*, p. 1163), had been relied on for the prisoner, and the Court did not express any approval of the judgment in that case; and the decision in this case seems to bear against that judgment. On R. *v.* Knewland, 2 Leach, 721 (*ante*, p. 1141) being cited, Channell, B., said, 'This is a statutory offence. The decision in that case was that the facts did not support an indictment for robbery at common law.'

(*w*) R. *v.* Tomlinson [1895], 1 Q.B. 706. Wills, J., said, 'With regard to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind, I only desire to say that it ought in my judgment to receive a liberal construction in practice; otherwise great injustice may be done, for persons who are thus practised upon are not as a rule of average firmness; but I quite appreciate the fact that the threat must not be one that ought to influence nobody.'

(*x*) 1 F. & F. 511. Pollock, C.B., after consulting Cockburn, C.J.

that he intended to set fire to the stack, but they thought that he intended to extort money from the prosecutor by his conduct, and an acquittal was directed; but the prisoner was ordered to be detained on the charge of demanding property with menaces, on the ground that, assuming the finding of the jury to be correct, the prisoner was liable upon such a charge under 7 Will. IV. and 1 Vict. c. 87, s. 7, of which sect. 45 (*ante*, p. 1159) is in substance a re-enactment.

Reasonable or Probable Cause.—The prisoner was indicted (*y*) for delivering to the prosecutor certain letters directed to him and demanding of him money, with menaces, and 'without any reasonable or probable cause.' It appeared that criminal intercourse had frequently occurred between the prisoner and the prosecutor, a clergyman, and that the prisoner had received at different times £1,200 from the prosecutor. Tindal, C.J., told the jury, 'that parts of this offence had been made out, is perfectly clear; that a letter was sent by the prisoner to the prosecutor making a demand of money with menaces, there is no doubt; what you will have to say therefore is whether that was done without reasonable and probable cause; for it is admitted that the menaces contained in these letters are such as are contemplated by the Act; and indeed the threat of exposing a clergyman, who has been guilty of great vices, in his own church on the most solemn day of the year, of publishing his conduct afterwards to every rank of society in his own neighbourhood, and also of spreading his disgrace more publicly still, can scarcely be said to be such a threat as not to require more than ordinary firmness to resist it; and therefore, according to the proper test laid down by Lord Ellenborough (*z*), to be such as not to fall within the meaning of this Act. But the main defence is that there was some just and reasonable ground for the demand made in this case, or that the prisoner at least truly and honestly believed that she had just and reasonable cause for making it; and that is the view which I recommend you to take in applying this evidence. Ask yourselves the question whether this demand was made at a time when the party making it really and honestly believed that she had good and probable cause for making it' (*a*).

The prisoner was indicted (*b*) for sending to J. H. a letter demanding money from her with menaces. The letter sent by the prisoner to the prosecutrix alluded in threatening and mysterious language to facts injurious to her reputation, and added that if she did not write by twelve o'clock on a certain day, he would explain all to her father, brothers, and friends. The prisoner afterwards sent a letter to the father, in which the prisoner stated that he had received instructions to subpœna his daughter, J. H., as a witness against a brothel, which brothel his daughter had frequently visited. J. H. was too ill to attend as a witness on the trial, and on the part of the prisoner it was suggested that, as the fact of her having gone to the brothel was not negatived, it could not be concluded that the prisoner had not reasonable and probable cause for

(*y*) Under 7 & 8 Geo. IV. c. 29, s. 8, re-enacted in substance as sect. 44 of the Larceny Act, 1861, *ante*, p. 1158.

(*z*) In R. *v.* Southerton, 6 East, 126.

(*a*) R. *v.* Miard, 1 Cox, 22. The evidence on which the question was left to the jury is not stated. See R. *v.* Chalmers, 10 Cox, 450 (C. C. R.). R. *v.* Craig [1903], 29 Victoria, L. R. 28.

(*b*) Under 7 & 8 Geo. IV. c. 29, s. 8 (rep.).

the accusation he threatened to make; but Rolfe, B. (Williams, J., being present), told the jury that in his opinion the words 'reasonable and probable cause,' as used in the Act of Parliament, applied *to the money demanded*, and *not to the accusation constituting the threat;* and that if J. H. had in fact gone to the brothel, it would not have made any difference in the case (*c*).

Accusing or Threatening to Accuse of Crime.—The word '*accuse*' in 7 & 8 Geo. IV. c. 29, s. 7 (rep.), was not confined to a threat to prefer a charge before a tribunal competent to entertain it, but included a threat to accuse before any third person, and '*threatening to accuse*' had a like extensive meaning (*d*).

On the trial of an indictment upon 7 Will. IV. and 1 Vict. c. 87, s. 4 (rep.), for extorting money by intimidating a person, by threatening to accuse him of an infamous crime, the jury need not confine themselves to the expressions used before or at the time the money was given; but if those expressions are equivocal, may connect them with what was afterwards said by the prisoner when taken into custody (*e*).

These rulings are equally applicable to ss. 46, 47, and 48 of the Larceny Act, 1861 (*f*).

On an indictment for feloniously accusing H. C. S. of an assault with intent to commit an unnatural offence, with intent to extort money, it appeared that the prosecutor was taking shelter under a portico, when the prisoner, a sentry there, seized him and charged him with having indecently touched or assaulted him, took him to the guard-house, and said to the sergeant, 'I charge this man with indecently assaulting me.' The prosecutor was then taken to the station, where the prisoner made the same charge. On hearing the charge before the magistrate, the prisoner stated that the prosecutor caught hold of his private parts. Cresswell, J., held that evidence of declarations of the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard-house, and accuse him of an unnatural crime, was admissible. The evidence was not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question was, whether on this occasion he did an act with the design of effecting a certain object. One step in the proof was to shew that he would be likely to know that a certain result would follow, and if it could be proved out of his own mouth that he was aware that such a result would be produced, it was an ingredient in the necessary proof that he contemplated it. His whole conduct was to be interpreted with reference to the charge made against him, and what was said by him under similar circumstances to the present, was admissible (*g*).

(*c*) R. *v.* Hamilton, 1 C. & K. 212. Cf. R. *v.* Cracknell, 10 Cox, 408. R. *v.* Richards, 11 Cox, 43.

(*d*) R. *v.* Robinson, 2 M. & Rob. 14. 2 Lew. 273. The words were, 'Give us our allowance money and we will say nothing about it.'

(*e*) R. *v.* Kain, 8 C. & P. 187, Park, J., and Parke, B.

(*f*) In R. *v.* Tomlinson, *ante*, p. 1166, Wills, J., says, 'The words "injury" and "accusation" ought to receive a liberal interpretation and not to be confined to any specific class of injuries or accusations. . . . I do not think that the word "accusation" is confined to cases coming within sect. 46 . . . nor can I think that it applies only to accusations of criminal offences.'

(*g*) R. *v.* Cooper, 3 Cox, 547. It is for the jury to say what the accusation was that the prisoner intended, *id.*, R. *v.* Braynell, 4 Cox, 402.

But where, on a similar indictment, it appeared that the prosecutor had gone into an urinal for the purpose of easing himself, when the prisoner came from an adjoining partition, and said to him, 'If you do not give me a sovereign, I will charge you with an indecent assault'; Erle, J., held that proof that the prisoner had made a similar charge against another person two years before, and when taken into custody gave a false address, was not admissible. He distinguished R. *v.* Cooper (*h*) on the ground that there the main question turned upon the intent with which the accusation was made, and the evidence was there admitted to throw light upon that subject. But in this case the intent was quite manifest if the prosecutor was believed (*i*).

In R. *v.* Henry (*j*), upon an indictment in the ordinary form against T. and H. for robbery it was proved that about nine o'clock at night H. induced the prosecutor to walk with him into a house then being fitted up, under the pretence of shewing him the fittings. When he had entered the prisoner locked the door, seized him by the collar, told him he had him in his power, and if he made a noise he would send for the police, and charge him with sodomitical practices. This induced the prosecutor not to give the alarm, and then H. rifled his pockets of a sovereign and a shilling, and proceeded to take the watch-guard from his neck, and the watch from the fob, and immediately afterwards took some rings from his fingers. Some noise was made while this was going on and T., who was in the house, came to the door of the room, and after trying in vain to gain admittance through it, got in at the window; he came into the room after H. had rifled the prosecutor's pockets, and whilst he was removing the watch-guard. There was a candle burning in the corner of the room; T. took no part in the robbery, and it was not quite clear that he saw it. The jury found H. guilty, and that T. was present at the time of the taking of the rings, and was a party with H. to a design to bring the prosecutor there, and obtain money and property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in or privy to the robbery committed by H., by taking from the person of the prosecutor. It seemed to Parke, B., that since 7 Will. IV. & 1 Vict. c. 87, s. 4, which was in similar terms to sect. 47, *supra*, the offence of robbery and of obtaining money or goods on a charge of sodomy were distinct offences, and that T. could not be considered, under these circumstances, as a principal in the second degree to the robbery. Upon a case reserved, the judges thought that inasmuch as 7 Will. IV. & 1 Vict. c. 87, repealed 7 & 8 Geo. IV. c. 29, s. 7, the offence intended by T. was that of extorting money by accusation, &c., under 7 Will. IV. & 1 Vict. c. 87, and no longer robbery, under 7 & 8 Geo. IV. c. 29, and that the conviction was therefore wrong (*k*).

(*h*) *Supra.*

(*i*) R. *v.* M'Donnell, 5 Cox, 153. In R. *v.* Braynell, 4 Cox, 402, Williams, J., held that depositions containing evidence given by the prisoners, upon a charge made by them against the person who was now the prosecutor, were admissible, but not the cross-examinations of the prisoners.

(*j*) 2 Mood. 118.

(*k*) 'Robbery is a common law felony, and it seems quite clear that no enactment of a new offence alters or prevents a prosecution for that offence. See Williams *v.* R., 7 Q.B. 250, and *ante*, Vol. i. p. 6. So, if there are several felonies created by statute, it is no objection to an indictment for one, that the evidence proves another also. Neither in R. *v.* Henry, nor in R. *v.* Norton, *infra*, was this point noticed.' C. S. G.

But this decision was questioned in R. *v.* Stringer (*l*). S. and N. were convicted on an indictment for assault with intent to rob. The prosecutor proved that at a little after nine at night, he was accosted by N. who asked him the nearest way to the City, which the prosecutor told him. Almost immediately after S. came up from behind, and seized the prosecutor by the collar, and said to him, 'You damned beast, you have been indecently exposing your person; I have been watching you with your friend' (pointing to N.) 'for three-quarters of an hour.' S. then forced prosecutor to go to a police-station, N. accompanying them part of the way. At the station S. repeated the charge which he had made when he first seized the prosecutor, and added that the private parts of both men were exposed; that one had his arms round the neck of the other; and each of them had hold of the private parts of the other. The whole charge was a fiction, and many circumstances were proved to shew that the whole was a preconcerted plan between the prisoners for the purpose of extorting money from the prosecutor; No money, however, was given. Rolfe, B., told the jury that if S. was acting in pursuance of a previous plan, arranged with N., with a view to induce the prosecutor to give him money, in order that he might escape the annoyance attending such a charge, that was an assault with intent to rob. Upon a case reserved upon the question whether the conviction could be sustained, the subject of the charge made by S. against the prosecutor not coming within the terms of 7 & 8 Geo. IV. c. 29, ss. 8 & 9, or 7 Will. IV. & 1 Vict. c. 87, ss. 4 & 22, the judges thought the conviction good, as the prisoners intended to get the money by the violence of the assault, as well as by the charge, which would be a common law robbery. And they doubted whether R. *v.* Henry (*m*) was rightly decided on the ground on which it was decided, viz. that it was not robbery to obtain money by threat of a charge of sodomy.

In R. *v.* Norton (*n*), the first count framed on 7 Will. IV. & 1 Vict. c. 87, s. 4 (rep.), charged that the prisoner threatened to accuse the prosecutor of having attempted to commit with him an abominable crime, and thereby extorted a sovereign, &c. The second count charged the prisoner with robbery in the common form. The third count, framed on 7 Will. IV. & 1 Vict. c. 87, s. 7 (rep.), charged the prisoner with demanding money of the prosecutor with menaces. The prosecutor stated that he was induced to meet the prisoner by his telling him that if he did not he would rue it as long as he lived; when I saw him he said, 'Walk this way'; I followed him, and after we got into a rather lonely place, he said, 'Can you not lend me some money?' I said, 'You have no claim on me, I cannot do so, you can have no money from me'; he then said, 'I am now going to say something of very great importance to you, and it is no use your calling out for help, or giving me into the hands of the police, for if you do, remember I am armed, and if you do, by God! I will have my revenge; and if you do not assist me I will say you took indecent liberties some time ago.' He was exceedingly excited while saying this; he threw his arms about and used violent gesticulation; I thought he

(*l*) 2 Mood. 261.
(*m*) *Supra.*
(*n*) 8 C. & P. 671.

was going to attack me, it was a lonely spot; I was so completely paralysed and overcome I scarcely knew what I was about; I was induced, in consequence of that threat, to give him some money on the spot. The prosecutor added, that he gave him the money both from fear of personal violence, and from the attack on his character. For the prisoner it was contended that the evidence did not support the first count, as the words used did not necessarily import an intention to accuse of an attempt to commit the whole capital crime (*o*). That with respect to the second count, the charge of robbery was not sustainable, as since 7 Will. IV. & 1 Vict. c. 87, the charge of robbery was only sustainable by shewing that the money was obtained by actual force, or the fear of personal violence. With regard to the third count, it was not supported, as the proof was of another offence, namely the actual obtaining of the money with threats. The Recorder in summing up said, 'There is this distinction between the present statute (7 Will. IV. & 1 Vict. c. 87) and the 7 & 8 Geo. IV. c. 29, that in the latter the words are "if any person shall accuse," &c. "every such offender shall be deemed guilty of *robbery*," whereas in the former the words are "shall be guilty of *felony*." There are also in the present statute separate provisions for the punishment of robbery, and also a provision for demanding property with menaces. The difference is, that in the present statute the offence is not asserted to be robbery but only felony, and it may be that the Legislature intended to say, "We will allow the law to remain as it is on the cases decided, as to the crime of robbery; but we will not allow of a constructive robbery (*p*) further than that, but will provide for it by the provisions of this Act." The statute is not very clear: I shall therefore take your opinion as to the matters of fact upon each of the separate charges. With respect to the first count, I am of opinion that the threat must be to accuse of an attempt to commit the complete capital offence; and you will say upon the evidence, whether such a threat has or has not been proved. As to the second count, the question is, whether the prosecutor parted with his money under bodily fear, such as would operate upon a man of firm mind; and if you shall be of opinion that the property was parted with from the influence conjointly of the violence offered and the vague threat of an undefined charge, the crime of robbery will in my opinion have been made out. In order to constitute robbery in the absence of actual force, it is necessary that the party should be put in actual bodily fear, but I shall not think it the less bodily fear because it was produced by two adequate causes, each of them sufficient in itself to produce the effect. If there was violence enough to produce bodily fear it will be a robbery; and I do not think it the less a robbery, because in addition to the violence there was a threat to accuse. Then, with respect to the third count, I shall hold that, if menaces were used to obtain money, that count is sustained, although the money was actually obtained.' The jury found the prisoner guilty on the last two counts, but he was afterwards sentenced on the second count only (*q*).

(*o*) Sodomy was then a capital felony.

(*p*) *Vide ante*, pp. 1138 *et seq.*

(*q*) The Reporters state in a note that the Recorder mentioned the case to Parke, B., and 'that they were both of opinion that in those cases where money was obtained by any of the threats specified in the statute, the indictment must be upon

The prisoner was indicted (under 4 Geo. IV. c. 54, s. 5, rep.) for having feloniously and maliciously, with intent to extort money, charged and accused A. B. with having committed the horrible and detestable crime, &c., and that he feloniously and maliciously did menace and threaten to prosecute the said A. B. The evidence was, that he had threatened to procure witnesses to support a charge already made. It was objected for the prisoner that the statute applied only to the threatening to accuse prospectively, and that this was at most a threat to support such a charge by evidence. Bayley, J., said, 'Threatening to procure witnesses to support a charge already made is not within the Act of Parliament, which makes it felony to extort money by threatening to accuse of an indictable offence. It is one thing to accuse, but another to procure witnesses in support of an accusation already made' (*r*).

In R. *v.* Middleditch (*s*), on indictment under 7 & 8 Geo. IV. c. 29, s. 8, the first count charged the prisoner with accusing the prosecutor of having made a solicitation to him, whereby to induce him to commit with the prosecutor the crime of b———, with a view to extort money from the prosecutor. The second count charged the prisoner with having accused the prosecutor of having made a solicitation to him, whereby to induce him to permit the crime of b——— to be committed by the prosecutor. About half-past ten at night the prisoner, dressed in a soldier's uniform, accosted the prosecutor as he was passing down Hemming's Row, endeavoured to whisper to him, and stopped and asked what hour it was, and, receiving for an answer, 'I don't know exactly, but it is past ten,' attempted to whisper several times again, but the prosecutor drawing back, what the prisoner said in such whispers was inaudible. The prisoner followed the prosecutor for a considerable time through various streets into the Haymarket, Piccadilly, and the Regent Circus, and when asked by a person, who interfered for the protection of the prosecutor in Piccadilly, 'What do you mean by annoying this gentleman?' the prisoner replied, 'I know what I mean.' The prosecutor on getting into Regent Circus applied to a policeman to take the prisoner in charge for following and annoying him, and at the same moment the prisoner ran up and said, 'I charge this person with making an indecent assault on my person.' He afterwards explained this by stating, 'This man came up to me in Orange Street, where I was standing at a watering-place making water, and, putting his hand round a stone, which stood between me and an adjoining urinal, took hold of my private parts.' The same charge was

the statute and not for robbery; but where the money was obtained with threats to accuse, other than those which are specified in the statute, the indictment might be for robbery, if the party was put in fear, and parted with his property in consequence. The finding on the second count was held good. Indeed, it seems sustainable on two grounds; first, that there was violence enough without any threat at all to put the party in fear; and, secondly, that the threat to accuse was not one of those mentioned in the Act, and therefore it might properly be taken into consideration as co-operating with the violence in producing the bodily fear, which in the absence of force is necessary to constitute robbery.' This case was before R. *v.* Stringer, *ante*, p. 1170, and the opinions in this note as to the form of indictment are therefore entitled to less weight, in addition to their being merely extra-judicial, as the count for robbery was clearly proved.

(*r*) R. *v.* Gill, 1 Lew. 305. The learned judge seemed to think that a threat to prosecute would amount to a threat to accuse within the meaning of the Act. See R. *v.* Abgood, 2 C. & P. 436.

(*s*) 1 Den. 92: 2 Cox, 313.

preferred at the station house, and also before the magistrate, with the following addition, '*I said, "What do you mean by that, you d——d old scoundrel?" He made answer, "Don't make a noise for God's sake," and left the place immediately.*' According to the evidence the prosecutor had not been in an accommodation-place that evening with the prisoner or any other person, but being followed by the prisoner, and observing a cigar shop, he inquired where he could find a policeman; the prisoner afterwards continued his annoyance to the prosecutor by following him when he came out of the shop. The jury convicted, and, upon a case reserved upon the question whether there was sufficient evidence to go to the jury and to sustain the verdict on the said two counts, which alleged a solicitation to commit a capital offence in the express terms of the statute, the prisoner's counsel contending that the evidence only proved a charge of an indecent assault, the judges were unanimously of opinion that, if the charge were confined to the charge before the magistrate, it could not be with intent to obtain money. But five of the judges (*t*) thought that the previous conduct of the prisoner, coupled with the charge (before the magistrate) was sufficient evidence for the jury to convict the prisoner on this indictment. Seven of the judges (*u*) thought otherwise.

In the case of letters alleged to contain threats to accuse, &c., it is for the jury to decide on the meaning of the letters (*v*) and the intent with which they were sent. Whether the threatened accusation is true or false is immaterial (*w*).

Where the prisoner was indicted for sending a letter to the prosecutor threatening to accuse him of an infamous crime with intent to extort money, Martin, B., told the jury that the question for them to determine was whether the prisoner intended to extort money, and that it was nothing that he denied it, if his own acts and conduct, and his meaning, as indicated by his letters, plainly proved that such was the real object (*x*).

The prisoner was indicted for sending to the prosecutor the following letter, threatening to burn and destroy his houses, &c.:—

'SIR,—This is to inform you that you are better not let your farm to any of your family; if you do, you will sufer as before. You know how feelt the other day.

'A CAUTION FRIEND.'

It was proposed to ask the prosecutor what he considered was the meaning of the letter, and on this being objected to, Erle, J., said, it appeared to him that the question was admissible. The offence intended by the statute was a threat to burn the premises, and that threat must be

(*t*) Denman, C.J., Tindal, C.J., Erle, Wightman, and Williams, JJ.

(*u*) Pollock, C.B., Alderson, B., Rolfe, B., Coltman, Patteson, Coleridge, and Cresswell, JJ.

(*v*) R. *v.* Girdwood, 1 Leach, 142; 2 East, P.C. 112 (*ante*, p. 1162). In some of the cases on the repealed statutes the judges seem to have thought that there could be no conviction unless on the necessary construction a threat within the statute was imported. See R. *v.* Jepson, 2 East, P.C. 1151 (on 27 Geo. II. c. 15). R. *v.* Boucher, 4 C. & P. 562 (on 4 Geo. IV. c. 54). It is submitted that the true rule is as in cases of libels that the judge is to rule whether the words are capable of a meaning within the statute and for the jury to say whether they were written with that meaning.

(*w*) R. *v.* Menage, 3 F. & F. 310, Martin, B.

(*x*) Ibid.

in writing, and the thing intended to be prevented was the misery occasioned to the party who had received the intimation that his premises would have the calamity of fire brought upon them. Unless the law went so far as to make it punishable to create that fear by any language the author knew would create that fear, the law would be powerless. The very fact of saying ironically, 'I don't say you are a thief,' could be expressed in such a way as to make anybody understand that the party meant to make that charge; and, although there might be no single word in the letter which by itself would appear to mean so to a stranger, yet the party receiving it would perfectly well understand it. The jury must be satisfied that when he wrote those words—'You will suffer as before'—the writer intended to create in the mind of the party receiving the letter the fear that his house would be burnt down. Evidence might be offered that, under the particular circumstances, the words had not their ordinary meaning, but the meaning imputed to them upon the record, and therefore the witness might be asked whether he understood the meaning to be that which the record imputed (*y*).

On the trial of an indictment for feloniously sending a letter with intent to extort money, the prosecutor, after proving the letter in question, said, that on the Saturday following the Thursday on which he received it, he saw the prisoner at a public-house in the Strand, and asked him what he meant by sending him that letter, and what he meant by the expression in the letter 'transactions five nights following.' The prisoner said that the prosecutor knew what he meant. The prosecutor denied it, and the prisoner afterwards said, 'I mean by taking indecent liberties with my person.' Alexander, C.B., submitted to the judges the question whether parol evidence to explain the letter was properly received; adding, that without it the prisoner could not have been convicted, and that by his cross-examination he in effect repeated the charge. All the judges (except Littledale, J., who was absent) agreed that such evidence was properly received (*z*).

An indictment charged that the prisoners feloniously did send to B., a writing without name or signature, directed to the said B., by the name and description of 'Starve Gut B.,' threatening to kill and murder him, which said writing is as follows, viz.:—'Starve gut B., if you don't go on better great will be the consequence; what do you think you must alter an (or) must be set fire; this came from London: i say your nose is as long rod gffg sharp as a flint, 1835. You ought to pay your men.' A second count sent out the letter as threatening to burn and destroy his houses, outhouses, barns, stacks of corn and grain, hay, and straw.

(*y*) R. *v.* Hendy, 4 Cox, 243. 'Mr. Moody gave me this note of this case: an indictment averred that a fire of certain premises of the prosecutor had taken place, and that the prisoner sent a letter threatening to burn the house, &c., of the prosecutor, which was set out, and to the words, "you shall suffer as before" added, "meaning the said fire"; and Erle, J., allowed the prosecutor to be asked "what meaning he, at the time he received the letter, put on these words?"' C. S. G.

(*z*) R. *v.* Tucker, 1 Mood. 134. It has been held, on the trial of an indictment for threatening to accuse a person of an abominable crime, that the jury need not confine themselves to the consideration of the expressions used before the money was given, but may, if those expressions are equivocal, connect with them what was afterwards said by the prisoner when taken into custody. R. *v.* Kain, 8 C. & P. 187.

Denman, C.J., asked the jury in the terms of the statute, whether this was a letter threatening to put B. to death, or to burn and destroy his houses, outhouses, barns, stacks of corn and grain, hay and straw. The jury negatived the threat to put him to death, but found that the letter threatened to fire his houses, outhouses, barns, stacks of corn and grain, hay and straw. Lord Denman, C.J., had some doubts whether this question ought to have been left to the jury, and whether the letter could be in point of law a threatening letter, to the effect found, but, upon a case reserved, the judges held the conviction good after verdict (*a*).

Indictment.—Besides what has been said in the notes to the sections (*supra*, pp. 1158 *et seq.*), the following rules seem to apply. In indictments for sending a letter threatening, &c., the letter should be set out to enable the counsel to see whether it falls within the purview of the enactment on which the indictment is based (*b*). And an intent in the writer consistent with the terms of the letter and within the statute should be alleged (*c*).

It seems to be unnecessary to specify the ownership of the property intended to be extorted, for the word 'extort' implies that the accused is not acquiring his own property, and the gist of the offence is in the intent to acquire and not in the acquisition of the property, the ownership whereof is quite immaterial (*d*). But it seems to be necessary to state who was threatened or from whom the property was demanded (*e*).

It is not necessary to specify the offence of which the prisoner threatened to accuse the prosecutor, but if the offence is specified it must be proved as laid (*f*), unless an amendment is allowed.

Where an indictment contained three counts, each charging the sending of a different threatening letter, Byles, J., held that the prosecutor must elect on which count he would proceed, though any letter leading up to or explaining the letter on which the trial proceeded would be admissible (*g*).

(*a*) R. *v.* Tyler, 1 Mood. 428.

(*b*) So held on the repealed enactments. R. *v.* Lloyd, 2 East, P. C. 1122, and R. *v.* Hunter, 2 Leach, 631.

(*c*) R. *v.* Major, 2 Leach, 772; 2 East, P.C. 1118.

(*d*) R. *v.* Tiddeman, 4 Cox, 387, Platt, B.

(*e*) R. *v.* Dunkley, 1 Mood. 90.

(*f*) R. *v.* Hickman, 1 Mood. 34, Littledale, J.

(*g*) R. *v.* Ward, 10 Cox, 42.

CANADIAN NOTES.

ROBBERY.

Definition of Robbery.—Code sec. 445.

Where the loser in a card game was informed shortly after its termination that he had been cheated and thereupon, in the *bonâ fide* belief (whether mistaken or not), that such was the case, assaulted the winner and by force took from him a part of the money won in the game, such assault and retaking does not constitute theft or robbery. But under such circumstances the accused may properly be convicted of common assault. R. v. Ford (1907), 12 Can. Cr. Cas. 555, 13 B.C.R. 109.

Robbery with Violence; Joint Robbery; Robbery While Armed.—Code sec. 446.

On a indictment for "robbery with violence and wounding" which does not expressly charge either common assault or assault occasioning bodily harm, a verdict of "guilty of assault as charged but not guilty of robbery" is improperly recorded and the result is a mis-trial. R. v. Edmonstone (1907), 13 Can. Cr. Cas. 125 (Ont.).

The jury should have been directed to reconsider the case with a view to finding definitely the character of the assault and as to the wounding and should have been instructed as to the different verdicts which they might find on the indictment. Under the circumstances a new trial should be granted on the whole case as if no verdict had been rendered. *Ibid.*

Penalty for Robbery.—See Code sec. 447.

Assault with Intent to Rob.—See Code sec. 448.

When the complete offence of robbery is charged but not proved, and the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. Section 949. An assault with intent to rob is a form of attempt to rob. Section 72. On a count for robbery the accused may be convicted of any offence the commission of which would be included in the commission of robbery and which is proved, or he may be convicted of an attempt to commit any offence so included. Section 951. An attempt to assault with intent to rob is in itself an indictable offence. Section 571.

When an attempt to commit an offence is charged but the evidence establishes the commission of the full offence the accused is not

entitled to be acquitted, but the jury may convict him of the attempt, unless the Court where the trial takes place thinks it fit in its discretion to discharge the jury from giving any verdict upon such trial and to direct such person to be indicted for the full offence. Section 950. After a conviction for the attempt the accused is not liable to be tried again for the offence which he was charged with attempting to commit. Section 950(2).

Stopping the Mail with Intent to Rob.—See Code sec. 449.

Compelling Execution of Documents by Force.—See Code sec. 450.

Letters Demanding Property with Menaces.—See Code sec. 451.

Under this section (451) what is made criminal is the sending a letter demanding money with menaces; and in these cases it must always be a question of law, whether the menaces in the letters sent are such as are contemplated by the statute. R. v. Gibbons (1898), 1 Can. Cr. Cas., at page 345, per Bain, J. Under section 452, however, the offence is demanding money or property with menaces with intent to steal it.

The words "without reasonable or probable cause" apply to the demand for the money and not to the accusation threatened to be made (following R. v. Hamilton (1843), 1 C. & K. 212, a prosecution under 7 & 8 Geo. IV. ch. 29, sec. 8, the wording of which section is identical with the words of Code sec. 403). R. v. Mason (1847), 24 U.C.C.P. 58.

On a charge of delivering a letter demanding property with menaces and without reasonable or probable cause, the question as to whether the demand was made without reasonable or probable cause is one of fact, and the onus of proof is upon the prosecution to prove the want of reasonable or probable cause. R. v. Collins (1895), 1 Can. Cr. Cas. 48 (N.B.).

Demanding with Intent to Steal.—See Code sec. 452.

See R. v. Gibbons (1898), 1 Can. Cr. Cas., at page 345, per Bain, J., cited above. An essential element of that offence is the intent to steal; and any menace or threat that comes within the sense of the word menaces in its ordinary meaning, proved to have been made with the intent of stealing the thing demanded, would bring the case within the section. For that reason it cannot be determined as a question of law, and without reference to the circumstances of the particular case whether a demand for money with menaces is within sec. 452 or not. *Ibid.*

A demand of money from a hotelkeeper under threat or prosecution for selling intoxicating liquor in prohibited hours contrary to a liquor license statute if the demand be not complied with, may constitute the offence of demanding money with menaces, "with intent to steal the same." R. v. Gibbons (1898), 1 Can. Cr. Cas. 340 (Man.). And see note to sec. 454.

Demanding with menaces money actually due is not a demand with intent to steal. Where prisoner who owned a house deserted his wife, who in his absence rented the house to P., and on returning demanded the rent with menaces from P., who had in the meantime paid it over to the wife, it was held that if he had succeeded in inducing P. thus to pay him the rent he claimed he never could be held to have stolen that money from him, and that his demanding it with threats under such circumstances could not be held to have been a demand with intent to steal. R. v. Johnson (1857), 14 U.C.Q.B. 569. See, however, sec. 501, as to the offence of intimidation.

For the purpose of proving the "intent to steal" it is sufficient if an inference of such intent is deducible from the acts and conduct of the prisoner as shewn by the evidence. The question of intent to steal is one entirely for the jury, and cannot be determined as a question of law by the Judge. R. v. Gibbons (1898), 1 Can. Cr. Cas. 340 (Man.).

To demand and obtain possession of goods from a debtor for the purpose of holding them as security for a debt actually owing, is not a demand with menaces made with "intent to steal," although such possession is obtained by means of an unjustified threat of the debtor's arrest made by the creditor's agent without any honest belief that the debtor was liable to arrest. R. v. Lyon (1898), 2 Can. Cr. Cas. 242 (Ont.).

Threatening Accusation of Crime.—See Code sec. 453, 454.

Where the prisoner is being tried on a charge of having, with intent to extort money, accused or threatened to accuse a physician of having procured an abortion on the prisoner's wife, the evidence for the prosecution being to the effect that the demand for the money was on a claim of seduction as well as abortion, and the defence claiming that the demand was in respect of the seduction only, evidence is not admissible on behalf of the defence to prove that the charge of seduction was true. R. v. Wilson (1902), 6 Can. Cr. Cas. 131.

Where an information for rape or other offence under sec. 453 is laid with the sole intent to extort money or property from the person against whom the charge is made, the informant thereby "accuses" such person with intent to extort or gain something from him under Code sec. 453, and commits an indictable offence thereunder. See R. v. Kempel, 3 Can. Cr. Cas. 481 (Ont.).

Upon a charge of extortion in causing a person to be summoned for ill-treatment of a horse with intent to extort money, a letter written by the person summoned to a third person, on whom he had given an order for the money demanded to settle the charge, is not admissible in evidence against the accused charged with the extortion unless the latter is shewn to have known its contents, although it was written concurrently with the order and was delivered there-

with to such third party by the accused. A summons by a justice of the peace requiring the person summoned to answer a charge punishable on summary conviction under the Criminal Code is a "document containing an accusation" within the meaning of Code sec. 454. And it is an offence under Code sec. 454 for any person, with intent to extort or gain, to cause another person to be served with a justice's summons charging the latter with a criminal offence, notwithstanding that the information was laid by a third person without any such intent to extort. The King v. Cornell, 8 Can. Cr. Cas. 416.

The "offence" whereof to accuse, or threaten to accuse, a person with intent to extort or gain anything from him, which is here made an indictable offence, need not be an "offence" under the Code or other Dominion law, but may be an offence under a provincial law, *ex gr.*, an offence under a Liquor License Act. R. v. Dixon (1895), 2 Can. Cr. Cas. 589 (N.S.), and see R. v. Gibbons (1898), 1 Can. Cr. Cas. 340.

Where in a charge of sending a threatening letter to a person with intent to extort money, it is proved that the accused had stated that he had written a letter to such person, and that he had stated its purport in language to the like effect as the threatening letter, it is not error for the Court to admit the threatening letter in evidence without further proof of the handwriting, and to submit to the jury for comparison with an exhibit, already in evidence, admittedly written by the accused. A jury may properly make a comparison of doubtful or disputed handwriting, and draw their own conclusion as to its authenticity, if the admittedly genuine handwriting and the disputed handwriting are both in evidence for some purpose in the case, although no witness was called to prove the handwriting to be the same in both. R. v. Dixon (No. 3) (1897), 3 Can. Cr. Cas. 220 (N.S.).

CHAPTER THE TENTH.

OF LARCENY.

LARCENY (*a*) is thus defined by Bracton, '*Furtum est, secundum leges, contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit. Cum animo dico, quia sine animo furandi non committitur*' (*b*). In subsequent definitions, the taking of the property has been stated to be 'felonious' (*c*); which expression has been rendered as signifying a taking *animo furandi*, or, as the civil law expresses it, *lucri causa* (*d*). Larceny is defined by East as 'the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner' (*e*). And in R. *v.* Hammond (*f*), Grose, J., in delivering the opinion of all the judges, on a case reserved, said that the true meaning of larceny is 'the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker.'

Petty and Grand Larceny.—At common law a distinction was drawn between petty larceny, *i.e.* theft of property not exceeding 12*d.* in value, which was treated as a misdemeanor (*g*), and grand larceny theft of property over that value which was capital. This distinction was abolished in 1827, by 7 & 8 Geo. IV. c. 28, s. 2, which was repealed in 1861 and re-enacted as sect. 2 of the Larceny Act, 1861, in the following terms: 'Every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the 21st day of June, 1827; and every Court whose power as to the trial of larceny was before that time limited to petty larceny shall have power to try every case of larceny, the punishment of which cannot exceed the punishment herein-

(*a*) *Latrocinium.*

(*b*) Lib. iii. (De Corona), c. xxxii. f. 150*b*. Fleta (lib. i. c. 38, p. 54), says, '*Est autem furtum contractatio rei alienæ fraudulenta, animo furandi, invito illo cujus res illa fuerit.*' And see Brit. c. 15, p. 22. 3 Co. Inst. 107. Mirror of Justices (7 Selden Society Publ., p. 25). Steph. Hist. Cr. iii. 135. Steph. Dig. Cr. L. (6th ed.), art. 321.

(*c*) 3 Co. Inst. 107. 1 Hale, 504. 1 Hawk. c. 33. 4 Bl. Com. 229.

(*d*) 4 Bl. Com. 232. 2 East, P.C. 553, citing from Just. Inst. lib. iv., tit. 1, s. 1, to the following definition: *furtum est contractatio fraudulosa lucri faciendi causa vel ipsius rei vel etiam usus ejus possessionisve. Vide post*, p. 1204.

(*e*) 2 East, P.C. 553. In R. *v.* Holloway, 1 Den. 375, Parke, B., said, 'Perhaps this was the more accurate definition; but it needed some addition; the taking should be not only wrongful and fraudulent, but also "without any colour of right."' But 'felonious intent' excludes any colour of right.

(*f*) 2 Leach, 1089.

(*g*) The amount of 12*d.* was fixed in Anglo-Saxon times. In the *Judicia Civitates Londoniæ* (*temp. Athelstan*), it is laid down that no thief be spared over xii*d.* See the text set out in Gomme, Governance of London [1907], p. 122. And see Stat. West. 1 (3 Edw. 1), c. 15.

after mentioned for simple larceny, and also to try all accessories to such larceny.'

Sect. I.—The Taking and Carrying Away Necessary to Constitute Larceny.

The Actual Taking.—There must be an actual taking or severance of the goods from the possession (*h*) of the owner, on the ground that larceny includes a trespass. If, therefore, there be no trespass in taking goods, there can be no felony in carrying them away (*i*). But the taking need not be by the very hand of the party accused: so that if a thief fraudulently procures a person innocent of any felonious intent to take the goods for him, he is just as liable as if he had taken the goods with his own hands; and should be charged as the principal offender (*j*).

The least removing of the thing taken from the place where it was before with intent to steal it, is a sufficient asportation, though it is not quite carried away (*k*). Thus, a guest who had taken the sheets from his bed, with intent to steal them, and carried them into the hall, was apprehended before he could get out of the house, was held guilty of larceny (*l*). So was a person who had taken a horse in a close, with intent to steal him, but was apprehended before he could get him out of the close (*m*). So was a person, who, intending to steal plate, took it out of a trunk wherein it had been deposited, and laid it on the floor, but was surprised before he could carry it away (*n*). And the removal of a parcel from the head to the tail of a waggon, with an intent to steal it, was held a sufficient asportation to constitute larceny (*o*). But where, on indictment for stealing a wrapper and four pieces of linen cloth, and the facts were that the pieces of linen cloth were packed up in the wrapper in the common form of a long square, and laid lengthways in a waggon; that the prisoner set the package on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose; but that he was discovered and apprehended before he had taken anything out of it, his acts were held not to amount to larceny as the bale had not been removed from the place where it first laid, though his intent to steal was manifest (*p*). But where the prisoner had lifted up a bag from the bottom of the boot of the coach, and was detected

(*h*) In R. *v.* Kidd, 72 J. P. 104; 148 C. C. C. Sess. Pap. 267, the defendants were indicted for stealing copies of pirated music belonging to the copyright owner. The defendant dealt in and sold pirated music, and it was submitted that by sect. 23 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), the copies of the pirated music were the property of the copyright owner and that larceny had been committed by the defendant. Bosanquet, Common Serjeant, however, held that the copies of the pirated music never were in the possession in any sense of the copyright owner and that they were never taken from him; and that this was not larceny.

(*i*) Kel. (J.) 24, a case where a lodger carried off furniture let to her with the rooms. 1 Hawk. c. 33, s. 1. Bac. Ab. tit. 'Felony' (C.). 2 East, P.C. 554.

(*j*) 1 Hale, 514. 2 East, P.C. 555. As to responsibility for crime committed through innocent agents, *vide ante*, Vol. i. p. 104.

(*k*) 3 Co. Inst. 108. 1 Hawk. c. 33, s. 25. Bac. Abr. tit. 'Felony' (D.). 4 Bl. Com. 231. 2 East, P.C. 555.

(*l*) 3 Co. Inst. 108. 1 Hale, 507, 508.

(*m*) 3 Co. Inst. 109.

(*n*) R. *v.* Simson, Kel. (J.) 31.

(*o*) R. *v.* Coslet, 1 Leach, 236. All the judges.

(*p*) R. *v.* Cherry, 2 East, P. C. 556. 1 Leach, 236 note (*a*). All the judges.

before he got it out of the boot; and it did not appear that the bag was entirely removed from the space which it had first occupied in the boot; but the raising it from the bottom had completely removed each part of it from the space which that specific part occupied: the judges held, upon a case reserved, that there was a complete asportation (*q*). Where the prisoner went into the stable of an inn, and pointing to a mare, said to the ostler, 'That is my horse, saddle him'; the ostler did so, and the prisoner tried to mount the mare in the inn-yard, but from the noise made by some music the mare would not stand still: the prisoner then directed the ostler to lead the mare out of the yard for him to mount; the ostler led the mare out, but before the prisoner had time to mount her, a person who knew the mare came up, and the prisoner was secured; it was held that if the prisoner caused the mare to be led out of the stable intending to steal her, that was a sufficient taking to constitute a felony (*r*).

On an indictment for stealing, embezzling, and secreting a letter, it appeared that the letter was, amongst others, sorted to the prisoner for delivery, and ought to have been delivered by him at its destination, but was not delivered, and the prisoner returned to the post-office as usual, and reported himself as having finished his delivery. It was his duty in case there were any letters, which for any cause he was unable to deliver, to bring them back to the post-office on his return from the delivery; he brought the pouch which contained four, which he had been so unable to deliver, but the letter in question was not returned, nor did the prisoner give any account of it. The prisoner, on being asked why he had not delivered it, at once produced it from his pocket; unopened, and with the coin safe within it. Upon being asked why he had not delivered it, he said that the house was closed, which was false; and he also stated that he was going to deliver it in the afternoon. The jury were directed that if they were satisfied that the prisoner put the letter into his pocket with intention to steal or secrete it, he might be convicted; and, on a case reserved, it was held that when the prisoner put the letter in his pocket with that intent, the offence was complete (*s*).

Where on an indictment for stealing porter, it appeared that the prisoner had made a hole in the barrel through which the porter flowed into a can on the ground; but a person snatched up a can while the porter was running into it in the presence of the prisoner; Coltman, J., held that there was a sufficient asportation of what porter was run out (*t*).

Upon an indictment for stealing gas, it appeared that the prisoner had contracted for the supply of his house with gas, to be paid for by meter. The meter, which was hired by the prisoner of the gas company, was connected with an entrance pipe, through which it received the gas from the company's main in the street, and an exit pipe through which the gas was conveyed to the burners. The entrance and exit pipes were the property of the prisoner. The prisoner, to avoid paying

(*q*) R. *v.* Walsh, MS. Bayley, J., and 1 Mood. 14.

(*r*) R. *v.* Pitman, 2 C. & P. 423, Garrow, B.

(*s*) R. *v.* Poynton, L. & C. 247.

(*t*) R. *v.* Wallis, 3 Cox, 67. Coltman, J., said he would reserve the point. 'The prisoner was convicted and probably no case was reserved, because Coltman, J., a very sound lawyer in criminal as well as other matters, was clear that there was no doubt upon the point.' C. S. G.

for the full quantity of gas consumed, and without the knowledge or consent of the company, had caused to be inserted a connecting pipe with a stop-cock upon it into the entrance and exit pipes and extending between them. He shut the stop-cock at the meter, so that gas could not pass into it, and opened the stop-cock in the connecting pipe, when a portion of gas ascended through the connecting pipe into the exit pipe, and from thence to the burners, and the gas was consumed there. It was contended that the entrance pipe being the property of the prisoner, he was in lawful possession of the gas by the consent of the company so soon as it had been let into his entrance pipe out of the main, and that his diverting gas in its course to the meter was not larceny. The jury were told that if they were of opinion that the entrance pipe was used by the company for the conveyance of their gas by the permission of the prisoner, but that he had not by his contract any interest in the gas or right of control over it until it passed the meter, his property in the pipe was no answer to the charge; that there was nothing in the nature of gas to prevent it being the subject of larceny; and that the stop-cock on the connecting pipe being opened by the prisoner, and a portion of the gas being propelled through it by the necessary action of the atmosphere, and consumed at the burners, there was a sufficient severance of that portion from the volume of gas in the entrance pipe to constitute an asportavit, and that if the gas was so abstracted with a fraudulent intent, the prisoner was guilty of larceny. The jury answered these questions in the affirmative and gave a verdict of guilty, and upon a case reserved it was held that this direction was correct. 'There may be larceny of gas as well as of wine or oil (*u*). The gas was not put into the possession of the prisoner, but was in the possession of the company, and the prisoner took it away, having an *animus furandi*, and converted it to his own use. It was the gas of the company, and its being in the prisoner's pipe makes no difference. There is nothing in the nature of gas to make it not the subject of larceny, and by means of the stop-cock it was abstracted' (*v*).

Attempt.—Where goods in a shop were tied to a string by one end to the bottom of the counter, and a thief took up the goods and carried them towards the door, as far as the string would permit, and was then

(*u*) Or water (Ferens *v.* O'Brien, 11 Q.B.D. 21; 52 L. J. M. C. 70), or electricity (45 & 46 Vict. c. 56, s. 23). See *post*, p. 1280.

(*v*) R. *v.* White, Dears. 203; 22 L. J. M. C. 123. Another, and perhaps better, answer to the objection was, that the prisoner abstracted gas from the main of the Company, and that that gas, as well as the main, was in their possession; for assuming that the entrance pipe was in the possession of the prisoner, he fraudulently caused the gas to flow out of the main into the entrance pipe, that is, out of their possession into his possession. On the argument before the judges, it was also urged that the offence was made a specific offence by the Gas Works Clauses Act, 1847 (10 & 11 Vict. c. 15, s. 18), and therefore was not indictable; the Court held that that section might apply to cases where the act done would not be larceny; as if the prisoner had altered the machinery of his meter, and made it register wrong; but even if the Legislature had made this a distinct offence, it would not be the less a larceny. It was also urged that everything taken went into the possession of the prisoner by the consent of the original owner, and no fraudulent representation was made; the answer to this is, that the owner only consented to that which was measured by the meter going into the prisoner's possession; and Martin, B., said, 'If there was a spout in a stable to get corn from a bin, and the ostler by boring a hole higher up got the corn out and took it away for himself would not that be larceny?' C. S. G. Cf. R. *v.* Firth, L. R. 1 C. C. R. 172; 38 L. J. M. C. 54.

stopped; this was held not to be larceny, because there was no severance (*w*). And where a thief took from the pocket of the owner a purse, to the strings of which some keys were tied, and was apprehended with the purse in her hand, but still hanging by means of the keys to the pocket of the owner, it was ruled not to be larceny, on the ground that as the purse still hung to the pocket of the owner by means of the strings and keys, it was in law still in his possession (*x*). In such cases the prisoner may be convicted of an attempt to steal, either on an indictment for the full offence (*y*), or on an indictment specifically charging the attempt.

Where a count charged the prisoner with an attempt to steal 45 lbs. of meat of C., it appeared that C. was the contractor who supplied meat to a camp, and the course of business was for him each morning to send by his servants meat to the quartermaster-sergeants at the camp, and a soldier from each mess attended. The quartermaster-sergeant had his own scales and weights, and with these he and C.'s servant together weighed out to each soldier in attendance the proper quantity of meat for each mess. C.'s servant came one day in charge of the meat, and he and the quartermaster-sergeant proceeded to weigh out the meat to the different messmen with the quartermaster-sergeant's weights, the prisoner putting the weights in the scale. It was discovered that the 14 lbs. weight of the quartermaster-sergeant had been removed, and a false 14 lbs. weight had been substituted for it, and used in weighing the meat. It was objected that there was no overt act so proximately connected with an attempt to steal as to justify a conviction; but the case was left to the jury, who found that the prisoner fraudulently substituted the false for the true weight with intent to cheat; that his intention was to steal the difference between the just surplus for which he would have to account to his master and the apparent surplus remaining after the false weighing, and that nothing remained to be done, on his part, to complete his scheme, except to carry away and dispose of the meat, which he would have done if the fraud had not been detected; and, upon a case reserved, it was urged that nothing was done by the prisoner with reference to stealing the meat; all that he did was to put a false weight into the scale; but that act was too remote. Secondly, that the property in the meat as soon as it was put in the scale became the property of the Queen. But it was held that the conviction was right. If the prisoner had actually moved away with any part of the meat the larceny would have been complete. The meat was in the prisoner's custody and under his control. He had almost the manual comprehension of it, and had all but begun the asportation. The preparation of the false weight, the placing it in the scale, and the keeping back the surplus meat, were several overt acts, which brought the attempt

(*w*) Anon. 2 East, P.C. 556, Eyre, B. So where the prisoner drew the end of a piece of lace through a hole in a window and shook the card on which the remainder of the lace was wrapped, but not so as to remove it from its place, it was held not to be larceny. R. *v.* Newman. Talf. Dick. Q. S. 216.

(*x*) R. *v.* Wilkinson, 1 Hale, 508; 2 East, P.C. 536. As to the possession of the property by the thief, in cases of robbery see R. *v.* Lapier, *ante*, p. 1130, and R. *v.* Farrell, *ante*, p. 1129.

(*y*) 14 & 15 Vict. c. 100, s. 9. See R. *v.* Ring, 61 L. J. M. C. 116. R. *v.* Brown, 24 Q.B.D. 357. R. *v.* Cheeseman, *infra*. And see *ante*, Vol. i. p. 144.

close to completion ; and if the actual transaction has commenced, which would have ended in the offence if not interrupted, there is clearly an attempt to commit the offence. As to the second point, the property was in the vendor until it passed out of him to the vendee by delivery (*z*).

Returning the Goods.—Where there has once been a sufficient taking of the goods by the thief, the offence is completed and will not be purged by a return of the goods (*a*).

In R. *v.* Wright (*b*), upon an indictment of a servant for stealing his master's plate, it appeared that the plate had been pawned by the prisoner who had redeemed it, and had returned it after it was missed, but before complaint to a magistrate. The prisoner had also on previous occasions pawned and redeemed plate. Hullock, B. (Holroyd, J., being present) left it to the jury to say, whether the prisoner took the plate with intent to steal it, or whether he merely took it to raise money on it for a time, and then return it ; for that in the latter case it was no larceny. But in R. *v.* Phetheon (*c*), where a servant was indicted for stealing a silver saucepan, which had been pledged at a pawnbroker's, and the counsel for the prisoner asked the jury to consider whether he took it feloniously, or intending at the time he pawned it to redeem it as soon as he could ; Gurney, B., in summing up, said, ' You will say whether the prisoner stole this property or not. I confess, I think, that if this doctrine of an intention to redeem property is to prevail, Courts of justice will be of very little use. A more glorious doctrine for thieves it would be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined ' (*d*). And in R. *v.* Medland (*e*), where it appeared that the prisoner had taken ready furnished lodgings, and had pawned some of her landlord's property, but she had often pawned and afterwards redeemed portions of the same property ; the Recorder of London consulted Coleridge, J., and Platt, B., and they both agreed with him that there was nothing in the evidence that would justify the jury in acquitting the prisoner, on the ground that she took the property with the intention of redeeming it ; and the jury were directed that for such a defence to be at all available, there must not only be the intent to redeem, evidenced by similar previous conduct, but there must be proof also of the power to do so.

One count charged the prisoner (*f*) with having, as bailee of plate, fraudulently converted it to his own use. Another count charged him with simple larceny of the same plate. The prosecutrix deposited with the prisoner, who had offered to take care of anything for her during her absence, a chest of plate for safe custody till she returned. When the chest of plate was placed in the prisoner's hands, it was locked (the prosecutrix keeping the key), then covered with a wrapper, sewn together, and sealed in a great number of places, and then tied with a cord. The

(*z*) R. *v.* Cheeseman, L. & C. 140 ; 31 L. J. M. C. 89.

(*a*) See 2 East, P.C. 557, and as stated with reference to robbery, *ante*, p. 1130.

(*b*) Carr. Supp. 278, 9 C. & P. 554 (*n*).

(*c*) 9 C. & P. 552.

(*d*) 9 C. & P. 552. See R. *v.* Wynn, *post*, p. 1183.

(*e*) 5 Cox, 292. Cf. R. *v.* Naylor, L. R. 1 C. C. R. 4 ; where it was held that the offence of obtaining by false pretences was complete when the goods were obtained by the pretence, though he meant to pay for them when he could.

(*f*) Under 20 & 21 Vict. c. 54, s. 4, re-enacted as 24 & 25 Vict. c. 96, s. 3, *post*, p. 1245.

prisoner was not informed of the contents of the parcel, nor was any key given to him. The prisoner uncorded the chest, broke the seals, took off the wrapper, procured a key, and opened the chest. A pawnbroker advanced £200 to the prisoner, taking bills for the amount, and the whole chest of plate, worth from £500 to £600. The prisoner had made false statements to the pawnbroker to account for his possession of the plate, and also to the prosecutrix on her return as to where the plate was. The prisoner was unable to redeem the plate. The jury found the prisoner guilty on both counts, but recommended him to mercy, 'believing that he intended ultimately to return the property.' It was then contended that to support either of the counts, it was necessary that the prisoner should have intended permanently to deprive the prosecutrix of the property, and that the verdict shewed that was not his intention; but, upon a case reserved, it was held that the conviction was right on the count for larceny. To constitute larceny, there must be an intention on the part of the thief to appropriate the property to his own use, and usurp an entire dominion over it; and, if at the time of the asportation, his intention is to make a mere temporary use of the chattels taken, so that the dominus shall have the use of them afterwards, that is a trespass and not larceny; but that law did not apply to this case. Here there was abundant evidence of a larceny at common law. Assuming that the reason for recommending the prisoner to mercy was to be considered as part of the finding of the jury, all that they said was that he intended ultimately to return the property, not that at the time of the wrongful taking he had any such intention. But the recommendation to mercy was no part of the verdict; it assumed that the verdict of guilty was correct; but the jury seem to have thought that the prisoner had it in his mind at some uncertain time, to restore the plate if he could get it again; and they might consider that a sufficient reason for recommending him to mercy. That interpretation makes sense of their finding (*g*).

The prisoner was convicted, upon two indictments for the larceny, as bailee, of two watches. He was a travelling watchmaker, and about August he received a watch from one of the prosecutors to be repaired. This watch he pledged shortly before Christmas and asked the person he pledged it with not to part with it as it was not his property. The other watch was handed to the prisoner in November and pledged by him the same month, the prisoner saying he only wanted the money temporarily. He was arrested the following April and had not redeemed either watch. Field, J., entertained some doubt whether, inasmuch as the act of conversion merely amounted to a pledge, there was reasonable evidence of a fraudulent conversion, *i.e.* an intention on the part of the prisoner to deprive the prosecutors permanently of their property, but the Court held, upon a case reserved, that there was some evidence of a fraudulent conversion and upheld the conviction (*h*).

(*g*) R. *v.* Trebilcock, D. & B. 453. The only reference made to the question as to the case coming within 20 & 21 Vict. c. 54, s. 2, was that Campbell, C.J., told the prisoner's counsel that he 'need not consider the recent statute. If it is not larceny at common law, the statute will not make it so.'

(*h*) R. *v.* Wynn [1887], 16 Cox, 231 (C. C. R.). See also *post*, pp. 1184 *et seq.*

SECT. II.—THE TAKING ANIMO FURANDI.

One of the most material considerations respecting the taking and carrying away of goods necessary to constitute larceny is, whether the fact were done *animo furandi*—'*cum animo dico, quia sine animo furandi non committitur*' (*i*). The ordinary proof of such felonious intent is that the party commits the fact clandestinely, or, upon its being laid to his charge, denies it: but this is by no means the only criterion of criminality; for the variety of circumstances is so great, and their complication thereof so mingled, that it is impossible to recount all those which may indicate a felonious intent, or *animo furandi*. The felonious intent must be left, upon the particular circumstances, to the due and attentive consideration of the Court and jury, who will not forget the excellent rule, that in doubtful cases it is proper rather to incline to acquittal than conviction (*j*). The following pages deal with points which have already occurred.

Where the Taking is only a Trespass.—The taking, though wrongful, may only amount to a trespass. Thus, if a man takes away the goods of another openly before him or others, otherwise than by robbery, this is evidence only of a mere trespass, because done openly in the presence of the owner or of other persons who are known to the owner (*k*). And the evidence of its being only a trespass will be strong, where a person, having possessed himself of the goods of another, avows the fact before he is questioned (*l*). If a man leaves a harrow or plough in a field, and another person who has land in the same field uses those instruments, and having done with them, either returns them to the place where they were, or acquaints the owner with his having taken them, this is no felony, but at most a trespass (*m*). And the same conclusion must be drawn where a man, having cattle upon a common which he cannot readily find, takes his neighbour's horse, which is depasturing on the common, rides about upon it to find his cattle, and when he has done with it turns it again upon the common (*n*). But the case will not be so clear where the property is taken without the privity or leave of the owner, and no intention to return it is manifested by the party by whom it was taken.

Where two men were indicted for stealing a mare and a gelding, it appeared that they went to the stables of the prosecutor by night and took out the mare and the gelding, and rode on them to L., a place about thirty miles off, where they took them to different inns, and left them in the care of the ostlers, directing the ostlers to clean and feed them, and saying that they should return in three hours. In the course of the same day the prisoners were arrested fourteen miles from L., walking away from it. The jury having been directed to consider whether the prisoners, when they took the mare and gelding, intended to make any further use of them than to ride them for the purpose of assisting them on their journey towards the place where they were going, and then to leave them to be recovered by the owner or not as it might turn out, found the prisoners guilty; but added that they were of opinion that the prisoners meant merely to ride the horses to L., and leave them there; and had

(*i*) *Ante*, p. 1174.
(*j*) 1 Hale, 509. 4 Bl. Com. 232.
(*k*) 1 Hale, 509.
(*l*) 2 East, P.C. 661.
(*m*) 1 Hale, 509. 4 Bl. Com. 232.
(*n*) 1 Hale, 509.

no intention to return for them, or to make any further use of them. At a conference of the judges this finding was considered; when the majority held it to be only a trespass, and no felony, as there was no intention in the prisoners to change the property, or make it their own, but only to use for the particular purpose of saving their labour in travelling. They agreed, however, that it was a question for the jury; and that, if the jury had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned (*o*).

Where the prisoner took away a horse and other property altogether, and after going some distance turned the horse loose and proceeded on foot to a place where he was stopped attempting to sell some of the other property; it was left to the jury to say, whether the prisoner had any intention of stealing the horse; for that, if he intended to steal the other articles, and only used the horse as a mode of carrying off the other plunder more conveniently, and, as it were, borrowed the horse for that purpose, he would not be in point of law guilty of stealing the horse (*p*).

On an indictment for horse stealing, it appeared that the horse was taken by the prisoner out of a stable near where he lived, with a bridle, and ridden by him to Bewdley on his way to Birmingham, a distance of forty miles, where he left the horse at an inn, and it was contended that the prisoner, wishing to see Birmingham, merely took the horse to assist him along the road. Atcherly, Serjeant, told the jury that 'if a person, without leave or authority, takes a horse for frolic, or any purpose, without intent to steal, he is not guilty of felony. This intent must be gathered from the circumstances, especially from the disposition to sell the animal. In this case the prisoner does not appear to have ever offered the horse for sale; but when he arrived at the inn at Bewdley, he had the horse fed, and then went to sleep elsewhere, and, moreover, he returned to the neighbourhood whence he took the horse and where he was well known' (*q*).

The prisoner took from the house in the night a young girl's bonnet, and some other articles of her dress, and carried them to a hay-mow where he had twice had connection with her; and the jury thought that he only took them in order that she might again go to the mow, and that he might have another opportunity of soliciting her to repeat the connection. Upon a case reserved, the judges thought the taking with such an intent was not felonious, and the prisoner was pardoned (*r*).

By sect. 39 (*s*) of the Larceny Act, 1861 (24 & 25 Vict. c. 96), 'Whosoever,

(*o*) R. *v.* Philipps, 2 East, P. C. 662. One judge, Grose, J., thought the case was felony because they did not mean to return the horse to the owner. Lord Alvanley declined to give any express opinion.

(*p*) R. *v.* Crump, 1 C. & P. 658, Garrow, B.

(*q*) R. *v.* Addis, 1 Cox, 78. This case does not warrant the marginal note. 'It is not felony to take a horse and ride him forty miles away, there leaving him, if there was no attempt to sell or dispose of him.'

(*r*) R. *v.* Dickinson, MS. Bayley, J., nd R. & R. 420.

(*s*) This section is framed from 2 & 3 Vict. c. 58, s. 10, passed in consequence of R. *v.* Webb, 1 Mood. 431, on which it was held not to be larceny for tributers in a copper mine to take ore from the heaps piled by other tributers, as all the ore gotten was in the possession of the adventurers of the mine, and there was no intention to deprive them of the property but merely to cheat the tributers from whose pile the ore was taken. S. 10 was confined to Cornwall. The present section extends to England and Ireland. In R. *v.* Trevenner, 2 M. & Rob. 476, Cresswell, J., held that an indictment under 2 & 3 Vict.

being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . .' (*t*).

In R. *v.* Holloway (*u*), the prisoner was employed by the prosecutors, who were tanners, to dress skins of leather. The skins when dressed were delivered to the foreman, and every workman was paid in proportion to the work done by himself. The skins were afterwards stored in a warehouse adjoining the workshop. The prisoner got access clandestinely to the warehouse, and carried away skins, which had been dressed by other workmen. The prisoner did not remove the skins from the tannery, but they were recognised the following day at the place where he usually worked in the workshop. It was a common practice at the tannery for one workman to lend work, that is to say, skins dressed by him, to another workman, and for the borrower in such case to deliver the work to the foreman, and get paid for it on his own account as if it were his own work. A question arose as to the intention of the prisoner in taking the skins from the warehouse. The jury found that the prisoner did not intend to remove the skins from the tannery, and dispose of them elsewhere, but to deliver them to the foreman and get paid for them as if they were his own work, and in this way he intended the skins to be restored to the possession of his masters. And upon a case reserved upon the question, whether on the finding of the jury the prisoner ought to have been convicted of larceny, the judges held that he ought not. They felt constrained to follow the decision in R. *v.* Webb (*v*), that to constitute larceny the intention of the taker must be to take entire dominion of the property, *i.e.* to deprive him wholly of the property (*w*).

R. *v.* Holloway was followed in R. *v.* Poole (*x*). There the prisoners were indicted for stealing gloves from their master, a glovemaker, and it appeared that when they had done any work, the practice was to take the finished gloves to an upper room, and lay them on a table, in order that the workmen might be paid according to the number finished. The prisoners broke open a store room, on the premises of the master, took

c. 58, s. 10, was bad for not alleging that the ore was in the mine when it was removed. For s. 38 *vide post*, p. 1258.

(*t*) The words omitted are repealed.

(*u*) 1 Den. 370; 2 C. & K. 942.

(*v*) 1 Mood. 431.

(*w*) It is well worthy of notice that in this case the prisoner never claimed either the property in, or the *possession* of the skins; all at the utmost that he assumed was the mere *custody* as a servant. The like observation applies to R. *v.* Webb. These cases, therefore, entirely differ from those where a person, not a servant, takes possession of a chattel even for a temporary purpose. In the course of the argument, Alderson, B., said, 'If a servant takes a horse out of his master's stable, and turns it into a road with intent to get a reward the next day by bringing it back to his master, would he be guilty of larceny?' In fact, this case is precisely the same as if the prisoner had never removed the skins at all (for the removal made no change in the property or possession), but had merely alleged that he had dressed a number of skins lying on the floor of the warehouse, and thereby had obtained the amount that would have been due to him if he had dressed those skins. C. S. G. Cf. R. *v.* Richards, 1 C. & K. 532 (*post*, p. 1205), and R. *v.* Hall, 1 Den. 381 (*post*, p. 1188).

(*x*) Dears. & B. 345.

out a quantity of finished gloves, and laid them on the table in the upper room, also part of the same premises, with intent fraudulently to obtain payment for them as for so many gloves finished by them. This was held not to be larceny (*y*).

Upon an indictment for larceny against M. and S., it appeared that M. was in the service of the prosecutor, and had the care of his warehouse, in which the bags which the prosecutor used in his trade as a potato dealer were kept. S. had for some years supplied the prosecutor with bags, which he made, and from time to time, when he had finished a lot, his custom was to take them, and put them down at the warehouse door of the prosecutor, and shortly afterwards either he or his wife used to come and receive payment for them from the prosecutor. One morning M. brought out of the warehouse twenty-four bags, and put them at the place where S. used to deposit the bags he brought for the prosecutor. Shortly afterwards S.'s wife came, and asked payment for them as for bags that her husband had brought there that morning. Upon this S. was sent for, and asked whether he had brought those bags there; he said, 'Yes.' The jury were told that if they were satisfied that M. brought his master's bags out of the warehouse and placed them by the door for the purpose of enabling S. to receive payment for them from his master, and with intent that he should do so as if they had been new bags finished by S., for which he was entitled to be paid, that that would be larceny; and if they were satisfied that this had been done by M. in pursuance of previous engagement between him and S., that S., though absent when the bags were so removed, would be an accessory before the fact to the larceny. The jury having found that the bags had been so removed for the purpose, and with the intent aforesaid, and that the same had been done in pursuance of a previous arrangement between him and S., and having found both guilty; it was held, upon a case reserved, that the direction to the jury was right, and that both prisoners had been properly convicted (*z*).

On an indictment for stealing fat it appeared that the prisoner was a servant of the prosecutor, who was a tallow-chandler. In the candle-room was a pair of scales used in weighing the fat the prosecutor bought for the purpose of his trade. The prisoner removed some fat from a room above the candle-room and placed it in the scales in the candle-room, and said that it belonged to a butcher named R. W. in the prisoner's presence, stated that he had come to weigh the fat, which he had brought from R.'s. The prosecutor told W. he would not pay him for the fat until he had seen R., and left the warehouse for that purpose. W. and the prisoner then ran away. The jury were directed that if they were satisfied that the prisoner removed the fat from the upper room to the candle-room, and placed it in the scales with the intention of selling it to the prosecutor as fat belonging to R., and with the intention of

(*y*) Crompton, J., said, 'If this had been the first time the point had been raised, I should have been inclined to think that there was sufficient here to make out the *lucri causa*.' But that is clearly not the question; the *lucri causa* exists as much in false pretences as in larceny; and the question in these cases is, did the prisoner intend to assume such a dominion over the goods as was wholly inconsistent with the master's ownership?

(*z*) R. *v.* Manning, Dears. 21; 22 L. J. M. C. 21.

appropriating the proceeds to his own use, the offence amounted to larceny. This direction was held right on the ground that the prisoner took the fat intending to deal with it as his own, to treat it as the property of the alleged vendor, and that the fat should never revert to the owner as his own property except by purchase. It was therefore severed from the owner completely, unless he chose to buy back his own property. What better proof of *animus furandi* could there be than the assertion of such a right of ownership by the prisoner as to entitle him to sell the property (*a*)?

The prisoner was indicted for stealing three railway tickets and three pieces of paste-board, laid in one count as the property of the railway company, and in another as that of the station-master at a station. The prisoner went into the ticket-office at the station, took out three first-class tickets for the journey to Y., and stamped them in the machine for February 8. The last train on that day for Y. had gone, and the prisoner in vain tried to restamp the tickets with another date. Tickets stamped for one day might be restamped for another day, and so rendered available. It was objected that there was no such absolute taking away without an intention to restore as to constitute the offence of larceny: but Patteson, J., held that it was a question for the jury, whether the prisoner took the tickets with an intention to convert them to his own use and defraud the company of them; and told the jury that if the prisoner took the tickets with intent to use them for his own purposes, whether to give to friends, or to sell them, or to travel by means of them, it would not be the less larceny, though they were to be ultimately returned to the company at the end of the journey (*b*).

A mare was missed; and on the next day the prisoner said that if the prosecutor would get the agent to pay the prisoner £8 or £9, some of the neighbours would go and find the mare, and that unless the matter was settled, the mare would be removed a day's journey. Thereupon it was agreed by the prosecutor's son to give the prisoner £12, as he could not get the mare otherwise, and ultimately the prosecutor paid the prisoner £6, and the mare afterwards was returned. The jury were directed that if the prisoner had got some person to take away the mare with the intention of obliging the prosecutor to pay him a sum of money for the return of the mare, which in fact he knew he had no claim for, it was a felonious stealing of the mare, and they convicted the prisoner; and, upon a case reserved, on the question whether the direction to the jury was correct, it was held that the conviction was right, and that the jury were right in their finding, as there was evidence to justify such a finding (*c*).

Taking by Mistake.—A taking of another's property may also be by mistake, arising from heedlessness or accident, in which the *animus furandi* has no part. Thus, if the sheep of A. stray from his flock to the flock of B., and B. drive them along with his own flock, and by mistake, without knowing or taking heed of the difference, shears them, it is not

(*a*) R. *v.* Hall, 1 Den. 381; 18 L. J. M. C. 62. In the course of the argument, Coleridge, J., asked, 'If A. takes the horse of B. wrongfully, keeps it a month, disguises it, and then sells it back to B. as a new horse, is that larceny?' It was answered, No. Alderson, B.: 'Then if a man stole (took) a bank note, and brought it to the owner to be changed, it would be no larceny.'

(*b*) R. *v.* Beecham, 5 Cox, 181. Patteson, J., also held that the station-master had no property in the tickets. See R. *v.* Boulton, 1 Den. 508; 19 L. J. M. C. 67. R. *v.* Kilham, L. R. 1 C. C. R. 261, *post*, p. 1516.

(*c*) R. *v.* O'Donnell, 7 Cox, 337 (Ir.).

larceny. But if B. knew them to be the sheep of another person, and tried to conceal that fact; if, for instance, finding another's mark upon them, he defaced it, and put his own mark upon them, this would be evidence of felonious intent (*d*). And a like conclusion may be drawn, where a party having possession of another's property, appears desirous of concealing it, or of preventing inspection by the owner, or of any person who may make the discovery; or where, being asked, he denies having the property, though it is clear that he knew of its being in his possession. On the other hand, a mode of conduct of a different description in these several respects will be evidence to rebut any felonious intent (*e*).

Claim of Right.—The circumstance of goods being taken on a claim of right may also negative any *animus furandi*. A man may be guilty of larceny by taking his own goods, *e.g.* where, having bailed them to another person, he afterwards steals them from such person in order to charge him for them in an action, or robs the other person of them in order to charge the hundred (*f*). But generally, at common law (*g*) a man cannot commit felony of goods wherein he has a property. Thus if A. takes away the trees of B., and cuts them into boards; or if A. takes the cloth of B. and makes it into a doublet; B. may take the boards or the cloth, and it will not be a felony (*h*). So if A. takes the hay or corn of B., and mingles it with his own heap or cock, or takes B.'s cloth and embroiders it; B. may retake the whole heap of corn or cock of hay (at least so much of them as cannot be easily distinguished from his own), and the garment with the embroidery; and such retaking is not larceny (*i*).

It is not larceny to take goods on a claim of right or property in them, if there is any fair pretence of property or right (*j*). It is in each case a matter of evidence whether they were *bona fide* so taken, or whether they were taken with a thievish and felonious intent: and, obtaining possession of goods by a fraudulent claim of right, or by a fraudulent pretence of law, and then running away with them, is larceny (*k*). Where a keeper found snares, set by the prisoner, with game in them, and took the game and snares for the use of the lord of the manor, and the prisoner demanded them with menaces, and the keeper thereon gave them up; it was left to the jury to say, whether the prisoner acted under a *bona fide* impression that he was only getting back his own property: for although he might be liable for a trespass, yet, if he demanded them under a *bona fide* belief that he was entitled to them as his property, he would not be guilty of larceny (*l*). If the owner of land upon which a horse has strayed takes the horse *damage*

(*d*) 1 Hale, 506, 507.

(*e*) 2 East, P.C. 661.

(*f*) 1 Hale, 513. 2 East, P.C. 659. 3 Co. Inst. 110. R. *v.* Wilkinson, R. & R. 470.

(*g*) See 31 & 32 Vict. c. 116, *post*, p. 1280.

(*h*) 1 Hale, 513. See R. *v.* Knight, 73 J. P. 15; 25 T. L. R. 87, where a man was indicted for stealing from the sheriff fowls belonging to him which the sheriff had seized under the impression that they belonged to the prisoner's wife.

(*i*) 1 Hale, 513. 2 East, P.C. 659.

(*j*) 2 East, P. C. 659. If there is any doubt an acquittal will be directed.

(*k*) 3 Burn's J. D. & W. 414, citing 1 Hale, 507. 1 Hawk. c. 33, s. 8. Farre's case, Kel. J. 43.

(*l*) R. *v.* Hall, MS. C. S. G., and 3 C. & P. 409, Vaughan, B. See *ante*, p. 1131; R. *v.* Rutter, 1 Cr. App. R. 174; 73 J. P. 12. And see R. *v.* Holloway, 5 C. & P. 524. In R. *v.* Ford [1907], 12 Canada Cr. Cas. 555, it was held not larceny nor robbery forcibly to retake winnings at cards in *bona fide* belief that the winner had cheated.

feasant, or if the lord of the manor seizes a horse as an estray; though he may have no title so to do, yet as the act is not done *felleo animo*, it will not be felony (*m*). But if new marks are given to the horse to disguise him, or his old marks are altered, these acts will be considered as indicating a thievish intent (*n*).

Where, after a seizure of uncustomed goods, some persons broke at night into the house where they were deposited, with a design to retake them for the benefit of the former owner, it was held that any presumption of a felonious intent to steal, as laid in the indictment (which was for a burglary) was rebutted by the fact which the jury found, namely, that the prisoners intended to retake the goods on behalf of their former owner (*o*).

Where the master of a captured vessel got property from the vessel clandestinely under the following circumstances, it seems to have been held not to amount to larceny. The vessel was foreign, captured at sea, and condemned as prize to the King. The property in question was secretly conveyed from the ship by the master, and found at the master's, or at a place to which he had sent it, and a bulk-head had been broken to get at part of such property. Chambre, J., doubted whether this regaining the possession of what had belonged to the master's owners and had been entrusted to his care, amounted to a larceny, and saved the point. And ultimately the prisoner was recommended for a pardon (*p*).

Gleaning.—Though there is no legal right to take corn by gleaning, except possibly by custom in some particular places (*q*), such a taking will not necessarily amount to a felony. Undoubtedly it will be an act open, like other acts of trespass which have been mentioned, to proof of a felonious intention, upon which it is peculiarly the province of the jury to determine; but it can hardly be contended that such taking will amount to larceny, if it should appear to have been merely a taking of the corn left on the ground after the crop had been carried, and to have been done openly, under a claim of right not altogether without colour, though not capable of being established by proof, or to have been done under an apparent sanction, arising from former similar acts of the same individual, or of others in the neighbourhood, having been allowed by the occupier of the land.

Accessories, &c.—Where there is clearly an *animus furandi* in some of the persons concerned in a felonious taking, it may be negatived as to others, if it appear that the others had a different object in view from that of obtaining any share of the stolen property. D. was indicted for a burglary in the house of P., and V. as accessory before and after the fact to the 'said felony and burglary.' It appeared that D., at the instigation of V., who was in the employment of the police office at Bow-street, had concerted with three other men to rob the house of P., and

(*m*) 1 Hale, 506, 509.

(*n*) 2 East, P.C. 659.

(*o*) R. *v.* Knight, 2 East, P.C. 510, 659.

(*p*) R. *v.* Vanmuyen, R. & R. 118, and MS. Bayley, J., where it is observed that there was no evidence to shew that the master took the property for *himself* in opposition to the intention of his owners; and that most of the judges seemed to think it would have been larceny if he had, and *contra* if he had not.

(*q*) Steel *v.* Houghton, 1 H. Bl. 51. R. *v.* Price, 4 Burr. 1925. In Woodfall on Landlord and Tenant, (ed. 1814), c. ix. p. 242, there is said to have been a conviction in 1798 for larceny by gleaning.

that it was agreed that V. and another officer should lie in wait to apprehend the three other men, and that the reward for their conviction should be divided amongst them. V. had told P. that his house would be robbed that night, desiring him to mark a piece of cloth, and leave it on the counter, to take care to fasten the latch of the door, and to make no resistance, as he should not lose anything; to which P. consented, and left the house with V. and the other officer to watch; which they did in a passage on the opposite side of the street. P.'s house was robbed by D. and the three other men; and the three men who accompanied D. were almost immediately apprehended by V., and had been tried at a former sessions for burglary; but convicted only of stealing in the dwelling-house to the amount of 40*s.*, in consequence of its being possible that the robbery was committed by day. Upon the present indictment against D. and V., the jury acquitted D. of the burglary, but found him guilty of stealing in the dwelling-house to the value laid in the indictment of £5, and V. as accessory before and after the commission of the said felony and stealing in the dwelling-house. Upon a case reserved, ten of the judges held the conviction wrong, being of opinion that, as D. was not present to aid or assist (though the other offenders thought he was) but to detect, and as he had no intent that the felony should be successful, he had not the felonious intention necessary to make him a principal, although he acted from a bad motive, *viz.* the reward. But several of the judges seemed to think that he was liable to be indicted as an accessory before the fact (*r*).

Taking Goods Found.—The question whether and under what circumstances the appropriation of goods found is larceny, has been the subject of considerable discussion. The leading case is R. *v.* Thurborn (*s*), where the prisoner was indicted for stealing a bank note. He found the note, which had been accidentally dropped in the high road. There was no name or mark on it indicating who was the owner, nor were there any circumstances attending the finding which would enable the prisoner to discover to whom the note belonged when he picked it up, nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. Before he disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; nevertheless, he changed it, and appropriated the money to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor's property before he thus changed the note. Parke, B., directed a verdict of guilty, but on conferring with Maule, J., he was of opinion that the original taking was not felonious, and that in the subsequent disposal of it there was no taking, and he therefore reserved a case for the consideration of the judges. Park, B., in delivering their opinion, said, 'In order to constitute the crime of larceny, there must be a taking of the chattel of

(*r*) R. *v.* Dannelly, R. & R. 310. 2 Marsh, 571. From this decision it became unnecessary to give any opinion upon the objection taken on behalf of V. Lord Ellenborough, and Holroyd, J., thought the conviction right; that although there was a clear intention that the felony should be discovered, yet there was another intention not inconsistent with the former, *viz.* that the felony should at all events be committed: and the presence of Dannelly did in fact aid and assist and countenance the commission of a felony.

(*s*) 18 L. J. M. C. 140; 1 Den. 387. S. C. as R. *v.* Wood, 3 Cox, 277, 453.

another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much of it as is necessary to be referred to for the present purpose. By the term *animus furandi* is to be understood the intention to take not a partial or (*t*) temporary, but the entire dominion over the chattel, without a colour of right. As the rule of law, founded on justice and reason, is that, *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him, and the crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner.' After elaborately reviewing the old authorities (*u*), the learned baron continued: 'The result of these authorities is, that the rule of law on this subject seems to be, that if a man finds goods that have been actually lost, or are reasonably supposed by him to be lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny (*v*). In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may rise; but it will generally be ascertained whether the accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent; in others, appear only after examination. It would probably be presumed that the taker would examine the chattel, as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel. To apply these rules to the present case: the first taking did not amount to larceny, because the note was really lost, and there was no mark on it or other circumstance to indicate then who was the owner, or that he might be found, and therefore the original taking was not felonious, and if the prisoner had changed the note, or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after he was in possession of the note, the owner became known to him, and he then appropriated it *animo furandi*, and the point to be decided is, whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without the knowledge of the ownership,

(*t*) 'Particular' in the report in 1 Den.

(*u*) The following statement as to the older authorities appeared in former editions of this work. 'It is laid down in the old books, that if one *loses* his goods, and another finds them, though he converts them, *animo furandi*, to his own use, yet it is no larceny, for the first taking was lawful (3 Co. Inst. 108. 1 Hawk. c. 33, s. 2. Bac. Abr. tit. "Felony" (C)), and that if A. finds the purse of B. in the highway, and takes it and carries it away, with all the circumstances that usually prove the *animus furandi* yet it is not felony, 1 Hale, 506. But this doctrine of taking by finding must be admitted with great limitation, and must be understood to apply only where the finder really believes the goods to have been lost by the owner. 1 Hale, 506. 2 East, P.C. 664. Buckley *v.* Gross, 3 B. & S. 566.'

(*v*) This proposition was accepted as the law in R. *v.* Mortimer [1908], 72 J. P. 349. 1 Cr. App. R. 20, *post*, p. 1194.

it would not have been larceny; nor would it, we think, if he had done so, knowing who was the owner; for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was dispunishable, as we have already decided: and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than others, and consequently no larceny' (*w*).

The prisoner must have a felonious intent *at the time of the finding*. Evidence of what occurred subsequently to the finding is admissible to prove a felonious intention at the time of the finding; but the question of the intent at the time of the finding must be left to the jury. In R. *v.* Christopher (*x*) the Court followed R. *v.* Thurborn, but some doubts as to its correctness were expressed (*y*). Even though the property found is not marked the finder may be held guilty of larceny if he appropriates it without inquiry, unless he has fair reason to believe that it has been abandoned (*z*).

In R. *v.* Glyde (*a*), upon the authority of R. *v.* Thurborn the finder of a sovereign in the high road, who at the time of finding, had no reasonable means of knowing who the owner was, but intended to appropriate it even if the owner should afterwards become known, and to whom the owner was speedily made known, when he refused to give it up, was held not guilty of larceny (*b*).

(*w*) In the fourth edition of this work (vol. ii. p. 180), Mr. Greaves expressed doubts as to the correctness of this decision.

(*x*) Bell, 27; 28 L. J. M. C. 35.

(*y*) Williams, J., said, 'Agreeing with the decision in that case, I must confess I have never been able to agree with some of the principles there laid down.' And Hill, J., said, 'Two things must be made out in order to establish a charge of larceny against the finder of a lost article. First it must be shewn that at the time of finding he had the felonious intent to appropriate the thing to his own use.' 'The other ingredient necessary is that, at the time of the finding, he had reasonable ground for believing that the owner might be discovered, and that reasonable belief may be the result of a previous knowledge, or may arise from the nature of the chattel found, or from there being some mark upon it; but it is not sufficient that the finder may think that by taking pains the owner *may* be found; there must be the *immediate* means of finding him.' Cf. R. *v.* Moore, L. & C. 1, *post*, p. 1197. R. *v.* Preston, 2 Den. 353.

(*z*) See R. *v.* Coffin, 2 Cox, 44.

(*a*) L. R. 1 C. C. R. 139; 37 L. J. M. C. 107.

(*b*) Cockburn, C.J., said, 'Here I think there was no evidence to shew that, when the prisoner picked up the sovereign, he had any reason to believe that the true owner would come forward.' Martin, B., said, 'If there were no authority on the point I should have said that this was a felony. There was a taking, and the circumstances shew that the sovereign was not abandoned. Then, I think, there was evidence of a taking, and evidence that the taking was felonious, upon the authority of R. *v.* Christopher, *supra*. I think Thurborn's case was rightly decided, but the reasons given for that decision have not been acquiesced in. The second point there decided is, that to justify a conviction for larceny the finder must have reasonable means at the time of the finding of knowing who the owner is, but I doubt whether that is right. But the present case is concluded by authority.' Blackburn, J., said, 'I might wish the law to be as my brother Martin does, but Thurborn's case is in point. And I am inclined to think that we should have to adhere to it, if it were to be reconsidered. And I do not think that, without the interference of the Legislature, where the original taking is innocent and the conversion only unlawful we could hold the crime of larceny to be completed. Then we are bound to act on Thurborn's case, and here it is clear that there was no evidence that the prisoner had any means of finding the owner at the time of picking up the sovereign, and the jury were not asked that question. Therefore I think the conviction should be quashed.' In R. *v.* Dixon [1855], Dears. 580; 25 L. J. M. C. 39, the prisoner was indicted for stealing some bank notes. Parke, B., said, 'If the prisoner had seen the notes drop from the prosecutor, or if

In R. *v.* Mortimer (*c*), the prisoner was convicted of stealing a gladstone bag under the following circumstances. The prisoner had deposited luggage in a railway cloak-room in London. When he reclaimed his luggage the gladstone bag of another person was by mistake given out to the prisoner with his own luggage. The prisoner on the next day told another person that a bag had been given to him by mistake. The prisoner was on that day arrested on another charge, and after he had been in custody for a week the bag was found in the possession of the prisoner's son at Swansea. It had been opened, and the contents were mixed with the prisoner's own effects. On appeal it was held that where an article has been lost and has come into the possession of a person charged with stealing it, it is not necessary in every case to direct the jury that in order to convict of larceny they must find that the prisoner meant to appropriate the article when it first came into his possession. The need for such direction depends on the defence set up, but it should be given when there is evidence that when the article first came into the possession of the prisoner he meant to return it, but subsequently determined to appropriate it (*d*).

In cases of taking by *finding*, some of the strongest circumstances to rebut the implication that such taking was felonious, will be those which shew that the taker made it known that he had found the property, so as to make himself responsible for the value, in case he should be called upon by the owner; or those which shew that he endeavoured to discover the true owner, and kept the goods till it might reasonably be supposed that the true owner could not be found (*e*).

In the old books it is stated that if a man's horse is on his ground, or upon his common, and a person takes it *animo furandi*, it is no finding, but felony (*f*), and that if the horse strays into a neighbour's ground, common or highway (*g*), it is felony in him who so takes the horse (*h*). So where upon an indictment for stealing a ewe and a lamb, it appeared that the prosecutor's flock of sheep had strayed through a gap into the road, and had all been recovered except the ewe and the lamb in question, which were afterwards seen grazing in a lane, along which the prisoner was seen driving some sheep, and the prisoner some days afterwards sold the ewe and the lamb about ten miles from the place; Cresswell, J., told the jury that if a person find an animal straying in a road and take it with intent to dispose of it to his own use, it is larceny; and that in this case the question for their consideration was, whether the prisoner so took the ewe and the lamb, or whether they got mixed with the sheep he was driving and he took them away by mistake (*i*). If a man should hide a purse of money in a corn-mow, and his servant finding it should take

the notes had had the owner's name upon them, or there had been any marks, which enabled the prisoner to know at the moment when he found the notes who the owner was, or that he could be discovered, it might have been within the principles laid down in R. *v.* Thurborn.' Jervis, C.J., said, 'The finding of the jury was that the notes were lost; that the prisoner did not know the owner; but that it was probable he could have traced them. He was not bound to do that.'

(*c*) [1908], 99 L. T. 204; 72 J. P. 349.

(*d*) The Court were of opinion that if R. *v.* Thurborn so ruled it went too far.

(*e*) 2 East, P. C. 665.

(*f*) 1 Hale, 506.

(*g*) R. *v.* Hutchinson, 1 Lew. 195.

(*h*) R. *v.* Cook, Gloucester Spring Ass. 1842, MS. C. S. G. *Vide ante*, p. 1178.

(*i*) 1 Hale, 506. 2 East, P. C. 664.

part of it, the taking will be felony, if it appeared by circumstances that the servant knew that his master laid it there (*j*).

Where a trunk left in a hackney carriage was taken and converted to his own use by the driver he was held guilty of larceny on the ground that he must have known where he set the owner down (*k*). The prisoner, a hackney coachman, had taken up the prosecutor with several packages, at the Adelphi, and set him down in Oxford Street. The prosecutor there took all the things out of the coach, except one corded box, which was left under the seat, and the prisoner then drove off. A few days later he was traced and the box found in a house uncorded and with the hasps broken and some of the contents missing. He was indicted for stealing the box and some wearing apparel and two bonds which had been in it. The case was left to the jury to consider whether they were satisfied that the prisoner had uncorded the box, not merely from an idle, though natural, curiosity, but with intent to appropriate some part of its contents, and they were of opinion that he uncorded the box and destroyed the papers with intent to appropriate the goods found in the box and found him guilty. A majority of the judges held the conviction proper (*l*).

Where on an indictment for larceny, it appeared that a dressing-case had been left in a railway carriage, and the prisoner, a servant of the company, had said that he had found it in a first-class carriage on the arrival of the train at one of the stations on the line; Williams, J., told the jury that there was no pretence for treating this as a case of lost property. It was the duty of the prisoner, if he found such an article left by a passenger, to take it to the station-house, or some office of the line. It was absurd to say that this case was analogous to that of the finder of lost property. It was nothing like lost property (*m*).

Upon an indictment for larceny of a purse and money, it appeared that the prosecutor, in making a purchase, left his purse on the prisoner's stall in the market, unperceived by either of them. A stranger pointed it out to the prisoner, who put it into her pocket, took an early opportunity of hiding it away, and on the prosecutor returning to search for it, denied all knowledge of it. The jury were asked: First, Did the prisoner take up the purse, knowing that it was not her own, and intend at that time to appropriate it to her own use? Secondly, Did the prisoner know who was the owner of the purse at the time she took it? The jury answered the former question in the affirmative, and the latter in the negative. A verdict of guilty was recorded, and upon a case reserved, it was held that the conviction was right. Jervis, C.J., said, 'If there had been any evidence that the purse and its contents were lost property, properly so speaking, and the jury had so found, the jury ought further to have been asked whether the prisoner had reasonable means of finding the owner, or reasonably believed that the owner could not be found; but there is in this case no reason for supposing that the property was lost at all, or that the

(*j*) 1 Hale, 507.

(*k*) R. *v.* Lamb, 2 East, P. C. 664. In the Metropolitan Police District it is the duty of drivers of hackney and stage carriages to take to the nearest police station all articles found in their carriages. 16 & 17 Vict. c. 33, s. 11. See Metropolitan Police Guide (ed. 1906), pp. 1409, 1427.

(*l*) R. *v.* Wynne [1786], 1 Leach, 413, 2 East, P. C. 664, Eyre, B. Cf. R. *v.* Sears, 1 Leach, 415 *n*, Ashhurst, J. And see note (*f*), *post*, p. 1200.

(*m*) R. *v.* Pierce, 6 Cox, 117.

prisoner thought that it was lost. On the contrary, the owner having left it at the stall, would naturally return for it when he missed it. There is a clear distinction between property lost and property merely mislaid, put down and left by mistake, as in this case, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. The question as to possession by finding, therefore, does not arise' (*n*).

The prosecutor went to the prisoner's shop to have his hair cut, which was done by the prisoner, and the prosecutor, before leaving the shop, bought some hair oil. When he went to the shop he had, in a clasped purse in the pocket of his great coat which he carried on his arm, two £10 Bank of England notes, and some gold. He folded his great coat, and laid it on a chair whilst his hair was being cut; and he paid for the hair oil from the purse in which the money was. Next morning he missed one of the £10 notes, returned to the prisoner's shop, stated to the prisoner his belief that he had lost it in the shop, and offered him a reward of £3 if he would restore it. The prisoner told him that he knew nothing of the note; but in his statement before the magistrate, he explained that he had given gold for the note the same day that the prosecutor lost it, but was afraid to explain this to the prosecutor, lest he should be obliged to give up the note to him. The prisoner was indicted for stealing and receiving the note, and evidence was given to shew, that the prisoner had given gold for a £10 note, about the time of the loss by the prosecutor, to a man in the shop of the prisoner, and that the prisoner, on the same day the prosecutor inquired after the note, parted with it. The jury found: (1) That the note was dropped by the prosecutor in the shop, and that the prisoner found it there. (2) That the prisoner at the time he picked up the note did not know, nor had he reasonable means of knowing who the owner was. (3) That he afterwards acquired knowledge of who the owner was, and after that he converted the note to his own use. (4) That he intended, when he picked up the note in the shop, to take it to his own use, and deprive the owner of it, whoever the owner might be. (5) That the prisoner believed, at the time he picked up the note, that the owner could be found. Upon these findings the prisoner was held guilty of larceny (*o*). The findings bring the case clearly within R. *v.* Thurborn (*p*). for unless the circumstances of the finding are such that the finder is warranted in believing that the goods are lost, or that the owner could not be found, it is larceny. Here the note was lost in the sense that it was dropped out of the owner's purse; but it was not lost in the sense that the owner did not know where to find it. As soon as the owner discovered his loss, he went at once to the shop and inquired for it. Before a man

(*n*) R. *v.* West [1854], Dears. 402; 6 Cox, 415. 'In this case all the Court decided was, that the property was not lost property.' R. *v.* Dixon, Dears. 580, Parke, B. There seems to be some confusion in the cases upon the question whether the property is *lost* or *mislaid*. It is sometimes stated that if the property is only mislaid, larceny can be committed of it, as of goods in possession. But sometimes the law is more correctly stated to be that if goods appear to be abandoned, and the finder reasonably believes them to be so, and has no reasonable means of finding the owner, he may convert them to his own use, although the owner may after all have only mislaid the goods. A man cannot be found guilty of larceny unless he has the *animus furandi*.

(*o*) *Vide* R. *v.* Moore, L. & C. 1, *infra*.

(*p*) *Ante*, p. 1191.

can appropriate a thing innocently, he must believe it to be lost in the sense that the owner does not know where to find it (*q*).

Upon an indictment for stealing a gold chain, breast-pin, eye-glass and pin, Rolfe, B., told the jury, 'If a man is possessed of a chattel, he does not lose the property in it, because he places or drops it in a field; nay, if he drops it in a street, it still remains his property. The only case where a party can be justified in converting it to his own use is, where it has fallen where a party may fairly say that the owner has abandoned it, or if the party cannot be found to whom it belonged. If I had an apple and dropped it, it might be presumed that I had abandoned it; but if I drop £500, the presumption is that I do not mean to abandon it. If I drop a thing where there is no reasonable means of finding out that it belongs to me, then, though I am found out to be the owner, the party finding it would not be guilty of felony if he converted it to his own use; though he would be liable to an action of trover' (*r*).

Three pigs which had been bitten by a mad dog were shot and buried by their owner. The prisoners dug up the pigs and sold them to a meat salesman for £9 3*s*. 9*d*. It was submitted: (1) That the owner had abandoned his property in the pigs; (2) That the pigs were of no value to the owner; (3) That the pigs were attached to the soil and could not be the subject of larceny. The jury were directed there had been no abandonment, as the prosecutor's intention was to prevent the pigs being made use of, but that if the jury were of opinion that he had abandoned the property they should acquit the prisoners. The jury convicted the prisoners and the conviction was affirmed (*s*).

Where a pocket-book containing bank notes had been found by the prisoner in the highway, and afterwards converted by him to his own use; Lawrence, J., observed, that if the party finding property in such manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring the property, converts it to his own use, such conversion will constitute a felonious taking (*t*). And in another case Parke, B., said, 'Suppose a person finds a cheque in the street, and, in the first instance, takes it up merely to see what it is; if afterwards he cashes it, and appropriates the money to his own use, that is a felony, though he is a mere finder till he looks at it' (*u*).

The prisoner received from his wife a £10 Bank of England note which she had found, and passed it away. The note was endorsed 'E. May' only, and the prisoner, when asked to put his name and address on it by the person to whom he passed it, wrote on it a false name and address. When charged at the police station the prisoner said he knew nothing about the note. The jury were directed that if they were satisfied that the prisoner could within a reasonable time have found the owner, and if

(*q*) R. *v.* Moore, L. & C. 1; 30 L. J. M. C. 77.

(*r*) R. *v.* Peters [1843], 1 C. & K. 245.

(*s*) R. *v.* Edwards, 13 Cox, 384. (C. C. R.)

(*t*) Anon. *cor.* Lawrence, J., Stafford Sum. Ass. 1804, MS. But the absence of a mark is not in itself enough to relieve the finder. R. *v.* Coffin, 2 Cox, 44.

(*u*) Merry *v.* Green, 7 M. & W. 623. In 10 L. J. M. C. 192; R. *v.* Thurborn (*ante*, p. 1191), the same judge said, 'A cheque must at least have the name of the drawer and drawee upon it, and in general there must be the means, by the name on the document, of finding the owner of the cheque.' See R. *v.* Gardner, L. & C. 243, *post*, p. 1203.

instead of waiting the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. A conviction on this direction was held wrong, and it was ruled that the jury ought to have been asked whether the prisoner at the time he received the note believed the owner could be found (*v*).

Upon an indictment for stealing a hat, it appeared that the prosecutor, having his hat knocked off by some one, the prisoner, who had his own hat on his head, picked up the prosecutor's hat and carried it home. Park, J., told the jury, 'If a person picks up a thing, when he knows that he can immediately find the owner, and instead of restoring it to the owner, he converts it to his own use, this is felony' (*w*).

Upon an indictment of a servant for stealing four £5 notes in the dwelling-house of her master, it appeared that the prisoner, when asked by her master what she had done with the money, at first said she had not seen it, but afterwards said she found the notes in the passage of the house. It was contended that, if that statement were true, the prisoner was not guilty of felony, as their being in the passage would not necessarily lead to the conclusion that the notes were her master's property, and she might have supposed that they were dropped by some person who had come to the house. Park, J., said: 'It is suggested that this is not a felony, because the prisoner might have found the notes in the passage. What passage? Why the passage of her master's house. What, if I drop a ring, is my servant to take it away?' He added (*x*), 'In the present case, there was no necessity for the prisoner to keep the property till it was advertised; for, as she found it in her master's passage, she should have ascertained whether it was her master's; at least, she should have asked him that question' (*y*).

A. C. died possessed of a bureau, in a secret part of which she had concealed nine hundred guineas *in specie*. After her death, R. C., her personal representative, lent the bureau to his brother H.; who took it to the East Indies and brought it back, without the contents of it being discovered. It was then sold to a person named D. for three guineas, who delivered it to G., a carpenter, for repair. G. employed a person named H., who found out the money. H. received only a guinea for his trouble; but the whole sum of nine hundred guineas was secreted by G., by G.'s wife, and by one S., and converted to their own use. R. C., the personal representative of the original owner of the bureau, filed a bill of discovery against G. and his wife, and S.; in which bill D. joined, but did not claim any of the money on his own account. The defendants demurred to the bill on the ground that an answer to the discovery sought might subject them to criminal punishment. The Lord Chancellor in a reserved judgment said: 'I have looked into the books, and have talked with some of the judges and others; and I have not found in any one person a doubt that this is a felony. To constitute felony, there must, of necessity, be a felonious taking. Breach of trust will not do. But from all the cases in Hawkins, there is no doubt that this bureau being delivered to G., for no other purpose than to repair, if he broke

(*v*) R. *v.* Knight, 12 Cox, 102. R. *v.* Deaves, 11 Cox, 227; Ir. Rep. 3 C. L. 306.

(*w*) R. *v.* Pope, 6 C. & P. 346.

(*x*) After referring to the case before Lawrence, J., *ante*, p. 1197, note (*t*).

(*y*) R. *v.* Kerr, 8 C. & P. 176, Park, J.

open any part which it was not necessary to touch for the purpose of repair, with an intention to take and appropriate to his own use what he should find, that is a felonious taking within the principle of all the modern cases; as not being warranted by the purpose for which it was delivered. If a pocket-book containing bank notes were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is a felony. So, if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly; but not being entrusted with it for the purpose of opening it, that is felony, according to the modern cases. There is a vast number of other cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it' (*z*).

To an action for false imprisonment, the defendants pleaded that the plaintiff stole a purse containing money, the property of T., and that they gave the plaintiff in charge to a peace officer to be taken before a magistrate to be examined concerning the premises. At the trial it appeared that at a sale by public auction the plaintiff purchased an old bureau, the property of T., and took it home. A month later a carpenter's apprentice, while doing some repairs to the bureau, remarked to the plaintiff that he thought there were some secret drawers in it, and touching a spring pulled out a drawer, which contained some writings. The plaintiff then discovered another drawer, in which was a purse containing several sovereigns and other coins, and under the purse a quantity of bank notes. Of this property the plaintiff took possession. The defendants went with a police officer to the plaintiff's house, took him into custody and conveyed him before a magistrate on a charge of felony, when he was discharged, the magistrate doubting whether a charge of felony could be supported. A witness stated that after the bureau was sold, some one of the bystanders observed that the plaintiff might have bought something more than the bureau, as one of the drawers would not open, upon which the auctioneer said: 'So much the better for the buyer; I have sold it with its contents.' The auctioneer, however, stated that there was one drawer which would not open, and that what he said was, 'That is of no consequence; I have sold the secretary, but not its contents.' It did not appear that any person knew that the bureau contained anything whatever. Tindal, C.J., told the jury that, as the property had been delivered to the plaintiff, as the purchaser, he thought there had been no felonious taking, and left to them the question of damages only, reserving leave for the defendant to move to enter a nonsuit. On the motion the judgment of the Court was given by Parke, B.: 'We have come to the conclusion that, if the defendants' case was true, there was sufficient evidence of a larceny by the plaintiff; but we cannot direct a nonsuit, because a fact was deposed to on the part of the plaintiff which ought to have been left to the jury, and which, if believed by them, would have given a colourable right to him to the contents of the secretary, as well as to the secretary itself, *viz.*, the declaration of the auctioneer that he

(*z*) Cartwright *v.* Green, 8 Ves. 405; 2 Leach, 952, Eldon, L.C.

sold all that the piece of furniture contained, with the article itself, and then the abstraction of the contents could not have been felonious. There must, therefore, be a new trial and not a nonsuit. But if we assume, as the defendants' case was, that the plaintiff had express notice that he was not to have any title to the contents of the secretary, if there happened to be anything in it; and, indeed, without such express notice, if he had no ground to believe that he had bought the contents, we are all of opinion that there was evidence to make out a case of larceny. It was contended that there was a delivery of the secretary, and the money in it, to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us that, though there was a delivery of the *secretary*, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession *of the purse and money*. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence: and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this. The old rule in 3 Co. Inst. 108 that, "If one lose his goods, and another find them, though he convert them *animo furandi* to his own use, it is no larceny" (*a*), has undergone in more recent times some limitations; one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constituted a larceny (*b*). Under this head fall the cases where the finder of a pocket-book with bank notes in it, with a name on them, converts them *animo furandi* (*c*); or a hackney coachman, who abstracts the contents of a parcel which has been left in his coach by a passenger, whom he could easily ascertain (*d*); or a tailor who finds and applies to his own use a pocket-book, in a coat sent to him to repair by a customer whom he must know; all these have been held to be cases of larceny (*e*), and the present is an instance of the same kind, and not distinguishable from them. It is said that the offence cannot be larceny unless the taking would be a trespass, and that is true; but, if the finder from the circumstances of the case must have known who was the owner, and, instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems also from Wynne's case (*f*) that if, under the like circumstances, he acquire possession, and mean to act honestly, but afterwards alters his mind, and opens the parcel (*ff*) with intent

(*a*) 3 Co. Inst. 108.
(*b*) *Ante*, p. 1191.
(*c*) *Ante*, p. 1197.
(*d*) *Ante*, p. 1195.
(*e*) Cartwright *v.* Green, *ante*, p. 1199.
(*f*) 2 East, P. C. 664, *ante*, p. 1195. 'This position is at variance with R. *v.* Milburne, 1 Lew. 251, and with 2 East, P. C. 665, and does not seem fairly deducible from Wynne's case, as there the prisoner must have known the box was put in the coach; and as he assisted in taking out the luggage, *his* leaving the box behind was evidence of an intention at that time to convert it to his own use. There was no *evidence* of his intending to restore it, but a statement after he was in custody that he had been the same day to the prosecutor's for that purpose, of the truth of which nothing is stated in the report.' C. S. G.
(*ff*) See R. *v.* Mortimer, 72 J. P. 349.

to embezzle its contents, such unlawful act would render him guilty of larceny. We, therefore, think that the rule must be absolute for a new trial, in order that a question may be submitted to the jury whether the plaintiff had reason to believe that he bought the contents of the bureau, if any, and consequently had a colour of right to the property' (*g*).

Intention to Steal Formed after Finding.—The prosecutor put two heifers to be agisted on marshes belonging to S., who saw them there but did not know to whom they belonged. A day or two later they strayed on to the public road, where they were found by the prisoner, who put them upon his own marshes. The prisoner told S. he had found two heifers and asked him if he knew to whom they belonged. S. said that he did not know, but that they had been put on his marshes, and he made no objection to them remaining on the prisoner's marshes. A few days later S. told the prisoner that they belonged to the prosecutor. Prisoner left them on his marshes for a day or two, and then sent them a long distance away as his own property, to be kept for him. He then told S. that he had lost them, and denied all knowledge of them. The jury found (1) that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner; (2) that at the time of finding them he did not intend to steal them, but that he formed the intention to steal them after his first interview with S.; (3) that the prisoner, when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use. Bovill, C.J., after reading the first two findings of the jury said: 'That being so, the case is undistinguishable from R. *v.* Thurborn (*ante*, p. 1191), and the cases which have followed that decision. Not having any intention to steal when he found them the presumption is that he took them for safe custody, and unless there was something of a bailment afterwards, he could not be convicted of larceny' (*h*).

The prisoner was indicted for stealing one hundred £1 notes, which had been dropped by the prosecutor on the public road. A week after the loss the prosecutor went to the prisoner and asked her if she had the money, and she denied all knowledge of it. He offered her £10, and subsequently £20, but she persevered in her denial. Some of the notes were afterwards found in her possession. The jury were directed that if they believed that the prisoner found the notes, and that she, knowing who was the owner, had retained them with the intent to appropriate them to her own use, and had endeavoured to conceal them for the purpose of preventing the owner from recovering possession of them, the jury would be justified in convicting the prisoner. But, upon a case reserved, it was held that this direction was erroneous; as the jury might have taken the direction to mean that if she discovered the owner at any time afterwards, and then determined to appropriate the notes, it would have been larceny (*i*).

On an indictment for stealing a bag and papers, it appeared that an attorney's clerk had left the bag on a bench in an outer room of the

(*g*) Merry *v.* Green, 10 L. J. M. C. 154; 7 M. & W. 623.

(*h*) R. *v.* Matthews, 12 Cox (C. C. R.) 489. But see R. *v.* Mortimer, 72 J. P. 349.

(*i*) R. *v.* Shea, 7 Cox, 147 (C. C. R. Ir.).

Master's office of the Court of Queen's Bench, while he went into the inner room to transact some business. There he saw the prisoner, who was asking charity, and who in a few minutes left the room. On returning to the place where the bag had been left, the prosecutor missed it. As he was returning to his employer's chambers, he met the prisoner in the street with the bag. On being given into custody, the prisoner said that he took the bag believing that it had been accidentally left in the office by the owner, and that his intention was to restore it to him. On a former occasion some papers, which had been missed by the prosecutor, had been brought to his office by the prisoner, who received a shilling for his trouble. The Recorder, after consulting Erle, J., told the jury, 'You must be satisfied that the prisoner took this property against the consent of the owner, and for the purpose of gain. I am of opinion that it is not essential to the sustaining of this charge that he had an intention of converting this bag permanently to his own use. I will ask you, first, whether you think he took it with the intent to exact a reward from the owner for its restoration, and with a determination not to restore it unless such reward were given to him? If such is your view of the circumstances I shall have no hesitation in saying that the prisoner has committed larceny. Or secondly, do you think that, having reasonable grounds for believing that the bag belonged to some person in the inner office, who had deposited it there for a short time until he should return for it, the prisoner took it with an intention of returning it absolutely, and at all events taking the chance of any reward being given him for the pretended service? Even in this case I am of opinion that he would be guilty of larceny; but I would reserve that question' (*j*).

Upon an indictment for stealing a watch, the evidence tended to prove that the prisoner had found the watch, and subsequently appropriated it to his own use. It was therefore contended, on the part of the prosecution, that if at the time the prisoner found the watch, he took possession of it with a view of stealing it, or if he found the watch, and intended to detain it until a reward was paid for the same, he was guilty of larceny. The jury delivered the following written verdict, the words in italics having been subsequently added by the jury after explanation by the Court:—'Not guilty of stealing the watch, but guilty of keeping possession of it in the hope of reward, *from the time he first had the watch*.' Upon a case reserved, it was held that taking the finding in conjunction with the facts, the prisoner was not guilty of larceny. The jury had found the prisoner 'not guilty of stealing,' and there was no finding that the prisoner feloniously took the watch; they had, therefore, acquitted him (*k*).

On an indictment for stealing a banker's cheque for £82 19*s*. laid in one count as the property of G., and in another as that of B., it appeared that B., a lad of fourteen, who could not read, found the cheque, and shewed it to the prisoner, who told him that it was only an old cheque of the Royal British Bank, and that he wished to shew it to a

(*j*) R. *v.* Spurgeon [1846], 2 Cox, 102. The jury found that the prisoner took the bag in order to exact a reward, and would not have returned it without a reward. In this case the bag could not be said to have been 'lost' or mislaid at the time when it was taken up by the prisoner.

(*k*) R. *v.* York [1848], 1 Den. 335; 2 C. & K. 841.

friend, and so kept the cheque. B. went to the prisoner's shop the same day, and asked for the cheque; but the prisoner from time to time made various excuses for not giving up the cheque: and B. never saw it again. The prisoner saw G., and said he knew the cheque was G.'s, asked what reward was offered, and on being told five shillings, said that he would rather light his pipe with it than take five shillings. The cheque had never been received by either G. or B. The jury found that 'the prisoner took the cheque from B. in the hopes of getting the reward; and, if that is larceny, we find him guilty.' Upon a case reserved, it was held not to be felonious taking, as the mere holding of the cheque under the circumstances did not amount to such a taking as is required to constitute the offence of larceny (*l*).

On an indictment for larceny, it appeared that some timber bearing the owner's mark had been severed from a raft on the high seas and stranded. The prisoner removed the timber from the shore to his own house, and effaced the marks. On the following day he gave notice of the possession of the timber to the agent of the Receiver General of Admiralty droits. Cresswell, J., told the jury, 'There are two questions for your consideration. Did the prisoner take this timber feloniously for the purpose of converting it to his own use, or did he take it with intent, by defacing the marks so that it might not be identified, that it might become a droit of the Admiralty, which would entitle him to the salvage? Should you be of opinion that the latter was his intent, a delicate question will arise whether that would be sufficient to constitute a felony—a point of which I have considerable doubt, and which I shall reserve' (*m*).

Upon an indictment for stealing a lamb, it appeared that the prosecutor had ten white-faced lambs in a field, and that the prisoner was allowed to put twenty-nine black-faced lambs into the field for a night's keep, for one penny a-head. The next day the prisoner went to C. and asked him to buy twenty-nine lambs, which he agreed to do; C. counted the lambs, and informed the prisoner that there were thirty instead of twenty-nine, and pointed out to him a white-faced lamb, upon which he said, 'if you object to take thirty I will draw one'; C., however, bought and paid for the whole. The white-faced lamb was proved to be one of the ten belonging to the prosecutor, and it appeared that the prisoner must have taken the lambs from the field early in the morning, which was thick and rainy. The jury were directed that, though the prisoner did not know that the lamb was in his flock until it was pointed out to him, in point of law the taking occurred when the lamb was pointed out to the prisoner and sold by him. The jury having found that at the time of leaving the field the prisoner did not know that the lamb was in his flock, and that he was guilty of felony at the time it was pointed out to him, it was held, upon a case reserved, that the prisoner committed a

(*l*) R. *v.* Gardner [1862], L. & C. 243. In R. *v.* Wildman (London County Sessions 1907, 42 L. J. Newsp. 177), on an indictment of a jeweller for receiving a purse knowing it to be stolen, it appeared that a boy of eleven found a purse on a seat in a railway station. He sold the purse to a jeweller. A reward was offered and the jeweller gave the purse up and claimed the reward. The chairman (Wallace, K.C.) directed the jury that there was nothing to shew that the boy had any felonious intent in picking up the purse and that as the boy did not steal the purse the jeweller could not be convicted of receiving it.

(*m*) R. *v.* Watts [1844], 1 Cox, 349. The jury found the prisoner guilty of feloniously taking it for his own use.

trespass when he drove the lamb out of the field, though that was not a felonious trespass, and that the prisoner, being originally a trespasser, continued a trespasser all along, and the moment he sold the lamb with a felonious intent he became a thief (*n*).

The finder of a lost purse shewed it to the prisoner and asked him how much he would be likely to get as a reward. The prisoner kept the purse against the will of the finder. It was held he could be convicted on a count laying the property in the finder, but that it was doubtful whether he could be convicted on a count laying the property to the owner (*o*).

Sect. III.—The Taking Lucri Causa.

Larceny has been described as being 'a wrongful taking of goods with intent to spoil the owner of them *causa lucri*,' but if this motive be a necessary ingredient, it appears that it is not confined to the acquisition of pecuniary advantage, or to the taking of the thing stolen for the sake of its worth. Thus a taking with intent to destroy is sufficient to constitute larceny, if it be done to effect an object of supposed advantage to the party committing the offence, or to a third person.

The prisoner forced open a stable door, took out a horse, led it about a mile to an old coal-pit, and there backed it down and killed it, his object being that the horse might not contribute to furnish evidence against one H., who was under a charge for stealing it; he had no intention of deriving any pecuniary benefit from taking the horse. Thomson, C.B., saved the point, whether a taking with this intent constituted larceny; and, upon conference, six judges against five held it not essential that the taking should be *lucri causa*: they thought a taking, *fraudulenter*, with intent wholly to deprive the owner of the property, sufficient; but some of the six also thought that the object of protecting H. might be deemed a benefit or *lucrum* (*p*).

The prisoner was convicted of stealing a post letter, from an officer of the post-office. The prisoner had been cook to G., and had given notice to leave, and was in treaty with D. for a similar situation. D. had consented to employ her if a satisfactory answer from Mrs. G. should be returned to a letter making inquiries as to her character. This letter, the subject of the indictment, was written by D., directed to Mrs. G., and posted. Mrs. G. having found fault with the prisoner, discharged her from her service, and told her that a character would not be given to her. The day after her dismissal she went to the post-office at R., and applied to the clerk for the letter addressed to Mrs. G., stating that she was a servant of Mrs. G., and that Mrs. G. expected a letter that morning, which she was to take; but on being informed that the one letter by itself could not be given, she took from the office all the letters for Mr. and Mrs. G., including that written by D., and burnt it, but delivered the others to a person, who safely conveyed them to Mr. and Mrs. G. Upon a case reserved, all the judges present (except Platt, B.) held that the taking and destroying of the letter under these circumstances amounted

(*n*) R. *v.* Riley, Dears. 149; 22 L. J. M. C. 48.

(*o*) R. *v.* Swinson [1900], 64 J. P. 73, Bosanquet, Common Serjeant.

(*p*) R. *v.* Cabbage, MS. Bayley, J., and R. & R. 292. See R. *v.* Wynn, 1 Den. 365, *post*, p. 1442.

to larceny; for supposing that it was a necessary ingredient in that crime, that it should be done *lucri causa* (which was not admitted), there were sufficient advantages to be obtained by the prisoner in making away with the written character (*q*).

The prisoner was indicted for stealing an iron axle, the property of his masters. It appeared that the prisoner was in the employment of Messrs. Williams, ironmasters, as a puddler; his duty being to convert pig iron into puddle bar; for which he was paid according to the weight of the puddle bar produced from his furnace: and that the prisoner threw into his furnace an iron axle belonging to his masters, which had formerly been used for a tram cart. It was proved that the value of the axle in its former state was from 6*s*. to 7*s*., and that the benefit to the prisoner was a little better than a penny. Tindal, C.J., told the jury that it was manifest that the act done by the prisoner caused the destruction of the axletree in its former state, so that it could never be restored in specie to the masters as an axletree, though it might increase the mass of iron produced from the furnace: and if they were satisfied that the throwing the axle into the furnace was an act done by him without the consent and against the will of his masters, and that the pay of the prisoner was thereby increased, and that his object and motive was to obtain such increase of pay, all that was necessary, in point of law, to constitute a felony was made out. That the gain to the prisoner was indeed extremely small, in this particular instance; but that the character and nature of the offence did not depend upon the extent of the gain to the party offending or injury to the master: which, however, it must be observed, were extremely disproportionate to each other; and which loss to the masters might be carried almost to an incalculable amount by the opportunity of repeating the offence (*r*).

For a servant clandestinely to take a master's corn to feed his horses was held to be felony at common law: especially if by so feeding them the servant's labour was likely to be diminished. The prisoners had the care of one of their master's teams, the master allowed what beans he thought fit, but they took additional quantities from the granary. They were indicted for stealing two bushels, and the jury found that they took them to give their master's horses. Upon a case reserved, eight judges out of eleven held that this was felony, and that the purpose to which the prisoners intended to apply the beans did not vary the case. It was, however, alleged by some of the judges that the additional quantity of beans would diminish the work of the men who had to look after the horses, so that the master not only lost his beans, or had them applied to the injury of the horses, but the men's labour was lessened, so that the *lucri causa*, to give themselves ease, was an ingredient in the case (*s*).

(*q*) R. *v.* Jones, 1 Den. 188. In the course of the argument, Pollock, C.B., said, 'For the prisoner's counsel's argument the case would be the same if the prisoner had picked the postman's pocket of the letter. I see no difference. Will it be contended that picking a rich man's pocket, not to make yourself rich, but to make him poor, would not be a larceny?' Parke, B., 'Suppose you pick A.'s pocket to give to a beggar in the next street.' See R. *v.* Gillings, 1 F. & F. 36, *post*, p. 1441.

(*r*) R. *v.* Richards, 1 C. & K. 532, Monmouth Sum. Ass. 1844. 'The text is a correct copy of C. J. Tindal's note of the case, which he gave to the editor.' C. S. G.

(*s*) R. *v.* Morfit, MS. Bayley, J. and R. & R. 307. In R. *v.* Handley, C. & M. 547, Patteson and Cresswell, JJ., acted on this case and refused to reserve the point.

So where the prisoners took five sacks of oats for the purpose of giving them to their master's horses, the prisoners not being answerable for the condition or appearance of the horses, and the jury found that they took the oats with intent to give them to their master's horses and without any intent of applying them for their own private benefit, upon a case reserved the greater part of the judges present appeared to think that this was larceny (*t*).

In the interval between the last case and the preceding one Lord Abinger, C.B., and Rolfe, B., had approved of acquittals in similar cases (*u*).

The offence is reduced from felony to petty misdemeanor by the Misappropriation by Servants Act, 1863 (26 & 27 Vict. c. 103) (*v*), which provides, sect. 1, 'If any servant shall, contrary to the orders of his master, take from his possession any corn, pulse, roots, or other food, for the purpose of giving the same or of having the same given to any horse or other animal belonging to or in the possession of his master, the servant so offending shall not by reason thereof be deemed guilty of or be proceeded against for felony, but shall, on conviction of such offence before two justices of the peace, at their discretion, either be imprisoned, with or without hard labour, for any term not exceeding three months, or else shall forfeit and pay such penalty as shall appear to them to be meet, not exceeding the sum of five pounds, and if such penalty shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, the servant so offending shall be imprisoned, with or without hard labour . . . (*w*): Provided always, that if upon the hearing of the charge the said justices shall be of opinion that the same is too trifling, or that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the charge, without proceeding to a conviction: Provided also, that if upon the trial of any servant for feloniously taking from his master any corn, pulse, roots, or other food consumable by horses or other animals, such servant shall allege that he took the same under such circumstances as would constitute an offence punishable under this Act, and thereof shall satisfy the jury charged with his trial, then it shall be lawful for such jury to return a verdict accordingly; and thereupon the Court before which such trial shall take place shall proceed to award such punishment against such servant as may be awarded by two justices of the peace on the conviction of any person under the provisions of this Act: Provided also, that in case of non-payment of any penalty to be imposed by the Court on such servant, he shall be imprisoned, with or without hard labour, for any term not exceeding three months, as the Court shall order, unless such penalty be sooner paid' (*x*).

(*t*) R. *v.* Privett, 1 Den. 193; 2 C. & K. 114.

(*u*) R. *v.* Smith, 1 Cox, 10.

(*v*) The preamble recites that 'the offence of taking corn or other food by a servant from the possession of his master, contrary to his orders, for the purpose of giving the same, or of having the same given, to the horses or other animals of such master, *is* felony.'

(*w*) The omitted words were repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43). The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5, fixes the scale of imprisonment in default of payment of a fine.

(*x*) Sect. 2 gives an appeal to Quarter Sessions. Sect. 5 limits the Act to England, so that the offence remains a felony in Ireland.

Where the prisoner instead of delivering a parcel of letters sent by his coach, opened the parcel, read the letters, and disposed of them as he thought proper; it was held that this was not larceny but only trespass and breach of contract, although it was done to gratify some idle curiosity, or perhaps to prevent the letters from arriving (*y*).

The prisoner was indicted for stealing pieces of paper, and it appeared that two important despatches had been received in the Colonial Office, and that a certain number of copies of these despatches had been privately printed for distribution among the members of the Government, and some of them had been delivered at the Colonial Office, and placed upon a table in that office. The prisoner had been in that office, and close to the table where the copies were lying, and shortly afterwards he sent one of these copies to the editor of the 'Daily News' newspaper, with a note marked 'private,' requesting that the despatch might be inserted in the 'Daily News,' and stating that no other journal had received a copy. The editor had no previous acquaintance with the prisoner. The editor wrote to the prisoner at the address mentioned in his letter, and he replied that it was 'all right,' but he did not wish his name to be mentioned in any way as connected with the publication. The despatches were published, and in consequence of a letter from the editor the prisoner called on him, and introduced himself as the person who had sent the despatches, and he pressed the editor not to give any further information. There was no pecuniary inducement for the act; but it rather appeared that the prisoner bore some resentment to the Colonial Minister for the refusal of an appointment. The editor stated that the only object for which the despatches were sent to him, as he understood, was that they might be published in the 'Daily News.' Martin, B., told the jury that the offence consisted in the taking away the property of another without his consent, and with the intention at the time to convert that property to the use of the taker. Such documents as these were clearly the subject of larceny, and as the stealing of the paper itself would have been a felony, the fact of the paper being printed made no difference: and the only question for the jury was, whether the evidence established to their satisfaction that at the time the prisoner took the documents away from the Colonial Office, he intended to deprive that office of all property in them, and convert them to his own use (*z*).

Sect. IV.—The Taking of the Goods must be Invito Domino.

It is of the very essence of larceny that the taking of the goods should be without the consent of the owner, *invito domino* (*a*).

Upon an indictment for burglary and larceny the evidence was that the prisoners, intending to rob a manufactory of which B. was the principal proprietor, applied to a man named P., who was employed as watchman to the manufactory, to assist them in the robbery. P. assented to their proposal; but immediately afterwards gave information to B., and told

(*y*) R. *v.* Godfrey, 8 C. & P. 563, Abinger, C.B. See also R. *v.* Bailey, L. R. 1 C. C. R. 347; 41 L. J. M. C. 61, *post*, p. 1267.

(*z*) R. *v.* Guernsey, 1 F. & F. 394. Such an act would fall within the Official Secrets Act, 1889, *ante*, Vol. i. p. 317.

(*a*) The same is true of robbery, *ante*, p. 1127.

him what was intended, and the manner and time the prisoners were to come; that they were to go into the counting-house, and that he was to open the door into the front yard for them. B. told him to carry on the business, and that he would bear him harmless; and B. also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time. In consequence of this information B. removed from the counting-house everything but 150 guineas and some silver ingots, which he marked, in order to furnish evidence against the prisoners; and laid in wait to take them, when they should have accomplished their purpose. When the prisoners came P. opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard; and from thence they and P. went through a door, which was left open, up a staircase in the centre building, leading to the counting-house and rooms where the plated business was carried on: this door the prisoners bolted, and then broke open the counting-house, which was locked, and the desks, which were also locked; and took from thence the ingots of silver and guineas. They then went to the story above, into a room where the plated business was carried on, and broke the door open, and took from thence a quantity of silver, and returned downstairs; when one of them unbolted the door at the bottom of the stairs which had been bolted on their going in, and went into the middle yard, where all (except one who escaped) were taken by the persons placed to watch them. It was submitted that no felony was proved, as the whole was done with the knowledge and assent of B., and that the acts of P. were his acts. The prisoners having been convicted the case was argued before the twelve judges, a majority of whom held that the prisoners were guilty of the larceny; for that, although B. had permitted, or suffered, the meditated offence to be committed, he had not done anything originally to induce it; that, his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. They thought also that there was no distinguishing between the degrees of facility a thief might have given to him; that B. never meant that the prisoners should take away his property, and the circumstance of the design originating with the prisoners and B.'s taking no step to facilitate or induce the offence, until after it had been thought of, and resolved on by them, formed, in the opinion of some of the judges, a very considerable ingredient in the case, and differed it greatly from what it might have been if he had employed his servant to suggest the perpetration of the offence originally to the prisoners. But Lawrence, J., before whom the prisoners were tried, doubted whether it could be said to be done *invito domino*, when the owner had directed his servant to carry on the business, and meant that the prisoners should be encouraged by the presence of that servant; and that by his assistance they should take the goods, so as to make a complete felony; though he did not mean that they should carry them away (*b*).

(*b*) R. *v.* Egginton, 2 Leach, 913; 2 East, P. C. 666; 2 B. & P. 508.

Upon an indictment for larceny, it appeared that the prisoner had asked a servant of the prosecutor if he wanted any money 'worked' for him. The servant said he did not want any. The prisoner said it would be a great deal to his interest if he 'worked' any. The servant had heard worked money spoken of by his master before, and communicated to his master what had passed between himself and the prisoner. About six weeks afterwards the servant, by his master's directions, wrote a note to the prisoner, desiring him to call on him, as he had got a little business for him to do. The prisoner accordingly came to the servant, and after several meetings, an arrangement was made between the prisoner and the servant that he was to come down that evening, and come in once or twice, and the servant was to give him what he could. He said he was to put down a shilling; the servant was to take it up, make a pretence of putting it into the till, take out two or three more, and place them on the counter, and the prisoner was to take them up; the servant told the master all that had passed. Afterwards some marked money was put in the till. The prisoner came in, and bought a pennyworth of gin, and put down a shilling. The servant gave him four marked shillings, the shilling he had put down, and threepence-halfpenny; directly the servant's hand was off it, the prisoner took it off the counter and put it in his pocket, and was going off when he was apprehended. The master stated that the servant acted with his knowledge and consent, and by his directions, and that he gave him directions to give the prisoner the money in the way he had done. Mirehouse, C.S., doubted whether there had been a felonious taking; and the prisoner having been found guilty, judgment was respited that the opinion of the judges might be taken, and the conviction was afterwards held right (*c*).

Sect. V.—Obtaining Possession by Fraud Animo Furandi.

Where the possession of goods is obtained neither clandestinely nor by force nor by fraud (*d*) on the part of the recipient it is not considered as obtained *invito domino*, and subsequent misappropriation of the goods by the recipient is at common law no trespass and therefore not larceny. The common law has been altered by sect. 3 of the Larceny Act, 1861 (*e*), and by the Larceny Act, 1901 (*f*), as to fraudulent misappropriation by bailees and persons entrusted.

(*c*) R. *v.* Williams, 1 C. & K. 195. No ground is stated for this decision; but as the prisoner took the money off the counter himself, this was an actual taking by him, wholly independent of the placing it there by the servant, who did not deliver it to the prisoner, but only placed it where he could take it. In R. *v.* Bannen, 1 C. & K. 295, Alderson, B., said, 'If a person desirous of stealing my horse asks my servant to let him do so, and the servant tells me of it, and I say, "Take out the horse and give it to him," and I, to confirm your evidence, will have you both taken with the horse in your possession, and all this is done, would this be horse-stealing?' And on its being answered that it would, Alderson, B., said, 'Though the horse was sent by my orders, if the person comes and takes the horse himself, it is a different matter.' Patteson, J., 'The case put by my brother Alderson would be no felony, because he voluntarily parts with his horse.' This supports the distinction, that if a servant, by his master's orders, delivers a chattel to a thief with whom he is in communication, that is not larceny; but if he only affords the thief facility for taking the chattel, and the thief takes the chattel himself, it is larceny. See also R. *v.* Johnson, C. & M. 218, *ante*, p. 1072; and R. *v.* Lawrance, 4 Cox, 440, *post*, p. 1266.

(*d*) As to mistake not induced by fraud, *vide post*, p. 1240.

(*e*) *Post*, p. 1245.

(*f*) *Post*, p. 1280.

Where chattels, &c., are obtained with the knowledge of the owner and without force, but by fraud, their fraudulent misappropriation may be larceny at common law, if the owner has merely parted with physical possession, and not with his ownership of the chattels, &c. (*g*). 'The law recognises a form of larceny in which the apparent delivery of the possession of goods by the owner of them, which has been obtained by a trick *animo furandi*, does not in law import consent to that possession, so that the person who obtained that possession may be treated as having "taken" the goods without the owner's consent' (*h*). 'If the *possession* of the goods said to have been stolen has been parted with, but the owner did not intend to part with the *property* in them, so that part of the transaction is incomplete and the parting with the possession has been obtained by fraud—that is larceny' (*i*). 'In order to reduce the taking under such circumstances from larceny to fraud the transaction must be complete if the owner has not parted with the property in the thing and the accused has taken it with a fraudulent intent, that amounts to larceny' (*j*). It would seem that where though the owner has meant to pass the property his intention is inoperative and is known by the recipient to be inoperative, the recipient may be guilty of larceny (*k*).

But if a person through the fraudulent representations of another delivers to him a chattel, intending to pass the *property* in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences (*l*). Where the indictment is for the latter offence the jury may convict of it though the evidence proves larceny; but the converse is not true (*m*).

'The offences of larceny by a trick, larceny by a person as bailee, and obtaining goods by false pretences, are often almost undistinguishable under the circumstances of particular cases, but the crucial point for the purpose of establishing larceny by a trick as distinguished from larceny by a bailee seems to me that there should have been an intention at the moment of obtaining possession of the goods then and there to steal them' (*n*).

In R. *v.* Middleton (*o*) the law is thus stated: 'It has often been decided that where the true owner did part with the physical possession of a chattel to the prisoner and therefore in one sense the taking of the possession was not against his will, yet if it be proved that from the beginning the prisoner had the intent to steal and with that intent obtained the

(*g*) 2 East, P. C. 668, 669, 693. See Oppenheimer *v.* Frazer [1907], 2 K.B. 77, Kennedy, L.J. Pollock & Wright on Possession, 128, 129.

(*h*) Oppenheimer *v.* Frazer [1907], 2 K.B. 50, 72, Moulton, L.J.

(*i*) R. *v.* Russett [1892], 2 Q.B. 312, 314, Coleridge, C.J.

(*j*) R. *v.* McKale, L. R. 1 C. C. R. 125, 129, Kelly, C.B., cited and approved in R. *v.* Russett.

(*k*) R. *v.* Middleton, L. R. 2 C. C. R. 38, 45, overruling R. *v.* Atkinson, 2 East, P. C. 673, where it was held not to be larceny to obtain money from A. by writing a letter in the name of B.

(*l*) Powell *v.* Hoyland, 6 Cox, 67, 70, Parke, B.

(*m*) 24 & 25 Vict. c. 96, s. 88 (*post*, p. 1514). R. *v.* Solomons, 17 Cox, 93 (C. C. R.). And see R. *v.* Adams, *post*, p. 1521. R. *v.* Barnes, 2 Den. 59. R. *v.* Essex, Dears. & B. 371, *post*, p. 1533.

(*n*) Oppenheimer *v.* Frazer [1907], 2 K.B. 50, 73, Moulton, L.J.

(*o*) L. R. 2 C. C. R. 38, 43, Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman and Archibald, JJ. To the same effect is R. *v.* Buckmaster, 20 Q.B.D. 182, 187, Manisty, J. In Oppenheimer *v.* Frazer [1907], 2 K.B. 50, 72, Moulton, L.J intimated (*obiter*) that this decision may be somewhat too narrow.

possession, it is sufficient taking. We are not concerned at present to inquire whether originally the judges ought to have introduced a distinction of this sort or ought to have left it to the legislature to correct the mischievous narrowness of the common law, but only whether this distinction is not now established, and we think it is' (*p*). And they referred to the two cases next to be mentioned as most clearly raising the point.

In R. *v.* Davenport (*q*) the prisoner had formerly been servant to a gentleman, who dealt with the prosecutor, and after he left his service, he called at the prosecutor's shop, and said his master (meaning the gentleman whose service he had left) wanted a silver cream ewer, desired the prosecutor to give it to him, and to put it down to his master's account: the prosecutor gave him two ewers in order that his master might select that which he liked best; he took both and sold them: the prosecutor stated that he did not charge his customer with these ewers, nor did he intend to charge him with either, until he had ascertained which he would have chosen. It was held that as the prosecutor had parted with the possession only and not the right of property, D. was guilty of larceny; but if he had sent but one ewer, and charged the customer with it, it would have been otherwise (*r*). And in R. *v.* Savage (*s*), where a prisoner went to a shop and said that D. wanted some shawls to look at, and the prosecutor gave her five shawls, and she pawned two of them the same evening, and the others were found in her lodgings, Patteson, J., ruled that as the property in the shawls would continue in the prosecutor until the selection was made, it was larceny if D. did not send for them (*t*).

The question in each case whether the offence is or is not larceny depends on the circumstances under which the accused received the goods.

The distinction is perhaps best shewn by an illustration given in R. *v.* Tideswell (*u*). In that case the prisoner was indicted for stealing 1 ton 10 cwt. of certain residual metal products. The prisoner, who had been in the habit of purchasing these products from the prosecutors for some time, would see the managing director of the prosecutors and arrange verbally with him to buy as much as he required at so much per ton. No specific quantities would be mentioned, the understanding being that the quantities purchased would be defined by weighing. It was the duty of

(*p*) They also referred to the cases collected in the 4th edition of this work, Vol. ii. p. 207.

(*q*) [1826] Newcastle Spring Assizes, Bayley, J. Archb. Peel's Acts, 4.

(*r*) This case was approved by the majority of the Court in R. *v.* Middleton, L. R. 2 C. C. R. 38, 43, 45, and the cases of R. *v.* Adams (R. & R. 225, and the 6th edition of this work, Vol. ii. pp. 162, 163); and R. *v.* Atkinson, (2 East, P. C. 673,) were disapproved.

(*s*) 5 C. & P. 143 and MS. C. S. G.

(*t*) D. being too ill to attend, the prisoner was acquitted, because it was assumed that D. did send her, and that she received the shawls properly, and that it afterwards entered into her mind to convert them to her own use, and at that time she had the possession of them. Where the prisoner asked to see some guns, and selected two out of those that were shewn to him and being informed of the price, said he wanted to shew them to his master, a country gentleman, and would take them to him at an hotel, and if they were approved of he would return and pay for them, or if not, bring them back. In R. *v.* Copeland, 5 Cox, 299 (Ir.), the Recorder of Dublin is reported to have held that it was not larceny in the prisoner to go away with the guns and never return, as the prosecutor had trusted the prisoner with the guns on the credit of his story. But this ruling seems open to considerable doubt. C. S. G.

(*u*) [1905] 2 K.B. 273: 74 L. J. K. B. 725.

the prosecutors' weigher to weigh out the amount sold and to enter the weight in a book. On the date charged he weighed out the amount sold, but in collusion with the prisoner entered the weight in his book 1 ton 10 cwt. less than the actual weight. Upon a case reserved, it was held that, as there was no contract between the seller, or any agent on his behalf, and the prisoner by which the property in the goods passed, the prisoner was properly convicted. Channell, J., said (*w*): 'If a farmer sells the sheep in a field to a purchaser at so much per head, but not knowing for certain how many sheep there are, sends his servant with the purchaser to count them, and the servant and the purchaser fraudulently agree to say that there were only nineteen sheep when there really were twenty, there is no larceny, because all the sheep have been sold by the owner to the purchaser, but the purchaser and the servant have conspired to defraud the owner of the price of one sheep. If, however, a farm bailiff, having authority to sell his master's sheep in the ordinary way, says to the purchaser, "There are twenty sheep in the field belonging to my master, but he does not know how many there are; you can take them all; I will tell my master that you had nineteen only, and you can pay him for nineteen only and give me a present for myself," there is clearly a larceny of one sheep, and that whether the bailiff professes to sell the twenty or whether he professes to sell nineteen only, for the fraud of the servant is known to the purchaser and no property passes in the twentieth sheep to the purchaser by the act so known to be fraudulent even if the bailiff professes to part with the property in it. R. *v.* Hornby (*x*) is a distinct authority for this. It is a decision of Coltman, J., alone, but appears to be good law. R. *v.* Middleton (*y*) also supports this view and so do all the cases as to what is usually called larceny by a trick.'

A. *Transaction complete, and Property parted with.*

The prosecutor was at a fair, having a horse there, in the care of a servant, which he intended to sell, when he was met by the prisoner, to whom he was personally known, and who said to him, 'I hear you have a horse to sell; if you will let me have him at a bargain I will buy him.' After the two had gone together to view the horse, the prosecutor said, 'You shall have the horse for eight pounds'; and calling to his servant, he ordered him to deliver the horse to the prisoner. The prisoner immediately mounted the horse, saying to the prosecutor that he would return immediately and pay him. The prosecutor replied, 'Very well.' The prisoner rode away with the horse, and never returned. Upon these facts, Gould, J., directed an acquittal on an indictment for stealing the horse, on the ground that there was a complete contract of sale and delivery, and that the *property*, as well as the possession, was entirely parted with (*z*).

Sale on Credit.—The prisoner called at the warehouse of Wilson, a silk manufacturer, after looking at several pieces of silk, selected one, agreed for the price of it, and said that his name was J. W., that he lived

(*w*) [1905] 2 K.B. p. 279.
(*x*) 1 C. & K. 305.
(*y*) L. R. 2 C. C. R. 38, *post*, p. 1215 *et seq.*
(*z*) R. *v.* Harvey, 1 Leach, 467; 2 East, P. C. 669, discussed in R. *v.* Russett [1892], 2 Q.B. 312, 314, 315.

at No. 6, A.-row, and that if Wilson would send it there at six o'clock in the afternoon, with a bill and receipt, he would pay him for it. Wilson, accordingly, entered the piece of silk in his day-book to the debit of the prisoner, made out a bill of parcels for it in his name, and sent his shopman with it to the place, and at the hour appointed. The shopman met the prisoner near A.-row, and accompanied him to No. 6, where he went with him into a room, and delivered to him the bill of parcels, which he examined and after saying it was right, gave the shopman two bills of £10 each, drawn by F. at B., on T. in L. The amount of the silk was only £12 10*s.*; and the shopman stated that he had not sufficient cash about him to pay the difference between that sum and the amount of the two bills; upon which the prisoner said that it was immaterial, that he should want more goods, and that he would call on the ensuing day at his master's, to look out other goods and take the change. Upon this the shopman left the goods, and returned home with the bills. The prisoner never came again to Wilson's warehouse; the bills, upon being presented, turned out to be mere fabrications; and, on inquiry at No. 6, A.-row, it appeared that the prisoner had only bargained for the lodgings the same morning, and that he absconded with the goods in a few minutes after Wilson's shopman had left the house. Within a month after the goods had been so obtained by the prisoner, the entry that had been made in the day-book was copied into the journal, and from thence posted regularly into the ledger, in the usual way where goods were not paid for immediately; and that the prisoner still stood debited in the ledger for the amount. On an indictment for stealing the silk it was argued that there was a sale of the goods to the prisoner, and such a delivery as would *change the property*. Macdonald, C.B., left it to the jury to consider whether there was not, in the mind of the prisoner, at the very beginning of this transaction, an intention and premeditated plan to obtain the goods without paying for them; and also whether this was a sale by Wilson, and a delivery of the goods, with intent to part with the *property*, he having received bad bills in payment for them, through the medium of his shopman. The jury were of opinion that the prisoner, from first to last, intended to defraud Wilson; and that it was not Wilson's intention to give him credit; and they found him guilty. But, upon a case reserved, the judges were of opinion that the conviction was *wrong*, on the ground that Wilson had *parted with the property* as well as the possession, upon receiving that which was accepted by his servant as payment, although the bills turned out afterwards to be of no value (*a*).

Upon an indictment against N., J., and C., for stealing a bank post bill for twenty pounds, another for fifteen pounds, and also seven guineas, the property of W., it appeared that N. introduced himself to the prosecutor, and succeeded in getting him to enter into conversation, and to open his desk, which gave N. an opportunity of seeing that the prosecutor had some money. N. then proposed to the prosecutor that they should take a walk together, which they did, and went to a public-house, where they were joined by C. J. came into the room and said that he had just came from C., for the purpose of receiving a large legacy, and produced a

(*a*) R. *v.* Parkes, 2 East, 671; 2 Leach, 614.

quantity of papers like bank notes; upon which C. said to him, 'Aye, I see it is good, but I imagine you think nobody, in company, has got any money but yourself'; to which J. answered, 'I will lay ten pounds, that neither of you shew forty pounds in three hours.' Immediately on this bet being proposed, the parties left the room; and N. and C. both asked the prosecutor if he could shew forty pounds, to which he answered that he believed he could. N. then accompanied the prosecutor to his room, where the prosecutor took out of his desk the two bills in question, and five guineas, and afterwards took out two more guineas, upon N. advising him to take a guinea or two more: and then they went together to another public-house, where C. had previously said, on their leaving the first public-house, that he should go; and where they found both J. and C. in a back room. J. put down a paper, apparently a £10 note for each who could shew forty pounds, upon which the prosecutor shewed his forty pounds, by laying them down on the table, but did not recollect whether he took up the £10 paper, which was given to him upon being allowed to have won his wager. J. then wrote four letters with chalk on the table; after which he went to the end of the room, turned his back, and said that he would bet them a guinea each that he would name another letter which should be made, and a basin put over it. Another letter was accordingly made, and covered with a basin. J. named a letter, but not the right one; by which the others won a guinea each. N. and C. then said, 'He is sure to lose; we may as well make it more, as we are sure to win: we may as well ease him of his money; he has more than he knows what to do with.' The prosecutor was so worked up with the hope of gain, that he at length, after various sums being proposed, staked his two post bills and the seven guineas; after which J. named a letter and guessed right; and then went to the table, swept off the bills and money, and went to the door of the room; the other prisoners sitting still, and the prosecutor making no objection, conceiving that he had fairly lost the money to J. Just at this time some police officers came to the house, who, upon seeing J., ran hastily towards the door, seized him, and brought him back into the room; and, upon perceiving, from the chalks upon the table, what had been going on, took the whole party into custody. Upon searching the prisoners, about eight guineas in cash were found upon them, and a great number of flash notes, but no real ones: and it was afterwards found that a lump of paper, which was put into the prosecutor's hands by J. when the officers came in, contained the two post bills belonging to the prosecutor. The prosecutor said, upon his cross-examination, that he did not know whether the paper which was given to him by J., on his shewing forty pounds, was a real ten pound note or not; that he intended to gamble; that, having won the first wager, he should, if the transaction had ended there, have kept the guinea; that he did not object to J. taking his forty-two pounds seven shillings when he lost; and that, if J. had guessed wrong the second time, he expected to receive from him forty-two pounds seven shillings, the amount of the stake. Upon this evidence it was contended, on behalf of the prisoners, that this was a mere gaming transaction, or at most, only a cheat, and not a felony; and the Court left it to the jury to consider, whether this were a gaming transaction, or whether it were a preconcerted scheme by

the prisoners, or any of them, to get from the prosecutor the post bills and cash. The jury were of opinion that it was a preconcerted scheme in all the prisoners to get from the prosecutor his post bills and cash; and they found them guilty. But upon a case reserved, the judges held the conviction wrong; on the ground that *the property* in the post bills and cash was parted with by the prosecutor, under the idea that it had been fairly won (*b*).

Where the prisoner went to a tradesman's house, and said she came from C., a neighbour, who would be much obliged if he would let her have half a guinea's worth of silver, and that she would send the half-guinea presently, and thereby obtained the silver, it was held not to be larceny (*c*). This case, in truth, was a *loan* of the silver upon the faith that the amount would be repaid at another time; and the money was obtained on a false pretence (*d*).

On an indictment for stealing two orders for the delivery of tallow, it appeared that the prisoner was a member of a firm of brokers, and had entered into a contract for the purchase for £8781, of 343 casks of tallow that were to arrive in this country. The tallow arrived, and the prisoner was called upon to complete the bargain. He then handed to the prosecutor a crossed cheque for the price of the tallow. He immediately sent the orders to the docks, and transferred the property into fresh warrants, and when the cheque was presented it was found that there was less than £10 standing to his credit. It was held that the charge of larceny could not be supported; since by taking a post-dated cheque instead of cash, the prosecutors had given the prisoner two days' credit for the goods, and the prisoner had the entire control over the property (*e*).

B. *Obtaining Goods from a Person having Limited Authority.*

Where the goods are obtained from a person having a limited power of dealing with them, *e.g.* a servant or carrier, the question whether possession or property was transferred is complicated by inquiries as to the extent of the authority of the servant, &c., to pass the property or the possession of the goods (*f*).

(*b*) R. *v.* Nicholson, 2 Leach, 610; 2 East, P. C. 669. In R. *v.* Riley, 1 Cox, 98, where the prosecutor was induced, by a preconcerted fraudulent scheme, to lend money to be used in play on a promise that it would be returned, it was held not to be larceny.

(*c*) R. *v.* Coleman, 2 East, P. C. 672; 1 Leach, 303.

(*d*) 2 East, P. C. 673.

(*e*) R. *v.* North, 8 Cox, 433. Pollock, C.B., after conferring with Channell, B. 'According to the statement of the case the orders were delivered before the cheque was given to the prosecutors; if so, the orders were not obtained by means of the cheque. If they had been, then the true question would have been whether they were obtained by false pretences, and the property in them parted with by the prosecutors.' C. S. G.

(*f*) In R. *v.* Prince, L. R. 1 C. C. R. 150; 38 L. J. M. C. 8. Blackburn, J., said, 'I lament the state of the law on this subject. The cases deciding that the property must be taken against the consent of the owner were decided when larceny was a capital offence; but this was afterwards qualified where the servant or agent had possession of the goods and they were taken against the consent of the servant; but this again was confined to such servants as had a *general authority* to part with the goods. There is a distinction between this case and one where the authority is limited to parting with the possession only, as distinguished from the property. The difficulty in these cases is to decide within which class of cases any particular case comes. I think that the carrier's porter in R. *v.* Longstreeth (*post*, p. 1217), had no authority to deal with the property at all, and it is to be observed that the same judges decided that case as

Where a servant or bailee, having authority to part with the property of his employer's goods, is induced by fraud voluntarily to part with such property the offence is not larceny (*g*). But where his 'authority is limited he can only part with the possession and not with the property, and if he is tricked out of the possession the offence so committed will be larceny' (*h*).

In R. *v.* Jackson (*i*), upon an indictment for stealing a diamond brooch and various other articles, B., who was in the employ of the prosecutor, a pawnbroker, and who had a general authority to manage his business, stated that the prisoner came to his master's shop, and produced duplicates of property previously pledged, to the amount of £34, which was the property laid in the indictment, and desired it to be brought up and a light, as he had some diamonds to seal; he then produced a small packet of diamonds, which he desired B. to look at, and to advance the most he could upon them. B. looked at them, and agreed to advance £160 on them, and at the request of the prisoner handed them over to him to seal up, which the prisoner did in his presence, and then returned a packet, which B. believed to be the one containing the diamonds, it resembling it in every respect. B. put it in his pocket, and then handed over to the prisoner the property laid in the indictment, and £124 in money for the diamonds, which he supposed he had got. The packet so deposited when afterwards opened was found to contain coloured stones of the value of £4. B. stated also that he had no authority from his master to lend money except upon pledges of an equivalent value; and that when he delivered the money, and also the property stated in the indictment, he supposed he had an equivalent for them in the diamonds in his pocket; and that when he delivered the goods in the indic ment he parted with them entirely, thinking the diamonds left with him were of sufficient value to cover the value of them and the cash advanced; and that, before he parted with them, he had received the parcel containing, as he supposed, the diamonds, and that he had before examined the genuine diamonds, and might then have detained them; but as the prisoner said that they might go through the hands of a second person and be changed, he handed the genuine diamonds back to the prisoner for the special purpose only of being sealed. Upon a case reserved, the judges were unanimous that the case was not larceny, because the servant, who had a general authority from the master, parted with the property and ownership, and not merely with the possession (*j*).

Upon an indictment for stealing three chests of tea, the property of S. T. and his partners, it appeared that Messrs. T. & Co. were carriers, and that on November 8, 1825, three chests of tea arrived at their warehouse, directed 'J. C., Tewkesbury.' About a month before this the prisoner, calling himself L., had called several times at the office inquiring for teas

decided R. *v.* Jackson (*supra*), to which case it was said to be opposed. There, I think, there was a general authority in the pawnbroker's assistant to part with the pledges, and the other cases came within the same principle.'

(*g*) R. *v.* Middleton, L. R. 2 C. C. R. 38, 48, but *vide ante*, p. 1212.

(*h*) R. *v.* Prince, L. R. 1 C. C. R. 150, 155, Blackburn, J.

(*i*) 1 Mood. 119.

(*j*) R. *v.* M'Kale, L. R. 1 C. C. R. 125; 37 L. J. M. C. 97. Kelly, C.B., referring to this case, said, 'There the transaction is complete, all took place, and was done before the chattel was delivered over, with the knowledge that the prisoner was about to depart with it.' *Vide post*, p. 1229.

and asking if any had arrived for him. The last time he had called was about a week before the time in question, and he desired the porter of Messrs. T. & Co., when any came, to take it to his (prisoner's) house. When the tea in question arrived it was taken by the porter to the prisoner's house, but he was from home, and the tea was taken back to the warehouse. On the Wednesday following the prisoner went to the porter's house and asked him if he had any tea for him; he told him he did not know, that he had three chests marked 'J. C.,' and said he did not know whether they were for the prisoner or not, as he did not know a person of the name of C. The prisoner said they were his, and that he had an invoice which specified the same; that they had spelt his name wrong by putting a C. instead of an L., but he did not produce any invoice. The carriage amounted to 18*s.* 9*d.*, for which, and the porterage, the prisoner paid £1; and the porter, by the prisoner's desire, fetched the goods and delivered them to the prisoner at his own house. On the Saturday following, J. C. applied to Messrs. T. & Co.'s office for the goods in question, which were afterwards found in the prisoner's possession. The jury found the prisoner guilty, and said they were of opinion that when the prisoner inquired at the waggon office for teas, he intended to obtain property not his own, and when he obtained the goods in question he knew they were not his property, and intended to steal them. Upon a case reserved, the judges held that the conviction was right, on the ground that the ownership of the goods was not parted with, the carriers' servant having no authority to part with the ownership to the prisoner, and the taking was, therefore, larceny (*k*). Where a carrier delivered goods to a wrong person by mistake, it was held that he did not part with the *property* in the goods, and that larceny might be committed with respect to such goods by the person receiving them from the carrier, as he had only had a limited authority to deliver to a certain person, and by leaving them with another by mistake the property was not really parted with (*l*).

In R. *v.* Small (*ll*), upon an indictment for stealing three pounds weight of cheese and 2*s.* 2*d.*, it appeared that the prisoner went to the shop of a cheesemonger and ordered about three pounds of cheese to go to one E., and the prosecutor's boy was to take it directly, with change for a crown piece. The prisoner met the lad and said, 'Oh, you have got the cheese, I forgot to order sixpenceworth of eggs; if you will give me the change and the cheese I will pay you.' The lad then gave him the cheese and 2*s.* 2*d.*; he then gave the lad a crown which turned out to be a bad one, though the lad believed it to be a good one at the time he took it. The lad went back for the eggs; the lad said, that if he had gone to E.'s he should have left the things there, but not the change without the money, and that he had no authority to part with these goods unless he received the crown piece. The master said, that his intention was to sell the goods, and if he received the crown he should be obliged to furnish the difference; he never expected the goods back again, and the boy had no authority to part with the change or the goods without payment. Mr. Serjt. Arabin

(*k*) R. *v.* Longstreeth, 1 Mood. 137.
(*l*) R. *v.* Little, 10 Cox, 559. Russell Gurney, Recorder.
(*ll*) 8 C. & P. 46.

(after consulting Parke, B., and Patteson, J.) told the jury that if they thought that it was a preconcerted scheme to get possession of the property without giving anything for it, and that the boy had the limited authority only, they should find the prisoner guilty (*m*).

Upon an indictment for stealing a horse, it appeared that the horse was impounded, and the prisoner, pretending that he had been sent by the owner of the horse to procure its release, paid the poundkeeper's demand, received the horse, and made off with it; and it was held that the poundkeeper was in the possession of the horse as servant to the owner, and had no right to transfer the property, and therefore the offence was larceny (*n*).

Upon an indictment for stealing a mare, it appeared that the prosecutor intending to sell his mare at a fair, sent her thither by a servant, to whom he gave no authority to sell the mare, or to deal with her in any way till he had himself arrived there. At the fair the prisoner asked the servant the price of the mare, and he told him £25; the prisoner then desired him to trot her out; the prisoner then went and talked to a man on horseback and a man on foot and then walked away. These two men then went up to the servant, and the man on foot offered the man on horseback £24 for the horse he was riding, which the latter refused, saying he would not sell him at any price; upon which the man on foot stepped aside to the servant, and said, if he would chop the mare for the horse the man was riding, he would give him £24 for the chop, and 5*s.* to put in his own pocket, at the same time taking from his pocket what appeared to be bank notes. The servant declined, saying the mare was not his; but afterwards agreed to the exchange of horses on the terms proposed, and as soon as the saddles were changed the man, who had been on horseback, rode away, and on the servant looking round for the man on foot, he perceived that he had gone away while the saddles were changing. The horse left in exchange was worth about £4. The prisoner had afterwards sold the mare for £14, saying that he had got it in a chop at the fair. It was submitted on behalf of the prisoner, that as the servant meant to part with the entire property in the mare, and not with the possession only, it was not larceny; but it was held that there was no parting with the property in the mare, as the servant had the mere charge of her, and had no right to deal with the property in her in any way whatever. And if the prisoner was in league with the other two men, and they three, by a fraud, in which each of them was to take his part, and did take his part, induced the servant to part with the possession of the mare under colour of an exchange, but they intending all the while to steal the mare, the prisoner ought to be found guilty (*o*).

The cashier of a bank has authority, arising from the nature of his employment, to pay the money of the bank to persons presenting genuine

(*m*) This case was acted on in R. *v.* Webb, 5 Cox, 154, where two counterfeit half-crowns were paid for a pair of boots to a servant who had, as the prisoner knew, been directed not to part with them without payment. See R. *v.* Middleton, L. R. 2 C. C. R. 58, per Bramwell, B., and R. *v.* Parkes, 2 Leach, 614, *ante*, p. 1213.

(*n*) R. *v.* Simpson, 2 Cox, 235. Williams, J.

(*o*) R. *v.* Sheppard, 9 C. & P. 121, Coleridge, J. In R. *v.* Middleton, L. R. 2 C. C. R. 58, Bramwell, B., points out that the prisoner and his confederates knew that the money did not belong to the servant.

orders, and to judge of their genuineness. In R. *v.* Prince (*p*), a cashier deceived by a forged cheque purporting to be drawn by a customer, pays money to the payee who presents it knowing it to be forged, he thereby parts with the property in the money of the bank to the payee so as to bind his employer; and the payee is not guilty of larceny, but of obtaining money by false pretences. And a conviction for receiving the money, with a knowledge of the fraud, from the payee who had obtained it in the manner above mentioned, was quashed. The cheque was payable to bearer and payment to the holder vested the money paid in him subject to the right of the bank to divest it (*q*). In R. *v.* Middleton (*r*), the question of the authority of a post-office clerk with respect to paying out savings bank monies was much discussed, but the judges were not agreed as to its extent.

C. *Transaction Incomplete and Possession only parted with.*

Very many decisions are reported in which juries have, under direction, found that the owner of goods has been induced to part with *possession* by fraud and have been held warranted in a verdict of larceny by a trick. They are only illustrations of the more or less correct application to the particular facts of the rules set forth *ante*, pp. 1210, 1211, but are set forth below for reference.

G. and S. were indicted for stealing silk stockings, the property of H. G., in the character of a servant to S., left a note at the shop of H., a hosier, desiring that he would send an assortment of silk stockings to his master's lodgings. H. in consequence took a variety of silk stockings to the address given. G. opened the door to him, and introduced him into a parlour where S. was sitting, disguised as a gentleman in deshabille. H. unfolded his wares, and S. looked out six pair of silk stockings, the price of which H. told him was fourteen shillings a pair; and he then desired H. to fetch some silk pieces for breeches, and some black silk stockings. H. hung the six pair of stockings, which S. had looked out, on the back of a chair, and went home for the other goods; but no positive agreement had taken place respecting the stockings. During H.'s absence, S. and G. decamped with the six pair of stockings, which were proved to have been afterwards pawned by S. A conviction of larceny on these facts was held right, as the whole of the prisoner's conduct manifested an original and preconcerted design to obtain a tortious possession of the property; and the verdict of the jury imported, that in their belief the evil intention preceded the leaving of the goods. The judges thought also that, even independently of the preconcerted design and evil intention, there did not appear to be a sufficient delivery to change the possession of the property (*s*).

(*p*) L. R. 1 C. C. R. 150; 38 L. J. M. C. 8.

(*q*) R. *v.* Middleton, L. R. 2 C. C. R. 38, 44.

(*r*) *Ubi supra.* See facts of this case, *post*, p. 1241.

(*s*) R. *v.* Sharpless, 1 Leach, 92; 2 East, P. C. 675. In the debate on R. *v.* Semple (2 East, P. C. 692), a case was mentioned as having been determined very recently by the judges, where a man ordered a pair of candlesticks from a silversmith to be sent to his lodgings, whither they were sent accordingly, with a bill of parcels by a servant; and the prisoner contriving to send the servant back, under some pretence, kept the goods; and it was ruled to be larceny, although they were delivered with the bill of parcels; such delivery being made under an expectation by the owner of being paid the money; for the jury found that it was a pretence to purchase with intent to steal. East, however, remarks upon this case, that it must be understood that the prisoner ran away

Inducing a tradesman to take goods, proposed to be bought, to a given place under pretence that the price will there be paid, and to leave them there in the care of a third person, and then getting them from that third person without paying the price, is larceny, if *ab initio* the intention was to get the goods from the tradesman, and not to pay for them. Upon an indictment for stealing trinkets and fancy articles, the property of B., it appeared that the prisoner called at the shop of B., to whom he was a perfect stranger, and said to him, 'I am come to take a choice of fancy articles; I am going into the country; I will pay you cash if you will deliver the goods, and you must serve me as low as you can.' He then wrote on a card his name, and an address at a coach office; and another card falsely describing where he lodged. He then selected the articles in the indictment, and desired that they should be taken the next day to the coach office. An invoice of the goods was made out by B. in the presence of the prisoner; and the next day B. carried the goods, packed in a case, to the office. The prisoner met him there, and said, 'I am surprised that my friend, who promised to be here, is not come.' In a quarter of an hour a letter was delivered by post to the prisoner, who, after appearing to read it, said, 'This is my very good friend, who will give me £200, at T.'s coffee-house, at half-past seven.' He desired B. to meet him there at that time, and then desired the book-keeper to reserve a place for him by the M. coach next day, when he said he would take the case with him. Both B. and the prisoner desired that the case might be taken care of; and B. swore on his cross-examination that he considered the goods to be sold, if he got his cash, but not before. Both left the coach office. B. went to T.'s, at the time appointed, but saw no friend of the prisoner's, nor the prisoner. Half an hour after they had left the office, the prisoner returned to it, telling the book-keeper he had altered his mind, and would take the case away then. He hired a cart, in which he had it conveyed to a house on the other side of the river. He was found in that house in two hours, with the case unpacked, and the goods all about the room. A conviction upon these facts was held right, on the ground that there was a felonious taking, the jury having found that the prisoner's intention, *ab initio*, was to get the goods out of B.'s possession, and then clandestinely remove and convert them to his own use, and that the property had never passed out of B. (*t*).

The plaintiff dealt in slippers; F., who likewise dealt in them, came to him and asked for fifteen dozen slippers, saying he had an order for them. The plaintiff refused to trust him with the goods, but went with him to the place of sale, which was the warehouse of the defendants, wholesale shoe manufacturers. On arriving there, F. said to the plaintiff, 'You must not go in, or you will spoil my custom.' The plaintiff remained on the outside a quarter of an hour, when F. came out, having sold and delivered the slippers to the defendants in the warehouse, and, being asked by the plaintiff for the money, made an excuse, and soon

with the goods, or did some other act to denote an intention of withdrawing himself from any account of them; and that no credit was intended to be given him, but that it was meant as a sale for ready money only. 2 East, P. C. 693, note (*a*).

(*t*) R. *v.* Campbell, 1 Mood. 179, cited in Stephenson *v.* Hart, 4 Bing. 476, 483, Park, J.

afterwards ran away. F. was indicted and convicted for stealing the slippers (*u*).

B. was employed by T.'s bailiff to sell four oxen at Ampthill fair for ready money. The prisoner inquired the price, and agreed for £48 10*s*. B. asked him to mark them (which is done by clipping off some hair); he said, 'No, I 'll mark them by and by, and if you go down to the King's Arms I 'll pay you for them.' B. soon went to the King's Arms, but did not find the prisoner. Having dined there, B. returned into the fair to the place where he had left the beasts, but they were gone. Two witnesses proved that they purchased two of the oxen in the fair from the prisoner. Search was afterwards made for him in the fair and at the different inns, without success. B. said, that the custom was to mark the beasts when they were sold; but not to deliver them until paid for, and that if the prisoner had applied to him for leave to drive them away, he would have refused till he had received the price. On an indictment for stealing the oxen, Garrow, B., left it to the jury to say, whether the prisoner, at the time he made the bargain, intended to pay for the oxen, or merely to get them into his possession to sell them and convert the money to his own use. The jury found the prisoner guilty, and said they thought he never at any time intended to pay for the beasts. On a case reserved this finding was held to warrant the conviction (*v*).

The prisoner agreed at a fair to sell a horse to the prosecutor for £23, of which £8 was to be paid at once, and the emainder upon delivery of the horse. The prosecutor handed £8 to the prisoner, who signed a receipt for the money, by which it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse, and the jury found that he never intended to do so. It was held that he was rightly convicted of larceny of the £8 by a trick (*w*).

A. and B. called at the prosecutor's shop, and A. asked the price of two waistcoats which were in the shop-window, and the prosecutor replied 'fifteen shillings.' A. said: 'You must go to the lowest price, as it will be for ready money.' The prosecutor said: 'Then you shall have them for twelve shillings,' which was agreed to by A., who said he would put the waistcoats into a gig standing at the door, in which B. was; to which the prosecutor replied 'Very well.' A. had no money, but B. had, and when A. went out to the gig, the prosecutor thought he went out to get the money from B. Immediately after the waistcoats had been placed in the gig, A. got in, and they drove off full gallop. The jury found that the waistcoats were parted with conditionally that the money was to be paid at the time, and that A. took them with a felonious intent; and, upon a case reserved, it was held that upon this finding A. was guilty of larceny; for it was an express finding that the prosecutor only parted with *the possession* of the goods (*x*).

W., a hosier, delivered two parcels containing certain goods to his apprentice, with directions to carry them to the house of H., another hosier. The apprentice, with the parcels under his arm, was met by the prisoner, who asked him where he was going. To which the apprentice

(*u*) Lyons *v.* De Pass, 11 A. & E. 326.
(*v*) R. *v.* Gilbert, 1 Mood. 185.
(*w*) R. *v.* Russett [1892], 2 Q.B. 312.
(*x*) R. *v.* Cohen, 2 Den. 249.

answered, 'To H.'s.' The prisoner, producing a small parcel, replied, 'I know your master, and I owe him for those parcels; I was going for them to your shop, therefore do you give me your parcels, and take this back to your master; there is a letter inside, and it must be immediately forwarded to B.' The apprentice accordingly consented to the proposed exchange, and delivered the two parcels to the prisoner, and the prisoner delivered his parcel to the apprentice. The parcel delivered by the prisoner contained a collection of old rags of no value, and he was not H. On an indictment for stealing the two parcels, the jury were of opinion that the prisoner, by falsely pretending that he was going to the house of the prosecutor for H.'s parcels, had contrived to make this exchange of parcels with an intent wrongfully to obtain and convert to his own use the goods mentioned in the indictment, and therefore they found him guilty. And upon a case reserved, the judges were unanimously of opinion that the conviction was right. Gould, J., who delivered their opinion, said, that it appeared to him that the prisoner's having obtained these goods fraudulently from the apprentice was just the same as if he had obtained them from the actual possession of the master (*y*).

The prisoner went to the prosecutor's counting house and proposed to buy four casks of bristles, and to pay ready money on delivery, and was told by the prosecutor's clerk that as he was a stranger he could not have them on any other terms. The prisoner said he would pay the money, but had not got a cheque; he was told by the clerk, that if he wished to pay the money, he had no objection to give him the delivery order. The prisoner went away with the order, and the clerk followed him almost immediately to the wharf, and found the prisoner busy loading the bristles into a cart. The clerk stopped the delivery at the wharf, but eventually consented to the bristles being taken away, upon the express condition, and the engagement of the prisoner, that they should be paid for at his door, before they were lodged in the house. Nobody was sent to accompany the cart, but another clerk of the prosecutor was directed to be at the prisoner's door a little before two o'clock, which would be the time the cart would arrive, for the purpose of receiving payment before the goods were taken from the cart. That clerk went to the prisoner's house, and after waiting till half-past three, he came back without seeing the prisoner, the cart, or the goods. The carman who drove the goods from the wharf was directed by the prisoner to drive to S., and when he had got part of the way he was directed by the prisoner to turn down another street, and wait at the corner of a street, where, notwithstanding the remonstrances of the carman, the bristles were put by the prisoner's directions into another cart, and driven away, and lodged in an empty warehouse, and the next morning the prisoner offered the bristles for sale, representing that he had taken them for a bad debt. On an indictment for stealing the bristles, it was objected that the clerk having permitted the prisoner to take possession of the delivery order, there was a complete transfer of the property, and that the subsequent conversion was a mere breach of contract: but the Recorder thought

(*y*) R. *v.* Wilkins, 1 Leach, 520; 2 East, P. C. 673. See R. *v.* Longstreeth, 1 Mood. 137, *ante*, p. 1217.

that it was a mere permission to enable him to remove them to his door in S., with a full engagement on the part of the prisoner that the order was not to operate to enable him to put them within his own premises till the money was paid ; and he told the jury that, if they believed there never was any *bona fide* intention to buy, but an intention to get the goods by fraud from the owner, they should find the prisoner guilty : which they did, and said that they thought the prisoner had no intention to buy, but to get them by fraud from the owner. The jury found that the prisoner never meant to buy, but to defraud the owner, and upon a case reserved, the conviction was held right (*z*).

In R. *v.* Slowly (*a*), the prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was induced to make out and sign a receipt, which they got from him and refused to restore the onions or pay the price. The jury found them guilty of larceny and said that they never meant to pay for the onions and that the fraud was premeditated. The conviction was affirmed.

In R. *v.* Stewart (*b*), the prisoners having taken a house went to the prosecutor's shop, selected certain goods, and ordered them to be sent home. The prosecutor sent them by one D., and gave him strict injunctions not to part with them without receiving the price. D., on arriving at the house, told the prisoners that he was instructed not to leave the goods without the money or an equivalent. After a vain attempt to induce D. to let them have the goods on the promise of payment on the morrow, one of the prisoners wrote a cheque for the amount of the bill, and gave it to D., requesting him not to present it till the next day. D. left the goods, and returned the cheque to his employers. The cheque was presented the next morning and dishonoured, the prisoner's account having been some time before overdrawn. On an indictment for larceny of the goods it was contended that D. had parted not only with the possession of the goods, but also with the property in them, and R. *v.* Parker (*c*) was cited. Alderson, B., said : ' It is for you to shew that the prisoner had reasonable ground for believing that the cheque would be paid. The case appears to me to approach more nearly to R. *v.* Small (*d*). If the owner of goods parts with the possession, meaning also to part with the property, in consequence of a fraudulent representation of the party obtaining them, it is not larceny, but a mere cheat (*e*). But if the owner does not mean to part even with the possession, except in a certain event, which does not happen, and the prisoner causes him to part with them by means of fraud, the owner still not meaning to part with the property, then the case is one of larceny. Here, if the owner had himself carried the goods and parted with them as the servant did, no doubt it would have been a case of false pretences ; or if the servants had had a *general authority* to act, it would have been the same as if the master acted. But in this instance he had a *limited authority* which he chose to exceed. I am of opinion, as at present advised, that if the prisoner intended to get

(*z*) R. *v.* Pratt, 1 Mood. 250.
(*a*) 12 Cox, 269 (C. C. R.).
(*b*) 1 Cox, 174.
(*c*) 2 Mood. 1, *post*.
(*d*) *Ante*, p. 1217.
(*e*) At common law or an obtaining by false pretences within 24 & 25 Vict. c. 96 s. 88. *Vide post*, pp. 1501, 1514.

possession of these goods by giving a piece of waste paper, which he had no reasonable ground to believe would be of use to anybody, and that the servant had received positive instructions not to leave the goods without cash payment, the charge of larceny is made out' (*f*).

Upon an indictment against A. and B. for stealing the money of J., it appeared that A., who represented himself to be a Frenchman and unable to speak English, offered the prosecutrix a dress for sale, and signified through B. that the price was 25*s*., and if she would give that sum for it, he would give her another dress worth 12*s*. which he produced. The prosecutrix agreed, and having one sovereign and one shilling in her pocket she took it out, and whilst holding it in her hand, A. opened her hand and took the guinea out of it; he did not take it forcibly, nor would she say that 'it was against her will': 'nor was it by her consent': 'he took her by surprise.' She then borrowed four shillings of a fellow-servant, but A. refused to take it, for she had borrowed it, and he said she was a bad woman, and had told a lie, and he would not produce the other dress; he then laid down the first dress and packed up the other. The dress left was of much less value than 25*s*. It was contended that this was a mere breach of contract, and not a felony: but the jury having found the prisoners guilty, it was held, upon a case reserved upon the question whether the above facts warranted the finding of the jury, that in point of law they did warrant the finding of the jury. The jury having found the prisoners guilty, the Court was bound to assume that the jury had been properly directed, and that they found that it was part of the scheme of the prisoners that the property was to be obtained by a pretended sale. In that case there was no contract, but only a fraud, by means of which the felony was committed (*g*).

The prosecutrix entered a sale-room where a mock auction was being held. The prisoner was auctioneer and knocked down a piece of cloth to the prosecutrix for 26*s*. for which she had not bid, as he knew. The prosecutrix denied that she had bid; the prisoner asserted that she had, and must pay for it before she could leave. The prosecutrix tried to go out of the room when a confederate, standing between her and the door, also said that she had bid, and prevented her leaving. She then in fear paid the money, and took away the cloth, which was given to her. It was held that these facts constituted a larceny, as they sufficiently shewed that the money was obtained from the prosecutrix against her will (*h*).

The prisoner, acting with others, dropped into the slit of an automatic box a disc about the size and weight of a penny and thereby obtained a cigarette out of the box. It was held that the prisoner was guilty of larceny (*i*).

The prisoner was indicted for stealing a chest and fifty-nine pounds of tea, which, in one count of the indictment, were stated as the property

(*f*) 'As the prosecutor received the cheque and presented it, it might have well been contended that he ratified the servant's act in taking it; and consequently that the case was not larceny. See R. *v.* Parkes, 2 Leach, 614, *ante*, p. 1213.' C. S. G.

(*g*) R. *v.* Morgan, Dears. 395. The direction to the jury was not stated in the case.

(*h*) R. *v.* Macgrath, L. R. 1 C. C. R. 205. R. *v.* Lovell, 8 Q.B.D. 185. R. *v.* Hazell, 11 Cox, 597.

(*i*) R. *v.* Hands, 16 Cox, 188.

of L. and T.; and, in another count, as the property of the East India Co. The facts were, that L. and Co. had purchased the chest of tea in question, No. 7,100, at the East India House, but had not taken it away, when the prisoner, who was in no way employed by them, went thither, and, going up to the place where the request papers were kept, selected one of them, and then proceeded, with the paper in his hand, as if to look for a chest of tea corresponding with the number on the paper. The servant in the India House who had the care of the request papers, seeing him so engaged, went up to him, took the paper which was in his hand, and seeing the number 7,100 upon it, pointed to a chest with a corresponding number, and said, that was the chest he wanted, and then returned the paper to him. The prisoner then went to the permit office, and shortly afterwards returned to the India House with a permit, when the same servant who had the care of the request papers received the permit from him, and asked him whose porter he was, and, upon his answering 'N.'s,' returned the permit to him again, and entered the name of N. in the book. The prisoner then took away the chest of tea. Upon this evidence the jury found the prisoner guilty. An objection was then taken by his counsel, that, as the possession of the property was obtained by a regular request note and permit, the offence could only be considered as a misdemeanor; but, upon a case reserved, the judges were clearly of opinion that the offence amounted to felony (*j*).

Upon an indictment for stealing wheat, the property of S. and others, it appeared that the wheat was not their property, but was deposited in one of their storehouses, which was in the care of E., one of their servants, who had authority to deliver the wheat only on the orders of the prosecutors or of C., their managing clerk. The prisoner, a servant also of the prosecutors, came with a man and a cart, and obtained the key of the storehouse from E., by representing that he had been sent by C. for five quarters of wheat, which he was to take to the railway. E. believing his statement, allowed the wheat to be removed, the prisoner assisting to put it into the cart, in which it was conveyed from the prosecutors' premises, the prisoner going with it. The wheat was disposed of by the prisoner's associates with his privity. The prisoner's statement was entirely false. It was contended that the wheat was obtained by false pretences, but the jury were directed that, if they believed the facts, the offence amounted to larceny; and, upon a case reserved after a verdict of guilty, it was held that the conviction was right; for the wheat was delivered to the prisoner for a special purpose, namely to be taken to the railway, and the property remained in the prosecutors throughout as bailees (*k*).

Upon an indictment for stealing a watch, it appeared that J. had bought the watch and had sent it back to the seller to be regulated. A letter was written by some one in his name and without his authority, requesting the seller to return the watch to J., in a letter

(*j*) R. *v.* Hench, MS. & R. & R. 163.

(*k*) R. *v.* Robins, Dears. 418. 'An indictment for false pretences cannot be supported, unless the property in the goods would pass if the statements were true; and consequently such an indictment can never be supported where goods are obtained from a person who has no authority to part with the property in them, such as a bailee for safe custody and the like.' C. S. G.

directed to the care of the postmaster at B. Afterwards the prisoner and a person who falsely represented himself to be J. came to the post office, and asked for the watch. It had not arrived, and the man personating J. requested that, when it did, it might be delivered to the prisoner. This was accordingly done by a clerk at the post office on the arrival of the watch. The writing the letter, personating J., and applying for the watch were parts of the same scheme, and the watch was sent by the seller in pursuance of the letter. It was objected that the offence was obtaining the watch by false pretences, and not larceny; but it was held, on a case reserved, that the prisoner was guilty of a larceny of the watch of J.: for, assuming that the seller had more than a bare charge, and was the bailee of it, yet his special property as such did not put an end to the general property of the true owner; and when the seller sent the watch away to a third person, addressed to the true owner, intending such person to deliver it to the true owner, and that third person (the postmaster) received it for that purpose, the seller's possession and special property ceased, and the general property of the true owner became entirely unincumbered, and drew to it the possession, unless the postmaster became the bailee; but this he did not, for he had only a charge, and he became the servant of the true owner for the purpose of delivering it to him; and his possession was the possession of the true owner, and could not be divested by the tortious acts of the prisoner (*l*).

The prosecutor had a colliery, at which both coal and slack were sold by retail, but none (except to private customers) was allowed to be taken away until it had been paid for; and when the carts were loaded, they were taken to a weighing machine in the colliery yard, where the weight and price of the coals having been ascertained, the coals were paid for to the clerk in charge of the weighing machine, which was at the entrance of the yard, so that carts entering and passing out of the yard had to pass the machine. The prisoner was acquainted with the regulations, and knew that he would not be permitted to take coals out of the yard until they had been weighed and paid for as above mentioned. The price of soft coal was about double that of slack. The prisoner brought his cart to the colliery and said, 'I want a load of the best soft coal,' and the cart was loaded with the best soft coal by a servant of the prosecutor, assisted by the prisoner. The servant then went away, and then the prisoner placed a quantity of slack from a heap of slack on the top of the load of soft coal, thereby making the cart appear to be loaded with slack only. The prisoner then took the cart to the weighing machine, and the clerk said to him, 'What have you got?' He said, 'Slack.' The clerk, seeing slack only in the cart, weighed it, and charged the prisoner for the load as slack, and the prisoner paid such charge and went away with his cart. The sum paid by the prisoner was considerably less than the real price of the load. On an indictment for stealing this coal the jury were directed

(*l*) R. *v.* Kay, Dears. & B. 231; 26 L. J. M. C. 119. The *ratio decidendi* of this case is severely criticised by Bramwell, B., in R. *v.* Middleton, L. R. 2 C. C. R. 58. The simple and true answer to the objection was that the property in the watch was not parted with either by the seller or the postmaster; for they neither had the power nor the intention to part with anything more than the possession of the watch. See R. *v.* Vincent, 2 Den. 464; 21 L. J. M. C. 109.

that if they were of opinion (*ll*) that the prisoner at the time he went to the colliery for the coal intended fraudulently to take the same away, and appropriate it to his own use, on paying for the soft coal the price of slack only, and that he actually carried out his intention by fraudulently placing slack over the soft coal, and making the false representation to the weighing clerk, they might convict the prisoner of larceny. A conviction upon this direction was upheld on the ground that as the jury had found that there was a preconceived plan on the part of the prisoner to get the coal, and appropriate it to his own use on paying for it the price of slack only, and that the prisoner carried out the plan by covering the coal with slack, and pretending to the clerk at the weighing machine that the cart contained slack only. The prisoner had obtained possession of the coal only and not the property in it, and the money paid by him was paid for the slack and not for the soft coal (*m*).

Where the prisoner, with the assent of the prosecutor, had pawned the coat of the prosecutor for a loaf of bread, and the next day proposed to go and redeem the coat, and the prosecutor expressed no dissent; but at the trial said that he thought, from the prisoner's manner, that he was in joke; and the prisoner went, paid the sixpence for the bread, received back the coat, and carried it away to a place ten or twelve miles distant; Parke, B., told the jury that if they thought that the prisoner, at the time when he paid the money and received back the coat, intended to deprive the owner entirely of the use of it, and to appropriate it to his own use, it would be their duty to convict him of larceny (*n*).

On an indictment of a surveyor of highways for stealing gravel, the property of certain road trustees, there was evidence that the prisoner, having unlimited authority to order materials for repairing roads, had ordered and carted away gravel in excess of the amount needed for the roads, and had sold the excess for his own benefit. Wightman, J., left it to the jury to say whether, at the time he had it carted away, he intended fraudulently to deprive the road trustees of the property in the gravel (*o*).

The prisoner was indicted for stealing a bill of exchange of the value of one hundred pounds, the property of E. The prisoner told E. that he would discount the bill for two and a half per cent. agency, exclusive of the legal interest for two months. E. immediately delivered the bill into the hands of the prisoner. The prisoner then told E., that if he would go with him to P.-street, he would give him the cash, to which E. replied, that his clerk should attend him, and pay him the agency, and the discount, on receiving the hundred pounds. As the prisoner and the clerk departed, E. whispered the clerk not to leave the prisoner without receiving the money, nor to lose sight of him. The prisoner and the clerk accordingly proceeded together to the prisoner's lodgings in P.-street. When they arrived the prisoner shewed the clerk into the parlour, and desired him to wait while he fetched the money, saying, that it was only about three streets off, and that he should be back again in a quarter of an

(*ll*) See R. *v.* Meyer, 1 Cr. App. R. 10.
(*m*) R. *v.* Bramley, L. & C. 21.
(*n*) R. *v.* Sparrow, 2 Cox, 287.
(*o*) R. *v.* Richardson, 1 F. & F. 488. The jury acquitted, or the question whether the gravel vested in the road trustees would have been reserved.

hour. He was not seen again until he was arrested some days later. It was objected by the prisoner's counsel, that these facts did not amount to felony. But the Court left the case with the jury to consider, first, Whether the prisoner had a preconcerted design to get the note into his possession with an intent to steal it; and secondly, Whether the prosecutor intended to part with the note to the prisoner without having the money paid before he parted with it. The jury found the affirmative of the first, and the negative of the second question, and concluded that the prisoner was therefore guilty. And this conviction was held right upon reference to all the judges (*p*).

The prisoner was indicted for stealing bank notes to the amount of thirty-five pounds, the property of W. Smith. The prosecutor expressed a wish that the prisoner would oblige him by letting him have some gold in exchange for notes and silver, and the exchange took place to a small amount. The prisoner then observed, he would procure him a considerable further quantity of gold, if the prosecutor would lay down notes to the amount. Upon this the prosecutor put down thirty-five pounds, in bank notes, for the purpose of receiving back their amount in gold; and the prisoner took them up, and went out of the house with them, promising to return immediately with the gold. The prisoner did not return. Upon these facts, Wood, B., held, that the case clearly amounted to larceny, if the jury believed that the intention of the prisoner was to run away with the notes, and never to return with the gold: and that whether the prisoner had, at the time, the *animus furandi* was the sole point upon which the question turned; for if the prisoner had, at the time, the *animus furandi*, all that had been said respecting the property having been parted with by the delivery was without foundation, as the property, in truth, had never been parted with at all. The learned judge further said, that a parting with the property in goods could only be effected by contract, which required the assent of two minds: but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner; the prosecutor only meaning to part with his notes on the faith of having the gold in return; and the prisoner never meaning to barter, but to steal (*q*).

The prosecutor owed money to S., and he said to his servant, in the hearing of the prisoner, 'G., you must go to S., and pay him this money'; thereupon the prisoner said, 'I will take it for you, I live only six doors from S.' Induced by the offer of the prisoner, the prosecutor gave him £1 12*s.* to carry to S. in discharge of the debt. The prisoner's statement was false, and he converted the money to his own use. He was indicted for stealing the money, and the jury were told that the prisoner was guilty of larceny if they were of opinion that he obtained the money by a trick, and meant at the time to appropriate it to himself; but that if he took it from the prosecutor *bona fide*, and afterwards converted it to his own use, it was not larceny (*r*). The jury found that the

(*p*) R. *v.* Aickles, 1 Leach, 294; 2 East, P. C. 675.

(*q*) R. *v.* Oliver, *cor.* Wood, B., cited in R. *v.* Walsh, 4 Taunt. 274; 2 Leach, at p. 1072.

(*r*) This latter position seems erroneous, for the prisoner had only the custody and not the possession of the money, and was therefore guilty of larceny in disposing of it. See R. *v.* Thompson, L. & C. 225, *post*, p. 1244.

prisoner had obtained the money by a trick, intending at the time to appropriate it to his own use, and convicted him; and, upon a case reserved, it was held that the case could not be distinguished from R. *v.* Semple (*s*), and that the conviction was right (*t*).

On an indictment for stealing a half-crown, two shillings, and six penny pieces, it appeared that the prisoner went to the shop of the prosecutor, and asked his son to give him change for a half-crown, and the boy gave him two shillings and six penny pieces, and the prisoner held out the half-crown, of which the boy caught hold by the edge, but never got it into his possession, and then the prisoner ran away, having drawn the half-crown out of the boy's hand, and taking it and the change with him. Park, J., said, 'If the prisoner had only been charged with stealing the half-crown I should have had great doubt, as the half-crown was his own, but he is also indicted for stealing the two shillings and the copper. He falsely pretends that he wants change for the half-crown, gets the change, and runs off; I think that is a larceny' (*u*).

Ringing the Changes.—A. and B. went into a shop, and A. asked for a pennyworth of sweets, and gave a florin in payment. The prosecutrix put the florin into the till, and took out of the till one shilling and sixpence in silver, and fivepence in copper, and put the change on the counter. A. took up the change; B. said to A. that he need not have changed, and threw down a penny. A. took up the penny, and then put down sixpence in silver and sixpence in copper, and asked the prosecutrix to give him a shilling in change. She took a shilling from the till and put it on the counter beside the sixpence in silver and sixpence in copper. A. then said to the prosecutrix that she might as well give him the florin and take it all. She took the florin from the till and put that on the counter, expecting she was to receive two shillings of the prisoner's money. A. took up the florin, and the prosecutrix took up the sixpence in silver and the sixpence in copper and her own shilling. The prosecutrix did not discover her mistake till she was putting the change into the till, but at the same moment B. distracted her attention by asking the price of some sweets, and both went out of the shop, A. taking her florin. Held, that the transaction was inchoate when the prosecutrix discovered her mistake, and that she never intended finally to part with her property in the florin till she received two shillings of the prisoner's money, and that the offence was larceny, and not obtaining money by false pretences, and that the conviction was right (*v*).

(*s*) 2 East, P. C. 691. *Vide ante*, p. 1219, note (*s*).

(*t*) R. *v.* Brown, Dears. 616. Pollock, C.B., said there was a case in which a banker's clerk persuaded customers at the bank where he was employed to allow him to place money of his to their accounts, and thereby, and by other devices, managed to obtain money belonging to the bank; and Lord Ellenborough held that he was guilty of stealing, saying that the machinery by which a man gets the property of another out of his possession makes no difference in the offence. Dears. 618 (*n*).

(*u*) R. *v.* Williams, MS. C. S. G., and 6 C. & P. 390.

(*v*) R. *v.* M'Kale, L. R. 1 C. C. R. 125; 37 L. J. M. C. 97. Kelly, C.B., said, 'The distinction is well settled between obtaining a chattel by means of a fraud and stealing it. If the property in the chattel is parted with by the prosecutor, though the possession is obtained by a fraud, that would not be a larceny, but then the transaction must be complete. Then the question is, had the prosecutrix parted with the property in the florin when the prisoner carried it off? I think not. . . . I think her property in the florin continued until she received what she expected to receive. It appears to me to be the same case as if the prisoner,

Where a prisoner by 'ringing the changes' fraudulently induced a barmaid to pay him money belonging to her master, which she had no intention of parting with, and had no authority to part with, except in return for the proper change, it was held that the prisoner could be properly convicted of larceny (*w*).

But where upon an indictment for stealing a shilling, it appeared that the prisoner went into a shop, and asked for half an ounce of tobacco, and pitched down half a crown on the counter for it; the shopman put down two shillings on the counter, and, whilst he was counting the half-pence out of the drawer, which was partly open, the prisoner picked up the two shillings off the counter, and appeared to throw them into the till, and asked for four sixpences instead of them; though suspecting that there was something wrong, the shopman gave the prisoner one shilling, two sixpences, and fourpence-halfpenny. On examining the drawer, it was found that the prisoner had only thrown in one shilling and pocketed the other: it was held that this was not larceny, but obtaining the money by false pretences (*x*).

And where upon an indictment for stealing a sovereign, it appeared that the prosecutor and the prisoner having entered a beer shop, were drinking together, and that the prosecutor, who had agreed to treat the prisoner, took a sovereign out of his pocket for the purpose of paying, and offered it to the landlady to change. She declared her inability to do so, and placed it on the table, and the prisoner said, 'I 'll go and get change.' The prosecutor said, 'You won't come back with the change,' to which the prisoner replied, 'Never fear,' and taking up the sovereign left the house, and did not again return. It appeared from the evidence of the prosecutor, that he was not aware of the last remark of the prisoner, nor at first that he had gone out with the sovereign, but he had not offered any opposition to the prisoner's taking it, having left the sovereign on the table after his reply to the prisoner's offer. For the prisoner it was submitted that the prosecutor having parted with the legal possession of

with 18*s.* in his hand, had asked her to give him a sovereign in change, and she lays the sovereign on the counter and he the silver. He takes up the sovereign and leaves the shop before she has counted the silver; and then she counts the silver, and discovers that she has only 18*s.* instead of 20*s.* I think that would be larceny. The cases cited by the counsel for the prosecution bear out this view of the case.' R. *v.* M'Kale was cited with approval in R. *v.* Buckmaster, 20 Q.B.D. 312, 314 (*post.* p. 1234). And see R. *v.* Twist, 12 Cox, 509. R. *v.* Greenaway, 72 J. P. 389.

(*w*) R. *v.* Hollis, 12 Q.B.D. 25; 53 L. J. M. C. 38.

(*x*) R. *v.* Williams, 7 Cox, 355. Martin, B., said, 'The case against the prisoner here is that he pretended that he had returned the whole when he had only returned one shilling.' This might apply to the last shilling given to the prisoner, and he might have been indicted for obtaining that by false pretences; but as to the shilling pocketed, the case is otherwise; that was put down on the counter in change for the good half-crown, and, until then taken into the hands of the prisoner, remained in the possession of the prosecutor, the counter being in his possession. In Chambers *v.* Miller, 13 C. B. (N. S.) 125, where a banker, on a cheque being presented, placed the amount on the counter, and the presenter of the cheque drew the money towards him, counted it over once, and was in the act of counting it a second time, it was held that the property in the money had passed. But Byles, J., said, 'I should be inclined to hold, as a matter of law, that so soon as the money was laid upon the counter for the holder of the cheque to take, it became the money of the latter.' No other judge intimated any such opinion, but all relied on the taking possession of the money by the presenter of the cheque; and, with all deference, money on the counter of a banker is just as much in his possession as if it were in his pocket. It is therefore submitted that the prisoner in this case was guilty of stealing the shilling he put in his pocket. C. S. G.

the sovereign, the subsequent appropriation of the money by the prisoner did not amount to larceny. Coleridge, J. (having conferred with Gurney, B.), said, 'It appears quite clear that the prosecutor having permitted the sovereign to be taken away for change, could never have expected to receive back again the specific coin, and he had therefore divested himself, at the time of the taking, of the entire possession in the sovereign, and consequently, I think, that there was not a sufficient trespass to constitute a larceny' (*y*).

The prisoner was the daughter of the proprietor of a 'merry-go-round,' and was in charge thereof. The price of a ride in this machine was one penny for each person. The prosecutrix got into it and handed to the prisoner a sovereign in payment of the ride, asking for the change. The prisoner gave her elevenpence, and the merry-go-round being about to start, she said she would give her the rest of the change when the ride was over. The prosecutrix assented to this, and about ten minutes after, when the ride was over, asked the prisoner for the change, when she replied that she had only received a shilling, and declined to give any more change. The indictment charged the prisoner with stealing nineteen shillings in money of the monies of the prosecutrix. The prisoner was convicted of stealing the nineteen shillings: held by a majority of the judges, that the conviction was wrong and must be quashed, as she could not be convicted of stealing nineteen shillings, but if the issues had been properly left to the jury she might have been convicted on an indictment properly framed (*z*).

Stealing Receipts.—The prisoner rented premises of the prosecutor for £25 a year, and on the day on which he quitted there being half a year's rent due, the prosecutor took a stamped receipt ready written and signed to the premises, off which the prisoner had removed all his goods. The prosecutor at the desire of the prisoner went into a room in his house, where the prisoner pulled out a bag of money, and asked to look at the receipt. The prosecutor gave him the receipt, which the prisoner took, and put two sovereigns into the prosecutor's hand and immediately went away; and upon the prosecutor afterwards asking him for the remainder of the money, he said he had got his receipt and he should not pay it. The prosecutor stated that at the time he gave the prisoner the receipt he thought the prisoner was going to pay him the rent; that he should not have parted with the receipt unless he had been paid all the rent; but that when he put it in the prisoner's hands he never expected to have the receipt again, and that he did not want the receipt back again, but wanted his rent to be paid. For the prisoner it was submitted that this was not larceny. For the prosecution it was contended that it was clear the prosecutor never intended to part with the receipt unless he was paid all the rent (*a*), and that the prisoner never intended to pay the rent, and obtained the receipt by means of fraud; the property in the receipt, therefore, was not changed, and the case amounted to larceny. Coleridge, J., said, 'I think it is a larceny. The prisoner had removed his goods off the

(*y*) R. *v.* Thomas, 9 C. & P. 741. In R. *v.* Reynolds, MSS. C. S. G., 2 Cox, 170, Maule, J., ruled in accordance with this decision on precisely similar facts. See R. *v.* Moore, *post*, p. 1236.

(*z*) R. *v.* Bird, 42 L. J. M. C. 44. See R. *v.* Gumble, L. R. 2 C. C. R. 1; 42 L. J. M. C. 7, as to the amendment of a similarly drawn indictment.

(*a*) R. *v.* Oliver, *ante*, p. 1228, was cited.

premises, so that the prosecutor could not distrain ; and then the prisoner induces the prosecutor to part with the receipt by asking to look at it, and it is delivered to him for that purpose. It is quite clear also, that the prosecutor never intended to give the prisoner the receipt till he was paid all the rent, and I think the payment of the two sovereigns makes no difference ' (*b*).

Upon an indictment for stealing a piece of paper, whereon was impressed a receipt stamp, and a piece of paper, it appeared that the prisoner managed his father's business, and that he employed H. as a mason to build some farm-buildings. When the work was completed, H. sent an account to the prisoner's father, shewing a balance of £49 3*s*. 4*d*. due. And one W. went to the father's house where they found the prisoner sitting at a desk, with papers before him, and his father sitting in another part of the room. The prisoner said, ' By this account there appears to be still due to you a balance of £49 3*s*. 4*d*. Have you brought a stamped receipt ? ' W. replied that he had, and taking a blank stamp out of his pocket, handed it to the prisoner. The prisoner then said, ' You have not written it.' W. asked the prisoner to write it. The prisoner then wrote on the stamp, and read it aloud as a receipt for £174 3*s*. 4*d*., namely, for £125 previously paid, and £49 3*s*. 4*d*., the balance. The prisoner did not give the stamp back either to H. or W., but asked H. to come to the desk and put his name to it, which he did without removing it from the desk. The prisoner then asked W. to witness it, which he did by signing his name on the stamp, the prisoner keeping one of his fingers on it all the time. The prisoner then took up the stamp, and asked his father if he had brought down his cheque book. He replied he had not. The prisoner said, ' Why have you not ? ' and left the room, both H. and W. believing that he was going for the cheque-book ; but he came back in about two minutes, returned to his desk, took up his papers, and after saying that the mason's charges were very exorbitant, and that they had already been over-paid, and that the matter was now settled, went out of the room, leaving his father, H. and W. there. Neither H. nor W. ever demanded the return of the receipt ; but they went away threatening to make the prisoner suffer for what he had done. H. would not have signed, nor W. witnessed the receipt, had they not expected immediately to have received a cheque for the £49 3*s*. 4*d*. Wightman, J., said, ' I think this case is distinguishable from R. *v.* Rodway (*c*). There when the landlord handed the receipt to the tenant, it was complete, and nothing remained but to pay the money. Here the receipt stamp was given by the creditor to the debtor for a special purpose, namely, to prepare the receipt ; and it never was in the prosecutor's possession after the receipt was in a complete state. In R. *v.* Rodway there does not appear to have been any one present but the parties : here the thing was done publicly, and in the presence of an attesting witness, who by proving that no money actually passed, could render the receipt of no value to any one. The prisoner must be acquitted ' (*d*).

Upon an indictment for stealing a piece of stamped paper, it appeared

(*b*) R. *v.* Rodway, 9 C. & P. 784, and MS. C. S. G.

(*c*) *Supra.*

(*d*) R. *v.* Frampton, 2 C. & K. 47.

that the prosecutor, having been employed by P., had applied to him for the wages due to him. They made up between them the balance of wages due to the prosecutor, which they fixed at £4 11*s.* 1½*d.* The prisoner then took out of his pocket a sixpenny stamp, and put it on the table. Prosecutor took the stamp, and asked prisoner whether he should write a receipt for the full sum, or for the balance? Prisoner said, for the balance. While prosecutor was writing, he observed the prisoner pull out a fist full of silver, and turn it over in his hand. When prosecutor had written out the receipt, prisoner took it up and went out of the room. Prosecutor followed him and said, 'You have not given me the money.' Prisoner said, 'It 's all right.' Prosecutor repeatedly asked prisoner for the money, but in vain. The jury were directed that the stamped receipt was the property and in the possession of the prosecutor at and after the time of his writing the receipt, and that, if they were of opinion that the prisoner took the receipt out of such possession with a fraudulent intent, they might convict him of larceny; which they did. But, on a case reserved, the judges were unanimously of opinion that the prosecutor had not such a possession of the paper as would enable him to maintain trespass. It was never intended that he should retain it, but it was merely handed over for him to write upon it; and therefore the offence was not larceny (*e*).

Wagering.—By sect. 17 of the Gaming Act, 1845 (8 & 9 Vict. c. 109), cheating at games is punishable as obtaining property by false pretences (*f*), but under certain circumstances the cheat may amount to larceny. Where the prisoners decoyed the prosecutor into a public-house, and there introduced the play of cutting cards: and one of them prevailed upon the prosecutor (who did not play on his own account) to cut the cards for him; and then, under the pretence that the prisoner had cut the cards for himself, and had lost, another of them swept his money off the table and went away with it: it was considered to be one of those cases which should be left to the jury to determine *quo animo* the money was obtained, and that it would be felony, in case they should find that the money was obtained upon a preconcerted plan to steal it (*g*).

The prosecutor was drawn in to deposit twenty guinea notes on a bet that one of the prisoners could not guess right three times successively on the hiding of a halfpenny by another of the prisoners under a pot: he put the notes in the hands of one of the prisoners, and then the other guessing right, the notes were handed over. The question was left to the jury whether, at the time the notes were taken, there was not a plan between the prisoners that they should be kept, under the false colour of winning a bet; and the jury so found. Upon a case reserved, the judges held that the conviction was right, because at the time of the taking the prosecutor parted with the possession only (*h*).

(*e*) R. *v.* Smith, 2 Den. 449; 21 L. J. M. C. 111.

(*f*) *Post*, p. 1589, and see R. *v.* Hudson, Bell, 263.

(*g*) R. *v.* Horner, 1 Leach, 270. An application for bail on the ground that the charge amounted only to a *misdemeanor*. Probably it would have been considered as making an essential difference if the prosecutor had been playing himself at the time, and had parted with his money under the idea that it had been fairly won. See R. *v.* Nicholson, *ante*, p. 1215.

(*h*) R. *v.* Robson, MS. Bayley, J., and R. & R. 413. This distinguished the case from R. *v.* Nicholson, *ante*, p. 1215.

Welshing, &c.—The prisoner at a race meeting made a bet with the prosecutor, laying odds against a particular horse. The money for which the prosecutor backed the horse was deposited with the prisoner. The prosecutor admitted that he would have been satisfied if he did not receive back the same coins. The horse won; but the prisoner denied ever having made the bet, and went away with the money. It was held that as it appeared that the prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid, while the prisoner obtained possession of the money fraudulently, never intending to repay it in any event, there was no contract by which the property in the money could pass, and therefore, that there was evidence of larceny by a trick (*i*).

In Oppenheimer *v.* Frazer (*j*), the facts were that S., a diamond broker, had represented to the plaintiff, a diamond merchant, that he knew certain diamond merchants, whose names he gave, who were likely to be customers for the plaintiff's diamonds. In consequence of these representations the plaintiff at various times, extending over some months, handed parcels of diamonds to S., telling him to offer them to the firms mentioned at certain prices. S. reported from time to time to the plaintiff sales of diamonds as having been made to the said firms at the plaintiff's prices, and in other cases he brought back diamonds with offers of a lower price purporting to be made by the said firms, and these lower prices were accepted by the plaintiff, and the diamonds were left in the possession of S. for the purpose of being delivered in pursuance of the supposed bargain. S. never, in fact, sold any of the diamonds to any of the said firms, but had pledged some and handed over others to another diamond broker. The jury found, in answer to one of the questions left to them at the trial, that S. in obtaining the diamonds from the plaintiff had been guilty of larceny by a trick, and not of larceny as a bailee. And this verdict was held to be warranted by the evidence (*k*).

Fortune-telling.—In R. *v.* Bunce (*l*), an indictment for stealing £10 9*s.* 4*d.*, it appeared that the prisoner was a gipsy, and had told P. that there was some property left for her that she had been cheated of, and that the prisoner could get it for her; that she could raise spirits and lay them, if P. would put half-a-crown on a certain spot in a book, which she pointed out. P. said she had heard of such things, and she thought that spirits could be raised, and she was induced to put some money in the book. The prisoner returned the next day, and said she had been working all night, and that her husband's money would not do, and she must have sovereigns; and she then required P. to give her all the money she had got, and promised she would bring it back the next Monday, and also the sum of £170, which she said belonged to her. On these representations

(*i*) R. *v.* Buckmaster, 20 Q.B.D. 182; 57 L. J. M. C. 25.

(*j*) [1907] 2 K.B. 50.

(*k*) The views of the Lords Justices as to the offence of larceny by a trick have been stated, *ante*, p. 1210. See also Farquharson *v.* King [1902], A. C. 325.

(*l*) 1 F. & F. 523, Channell, B., and Crompton, J. 'This decision is right, on the ground that Mrs. P. merely parted with the possession of the property, and expected it to be returned. It by no means warrants the position that in every case of fortune telling the offence is larceny; and wherever the prosecutor parts with the property without expecting it to be returned, the indictment ought to be for false pretences.' C. S. G. Cf. R. *v.* Buckmaster, *supra*.

the wife gave her all the money she could get, amounting to £10 9*s.* 4*d.* When P. gave the prisoner the money, she required a shift to wrap the money in, and also a shawl. These were given on her promise to return them on the Monday. Other articles were also given to the prisoner on her promise to bring them all back on the Monday. The prisoner was to have £5 for her trouble. She never returned. It was ruled that, if the original intention was only with a view to practise the art of a witch, in which the prisoner might believe, although it was afterwards altered, there would be no larceny. But if it was a mere trick to get the property, with no intention to return it, it was larceny.

Purse trick.—Where the prisoner induced the prosecutor to give him a shilling for a purse into which he had dropped three coins, after first shewing the prosecutor three shillings, and appearing to drop them into the purse, it was held that he could not be convicted of larceny; but it was suggested that he might have been convicted on an indictment for false pretences (*m*).

Ring dropping.—The prisoner was indicted for stealing a silver watch, &c., and seven shillings in money, the property of B. The prosecutor proved that the prisoner and two other persons, who made their escape, had joined him in the street; and that, after walking a short space with him, one of them stooped down and picked up a purse, which, upon inspection, was found to contain a ring, and a receipt for £147 purporting to be the receipt of a jeweller for 'a rich brilliant diamond ring.' The prisoner asked the prosecutor if he would take the ring and deposit his money and his watch as a security to return it upon receiving his portion of its value. The prosecutor assented to this proposal, and laid the watch and money mentioned in the indictment upon the table of the public-house they had entered, and received the ring. After which the prisoner beckoned the prosecutor out of the room, upon a pretence of speaking to him in private; and during this interval the other two men went off with the property. The prosecutor secured the prisoner, who then made proposals to him to make the matter up. The ring was valued at ten shillings. It was objected, on behalf of the prisoner, that, as the prosecutor had parted voluntarily with his property, it was a fraud only, and not a felony. But the Court referred it to the jury to consider whether the whole transaction was not an artful and preconcerted scheme, in the three men, feloniously to obtain the prosecutor's watch and money; and whether the prisoner and the other two men were not all in concert together to procure, by such a pretext, any man's money whom they might meet, and to steal it. And the jury found the prisoner guilty (*n*).

The prisoner was indicted for stealing twenty guineas and four

(*m*) R. *v.* Solomons, 17 Cox, 93. (C. C. R.)

(*n*) R. *v.* Patch, 1 Leach, 238. 2 East, P. C. 678. Gould, J., Perryn, B., and Buller, J. It appears that the Court proceeded upon the authority of R. *v.* Pear (*post*, p. 1238). And it is stated that their opinion was founded on this, that the possession was obtained by fraud, and the property not altered; for the prosecutor was to have it again; and that, therefore, it was not like the case of goods sold on credit, where the buyer means immediately to convert them into money, and is not able, nor intends to pay for them; for there the buyer gets the absolute property by the act and consent of the owner. 2 East, P. C. 679.

doubloons, the property of F. The prosecutor was walking along the street when a stranger joined company with him; and, after walking a little way in conversation together, the stranger suddenly stopped, and picked up a purse which was lying at a door. The stranger proposed that they should go and see what they had picked up, and they accordingly went into an adjacent public-house, where the stranger pulled out the purse, and from one end of it produced a receipt, signed S., for £210, 'for one brilliant diamond cluster ring,' and from the other end he pulled out the ring itself. A conversation then ensued upon the subject of their good fortune, during which the prisoner entered the room, and offered to settle the division of its value. The prosecutor eventually put down twenty guineas and four doubloons, which the stranger, in the presence of the prisoner, took up, and in return gave the prosecutor the ring; desiring that he would meet him at the same place, on the next morning at nine o'clock, and promising that he would then return to him the twenty guineas and the four doubloons, and also give him one hundred guineas for his share of the ring. It was also appointed that the prisoner should be there, and agreed that the prosecutor and the stranger should give him a guinea each for his trouble. The prisoner and the stranger went away together. The prosecutor attended the next morning pursuant to the appointment, but neither of the other parties came. The ring was of a very trifling value. It was left to the jury to consider, upon these facts, whether the prisoner and the stranger were not confederated together, for the purpose of obtaining money, on pretence of sharing the value of the ring, and whether he had not aided and assisted the stranger to obtain the money by the means which were used for that purpose. And the jury being of opinion he was so confederated with the stranger, and aiding and assisting him, found the prisoner guilty; and, upon a case reserved, nine of the eleven judges present were of opinion that the guineas and the doubloons were deposited in the nature of a pledge, and not as a loan; so that, though the *possession* was parted with, the *property* was not (more especially as to the doubloons, which the prosecutor clearly understood were to be returned the next day in specie); and therefore as the prisoner had obtained them with a fraudulent intent to apply them to his own use, the offence became a felony, from the intention with which he gained the possession. And they also held that, as the prisoner and his companion were acting in concert together, they were equally guilty. The other two judges thought that the doubloons were to be considered as money, and that the whole was a loan on the security of the ring, which the prosecutor believed to be of much greater value than the money he advanced upon it, and that therefore he had voluntarily parted with the property, as well as the possession. And they said that when money was delivered by a man on such an occasion, it was not in his contemplation to have the same identical money back again (*o*).

The prisoner was indicted for stealing several bank notes of the value of £100, the property of S. The prosecutor's wife stated, that as she was going along the street the prisoner stooped down, picked up a small parcel and said that he had got a prize: upon which she cried, 'Halves,'

(*o*) R. *v.* Moore, 1 Leach, 314; 2 East, P. C. 679. R. *v.* Marsh, 1 Leach, 345.

and said it was usual to give half of what was found. They examined the parcel in the presence of another man (who appeared to be an accomplice of the prisoner's) and found in it a locket with a large stone, and a paper purporting to be the receipt of a jeweller for £250 for a diamond locket. After some proposals respecting the disposal of the locket, it was at length agreed between them that the locket should be left in the custody of the witness, and that she should deposit £100 in the prisoner's hands as a security to return him the locket the next morning; at which time she was to receive from him half the value of the locket, as mentioned in the receipt found; and she was to have the £100 deposited in the prisoner's hands, as such security as aforesaid, returned back. They then went to the witness's house, where she procured bank notes to the amount of £100 and laid them on the table, and the prisoner took up the bank notes, said that they were right, and that he would call the next morning and settle the whole. He then delivered up the locket, went off with the notes, and never returned again. The locket was only of the value of five shillings and sixpence. Upon this evidence the prisoner was convicted of the simple felony, in stealing the notes: and upon a case reserved upon the objection that this was only a fraud, and not a felony, all the judges held the conviction proper (*p*).

But where on an indictment against W. and M. for stealing a £5 note and two sovereigns, the prosecutor said that he saw W. pick up a purse, which contained a watch-chain and two seals, and the prisoners represented them to be worth £18, and the prosecutor gave W. the £5 note and two sovereigns for his share, and took the chain and seals, which were really only worth a few shillings, it was held that this was not larceny. For the prosecution R. *v.* Moore (*q*), and R. *v.* Robson (*r*), were cited. Coleridge, J., 'In Moore's case, nine of the judges thought that the money charged to have been stolen was given as a pledge, so that the possession of it only was parted with by the prosecutor and the property not. In this case the prosecutor intended to part with the money for good and all, and to have the articles. If the party meant to part with the property in the money, as well as the possession of it, I am of opinion that it is no larceny. Here the prosecutor meant to part with his money for ever. In R. *v.* Robson the party had only the possession of the money given to him as a stakeholder. When this prosecutor parted with his £7 he never intended to have it back again, but meant to sell the chain and seals for himself. The prisoners must be acquitted' (*s*).

If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entices the owner away, in order that the person who has obtained such possession may carry the goods away, all will be guilty of felony, the receipt by one under such circumstances being a felonious taking by all. S., J., and W. conspired to get some money from M., and they pretended that he could not produce £100, upon which he produced it in notes, which J. took to

(*p*) R. *v.* Watson, 2 Leach, 640; 2 East, P. C. 680.

(*q*) *Ante*, p. 1236.

(*r*) *Ante*, p. 1233.

(*s*) R. *v.* Wilson, 8 C. & P. 111. The prisoners were afterwards tried and convicted for a conspiracy. See also R. *v.* Solomons, *ante*, p. 1235.

count and afterwards handed to S., and S. and W. pretended to gamble for them, J. then beckoned M. out of the room, and S. and W. immediately decamped with the money, and all the three afterwards shared it. Upon a case reserved, the judges were unanimous that this was larceny in all the three (*t*). In another case C. and D. planned to rob the prosecutrix of some coats, and C. got her to go with him that he might get some money to buy them of her, and she left the coats with D., who immediately absconded with them; and, upon a case reserved, the judges held the receipt by D. to be a felonious taking of the coats by both (*u*).

Hiring.—The prisoner was indicted for stealing a gelding, the property of H. The prosecutor was a livery stable keeper; and the prisoner, who was a post-boy, applied to him for a horse, in the name of E., saying, that there was a chaise going to B., and that E. wanted a horse to accompany the chaise, to carry a servant, and to return with the chaise. A gelding was accordingly delivered to him by the prosecutor's servant. The prisoner mounted the horse; and, on going out of the stable yard, and meeting a friend of his, who asked him where he was going, he said that he was going no further than B. This transaction took place about nine o'clock in the morning; and between three and four o'clock in the afternoon of the same day the prisoner sold the gelding for a guinea and a half, including the bridle and saddle. The horse appeared to have been ridden very hard, and his knees were broken very badly. The purchaser almost immediately disposed of his bargain for fifteen shillings. On putting this case to the jury, it was stated by the Court that the judges in Pear's case (*v*), under circumstances similar to the present, had determined, that if a jury be satisfied, by the facts proved, that a person, at the time he obtained another's property, meant to convert it to his own use, it is felony. But that if it appeared to them that the prisoner, at the time he hired the horse for the purpose of going to B., really intended to go there, but that, finding himself in possession of the horse, he afterwards formed the intention of converting it to his own use, instead of proceeding to the place to which the horse was hired to go, it would not amount to a felonious taking. The jury found the prisoner guilty, on the ground that he intended to steal the horse at the time he hired it; and he was afterwards executed (*w*).

In one case it was held, that to constitute a larceny at common law by a party, to whom goods have been delivered on hire, there must not only be an original intention to convert them to his own use, but a subsequent actual conversion. Upon an indictment for stealing a horse and gig, it appeared that the prisoner hired the horse and gig of a livery stable keeper, stating that he wanted them for two days for the purpose of going down to W. Instead of going to W., he immediately drove in

(*t*) R. *v.* Standley, MS. Bayley, J., and R. & R. 305.

(*u*) R. *v.* County, East. T. 1816. MS. Bayley, J.

(*v*) R. *v.* Pear, 1 Leach, 212; 2 East, P. C. 685.

(*w*) R. *v.* Charlewood, 1 Leach, 409; 2 East, P. C. 689. There are many cases to the same effect. See R. *v.* Spence, 1 Lew. 197. R. *v.* Banks, R. & R. 441. R. *v.* Cole, 2 Cox, 340, Patteson, J. R. *v.* Armstrong, 1 Lew. 195. R. *v.* Vicar, 1 Lew. 199. R. *v.* Semple, 1 Leach, 420. These cases shew that there must have been an intention to steal at the time of hiring. As to such cases, see 24 & 25 Vict. c. 96, s. 3, *post*, p. 1245.

a contrary direction to R., where he offered the horse and gig for sale to O., at a price much below their value. O.'s suspicions were aroused, and under pretence of going to fetch the money to pay the amount offered, he procured a constable and gave the prisoner into custody. Tindal, C.J., 'This case comes near to many of those which have decided that the appropriation of property under circumstances in some degree similar to the present amounted to larceny. However, here there has been no actual conversion of the property, and only an offer to sell. I am of opinion, therefore, that the prisoner must be acquitted' (*x*).

In R. *v.* Selby (*y*), the facts were precisely similar to those in the preceding case, and Patteson, J., after reading that case and the note to it (*z*), said that, in his opinion, the note was correct, and directed the jury accordingly; but, out of deference to the opinion of the Chief Justice, the point would have been reserved had not the jury acquitted. And where, on an indictment for stealing a horse and a gig, it appeared that the prisoner had hired them on the pretence of going to S., but took them in a contrary direction to M., and there offered them for sale; but no sale took place, and R. *v.* Brooks (*a*) was referred to; Coleridge, J., consulted Parke, B., and then said, 'My brother Parke agrees with me that the facts proved are sufficient to support the charge of larceny. If R. *v.* Brooks is correctly reported, we cannot assent to the doctrine there laid down' (*b*).

Fraudulent Legal Process.—A delivery of goods obtained by a fraudulent abuse of legal process is amongst the most aggravated of those cases of larceny where the taking is effected by procuring a delivery of the goods from the owner, or other person authorised to dispose of them. It will generally be a matter of some difficulty to give satisfactory proof of a felonious intent in such a transaction; but if the offence be proved, the severest punishment which it can receive may well be inflicted, for it has

(*x*) R. *v.* Brooks, 8 C. & P. 295. 'Assuming that this case is accurately reported, the correctness of the decision seems liable to great doubt. The question for the jury in such cases is, what was the intention of the prisoner *at the time when* he obtained possession of the chattel? Now the acts of the prisoner subsequent to that time are only material, for the purpose of enabling the jury to decide what his intention was at the time of the taking. An actual conversion is undoubtedly cogent evidence that the chattel was originally obtained for that purpose; but it is only evidence; and it is easy to suggest cases equally strongly indicative of a felonious intent at the time of the taking; thus, suppose a prisoner had hired a horse from A. for a day, and had taken it into a distant part of the country, and there used it for his own purposes for a long period, and being apprehended had confessed that he obtained the horse fraudulently with intent to keep it for his own use, and wholly to deprive the owner of it; and that he had made false representations for that purpose, could it be contended that there was no evidence to go to the jury of an intent to steal at the time of the taking? So in the principal case it is submitted that although no actual conversion took place, still there was evidence for the jury that the horse and gig were obtained with intent to convert them to the prisoner's use. It seems difficult also, to see how the fact that O. did not intend to complete the contract could vary the effect of the prisoner's acts; the prisoner had done all on his part to complete the contract, and as against him it might well have been held that the conversion was complete; in the same way as it has been held that the offence of bribery is complete where A. gives money to B. to induce him to vote for a candidate, and B. agrees so to do, although he never intends so to vote. Henslow *v.* Fawcett, 3 A. & E. 51. Harding *v.* Stokes, 2 M. & W. 233. See also R. *v.* Spence, 1 Lew. 197, where there seems to have been no sale.' C. S. G.

(*y*) Gloucester Sum. Ass. 1845, MSS. C. S. G.

(*z*) Note (*x*), *supra*.

(*a*) *Supra*.

(*b*) R. *v.* Janson, 4 Cox, 82.

been justly observed that such an offence converts the process of the law, which is the best security for property, into an instrument of rapine and plunder (*c*).

Sect. VI.—Taking Goods, &c., obtained by Mistake.

With respect to goods, &c., parted with by mistake, the established rule is that an *innocent* receipt of a chattel or money coupled with its *subsequent* fraudulent appropriation does not constitute larceny (*d*). The taking itself must be a trespass (*e*). Conversion following abandonment and delivery by the owner is not enough (*f*). The rule does not apply to delivery of a master's goods, &c., to a clerk or servant, for in such case neither property nor possession is changed (*g*); but does apply to cases where goods are misdelivered, or where by mistake a large coin is handed over to another in belief that it is of a lower denomination.

The reported decisions indicate that a difficulty has been found in applying the rule. They may possibly be reconciled by strict regard to the facts as found in each case; and the crucial point in cases of mistake seems to be to determine whether the accused is to be held to have received the money or goods at the moment when they actually came into his hands, or at the moment when he realises that they were not meant for him.

Letters Misdelivered by Post.—In R. *v.* Mucklow (*h*) the indictment was for stealing an unstamped draft written on the same sheet of paper with a letter, directed 'J. M., Saint Martin's Lane, B.,' and was sent by post to B. No person of that name being found or heard of to be living in Saint Martin's Lane, and the prisoner living in a house, about a dozen yards from Saint Martin's Lane, with his father, the postman called with the letter at their house when they were out, and left a message that there was a letter for them, which they were to send for; and it was in consequence thereof delivered the same day to the father, and afterwards came to the hands of the prisoner, his son, who appropriated the draft to his own use, and received payment of it, under circumstances proved by evidence arising from the contents of the letter and otherwise, that

(*c*) 1 Hawk. c. 33, s. 12. 2 East, P. C. 660. The books do not furnish many instances of larcenies of this description. But it is laid down that if a person, intending to steal a horse, take out a *replevin*, and having thereby procured the horse to be delivered to him by the sheriff, ride him away; or if a man intending to steal the goods of another, fraudulently deliver an ejectment, and by obtaining judgment against the casual ejector, get possession of his house, and take his goods; in both these cases the taking will amount to larceny. 3 Co. Inst. 108. 1 Hale, 507, Kel. (J.) 43. 1 Hawk. c. 33, s. 12. 2 East, P. C. 660. So if, under pretext or colour of a *capias ut legatum* sued out after an outlawry clandestinely obtained against a visible man, his goods are taken with a felonious intent, it will be felony. 2 East, P. C. 660. As to burglary by such form of fraud, *vide ante*, p. 1071.

(*d*) R. *v.* Flowers, 16 Q.B.D. 643, 646, Coleridge, C.J., explaining R. *v.* Ashwell, 16 Q.B.D. 190.

(*e*) See R. *v.* Riley, Dears. 149, where R. was convicted of larceny of a lamb which he had innocently driven off among his own flock, but had sold as his own after discovering the mistake, and the observations of Coleridge, C.J., on this case, 16 Q.B.D. 226. *Vide ante*, p. 1204.

(*f*) R. *v.* Ashwell, 16 Q.B.D. 190, 204, Mathew, J.

(*g*) *Vide post*, p. 1359.

(*h*) 1 Mood. 160. The letter and draft (which was drawn by L. & Sons, at K.) were intended for another J. M. of New Hall Street, B., but by mistake the letter was directed to St. Martin's Lane.

satisfied the jury he knew the letter and draft were not intended for him, but for another person. It was objected that this did not amount to larceny, as the possession of the letter and draft had been voluntarily parted with by the drawers, and by the postman, without any fraud on the part of the prisoner; and, upon a case reserved, the judges held the conviction wrong, on the ground that it did not appear that the prisoner had any *animus furandi* when he first received the letter (*i*).

In R. *v.* Davis (*j*), the prisoner was indicted for stealing a post-office order. A person posted a letter containing a post-office order and directed, 'J. D., Pack Horse Inn, W.' In W. there were two inns of that name, called the Upper and Lower Pack Horse; and at the lower the J. D. to whom the letter was directed, lived; at the Upper, R., the prisoner, who had gone by the name of J. D. only in W., was billeted, and the letter was delivered for him there from the W. post-office. He could not read, and took the letter to W. D., who read it to him; J. D. then told him that the letter and order were not intended for him, but W. D. advised him to keep them, and get the money, and this he did by applying to the post-office in the usual way. Erle, J., told the jury, that if at the time the prisoner received the order, he knew it was not his property, but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to his own use, he was guilty of larceny, and that in his opinion he had not received it until he had discovered by opening and reading the letter, whether it belonged to himself or not. A verdict of guilty was returned: but upon the attention of the judge being called to R. *v.* Mucklow, he reserved a case, and the conviction was quashed on the ground that that case was precisely in point.

A letter intended to be delivered in B. was addressed 'Mrs. F., 29, Gloucester Street,' but was delivered at 29, Gloucester Street, L., where the prisoner lodged. The prisoner, who was known to some persons as F., received and opened the letter and cashed a cheque that it contained. The last two mentioned cases were cited and followed, and it was held that there was no case of larceny to go to the jury (*k*).

In R. *v.* Middleton (*l*) the prisoner was a depositor in a post-office savings bank, in which a sum of eleven shillings stood to his credit. He gave notice to withdraw ten shillings, stating the number of his depositor's book, the name of the post-office, and the amount to be withdrawn. A warrant for ten shillings was duly issued to the prisoner, and a letter of advice sent to the post-office to pay the prisoner ten shillings. He went to the post-office, and handed in his depositor's book and his warrant to the clerk, who instead of referring to the proper letter of advice referred by a mistake to another for £8 16*s.* 10*d.*, and placed that sum upon the counter. The clerk entered that amount as paid in the prisoner's book, and stamped it, and the prisoner took up the money and went away. When the mistake was discovered, the prisoner was brought back, and

(*i*) Questions arose which were not decided: (1) whether want of a stamp rendered the draft void, and (2) whether the draft had any value in the drawer's hands. See R. *v.* Walsh, R. & R. 215.

(*j*) Dears. 640: 25 L. J. M. C. 91.

(*k*) R. *v.* Fish [1900], 64 J. P. 137, Bosanquet, Common Serjeant.

(*l*) L. R. 2 C. C. R. 38: 42 L. J. M. C. 73.

then said that he had burnt his depositor's book. The prisoner was charged with larceny of the £8 16*s.* 10*d.* The jury found the prisoner had the *animus furandi* at the moment of taking up the money from the counter, and the prisoner was convicted. And upon a case reserved, the conviction was held right by a majority of the judges (*m*).

In R. *v.* Middleton (*n*) it was said *obiter*, where a passenger hands to a cabman a sovereign in mistake for a shilling, the property does not vest in the cabman, and the question whether the cabman was guilty of larceny or not would depend thus whether he, at the time he took the sovereign, was aware of the mistake and had then the guilty intent, the *animus furandi*.

In R. *v.* Ashwell (*o*), the prisoner asked the prosecutor to lend him a shilling. The prosecutor handed the prisoner a coin believing it to be a shilling, and the prisoner believed that he had received a shilling. Some time afterwards the prisoner discovered that he had received a sovereign, and he then determined to convert it to his own use. He was indicted and convicted before Denman, J., for larceny. On a case reserved, the question was considered by the judges. All were of opinion that there was no bailment of the sovereign and that the prisoner was not guilty of larceny as a bailee. But the judges were equally divided on the question whether the prisoner was guilty of larceny at common law. Seven judges (A. L. Smith, Mathew, Stephen, Day, Wills, Manisty, and Field, JJ.) held that there was no larceny, as the receipt of the sovereign took place when the supposed shilling was received by the prisoner, and therefore the prisoner had lawful possession of the sovereign; and that according to undoubted law the determination at some time afterwards to convert the sovereign to his own use was no larceny. An equal number of judges (Coleridge, C.J., Grove, Denman, Hawkins, Cave, JJ., Pollock, and Huddleston, BB.) held the contrary because they thought the receipt or acceptance of the sovereign, as and for a sovereign, did not take place and could not take place until the prisoner found out that he had got a sovereign, and that then and there before he had lawful possession of the sovereign, he determined to convert it to his own use.

(*m*) Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ. held that assuming the clerk to have an authority equal to, and to represent, the Postmaster-General, and to have meant that the prisoner should take up the money, though he only so meant because of a mistake which he made as to the identity of the prisoner with the person really entitled to the money, the prisoner being aware of the mistake, and taking up the money *animo furandi*, was guilty of taking and stealing the money. And also, that, although the clerk, and therefore the Postmaster-General, intended that the property in the money should belong to the prisoner, yet, as he so intended in consequence of a mistake as to his identity, and the prisoner knew of the mistake, and had the *animus furandi* at the time, the prisoner was guilty of larceny. Bovill, C.J., Kelly, C.B., and Keating, J., held that the clerk had no property in the money or power to part with it to the prisoner, but only possession; that the authority of the clerk was a special authority not pursued, and that on that ground only the conviction should stand. Pigott, B., held that possession of the money was never given by the clerk to the prisoner, who, while it lay on the counter, and before he got manual possession of it, conceived the *animus furandi*, and took it, and therefore it was larceny. Martin, B., Bramwell, B., Brett, J., and Cleasby, B., held that the money was not taken *invito domino*, and that there was no trespass involved in the taking by the prisoner, and therefore there was no larceny. Bramwell, B., and Brett, J., held that the authority of the clerk extended to authorise him to part with the possession and property of the larger sum.

(*n*) L. R. 2 C. C. R. 38, 45.

(*o*) 16 Q.B.D. 190: 55 L. J. M. C. 65.

In R. *v.* Flowers (*p*), a foreman had in error delivered to the prisoner a bag containing another man's wages, which the prisoner appropriated. The jury found that the prisoner received the bag innocently, but afterwards fraudulently appropriated it. The Court held that this was not larceny. Coleridge, C.J., said, 'In that case (R. *v.* Ashwell, *supra*) the judges who were in favour of upholding the conviction did not intend to question the ancient doctrine that an innocent receipt of a chattel and its subsequent fraudulent appropriation do not constitute larceny. . . . In the present case the learned Recorder directed the jury that if the prisoner innocently received the money and afterwards appropriated it, he was guilty of larceny. It was not our intention in R. *v.* Ashwell to enunciate any such rule and the law has been incorrectly laid down to the jury by the learned Recorder.' And Manisty, J., said, 'The difference of opinion among the judges in that case (R. *v.* Ashwell, *supra*) was founded on the facts of the case and on the application of these facts to the settled principle of law that innocent receipt of a chattel coupled with its subsequent fraudulent appropriation does not amount to larceny. Some of the judges thought that the facts in that case did not shew an innocent reception of the sovereign and said it was larceny, others thought that the reception was innocent and held that it was not larceny. I am glad to think that the old rule of law still exists in its entirety.'

In R. *v.* Hehir (*q*), the Court for Crown Cases Reserved in Ireland held that where a man handed the prisoner a ten pound note, thinking it was a £1 note, and the prisoner received it thinking it was a £1 note, but some time later discovered it was a £10 note and then converted it to his own use, the prisoner was not guilty of larceny.

In the full discussion of certain authorities in R. *v.* Ashwell, the main difference of opinion was at the moment at which the accused could be said to receive the chattel or money in question. According to some of the judges (*r*) the decision in R. *v.* Mucklow (*ante*, p. 1240) and R. *v.* Davis (*ante*, p. 1241) could not be reconciled with Cartwright *v.* Green (*s*) and Merry *v.* Green (*t*) (the bureau cases) nor with R. *v.* Middleton (*u*). The bureau cases differ from these now under consideration in that the vendor had no idea of the existence of the secret drawers and no intention at all to part with their contents: whereas in the latter cases the postman meant to deliver them and in the coin cases the owner meant to part with the particular coin (*v*).

SECT. VII.—TAKING BY PERSONS HAVING ONLY A BARE CHARGE OR SPECIAL USE OF THE GOODS, AND BY BAILEES.

At common law nice and intricate questions arose in cases of the misappropriation of goods *taken by the delivery or consent of the owner or of some having authority to deliver them*. Where goods were obtained by delivery, if it appeared that, although there was a delivery by the owner in fact, yet there was clearly *no change of property nor of legal possession*,

(*p*) 16 Q.B.D. 643: 55 L. J. M. C. 178.
(*q*) 18 Cox, 267.
(*r*) 16 Q.B.D. 201, Cave, J. 218, Stephen, J. 225, Coleridge, C.J.
(*s*) 8 Ves. 405, *ante*, p. 1199.
(*t*) 7 M. & W. 623, *ante*, p. 1201.
(*u*) L. R. 2 C. C. R. 38, *ante*, p. 1241.
(*v*) 16 Q.B.D. 198, A. L. Smith, J.

but the legal possession still remained exclusively in the owner, larceny might be committed exactly as if no such delivery had been made (*w*). Thus if a person, to whom goods were delivered, had only the bare charge, or custody, of them, and the legal possession remained in the owner, such person might commit larceny, by fraudulent conversion of the goods to his own use (*x*); a doctrine which directly applied, and still applies, to the case of servants entrusted with the care of goods in the possession of their masters (*y*).

But where a horse was delivered by the prosecutor to the prisoner to be agisted at a certain sum per week, and in the second week the prisoner sold the horse as his own, it was held, that inasmuch as the prosecutor had parted with the possession, the offence was not larceny (*z*).

According to the old books, where the delivery of goods is made for a *certain special and particular purpose*, the possession is in general supposed to remain in the first proprietor (*a*). The distinction between a bare charge, or special use of goods, and a general bailment of them, seems to be sufficiently intelligible; and it seems consistent with principle that, in the former case, the legal possession should be considered as remaining in the owner; and, in the latter, as having passed to the bailee; and that, therefore, in the former case larceny might be committed of them by the person to whom they were delivered (*b*), and that in the latter it might not, unless there were a determination of the privity of contract.

The question is raised by East (*c*), whether the distinction concerning the legal possession remaining in the owner, after a delivery in fact to another, does not extend to all cases where the thing, so delivered for a special purpose, was intended to remain *in the presence* of the owner. And it is suggested, that in cases of this kind the owner cannot be said to give any credit to, or repose confidence in, the person in whose hands it is so, in fact, placed; and that, the thing intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before; and the person, to whom it is so delivered, has, at most, no more than a bare limited use, or charge, and not the legal possession of it (*c*). And though a person who goes into a shop, under pretence of buying goods, and, upon their being delivered to him to look at, runs away with them; and a person who goes into a market, and obtains a horse for the purpose of trying its paces, and then rides away with it, are guilty of larceny, on the ground of a preconcerted design to steal the chattels (*d*); yet they appear also to be guilty on the ground that the legal possession of such chattels still remained in the owner of the goods, notwithstanding the delivery, *he continuing present* (*e*).

(*w*) *Ante*, pp. 1219 *et seq.*

(*x*) 1 Hale, 505, 506. 1 Hawk. c. 33, s. 6. 2 East, P. C. 682.

(*y*) Dealt with fully, *post*, p. 1359.

(*z*) R. *v.* Smith, 1 Mood. 473. R. *v.* Harvey, 9 C. & P. 353. R. *v.* Goodbody, 8 C. & P. 665.

(*a*) 1 Hawk. c. 33, ss. 2, 9, 10. 2 East, P. C. 693. See R. *v.* Campbell, 2 Leach, 564. R. *v.* Walsh, 2 Leach, at p. 1079.

(*b*) *e.g.*, stealing a cup served to him to drink from, 1 Hale, 506, or cattle entrusted to him to drive to market, R. *v.* M'Namee, 1 Mood. 368. And see Anon. Kel. (J.) 35, 2 East, P. C. 682. 1 Hawk. c. 33, s. 2.

(*c*) 2 East, P. C. 683.

(*d*) 1 Hawk. c. 33, ss. 14, 15. Kel. (J.) 82. 2 East, P. C. 677.

(*e*) R. *v.* Chisser, T. Raym. 275, 276. 2 East, P. C. 683, 684. See R. *v.* Thompson, L. & C. 225: 32 L. J. M. C. 53. R. *v.* Johnson, 2 Den. 310: 21 L. J. M. C. 32.

On this principle it appears that at common law, if the clerk to a banker or merchant has the care of money, for special and particular purposes, and is sent to the bag or drawer for the purpose of bringing money generally out of the bag or drawer, and, at the time he brings such money, he secretly takes out other money for his own use, he is as much guilty of a felony as if he had no care of the money (*f*).

Statutes.—Most of these nice distinctions of the common law (*g*) have been swept away by sect. 3 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which provides that 'Whosoever, being a bailee of any *chattel, money, or valuable security*, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, *and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction*' (*h*).

The object of this section was to extend the definition of larceny to cases where the general property in the thing delivered was never intended to be parted with at all, but only the *possession*; where, in fact, the owner delivered the property to another under such circumstances as to deprive himself of the *possession* for some time, whether certain or uncertain, and whether longer or shorter, at the expiration or determination of which time the *very same thing* that had been so delivered was to be restored to the owner or delivered to some one else. In order, therefore, to bring a case within this section, in addition to the fraudulent disposal of the property, it must be proved, first, that there was such a delivery of the property as to divest the owner of the *possession*, and vest it in the prisoner for some time; secondly, that at the expiration or determination of that time, the identical same property was to be restored to the owner or delivered to some one else.

Where a count charged the prisoner with larceny of money as a bailee, and it appeared that the prosecutor had employed him to collect outstanding debts, and in the course of this employment the prisoner received the sums in question; it was held that the count was not proved, because a person who received money on behalf of another did not thereby become a bailee of the money, not being bound to hand over the particular money which he had received (*i*).

Where the prosecutor left a mare in the care of the prisoner, saying

(*f*) R. *v.* Murray, 2 East, P. C. 683; 1 Leach, 344. 1 Hawk. c. 33, s. 7.

(*g*) The cases on the former law are collected in the 4th edition of this work.

(*h*) Taken from 20 & 21 Vict. c. 54, s. 4, the first words in italics being substituted for 'property.' The provision that the offender may be convicted on an indictment of larceny was introduced *ex majori cautela*, but seems to have been unnecessary. R. *v.* Haigh, 7 Cox, 403. In R. *v.* Holman, L. & C. 177, a doubt was raised whether a count for embezzlement and a count for larceny as bailee could be joined; but the prosecutor having elected to proceed on the latter count, the conviction was held right. It is plain there is no objection to the joinder of counts for embezzlement and larceny as a servant, and on the latter count there might be a conviction of larceny as a bailee. The proviso was introduced to prevent the clause applying to the cases of persons employed in the silk, woollen, and other manufactures, who dispose of goods entrusted to them, and are liable to be summarily convicted under sundry statutes. C. S. G. See R. *v.* Daynes, 12 Cox, 514.

(*i*) R. *v.* Hoare, 1 F. & F. 647, Wightman, J., and Pollock, C.B. R. *v.* Hassall, L. & C. 58. As to fraudulent misappropriation by persons entrusted with property see 1 Edw. VII. c. 10, s. 1, *post*, p. 1407.

she was to be sold on Wednesday, and on that day the prosecutor sent his wife who saw the prisoner and asked him if he had sold the mare, and he said he had not, and the wife afterwards saw the prisoner sell the mare and receive some money; the wife then asked the prisoner to hand over the money to her and she would pay his expenses. The prisoner refused to do this and ran away; the majority of the Court held that the prisoner was a bailee of the money so paid to him and confirmed the conviction (*j*).

The first count charged the prisoner as a bailee with stealing £18 3*s*. 9*d*., the second with simple larceny, and it appeared that the sum of £18 3*s*. 9*d*. collected in a church for the benefit of a Missionary Society was handed to the vicar, and paid by him into his own bank. The prisoner, who was the curate, advised that it should be withdrawn, and placed in the savings bank, where interest would be obtained, and stated that he would place it in the savings bank. The vicar gave him a cheque for the amount, which the prisoner cashed at the bank; but the money was never paid into the savings bank. The money was not payable to the Society until some time after the prisoner was apprehended. The prisoner acted as secretary and treasurer of a local society in connection with that in London. The vicar had not acted as treasurer. Willes, J., said, 'The prisoner is charged with larceny as a bailee, but he was the acting treasurer of the society, and as such it was his duty to deposit or invest the moneys received, and he was not required to pay over the specific coins that came into his hands, which is essential to a bailment. Nor could the count for larceny be sustained, because the prisoner was not a servant, and the first possession of the money was a lawful one. He was only civilly liable for his default' (*k*).

Where a trustee of a friendly society, who was appointed by a resolution of the society to receive money from the treasurer, and to carry it to the bank; received the money from the treasurer's clerk, but applied it to his own purposes instead of taking it to the bank; it was held that he could not be convicted of larceny as a bailee (*l*).

The prisoner represented that he was selling horses for another person, and had no authority to sell them for less than £135, and obtained that sum for them. He had bought the horses for £110, though he represented that he was to pay £135 for them. Upon these facts it was contended that if a person by a false statement induces another to entrust him with property to be given to a third person, he is not the less a bailee; for he cannot take advantage of his own fraud. To this it was answered, that to constitute a bailment there must be a delivery of a thing in trust for some special object or purpose, and, upon a contract, express or implied, to conform to the object or purpose of the trust; and that the prisoner was not a bailee for the purchaser, of the excess over the £110; for the purchaser paid away that money, never expecting it to be returned; and

(*j*) R. *v.* De Banks, 13 Q.B.D. 29, Lord Coleridge, C.J., Grove, Field, and A. L. Smith, JJ. Stephen, J., diss. This case was followed in Ex parte George, 18 Cox, 631: 66 L. J. Q.B. 830.

(*k*) R. *v.* Garrett, 8 Cox, 368. Willes, J., said that Byles, J., and himself had previously decided in the same way in a similar case. There was no bailment either of the cheque or money in this case; for neither was intended to be returned in specie, and the property in both was parted with at the time of the delivery to the prisoner.

(*l*) R. *v.* Loose, Bell, 259: 29 L. J. M. C. 132.

the prisoner could not be a bailee of that sum for the vendor; and it was held that there was no bailment (*m*).

The prisoner was frequently employed by the prosecutor to fetch coals from C. Before each journey the prosecutor made up to the prisoner £24, out of which he was to pay for the coals, keep 23*s.* for himself, and if the price of the coal, with the 23*s.*, did not amount to £24, to keep the balance in hand to the credit of the next journey. It was the prisoner's duty to pay for the coal, as he obtained it, with the money received from the prosecutor, and the prosecutor did not know but that he did so; but provided he was supplied with coal, and not required to pay more than the proper price for it, it was immaterial to the prosecutor in what manner the prisoner paid for it. On the 20th March the prisoner had a balance of £3 in hand, and the prosecutor gave him £21 to make up £24 for the next journey. The prisoner did not then buy any coal, but fraudulently appropriated the money. Held that a conviction of the prisoner for a larceny of the £21 as a bailee was right (*n*).

The prisoner was indicted for stealing two loads of coal, the property of D. The prisoner was a carter, and was engaged by D. to deliver in his cart a boat's cargo of coals to certain persons named in a list which was handed to the prisoner, and he was not authorised to deliver coals to any person whose name was not contained in that list. Two of the loads of coal he fraudulently sold to persons not in the list. Upon these facts, the jury were directed that if the coals were entrusted to the prisoner for the specific purpose that they should be delivered by him to the persons named in the list, and that he, instead of so delivering, fraudulently converted them to his own use, that the prisoner ought to be found guilty; and a conviction on this direction was affirmed (*o*).

The prosecutor asked the prisoner to bring him half a ton of coals from the railway coal station, and gave the prisoner 8*s.* 6*d.* to pay for them. The prisoner bought half a ton of coals at the station in his own name, paying 8*s.*, but having credit for the remaining 6*d.* He then put the coals into his own cart, and on his way abstracted a hundredweight of the coals, and afterwards delivered the residue to the prosecutor as the coals which he had required. The prisoner was not in the prosecutor's employment (*p*). Cockburn, C.J., in delivering the judgment of the Court, said: 'In this case the prisoner was entrusted by the prosecutor with money to go and purchase some coals, and to bring them home to the prosecutor in the prisoner's own cart. The prisoner having purchased the coals, and loaded them into his cart, afterwards abstracted a portion of the coals, with intent to appropriate them to himself, and to deprive the prosecutor of them. We all think that the conviction is good. Some of us are even of opinion that if there had been no evidence of a specific appropriation of the coals to the prosecutor, yet the coals having been purchased with the money of the prosecutor given for the express purpose, the property

(*m*) R. *v.* Hunt, 8 Cox, 495. The Recorder. The indictment was for obtaining the excess over the £110 by false pretences. It is not stated whether the prisoner bought the horses before or after the sale to the prosecutor.

(*n*) R. *v.* Aden, 12 Cox, 512. See R. *v.* Wells, 1 F. & F. 109. R. *v.* Tonkinson, 14 Cox, 603.

(*o*) R. *v.* Davies, 10 Cox, 239.

(*p*) R. *v.* Bunkall, L. & C. 371: 33 L. J. M. C. 75.

in the coals, on the purchase, *ipso facto*, vested in the prosecutor, and that there was then a bailment within the terms of the statutory enactment, and that therefore the prisoner is guilty. Other members of the Court think that in order to support the conviction there must have been a specific appropriation of the coals to the prosecutor, and that there was evidence of such specific appropriation from the facts that the prisoner bought the coals with the money of the prosecutor, and put them into his cart, and after taking a portion of them, delivered the rest to the prosecutor, pretending that he had bought the coals which the prosecutor had required. We are all of opinion that there was evidence of such an appropriation, if an appropriation were necessary.'

The owner of a wrecked ship made a contract to recover the wreck, with a person who employed the defendant's father to do the work. The defendant was put in charge of the wreck by his father, and while so engaged corresponded with the person employed by the owner of the wreck, although that person still considered the father responsible. The defendant stole some of the wreck, and the jury found that he did so *animo furandi*; but were not asked whether he was bailee. It was held by the majority of the Court that he was a bailee, and was rightly convicted (*q*).

Bailment to a Married Woman.—The first count charged a married woman with larceny as a bailee; the second with simple larceny. The prisoner lived with her husband, and they took in lodgers, but she exclusively attended to them, made the contracts with, and received the payments from, them. The prosecutor lodged with them, and had in his bedroom a box, in which he had £45; going to another part of the country, he locked up the box, gave the key to the prisoner, and requested her to take care of the box, and the money for him; which she promised to do, and took the whole under her charge and into her possession so far as by law she could. Her husband had nothing to do with the transaction. During the absence of the prosecutor, she stole the money, her husband being perfectly innocent; and, on a case reserved after a verdict of guilty, it was held that either she was a bailee, and guilty on the first count, or she was not a bailee, and then she was guilty on the second count (*r*).

Bailment to an Infant.—Where an infant over fourteen years of age hired furniture, and, after paying some instalments, removed and sold the furniture, it was held that he was rightly convicted (*s*).

(*q*) R. *v.* Clegg, Ir. Rep. 3 C. L. 166; 11 Cox, 212.

(*r*) R. *v.* Robson, L. & C. 93. Martin, B., was of opinion that B. was a bailee, and said there was a late case, in the Common Pleas, in which it was held that a contract was not essential to a bailment, and that it was immaterial whether there was a valid contract or not; and Pollock, C.B., was disposed to be of the same opinion. During the argument, Wightman, J., said: 'Suppose she had taken a watch left by a lodger on his table, and had not at the moment the intention of appropriating it, but did appropriate it subsequently; would she not be within the statute?' Some of the Court seem to have thought that, if the prisoner was not a bailee, she was in the same position as a stranger, and as a stranger who had stolen the money would clearly be guilty of larceny, so was the prisoner. This case overrules R. *v.* Denmour, 8 Cox, 440. The contractual powers of a married woman are now established by the Married Women's Property Acts, 1882 to 1907.

(*s*) R. *v.* Macdonald, 15 Q.B.D. 323. It would seem that there may be a delivery of a chattel upon condition which does not necessarily make a contract; although it

This decision rests on the contestable view that bailment is not a contract.

Bailment by a Drunken Man.—Where on an indictment for larceny, the prosecutor proved that being tipsy, he saw the prisoner take his watch out of his pocket, which he took no steps to prevent, believing that the prisoner, with whom he had been acquainted for some time, was acting solely from friendly motives; and the prisoner afterwards offered the watch for sale; it was objected that there was no trespass, and consequently no larceny; Crowder, J., 'This evidence would not support a charge of larceny at common law, but the evidence discloses a bailment sufficient to bring the case within the 20 & 21 Vict. c. 54, s. 4 (*t*), if the jury are satisfied on the facts' (*u*).

Traveller Entrusted with Goods for Sale.—A traveller was entrusted with pieces of silk to carry about with him for sale to such customers as he might procure. It was his duty to send by the next post after sale the names and addresses of the customers to whom any silk might have been sold. All goods not so accounted for remained in his hands, and were treated by his employers as stock. At the end of each half year it was his duty to send in an account for the entire six months, and to return the unsold silk. He was paid by a commission. The prosecutors delivered four pieces of silk to the prisoner, and he, before the end of six months, appropriated the same to his own use. It was held that he could be properly convicted of larceny as a bailee, because the silk, until disposed of to customers, was the property of his employers (*v*).

In R. *v.* Henderson (*w*), a conviction of larceny as a bailee was affirmed under circumstances thus stated by Kelly, C.B., in the judgment of the Court: 'The effect of the statement of facts in the case is this: the prosecutor delivered two brooches to the prisoner for the purpose of their being sold by him for the prosecutor upon these terms. The prisoner was to sell them for not less than £200 for one and £115 for the other, and the second limitation was, that he was to sell them within a week, or at the most within ten days; if he could sell them for these prices, his duty was to pay over the price he received to the prosecutor; and if he was unable to sell them, his duty was, when the ten days had expired, to return the two brooches *in specie* to the prosecutor. The prisoner having received the brooches on these terms, and the ten days having elapsed, and the brooches being unsold, his duty was simply to return them to the prosecutor; for the property of the prosecutor in the brooches never ceased until the prisoner sold them to another person; the prisoner, however, proceeded to a pawnbroker's shop and effected a sale to another jeweller. No doubt he raised money upon them *prima facie* as a pledge;

would almost invariably give rise to one; and therefore speaking generally the term 'contract of bailment' is not inappropriate. In the case of an infant having a chattel delivered to him upon condition to return it, the law does not imply any promise on the part of the infant to return it, and therefore there is no contract and the remedy would be in detinue; but in the case of an adult the receipt by him of the chattel for his own benefit upon condition to return it raises the presumption of an acceptance and consequent promise to return the chattel according to the terms of the condition. See R. *v.* Ashwell, 16 Q.B.D. 190.

(*t*) Re-enacted in 24 & 25 Vict. c. 96, s. 3, *ante*, p. 1245.

(*u*) R. *v.* Reeves, 5 Jurist, 716.

(*v*) R. *v.* Richmond, 12 Cox, 495.

(*w*) 11 Cox, 593 (C. C. R.).

but the subsequent words shew that it was really by means of a sale. The act he did was to sell the brooches with other property for £250, and then he stipulated that he might redeem the brooches on payment of £110 before September. The question is whether this transaction was a conversion of the brooches to his own use? He being a bailee of them at common law, it would not amount to a larceny; but I am of opinion that it does amount to a conversion by a bailee to his own use under sect. 3 of the 24 & 25 Vict. c. 96, if it was a fraudulent taking or converting by the prisoner. When the ten days had expired there can be no doubt that the prisoner held the brooches on no other condition than to return them to the prosecutor; and I think that the converting of them to his own use by sale or pledge after that was a fraudulent taking and converting of them to his own use within the meaning of sect. 3. This view is supported by the finding of the jury on the first question put to them, that the transaction was not a contract of sale of the brooches to the prisoner, but a delivery of them to him for a particular purpose, *viz.* to be sold by him for the prosecutor within ten days. In leaving the second question to the jury the case was put too favourably for the prisoner. The second question left to the jury was, did the prisoner intend at the time of his raising the money on the brooches to resume possession of them so as to fulfil the purpose for which they were entrusted to him—*i.e.* return them *in specie* to the prosecutor? If he did not, the act was fraudulent. If he did so intend, whether such intention takes the case out of sect. 3, is another question, and does not arise in this case. If he sold the brooches without the intention of repossessing himself of them, so as to fulfil his duty, he was guilty of the larceny charged in the indictment. The jury must be taken to have found that he did not intend to repossess himself of them; the act of sale was therefore in itself a fraudulent applying of the brooches to his own use, and a larceny within the statute. The question reserved for us assumes something which is not the case: that the prisoner was not bound to restore the specific articles, whereas after the ten days had elapsed he was bound to return the specific brooches to the prosecutor' (*x*).

(*x*) In R. *v.* Jackson, 9 Cox, 505, on an indictment for larceny as a bailee it appeared that the prisoner borrowed a coat from the prosecutor, with whom he lodged, for a day, and returned it. Three days afterwards he took it *without the prosecutor's permission*, and was seen wearing it by him, and he again gave him permission to wear it for the day. Some few days afterwards he left the town, and was found wearing the coat on board a ship bound for Australia. Martin, B., stopped the case, stating that in his opinion there was no evidence of a conversion. 'There are many instances of conversion sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this statute; the determination of the bailment must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. As, for instance, in the case of a bailment of an article of silver for use, melting it would be evidence of conversion. So when money or a negotiable security is bailed to a person for safe keeping, if he spend the money or convert the security he is guilty of a conversion within this statute. The prosecution ought to find some definite time at which the offence was committed; the taking the coat on board ship was subsequent to the prisoner's going on board himself.' If this case is correctly reported, it deserves reconsideration. The words of the section '*take* or *convert* the same to his own use, &c.,' do not require a conversion, but were studiously framed to avoid the necessity of proving one. The evidence was sufficient to go to the jury that the prisoner took the coat on board for his own use with intent permanently to deprive the owner of it; and such a case seems clearly within the statute. Besides, the case ought to have

Where the prisoner was indicted for stealing sheep, and the prosecutor had delivered the sheep to the prisoner to keep, and he had afterwards sold them, and for some time concealed the sale ; and the defence was that the prisoner had, or supposed he had, authority from the prosecutor to sell the sheep ; Erle, C.J., told the jury that, ' if the prisoner sold the sheep without any authority and without any reason to suppose that he had authority to sell them, then he was guilty ; otherwise, not so ' ; and left it to them to say whether he had any reason to suppose he had such authority (*y*).

The drawer of an accommodation bill received it from the acceptor upon an arrangement to get it cashed and to pay over to the acceptor all the proceeds less £3 10*s.* 0*d.* Instead of doing this the drawer handed the bill to one of his creditors in order that the creditor might discount the bill and pay his own debt of £10, and then hand over the balance to the drawer. The creditor did not carry out this arrangement, but detained the bill. It was held that although the drawer was a bailee of the bill yet there was no conversion of it by him analogous to larceny (*z*).

Where the prosecutor gave the prisoner a bill of exchange, which the prisoner was to deposit by way of security with a third party for purchase money due from the prisoner to the third party, and was not to use for any other purpose, and the prisoner converted it to his own use, it was held by Bramwell, B., that the prisoner was not a ' bailee ' under sect. 3 (*a*).

The prisoner who received a bill of exchange for the purpose of getting it discounted and handing back the proceeds, instead of getting it discounted, endorsed it as his own to a creditor in payment of his account. The jury found that it was the prisoner's intention when he endorsed the bill to pass the property in it absolutely to the creditor. He was held to be rightly convicted of larceny as a bailee of the bill (*b*).

Sect. VIII.—Taking the Property of Husband or Wife by, or with the Consent of, the other Spouse.

Common Law.—At common law the goods and chattels of a married woman belonged to, or were treated as in the possession of, her husband, so he could not be guilty of stealing them from her. And at common law a wife could not be guilty of larceny of her husband's goods while they were living together (*c*). It was at one time held that even a stranger could not commit larceny in taking the goods of the husband by the

been left to the jury to say whether he did not return the coat to the prosecutor's house after the end of the last bailment for a day. If so the case was simply one of larceny. C. S. G. As to conversion by pawning see R. *v.* Medland (*ante*, p. 1182) and R. *v.* Wynn, *ante*, p. 1183.

(*y*) R. *v.* Leppard, 4 F. & F. 51.

(*z*) R. *v.* Weekes, 10 Cox, 224, Chambers, Common Serjeant.

(*a*) R. *v.* Cosser, 13 Cox, 187.

(*b*) R. *v.* Oxenham, 13 Cox, 349; 46 L. J. M.C. 125. R. *v.* Cosser, and R. *v.* Weekes, *supra*, were held to have been rightly decided, but were distinguished. See also *Re* Bellencontre [1891], 2 Q.B. at p. 137.

(*c*) Wife and husband being regarded as one person in law (and the husband that one) and the wife being regarded as having by endowment at the marriage a kind of interest in his goods. The common law has been modified by the Married Women's Property Act, 1882 (*post*, p. 1255).

delivery of the wife (*d*). The fact that the property taken by the wife belonged to the husband and others jointly does not make any difference (*e*).

On an indictment of an apprentice for stealing his master's plate, the prisoner confessed that he had stolen the articles in question from a closet in which they were usually locked up: but it did not appear how he obtained access to it. The master's wife had the constant keeping of the key and the prisoner could not have taken the key without the *privity* or *consent*. The Court held that it might be presumed that the prisoner had received the key from her and should therefore be acquitted (*f*).

The privity or consent of the wife is not treated as that of the husband if the goods are delivered to the wife's paramour (*g*). Where the prosecutor left his wife in the care of his house and property, and during his absence the prisoner, who had lodged for some time previously in the house, took a great many boxes, &c., from the house, and left them at a house where he and the prosecutor's wife afterwards lived together till he was apprehended, and the jury found that the prisoner stole the property jointly with the wife; it was held that this was larceny in the prisoner; for though the wife consented, it must be considered that it was done *invito domino* (*h*).

So where the prisoner, who lodged at the house of the prosecutor, went away with the prosecutor's wife to B., where they lived together as man and wife for more than a year; they took with them from the prosecutor's house a box belonging to the prisoner, containing the wife's wearing apparel and a coffee-pot and two candlesticks, the property of the prosecutor. The coffee-pot and candlesticks were used by them at B., and afterwards sold by the wife, and the prisoner there pledged some article of wearing apparel, and applied the money to his own use. The jury were directed to find the prisoner guilty, if they thought either that the prisoner, going away with the prosecutor's wife for the purpose of an adulterous intercourse, was engaged jointly with her in taking the goods, or that, not being a party to the original taking, the prisoner, after arriving at B., appropriated any part of the goods to his own use. The jury having found the prisoner guilty, on the ground that there was a joint taking by the prisoner and the wife, the judges were unanimously of opinion that the conviction was right (*i*).

(*d*) 1 Hale, 514, where it is put thus: 'If she take or steal the goods of her husband and deliver them to B., who knowing it, carries them away, this seems no felony in B.; for they are taken *quasi* by the consent of her husband. Yet trespass lies against B. for such taking; for it is a trespass; but *in favorem vitæ* it shall not be adjudged a felony, and so I take the law to be, notwithstanding the various opinions.' And he cites Dalton, c. 104, pp. 268, 269, *ex lectura Cooke* (new ed. c. 157, p. 504). And see 1 Hawk. c. 33, s. 32. 3 Co. Inst. 110. 2 East, P. C. 558. According to Dalton, if a wife steal the goods of her husband and deliver them to her adulterer, who knowingly carries them away, this is felony in him because no consent of the husband can be presumed. By 13 Edw. I. c. 34, 'Of women carried away with the goods of their husbands, the King shall have the suit for the goods so taken away.'

(*e*) R. *v.* Willis, 1 Mood. 375. Where it was held that a wife could not be convicted of stealing money of a friendly society deposited in a box in her husband's house, and kept locked by the stewards of the society.

(*f*) R. *v.* Harrison, 1 Leach, 47; 2 East, P. C. 559. See R. *v.* Avery, Bell, 150.

(*g*) Dalton, cap. 104, pl. 268, 269 (new ed. c. 157, p. 504).

(*h*) R. *v.* Tolfree, 1 Mood. 243, overruling R. *v.* Clark, 1 Mood. 376 n. See also R. *v.* Flatman, 14 Cox, 396.

(*i*) R. *v.* Thompson, 1 Den. 549.

So, where the prosecutor's wife arranged with the prisoner to elope with him and live with him as his wife, and the prisoner desired her to bring all the money she could, and to get the money and boxes of clothes ready by a particular night, when he would come for them and take her away; and she put £17 into the boxes, which already contained her clothes, two watches, some silk handkerchiefs, and about £4, and sat up after her husband had gone to bed till the prisoner came, took him into the room where her husband was asleep, and he took the boxes away, and, if her husband had remained asleep, she would have gone off with the prisoner, but as her husband awoke, she was obliged to stay. It did not appear that any adultery had been committed. The boxes were locked by the wife, and were found in that state in the possession of the prisoner, and were unlocked with keys produced by the wife. Coleridge, J., directed the jury that, if the prisoner took any of the husband's property, *there then being an intention* to commit adultery with the wife, he was guilty of larceny; and that, having told the wife to bring all the money that she could, it was for them to consider, whether he did not intend to steal the property taken away, although he might not, at the time of the taking, know exactly of what that property consisted (*j*).

The prisoner and the wife of the prosecutor packed up the articles alleged to be stolen in boxes, and when so packed the prisoner brought the boxes out, and they were put in a cart which he had previously ordered and driven to the station. The prisoner, the wife, and her three children went by the train to L. A fortnight afterwards the prisoner and the wife were found living together at L., in a house which she had taken in her own name, and all the property taken was found there. The jury were told that, if they were satisfied that the prisoner and the wife, when they took the property, went away for the purpose of having adulterous intercourse, and had afterwards effected that purpose, they ought to convict; but that if they believed that they did not go away with any such purpose, and had never committed adultery, they ought to acquit. The jury found the prisoner guilty of larceny, and the conviction was affirmed (*k*).

On an indictment for larceny it appeared that the prisoner, a servant, was seen to bring a box out of his master's house, and that on the night of the same day the prisoner and the prosecutor's wife occupied the same bedroom at B., and that in that room a police constable found them together, and charged the prisoner with stealing spoons and a watch of the prosecutor. The constable took the watch from the prisoner's person and found at the top of a box which the prisoner admitted to be his, several articles of female apparel, and under these some silver spoons and sugar tongs of the prosecutor. The wife proved that she ordered the

(*j*) R. *v.* Tollett, C. & M. 112, Coleridge, J.

(*k*) R. *v.* Berry, Bell, 95; 28 L. J. M. C. 70. In R. *v.* Glassie, 7 Cox, 1 (Ir.), the prosecutor's wife, taking with her articles of her wearing apparel, eloped with the prisoner, the clothes were found in a trunk belonging to the prisoner, of which the wife had the key, which the prisoner had given her, and she said she put them there; the name of the wife was changed, and a passage ticket taken out in the joint name of Walker. Lefroy, C.J., left the case to the jury, and the prisoner was convicted. 'This case is extremely ill-reported, and very little reliance can be placed in it. The facts above stated are taken from the different parts of the report.' C. S. G.

prisoner to get a fly and take away the boxes, and that the prisoner did not know of her putting in the spoons or sugar tongs. It was objected that the charge against the prisoner could not be maintained, as he was acting under the control of his mistress, and that she could not be legally charged with stealing from her husband. The jury were directed that, if the prisoner and the wife went away with the intention of carrying on an adulterous intercourse, and if he, when so going away, was concerned in taking away the property of the prosecutor, he was guilty; and, on a case reserved upon the point so raised, Erle, C.J., after argument for the prisoner, said: 'Upon these facts the taking of the box *animo adulterii* was evidence of larceny. The prisoner took his master's property, and with it his master's wife, with the intention of committing adultery. The conviction must therefore be affirmed' (*l*).

So, where a wife took thirty-five sovereigns and some clothes from her husband's bedroom, and as she left the house said to the prisoner, 'It 's all right, come on'; and he left in a few minutes after, and they were traced to a public-house, where they slept together, and when taken into custody the prisoner had twenty-two sovereigns upon him: the jury found him guilty of larceny, on the ground that he received the sovereigns from the wife, knowing that she took them without the authority of her husband; and the conviction was held right; for when a wife becomes an adulteress, she thereby determines her quality of wife, and her property in her husband's goods ceases; and in this case the prisoner was the accomplice of the wife, assisted her, and took the sovereigns, knowing that she had taken them without her husband's consent (*m*).

The prisoner having lodged in the prosecutor's house, left, but there was no evidence as to the time or manner of his leaving. The next day the prosecutor's wife left, with only a small bundle under her arm. The prisoner was apprehended on board a vessel in company with the wife, who was passing under the name of Mrs. D., and the prisoner had tickets in the names of Mr. and Mrs. D. A great quantity of the prosecutor's property, very much more than could have been comprised in the wife's bundle, and not confined to the wife's clothes, was found in the prisoner's cabin and on his person. There was no other evidence who had taken the articles from the house. The jury found the prisoner guilty of receiving, knowing the goods to have been stolen; and it was held that there was '*some* evidence to support the conviction' (*n*).

A wife, though she may have committed adultery, cannot, at common law, steal her husband's goods, and therefore the adulterer who received from her the goods which she had taken from her husband, could not be convicted of receiving stolen goods (*o*). An adulterer cannot be convicted of stealing the goods of the husband, brought by the wife alone to his

(*l*) R. *v.* Mutters, L. & C. 491, 511; 34 L. J. M. C. 54.

(*m*) R. *v.* Featherstone, Dears. 369; 23 L. J. M. C. 127. See next note.

(*n*) R. *v.* Deer, L. & C. 240; 32 L. J. M. C. 33. In R. *v.* Kenny, 2 Q.B.D. 307, Denman, J., speaking of this case and of R. *v.* Featherstone, *supra*, said, 'The Law Journal report of each of these cases shews the real ground of decision. In the first case (R. *v.* Deer) the goods were such that the wife could not have been the person to remove the whole of them from her husband's house, and therefore the prisoner received them from some other than the wife. In the other the prisoner was himself a party to the removal and was guilty not merely of receiving but of stealing.'

(*o*) R. *v.* Kenny, 2 Q.B.D. 307. See R. *v.* Streeter, and R. *v.* Payne, *post*, p. 1256.

lodgings and placed by her in the room in which the adultery was afterwards committed, merely upon evidence of the goods being found there; but it might be otherwise if the goods could be traced to his personal possession (*p*).

Where a wife took her husband's goods from a place within the jurisdiction of the Central Criminal Court, and was found committing adultery with the prisoner at Liverpool, the husband's goods being then in the prisoner's possession, but there was no evidence that the goods had been under the prisoner's control at any place within the jurisdiction of the Central Criminal Court, it was held that the prisoner could not be indicted in that Court for larceny (*q*).

Where the prisoner agreed with the prosecutor's wife that they should go away and live in adultery, they left, but were followed and overtaken on the road, when the man was carrying a box containing only some of the woman's necessary wearing apparel, the subject of the indictment, the Court held that the conviction could not be sustained (*r*).

Statutes.—The common law as to the larceny by one spouse of the property of the other has been considerably modified by the Married Women's Property Act, 1882 (*s*), which provides, by sect. 12, that 'Every woman whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband, to the proviso hereinafter contained), the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property (*t*), as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife.'

By sect. 16, 'A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.'

By the Married Women's Property Act, 1884 (*u*), sect. 1, 'In any such criminal proceeding against a husband or a wife as is authorised by the

(*p*) R. *v.* Rosenberg, 1 C. & K. 233. See also R. *v.* Taylor, 12 Cox, 627.

(*q*) R. *v.* Prince, 11 Cox, 145.

(*r*) R. *v.* Fitch, Dears. & B. 187. This seems to overrule the direction of Coleridge, J., on this point in R. *v.* Tollett, C. & M. 112, *ante*, p. 1253.

(*s*) 45 & 46 Vict. c. 75.

(*t*) The Act does not authorise criminal proceedings for libel by wife against husband. R. *v.* Mayor of London, 16 Q.B.D. 772.

(*u*) 47 & 48 Vict. c. 14.

Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence' (*v*).

Two prisoners, a man and a woman, were indicted for larceny in the dwelling-house of some household goods, a sewing machine and some money, and in a second count they were charged with feloniously receiving the same. The woman was the prosecutor's wife, and the man was a lodger, but had been turned out of the house by the prosecutor. After he left, the woman packed up the property in question and sent it to the man and then left the house and went and lived with the man. The property was found in their possession. The jury found the woman guilty of stealing, and the man of receiving, and upon a case reserved, the Court held that as the stealing by the wife of the husband's property was not a felony at common law or by virtue of the Larceny Act, 1861, but was made a criminal offence by the above sects. 12 and 16, the man could not be convicted, under the Larceny Act, 1861, of feloniously receiving property stolen by the woman from her husband (*w*). But an indictment which charged, as a common law misdemeanor, the unlawful receiving by a person of money in fact stolen by the wife of the prosecutor has been held good (*x*).

When a wife is charged under the above sects. 12 and 16 with stealing the property of her husband when about to leave or desert him, it is not necessary that the indictment should contain averments that the prisoner was the wife of the prosecutor and that she took the property in question when leaving or deserting, or about to leave or desert her husband (*y*). And it is not necessary, though it may be better, where another person is charged with the unlawful receiving of property so stolen, to insert in the indictment an allegation that the money belonged to the husband, and had been stolen from him by the wife (*z*).

Sect. IX.—Goods in respect of which Larceny may be committed.

A. *Goods part of the Freehold.*

At common law, larceny cannot be committed of things which savour of the realty, and are, when they are taken, *part of the freehold*; whether they are of the substance of the land, as lead, or other minerals; of the produce of the land, as trees, corn, grass, apples, or other fruits; or things affixed to the land, as buildings and articles, such as lead, &c., annexed to buildings (*a*). The severance and taking of things of this description is, at common law, only a trespass (*vide ante*, p. 1184).

One reason for this doctrine (though it does not apply to the whole of

(*v*) By the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 4 (1), the wife or husband of a person charged with an offence under the above sects. 12 and 16, may be called as a witness either for the prosecution or defence, and without the consent of the person charged. *Vide post*, p. 2277.

(*w*) R. *v.* Streeter [1900], 2 Q.B. 601; 69 L. J. Q.B. 915.

(*x*) R. *v.* Payne [1906], 1 K.B. 97; 75 L. J. K.B. 115.

(*y*) R. *v.* James [1902], 1 K.B. 540; 71 L. J. K.B. 211.

(*z*) R. *v.* Payne, *supra*.

(*a*) 3 Co. Inst. 109. 1 Hale, 510. 1 Hawk. c. 33, s. 34. Bac. Abr. tit. 'Felony' (A). 4 Bl. Com. 232. 2 East, P. C. 587. In R. *v.* Clinton, Ir. Rep. 4 C. L. 6, the prisoner, without any right, removed seaweed that had been cast up and left, between high and low water mark, on a part of the shore leased to the prosecutor. It was held that such seaweed was not the subject of larceny.

the articles which have been enumerated) is said to be, that things which are a part of the freehold, being usually more difficult to remove, are less liable to be stolen (1 Hawk. c. 33, s. 34, 2 East, P. C. 587). Possibly also, the doctrine may have proceeded upon certain subtleties in the legal notions of our ancestors (4 Bl. Com. 232); and it may perhaps in some measure have originated in the greater security from private depredations of the things which were part of the freehold, than of those which were merely personal, in the earlier times, when articles of provision and other personal chattels (frequently the most valuable) were carried from place to place by the individual tenants, in that attendance in the camp which was exacted by their military tenures (Bac. Abr. tit. 'Felony').

But things, which savour of the realty, may become the subject of larceny by being *severed* from the freehold: thus, stones when dug out of a quarry, wood when cut, fruit when gathered, or grass when cut, can be stolen (*b*), not only when they have been severed by the owner, but also if they have been severed by the thief himself, *if there be an interval between his severing and taking them away;* so that the severing and taking cannot be considered as one continued act. If the thief severs them at one time (whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid), and comes again at another time when they are so turned into personalty and takes them away, it is larceny (*c*). Thus, though 'if a thief severs a copper, and instantly carries it off, it is no felony at common law; yet if he lets it remain, after it is severed, any time, then the removal of it becomes a felony, if he comes back and takes it: and also of a tree which has been some time severed' (*d*). So also where a trespasser entered the close of another and cut growing grass, and three

(*b*) 3 Co. Inst. 109. 1 Hale, 510.

(*c*) 1 Hawk. c. 33, s. 34. 4 Bl. Com. 233. 2 East, P. C. 587. And so in 1 Hale, 510, it is said, 'But if a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time, or so, come and fetch it away, this hath been held felony, because the act is not continuated but interpolated, and in that interval the property lodgeth in the right owner as a chattel; and so it was agreed by the Court of King's Bench, 9 Car. 1, upon an indictment for stealing the lead of Westminster Abbey.' Dalt. c. 103, p. 166 (new ed. c. 156, p. 501). See R. *v.* Townley, *post*, p. 1274.

(*d*) Lee *v.* Risdon, 7 Taunt. 191. Gibbs, C.J. In R. *v.* Townley, *post*, p. 1274. Blackburn, J., referring to this case, said he had no fault to find with this latter proposition if it meant that the person severing the copper had gone away and abandoned all kind of possession, and afterwards, when his wrongful possession had ceased, had come again and resumed it. When a demise of real property is made, anything annexed to the freehold continues part of the inheritance of the landlord, and becomes part of a chattel real in the hands of the tenant in possession. By the lease or agreement the tenant has the use, not the dominion, of the property demised; and, therefore, when he separates any part of it, to convert it from a chattel real to a chattel personal, his right of using it is at an end for any legal purpose, that right being only to use it in the state in which it was before, and the person who has a right to the first estate of inheritance has a right to the immediate possession of the thing that has been severed, in the like manner as he has the right to the immediate possession of timber, where it is severed from the inheritance. Per Holroyd, J., Farrant *v.* Thompson, 5 B. & Ald. 826. And if a stranger severs a parcel of the freehold during the term, the part so severed immediately vests in the landlord, if he is owner in fee. Berry *v.* Heard, Cro. Car. 242. Herlakenden's case, 4 Co. Rep. 62. Cf. Leigh *v.* Taylor [1902], A.C. 157. But if the landlord has only an estate for life, the property vests in the owner of the inheritance. Per Lord Kenyon, Gordon *v.* Harper, 7 T.R. 9. See Blackett *v.* Lowes, 2 M. & S. 494, as to timber improperly cut by customary tenants vesting in the lord of the manor.

days later returned and took it away for his own use, the Court held that he was properly convicted of larceny at common law (*e*).

This being the common law, and many of the descriptions of property which come within this notion of a connection with the freehold being thereby placed in a very precarious and unprotected situation, the Legislature has from time to time interfered for their protection, and made the wrongful taking of them in some instances felony, and in others a minor offence, punishable by summary proceedings before a magistrate. The statute law on the subject is now for the most part contained in the Larceny Act, 1861 (24 & 25 Vict. c. 96).

Ore of Metal, Coal, &c.—By sect. 38, 'Whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . ' (*f*).

Metal, Glass, Wood, &c., Fixed to House or Land.—By sect. 31, 'Whosoever shall steal, or shall rip, cut, sever, or break with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square *or* street, or in any place dedicated to public use or ornament, *or in any burial ground* (*g*), shall be guilty of felony, and being convicted thereof, shall be liable to be punished as in the case of simple larceny (*h*); and in the case of any such thing fixed in any such square, street, or place as aforesaid, it shall not be necessary to allege the same to be the property of any person' (*i*).

While an indictment will not lie at common law for stealing lead piping fixed to the realty, a conviction of receiving such lead may be sustained under 24 & 25 Vict. c. 96, s. 91, if the indictment contains a receiving count (*j*). As to theft of fixtures by tenants and lodgers, see *post*, p. 1449.

Where the prisoner was indicted (*k*) for stealing lead, fixed to a house and buildings, the facts were, that the house in question being to be let, the prisoner, giving a false description of his situation in life and his place of residence, obtained possession of it under a treaty for a lease of it; and in a few days after he had so obtained possession of it, stripped it of the

(*e*) R. *v.* Foley, 17 Cox, 142 (C. C. R. Ir.), Palles, C.B., *diss.*

(*f*) Taken from 7 & 8 Geo. IV. c. 29, s. 37 (E.) and 9 Geo. IV. c. 55, s. 30 (I.). Sect. 39 (*ante*, p. 1185) deals with the fraudulent removal of ore after severance.

(*g*) It seems that stealing fixtures out of a churchyard was punishable under 7 & 8 Geo. IV. c. 29, s. 44 (rep.). R. *v.* Blick, 4 C. & P. 377, Bosanquet, J. R. *v.* Jones, Gloucester Spring Ass. 1828, MSS. C. S. G. R. *v.* Jones, Dears. & B. 555. See R. *v.* Davis, 2 East, P. C. 593.

(*h*) *Post*, p. 1313.

(*i*) Framed from 7 & 8 Geo. IV. c. 29, s. 44 and 9 Geo. IV. c. 55, s. 37 (Tr.), with the additions italicised. See R. *v.* Richards, R. & R. 28, decided under the repealed 4 Geo. II. c. 32, and also R. *v.* Senior, 2 East, P. C. 593; 1 Leach, 496, and R. *v.* Hedges, 1 Leach, 201. 2 East, P. C. 590 (*n*).

(*j*) R. *v.* Cooper [1908], 1 Cr. App. R. 89; 24 T. L. R. 867.

(*k*) Under 4 Geo. II. c. 32, repealed in 1827, and now represented by sect. 31, *supra*.

lead on the roof, &c. The jury said that they were of opinion that he had entered into the contract for the purpose of getting fraudulent possession of the house, and found a verdict of guilty; and, upon a case reserved, though no opinion was publicly delivered, the prisoner was afterwards sentenced (*l*).

Buildings within the Statute.—In an indictment (under the same repealed Act) for stealing lead fixed in a church, the judges were unanimous that a church was included within the words 'any building whatsoever' (*m*).

A summer-house, used occasionally for tea and refreshment, situate in a park, at the distance of half a mile from the dwelling-house, was held to be a building within 4 Geo. II. c. 32 (rep.) (*n*).

Upon an indictment for stealing two pieces of wood fixed to a building, it appeared that the building was intended for a cart-shed in a field, and that on all its sides it was boarded up, except where there was a door which had a lock on it; it had a wooden frame-work for a roof ready for thatching, but it had no thatch, some gorse being thrown on it; and Littledale, J., held that this was a building within 7 & 8 Geo. IV. c. 29, s. 44 (rep.) (*o*).

But where on a similar indictment for stealing a plank it appeared that the plank was used as a seat in the grounds of B., and that there was a wall, and pillars at the end of it, and that the plank was laid in mortar on the top of the wall and pillars, and there was no roof; Park, J., held that this was not a building within the meaning of 7 & 8 Geo. IV. c. 32 (rep.) (*p*).

A similar indictment alleged that the prisoner stole certain lead 'then being fixed to a certain wharf,' and it appeared that the lead stolen formed the gutters of two sheds on a wharf of the prosecutor; which sheds were constructed of brick, timber and tiles, with lead gutters. It was contended that the indictment was bad, as the word 'wharf' did not necessarily imply a building; and secondly, that there was a variance, for the indictment alleged that the lead was fixed to a wharf, and the proof was that it was fixed to a shed; but it was held, on a case reserved, that 'it is enough if the indictment alleges that the lead is fixed to that which may be a building, and which is proved by the evidence to be one. The allegation that the lead was fixed to a wharf, without saying that the wharf is a building, imposes that burden of proof on the prosecutor; but there is sufficient evidence here to shew that that which the lead was affixed to was in fact a building. The evidence must be fairly taken to shew that the shed from which the lead was stolen was part and parcel of the wharf itself' (*q*).

On an indictment for stealing lead affixed to the dwelling-house of W., a witness proved that he managed the property from which the lead was the property of any person.

(*l*) R. *v.* Munday, 2 Leach, 850; 2 East, P. C. 594.

(*m*) R. *v.* Hickman, 1 Leach, 318. 2 East, P. C. 593. The question discussed there and in R. *v.* Isley, 1 Leach, 320 (*n*); R. *v.* Parker, 2 East P. C. 592; and R. *v.* Miles, 1 Cox, 351, as to the mode of laying the property in lead affixed to a church is not now of importance as under sect. 31 it is unnecessary to allege fixtures, &c., to be

(*n*) R. *v.* Norris, R. & R. 69.

(*o*) R. *v.* Worrall, 7 C. & P. 516.

(*p*) R. *v.* Reece, Monmouth Lent Ass. 1828, MS. C. S. G. In Field *v.* Receiver for the Metropolitan Police District [1907], 2 K.B. 853, no question was raised as to a wall being a building within the Riot (Damages) Act, 1886.

(*q*) R. *v.* Rice, Bell, 87: 28 L. J. M. C. 64.

stolen for his nephew, W.; that he ordered all repairs, received the rent in his nephew's absence, and let the property to the present tenant; and, upon a case reserved, it was held that this was sufficient evidence that the house belonged to W. He was in possession, as he received the rent, and employed another person to let it, and the only rational inference from these facts was that the house was his (*r*).

Where it appeared that at the time the prisoner took the fixtures they had been severed from the building, it was held that he could not be convicted of stealing fixtures from a building, nor could he be convicted on that indictment of larceny at common law (*s*).

If a person steals fixtures in one county and carries them into another county, he cannot be indicted for simple larceny in the county in which he carries them (*t*).

Trees, &c.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 32, 'Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure garden, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound), be guilty of felony, and being convicted thereof, shall be liable to be punished as in the case of simple larceny; and whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the articles or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds), be guilty of felony, and being convicted thereof, shall be liable to be punished as in the case of simple larceny (*u*).

The prisoner was indicted under 7 & 8 Geo. IV. c. 29, s. 38 (rep.), for stealing pear-trees of the value of more than £1, described in one count as growing in a garden, and in another as in ground adjoining to a dwelling-house, and it appeared that the dwelling-house was occupied by a tenant of the prosecutor, and that a paved entry or walk of about a yard in width ran along the back of the house and was fenced on the opposite side by a low paling, with a wicket gate in the centre, which opened on an unfenced gravel walk running at right angles to the entry down the middle of a plot of inclosed ground of about half an acre. The ground on one side of this walk was occupied by the tenant as his garden; the other side was the ground on which the pear-trees were growing, and was retained by the prosecutor in his own occupation. The trees were grafted seedlings about seven feet high, and intended for sale. There were a few currant and raspberry bushes on the same part of the ground, and in the preceding summer the prosecutor had had a crop of potatoes and cabbages growing among the pear-trees. It was held first, that the land was not adjoining to the house; for ground cannot be properly said to adjoin a house unless it is absolutely contiguous, without anything

(*r*) R. *v.* Brummitt, L. & C. 9.
(*s*) R. *v.* Gooch, 8 C. & P. 293.
(*t*) R. *v.* Millar, 7 C. & P. 665.
(*u*) Taken from 7 & 8 Geo. IV. c. 29, s. 38 (E.), and 9 Geo. IV. c. 55, s. 31 (I.). As to the punishment, see *post*, p. 1313.

between them; secondly, that the pear-trees were trees within this section, and not 'plants' within sect. 42; thirdly, that it was a question for the jury whether the place was a garden or not (*v*); and fourthly, that the words 'adjoining or belonging to' only referred to the word 'ground,' and not to 'park, pleasure-ground, garden, orchard, or avenue' (*w*).

Upon an indictment on 7 & 8 Geo. IV. c. 30, s. 19 (rep.), for feloniously and maliciously damaging two oak-trees, one ash, one elm, and a hundred thorn shrubs growing in a hedge, thereby doing injury to an amount exceeding £5, a sworn valuer proved that it would be necessary to stub up the old hedge, and estimated the injury to the trees at £1, and the expense of stubbing, posts and rails to protect the new hedge, quickwood, setting, and clearing at £4 14*s.* 6*d.*; it was objected that the injury must be in respect of a growing tree, sapling, or underwood, and that there was no evidence of such injury beyond one pound; and, on a case reserved, it was held that the amount of injury must be confined to the injury done to the trees, and that the consequential injury cannot be taken into consideration (*x*).

Upon an indictment for cutting eight trees with intent to steal, whereby an amount of injury was done to them exceeding £5, framed upon the latter part of sect. 32 of the Larceny Act, 1861 (*supra*), proof that the aggregate value of a number of trees cut at one time exceeded the amount of £5 will satisfy the indictment, though no one tree was of the value of £5 (*y*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 33, 'Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money not exceeding five pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence, *either* against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before-mentioned, and shall be convicted thereof

(*v*) R. *v.* Hodges, M. & M. 341, Park, and Parke, JJ. '*Qu.*, whether it can be said that ground "adjoins or belongs to" a dwelling-house within this Act, unless it is occupied by the same person who occupies the dwelling-house.' C. S. G.

(*w*) S. C. MS. C. S. G. In R. *v.* Taylor, R. & R. 373, it was held that young apple and pear trees, from four to six feet high in the stem without the top, and which had been grafted and planted in order to sell the fruit which they might produce, were trees within 9 Geo. I. c. 22, s. 1 (rep.). See Tarry *v.* Newman, 15 M. & W. 645 (deciding that an information on 7 & 8 Geo. IV. c. 29, s. 39, might be laid by any person), and Smith *v.* Dear, 88 L. T. 664; 20 Cox, 458.

(*x*) R. *v.* Whiteman, Dears. 353; 23 L. J. M. C. 120. It may well be doubted whether the thorns in a hedge are shrubs, and, if they were, still they would come within sect. 34 of the Larceny Act, 1861.

(*y*) R. *v.* Shepherd, L. R. 1 C. C. R. 118; 37 L. J. M. C. 45. The judge left the case to the jury, directing them that in order to convict the prisoner, they must be satisfied that he cut down at one time, or so continuously as to form one transaction, such a number of the trees as would make the injury done amount to a sum exceeding £5, and the direction was held to be right. See R. *v.* Williams, 9 Cox, 338 (Ir.), and R. *v.* Thoman, 12 Cox, 54.

in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit; and whosoever having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this Act), shall afterwards commit any of the offences in this section before-mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny' (*z*).

Sect. 36. 'Whosoever shall steal, or shall destroy or damage with intent to steal, any plant (*a*), root, fruit, or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence either against this or any former Act of Parliament, shall afterwards commit any of the offences in this section before-mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny' (*b*).

Sect. 37 provides for the summary conviction (*c*) of persons who steal or destroy or damage with intent to steal 'any cultivated root or plant used for the food of man or beast or for medicine or for distilling or for dyeing or for or in the course of any manufacture, and growing in any land open or inclosed not being a garden, orchard, pleasure ground, or nursery ground' (*d*).

Clover in a field was held to be cultivated plant used for the food of beasts within 7 & 8 Geo. IV. c. 29, s. 43 (*e*). But in a subsequent case it was doubted whether grass growing in a field was a cultivated plant within the same section (*f*).

B. *Written Instruments.*

Common Law.—At common law *written instruments* are not the subject of larceny, whether they relate to real estate or concern mere choses in action. If they relate to real estate, the taking of them is considered as merely a trespass, upon the ground that they concern the land, or (in

(*z*) Taken from 7 & 8 Geo. IV. c. 29, s. 39. There was a similar section in 14 & 15 Vict. c. 92, s. 5 (I.). As to the punishment, see *post*, p. 1313. Sects. 34 and 35 create offences punishable summarily.

(*a*) See R. *v.* Hodges, *ante*, p. 1261.

(*b*) Taken from 7 & 8 Geo. IV. c. 29, s. 42 (E.); and 14 & 15 Vict. c. 92, s. 5 (I.). As to the punishment, see *post*, p. 1313.

(*c*) A person prosecuted after a previous conviction under the section may elect to be tried on indictment as the penalty for a second or subsequent offence is imprisonment with or without hard labour for not over six months. *Vide ante*, Vol. i. p. 17.

(*d*) Taken from 7 & 8 Geo. IV. c. 29, s. 43.

(*e*) R. *v.* Brumby, 3 C. & K. 315, Williams, J.

(*f*) Morris *v.* Wise, 2 F. & F. 51. Byles, J., reserved the question.

technical language) savour of the realty, and are considered as part of it by the law, and descend with it to the heir (*g*). When they concern mere *choses in action*, as bonds, bills, and notes, they were considered at common law not to be goods whereof larceny could be committed, as being of no intrinsic value, and not importing any property in the possession of the person from whom they are taken (*h*).

Documents Relating to Real Estate.—Upon an indictment for stealing a parchment writing, purporting to be a commission for ascertaining the boundaries of certain manors, pursuant to an order of the Court of Chancery, the goods of our sovereign lord the King; and also another parchment writing annexed thereto, purporting to be a return made to the said commission, the goods of persons unknown; it was found by a special verdict, that the prisoner was guilty of privately taking away these parchment writings, being of the value of one penny each, with intent to steal them. The Court held that as the parchment writings in question concerned the realty, they were not the subject of larceny (*i*).

The doctrine that charters and other written assurances concerning the realty were not the subject of larceny was carried so far, that it was held that no larceny could be committed of the box or chest in which they were kept (*j*).

Records.—But it is larceny at common law to steal rolls of parchment which do not concern the realty, even though they are the records of a court of justice. The first count charged the prisoner with stealing one roll of parchment, being records of the Court of Common Pleas, value ten shillings, the property of the King; the second count laid the property in the judges of the Court; the third in the prothonotaries; the fourth in S. The four remaining counts were similar to the first four counts, but described the property stolen as one roll of parchment. The facts to prove the stealing were clear, the jury found the prisoner guilty on the first four counts; and upon a case reserved, the judges held that as the records did not concern the realty, stealing the parchment was larceny (*k*).

Choses in Action.—In R. *v.* Watts (*l*), upon an indictment for stealing 'a piece of paper,' it appeared that the paper when stolen had written upon it an agreement between the prosecutor and the prisoner, signed by each of them, by which the prisoner contracted to build two cottages for the prosecutor for a sum specified, and the latter agreed to pay instalments at certain stages of the work, and the remainder on completion; and it was agreed that alterations during the progress of the buildings should not affect the contract. At the time of the theft the prisoner had been paid all the money he was entitled to under it, but there was money owing for alterations, and the work was still going on under it. The matter of the agreement was of the value of twenty pounds or upwards, and therefore by law required a stamp, but as between the

(*g*) 3 Co. Inst. 109. 1 Hale, 510 (*a*). 1 Hawk. c. 33, s. 35. 4 Bl. Com. 234. 2 East, P. C. 596.

(*h*) 1 Hawk. c. 33, s. 35. 4 Bl. Com. 234. 2 East, P. C. 597.

(*i*) R. *v.* Westbeer, 1 Leach, 12; 2 East, P. C. 596; 2 Str. 1133.

(*j*) Staundf. 25 b. 1 Hale, 510. And the same law is laid down in 3 Co. Inst. 109, as to the box or chest, though it be of great value; and the reason given is, that 'it shall be of the same nature the charters be of; *et omne majus dignum trahit ad se minus.*'

(*k*) R. *v.* Walker, 1 Mood. 155.

(*l*) Dears. 326; 23 L. J. M. C. 56.

parties to it, it would be available as an agreement without a stamp, but no evidence was given on either point. It was objected that the paper was a *chose in action*, though unstamped, and therefore not the subject of larceny as a piece of paper. Upon a case reserved, after a verdict of guilty, it was held that the prisoner ought not under the circumstances to have been convicted of stealing a piece of paper; for at the time when it was stolen it was an agreement, and therefore it was a *chose in action*, and it was clear that at common law larceny could not be committed of a *chose in action*; and the reason why title-deeds and *choses in action* were not the subject of larceny was because the parchment was evidence of the title to land, and the written paper was evidence of the right; and though the instrument was stolen, the right remained the same (*m*); and as a right could not be the subject of larceny, neither could the paper which was evidence of it (*n*). As to the agreement not being a *chose in action* because all that was due had been paid upon it, the agreement was still executory, and might be used by either party to prove his right (*o*).

Statute Law.—Testamentary Instruments.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 29, 'Whosoever shall, either during the life of the testator or after his death, steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*p*); and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument is the property of any person: Provided, that nothing in this or the last preceding (*q*) section mentioned, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned, by any evidence whatever, in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed (*r*) such act, on oath, in consequence of any compulsory process of any Court of law or equity in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency' (*s*).

(*m*) Per Alderson, B.

(*n*) Per Maule, J.

(*o*) Parke, B., differed in opinion, and held that at the time the instrument was stolen, it was not evidence of a chose in action; being unstamped, it was not available either at law or in equity.

(*p*) Or not less than three years or imprisonment with or without hard labour for not more than two years. 54 & 55 Vict. c. 69, s. 1. *ante*, pp. 211, 212. The words omitted were repealed in 1892. (S. L. R.)

(*q*) See *post*, p. 1265.

(*r*) See R. *v.* Gunnell, 16 Cox, 154, where the meaning of the words 'first disclosed,' in a similar proviso, were discussed.

(*s*) Taken from 7 & 8 Geo. IV. c. 29, ss. 22, 24 (E.), and 9 Geo. IV. c. 55, ss. 22, 24 (I.). 'The offences contained in this clause were formerly only misdemeanors; by this clause they are not only made felonies, but subjected to the same punishment

The first count charged the defendant with stealing the will of B.; the second count charged that the defendant the will of the said M. B. 'unlawfully and for a fraudulent purpose did conceal'; the third count charged that the defendant the will of the said M. B. 'unlawfully and for a fraudulent purpose did destroy.' It was opened for the prosecution that M. B. had died, having made her will, by which she left a sum of money to a person named A., the interest of other money to Mrs. R., and after her decease the principal to be divided among C.'s children; and that this will was given by M. B. to a nurse, who gave it to Mr. R., the husband of Mrs. R., who put it on a desk, from which it was taken away by the defendant; and that, after this, administration was taken out by Mrs. R. as sole next of kin of M. B., and that the defendant, who was the assignee of R., for the benefit of creditors, paid away the property in making a dividend on R.'s debts. Alderson, B., 'The words of the Act of Parliament are "for any fraudulent purpose destroy or conceal any will, codicil, or other testamentary instrument." The purpose ought, I think, to be stated in the indictment, which here it is not (*t*). But I think also that if the defendant concealed this will, and took the money which ought to have gone to A. and C.'s children, to pay R.'s debts, that would be a fraudulent purpose within the Act of Parliament' (*u*).

Documents of Title to Real Estate.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 28, 'Whosoever shall steal, *or shall for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of* any document of title to lands shall be guilty of *felony*, and being convicted thereof shall be liable . . . to be kept in penal servitude (*v*) . . . and in any indictment for any such offence relating to any document of title to lands, it shall be sufficient to allege such document to be or to contain evidence of the title or of part of the title of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof' (*w*).

as the forgery of a will, on the ground that these offences are just as criminal and mischievous as the forgery of a will. The words "cancel, obliterate," "the whole or any part of," were introduced to make this clause co-extensive with the preceding and subsequent sections. Four material alterations were made in the proviso. 1. The words "charged with" are substituted for "indicted for"; so that no disclosure made after the defendant has been charged with the offence will come within the proviso. 2. The word "first" has been introduced before "disclosed" in consequence of R. *v.* Skeen, Bell, 97; where the minority of the judges held, that a statement made before a Commissioner of Bankrupts was a disclosure within 5 & 6 Vict. c. 39, s. 6 (rep.), although the same facts as were contained in that statement had been previously proved before a magistrate on hearing a charge against the defendant. Under this clause no disclosure will avail unless it be absolutely the first disclosure. 3. The word "compulsory" has been introduced before "examination or deposition" so as to exclude any voluntary examination or deposition. See R. *v.* Strahan, 7 Cox, 85. Lastly, the provision in the former enactments as to value was unnecessary.' C. S. G.

(*t*) But see Holloway *v.* R., 17 Q.B. 317. R. *v.* Wynn, 1 Den. 365, and R. *v.* Douglas, 13 Q.B. 42, that it is unnecessary to state the purpose.

(*u*) R. *v.* Morris, 9 C. & P. 89, decided under 7 & 8 Geo. IV. c. 29, s. 22 (rep.).

(*v*) For not more than five nor less than three years, 54 & 55 Vict. c. 69, s. 1. For other punishments see that section *ante*, Vol. i. pp. 211, 212. The omitted words were repealed in 1892. (S. L. R.)

(*w*) Taken from 7 & 8 Geo. IV. c. 29, s. 23 (E.); and 9 Geo. IV. c. 55, s. 23 (I.), with the additions in *italics*. Under the former enactment the offences were misdemeanors. The provisoes in sect. 29 (*ante*, p. 1264) apply also to sect. 28.

By sect. 1, 'The term "document to title to lands" shall include any *deed, map,* paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, *or to any interest in or out of any real estate*' (*x*).

Upon an indictment under 7 & 8 Geo. IV. c. 29, s. 23 (rep.), for stealing three deeds relating to real estate, Patteson, J., told the jury, 'You must be satisfied that the defendant took these parchment writings under such circumstances as would have amounted to larceny, had deeds of the kind been the subject of larceny' (*y*).

On an indictment under 7 & 8 Geo. IV. c. 29, s. 23 (rep.), it appeared that the prisoner held certain premises under a lease from the prosecutor, who had possession of the counterpart. The prisoner told the prosecutor's clerk that if he would get him the counterpart he would give him £10; he said he had altered the lease so as to make it appear to be for seventy-one instead of twenty-one years, and he wanted the counterpart that he might alter it in the same way. The clerk informed the prosecutor, and, acting under his directions, he took the counterpart, and gave it to the prisoner, who gave him £10. It did not, however, clearly appear whether the deed was given into the prisoner's hands by the clerk, or put on the table and taken up by the prisoner; and it was held that if the deed was delivered by the clerk into the hands of the prisoner, he ought not to be convicted; but that if he took it off the table he might be convicted (*z*).

Records.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96,) s. 30, 'Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously *cancel,* obliterate, injure, or destroy *the whole or any part of* any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or *of* any original document whatsoever of or belonging to any Court of Record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such Court, or *of* any bill, petition, answer, interrogatory, deposition, affidavit, order or decree, or *of* any original document whatsoever of or belonging to any Court of Equity, or relating to any cause or matter begun, depending, or terminating in any such Court, or *of* any original document in anywise relating to the business of any office or employment under [His] Majesty, and being or remaining in any office appertaining to any Court of Justice, or in any of [His] Majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of *felony,* and being convicted thereof shall be liable . . . to be kept in penal servitude . . . (*a*); and it shall not in any indictment for such offence be necessary to allege that the article in respect of which the offence is committed is the property of any person' (*b*).

(*x*) Taken from 7 & 8 Geo. IV. c. 29, s. 23 (E.); and 9 Geo. IV. c. 55, s. 23 (I.), with the additions in *italics.*

(*y*) R. *v.* John, 7 C. & P. 324. The offence was then a misdemeanor, but is now a felony.

(*z*) R. *v.* Lawrance, 4 Cox, 438, 440. See the cases, *ante,* p. 1215.

(*a*) For not more than five nor less than three years, 54 & 55 Vict. c. 69, s. 1. For other punishment see that section, *ante,* Vol. i. pp. 211, 212. The words omitted were repealed in 1892. (S. L. R.)

(*b*) Taken from 7 & 8 Geo. IV. c. 29, s. 21; and 9 Geo. IV. c. 55, s. 21 (I.), with the additions in *italics.* The offences contained in this section were formerly only misdemeanors.

A warrant of execution on each of two judgments in the County Court had issued against the prisoner, under which a levy had been made by the high bailiff, and the warrants were handed to his deputy-bailiff, who was then left in possession of the prisoner's goods. The prisoner, a day or two afterwards, forcibly took the warrants out of the deputy-bailiff's hands, kept them, and then ordered him away as having no longer authority to remain there, and, on his refusal to leave, forcibly turned him out of the house in which the goods were. The prisoner was indicted, and convicted upon an indictment under the above section, which charged in the first count a stealing of the warrants of execution, and in the second a taking of the same from a person having the legal custody of them for a fraudulent purpose. The Court held, that the facts did not afford any evidence of a larceny of the documents, but did disclose a fraudulent purpose within the meaning of the statute, and that the conviction must be supported on the second count (*c*).

Choses in Action.—Common Law.—At common law written instruments which were mere *choses in action*, as being of no intrinsic value, and not importing any property in possession of the party from whom they were taken, were not the subjects of larceny (*d*); which offence can be committed only in respect of goods, &c., which have some worth in themselves, and do not derive their worth merely from their relation to some other thing (*e*).

Statute Law.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 27, 'Whosoever shall steal, *or shall for any fraudulent purpose destroy, cancel, or obliterate, the whole or any part of* any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature and in the same degree and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing *represented*, mentioned, *or referred to in or by the security*' (*f*).

By sect. 1, 'In the interpretation of this Act: The term "document of title to goods" shall include any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, *bought and sold note*, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented *or therein mentioned or referred to*' (*g*):

'The term "valuable security" shall include any order, Exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public

(*c*) R. *v.* Bailey, L. R. 1 C. C. R. 347; 41 L. J. M. C. 61.

(*d*) *Ante*, p. 1263.

(*e*) 1 Hawk. c. 33, s. 35. 2 East, P. C. 597.

(*f*) Taken from 7 & 8 Geo. IV. c. 29. s. 5 (E); and 9 Geo. IV. c. 55, s. 5 (I.), with the additions in *italics*.

(*g*) Taken from 5 & 6 Vict. c. 39, s. 4, with the addition of 'transfer' and 'valuable thing' from 7 & 8 Geo. IV. c. 29. s. 5, and of the new words in *italics*.

stock or fund, whether of the United Kingdom, or of Great Britain or of Ireland, or of any foreign State, or in any fund of any body corporate, company, or society, *whether within the United Kingdom or in any foreign State or country* (*h*), or to any deposit in *any* bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign State, *and any document of title to lands or goods as hereinbefore defined'* (*i*).

The prisoner was convicted on an indictment under sect. 27, *supra*, for stealing 'a certain valuable security, to wit, an agreement between L. and C., whereby C. was entitled to receive payment of certain sums of money, and which said sums of money were then due and unsatisfied to C.' It was proved that the sums were not due till some time after the stealing. Held, that since this section limits the term 'valuable security' to securities 'other than a document of title to lands,' it is material, in an indictment under this section, to describe the valuable security, so as to shew that it is within the section; that the description here given ought to have been proved; and that since it had not been proved, the conviction could not be supported (*j*).

In a case upon 2 Geo. II. c. 25, s. 3 (rep.), where the prisoner was convicted of stealing a note, by which the maker promised to pay to the prosecutor 'or order' a sum of money, but which the prosecutor had not endorsed, all the judges held that its not being endorsed was immaterial (*k*). In a case upon the same statute where the prisoners were indicted for stealing a bill of exchange, it appeared that, when the bill was stolen from the prosecutor at M., two names only were endorsed upon it; but that when it was negotiated by one of the prisoners at L., a third name was added to the two other endorsers: upon which it was objected, on behalf of the prisoners, that this being an indictment in L., for *then and there* stealing a bill of exchange, whereon were endorsed the names of the two first endorsers, it was not supported by the evidence of a bill with an additional name endorsed thereon, at the time the bill was negotiated by one of the prisoners in L. But the prisoners were convicted; and upon a case reserved, the judges all agreed that the addition of the third name made no difference; that it was the same bill that was originally stolen; and, therefore, that the conviction was proper (*l*).

In a case upon 15 Geo. II. c. 13 (rep.), relating to embezzlement by servants of the Bank of England, a prisoner was indicted for stealing certain

(*h*) Even before the addition of these words, scrip of a foreign railway company dealt with on the Stock Exchange as a negotiable security, had been held valuable securities within 7 & 8 Geo. IV. c. 29, s. 5. R. *v.* Smith, Dears. 561; 25 L. J. M. C. 31.

(*i*) Taken from 7 & 8 Geo. IV. c. 29, s. 5 (E.), and 9 Geo. IV. c. 55, s. 5 (I.). It extends the former enactments to funds of bodies corporate, companies, and societies in foreign countries, and to deposits 'in *any* Bank,' instead of 'in any Savings Bank.' The last words in the section are introduced in order that the terms 'valuable security' may include all the matters contained under the previous definitions of 'document of title to goods,' and 'document of title to lands'; so that wherever the terms 'valuable security' occur in the subsequent parts of the Acts, all the matters contained in these definitions may be included. Post office money orders fall within the definition of valuable security. 8 Edw. VII. c. 48, ss. 23, 59 (1), *post*, p. 1429. As to documents of title to lands, see *ante*, pp. 1263, 1265, 1266.

(*j*) R. *v.* Lowrie, L. R. 1 C. C. R. 61; 36 L. J. M. C. 24.

(*k*) Anon. 2 East, P. C. 598.

(*l*) R. *v.* Austin, 2 East, P. C. 602.

bills, commonly called exchequer bills ; and as it appeared that the person who signed them, on the part of the government, was not legally authorised so to do, the Court held that they were not good exchequer bills, and the prisoner was consequently acquitted (*m*).

It has been held that the paper and stamps of the notes of a firm of country bankers which had been paid by their correspondent banker in London, and which were re-issuable by the country bankers, were the valuable property of such country bankers while they were *in transitu* for the purpose of being re-issued. The prisoner was charged, in one set of counts, with stealing a number of ' promissory notes ' for the payment of certain sums of money, and in another set of counts the property was described as so many ' pieces of paper each being stamped with a stamp ' for the proper amount of the particular note. It appeared that the paid notes in question were made up into a parcel by the London bankers, and sent by the mail to the country bankers, who never received them, and were under the necessity of issuing other notes on fresh stamps in their stead. The jury having found the prisoner guilty, the case was referred to the twelve judges, whose opinion was afterwards delivered by Grose, J., to the following effect :—' In what sense or meaning, therefore, can it be said that these stamped papers were not the valuable property of their owners ? They were, indeed, only of value to those owners ; but it is enough that they were of value to them : their value as to the rest of the world is immaterial. The judges, therefore, are of opinion, that to the extent of the price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors ; and that the prisoner has been legally convicted ' (*n*).

The halves of country bank notes, sent in a letter, are goods and chattels. The indictment in some counts charged the prisoner with embezzling pieces of paper of the value of one penny, and in other counts, ' pieces of paper partly written and partly printed,' bearing stamps, the values of which were specified : all the counts charged them to be ' of the goods and chattels ' of the prosecutor. A stamp distributor had remitted to the prosecutor, by post, the first halves of country bank notes, to the amount of £190. It was objected that these halves of country notes were not goods and chattels : if the notes had been entire, they would have been *choses in action*, not goods and chattels, and in their present state they were of no value. Bosanquet, J., said : ' They might have been made of value to the prosecutor, by his putting the two halves together.' After citing R. *v.* Clarke, *supra*, his lordship added, ' I will consider of the objection, and if I should think it is a valid one the prisoner shall have the benefit of it ' (*o*).

Re-issuable notes, if they cannot be called valuable securities while in the hands of their makers may be called goods and chattels. The first

(*m*) R. *v.* Astlett (1st case), 2 Leach, 954 ; R. & R. 87.

(*n*) R. *v.* Clarke, 2 Leach, 1036 ; R. & R. 181. ' In a MS. note of the judgment in this case, with which the editor has been favoured, the principle is thus stated, ' If a chattel be valuable to the possessor, though not saleable, and of no value to any one besides, it may still be the subject of a larceny.' C. S. G.

(*o*) R. *v.* Mead, 4 C. & P. 535. See R. *v.* Jones, 1 Den. 551 ; 19 L. J. M. C. 162. The halves of a £5 note, which were sent in two different letters, were held to have been correctly described as ' two pieces of paper ' of the goods and chattels of the prosecutor.

count charged the prisoner with receiving thirty pieces of paper of great value, to wit, of £30 each, the said pieces of paper being (stamped with a stamp value 5*d*., the same being the stamp directed and required by the statute in such case made and provided, on every promissory note for payment to bearer on demand for every sum of money not exceeding £1 1*s*.) of the goods and chattels of W. and others. Second count the same, but substituting the words 'being duly stamped as directed and required by the statute in such case made and provided,' instead of the words between the brackets. Third count, receiving 'thirty valuable securities, commonly called promissory notes, each of the said valuable securities being for the payment of the sum of £1, and of the value of £1, of the property of W. and others, and the said valuable securities at the several times of committing the several felonies, last above mentioned, being of great value, to wit, £30.' Fourth, for receiving 'thirty other valuable securities of great value, to wit, of the value of £30.' Neither of the two last counts stated that the monies secured by the valuable securities remained due and unsatisfied. The prosecutors, W. and Co., were country bankers, and were in the habit of issuing promissory notes of £10, £5, and £1; payable at the house of G. and Co., in Lombard Street. A bag was delivered by G. and Co., to one of the partners of the house of W. and Co., containing a number of paid notes, and he was afterwards robbed of the bag, and some of the notes were traced to the prisoner under circumstances which satisfied the jury of his guilty knowledge in receiving them, and they found him guilty. And, upon a case reserved, it was contended (1) that in order to bring the case within 7 & 8 Geo. IV. c. 29, s. 5 (*p*) the notes must be outstanding, and the money purporting to be payable on them must be due and unpaid. (2) That as the notes had been satisfied and were in the hands of the makers they could not be valuable securities of the value they purported to be. (3) That there was no averment that the money was due and unpaid, nor could those notes be said to be goods and chattels of the value of the stamps, or of any other value; they were, in fact, of none. (4) That supposing them to be of value, and the property of the owners, they could not be called goods and chattels. The conviction was affirmed: some of the judges doubted whether the notes could properly be called valuable securities; but all thought that they were goods and chattels (*q*).

The first count charged the prisoner with stealing 'ten bills of exchange for the payment of £500 each, of the value of £500 each,' the property of A. The second count, 'ten orders for the payment of £500 each, and of the value of £500 each.' The third count, 'ten securities for the payment of £500 each, and of the value of £500 each.' And the fourth count, 'ten pieces of paper, each being respectively stamped with a stamp of six shillings, and of the value of six shillings,' &c. It appeared that in consequence of an advertisement offering to lend money upon bills of exchange or other personal security, the prosecutor, who had occasion for a sum of money, had an interview with the prisoner, who told him he could accommodate him with £5000 at £6 per cent. The prisoner pro-

(*p*) Re-enacted as 24 & 25 Vict. c. 96, s. 27, *ante*, p. 1267.

(*q*) R. *v.* Vyse, 1 Mood. 218.

duced from his pocket-book ten blank stamps, and the prosecutor wrote on each of them the words, 'Payable at P. and Co., 189, Fleet Street, London.' Nothing was written on the stamps at that time but these words; the prisoner took the stamps away. The prosecutor saw him again several days afterwards; he said the prosecutor had omitted to sign his name, and he again produced the ten pieces of paper; the prosecutor signed them, and wrote 'accepted' on each of them, and gave them to the prisoner again; he said he would send the money in a few days by the mail, but it was never sent. For the prisoner it was contended that the papers taken were not the subject of larceny, and that 7 & 8 Geo. IV. c. 29, s. 5, only made perfect and available instruments the subject of larceny; and secondly, that there was no felony, because the paper stamps being the property of the prisoner, no trespass was committed in taking them. Littledale, J., said, 'With respect to the first, second, and third counts, I am of opinion that when these acceptances were taken from the prosecutor, they were neither bills of exchange, orders, or securities for money.' After stating the facts, he proceeded, 'These papers were again taken away by the prisoner, and it appears to me, that, when they were so taken away, they were neither bills of exchange nor orders for the payment of money, but were only in a sort of embryo state, there being the means of making them bills of exchange. The 7 & 8 Geo. IV. c. 29, s. 5, enacts, that if any person shall steal any "bill, note, warrant, order, or other security whatsoever for money, or for payment of money, whether of this kingdom or any other state," the party is to be punished as he would be for stealing a chattel of the like value. Now, how could this be said to be of any value? and of what value can it be said to be? If these papers had been stolen from a dwelling-house, could they be charged to be of the value of £500 each? There is no sum mentioned in them, and no drawer; and they being, as I before observed, but a kind of embryo security, I am of opinion that the three first counts of this indictment are not proved. There is, however, a fourth count, which describes the papers as ten pieces of paper, each having a six shilling stamp; and upon this count the question is, whether the prisoner can be said to have stolen this property? The fourth count correctly describes them, but it seems to me that the circumstances under which they were obtained by the prisoner were not such as to make the prisoner liable for a felony. If a person by a false representation obtains the possession of the property of another, intending to convert it to his own use, this is felony; but the property must have previously been in the possession of the person from whom it is charged to have been stolen. Now, I think that these papers, in the state in which they were, were the property of the prisoner. He took them from his pocket, and A. never had them, except for the purpose of writing on them; they were never out of the prisoner's sight; A. writes on them, as was intended, and the prisoner immediately has them again. I think that the prisoner cannot be considered as having committed a trespass in the taking, as they were never out of his possession at all. The case cited (*r*) was a case in trover, and, to maintain trover, it is not

(*r*) Evans *v.* Kymer, 1 B. & Ad. 528.

necessary that the party should have manual possession of the goods; if he has a right of possession, that is sufficient. To support an indictment for larceny, there must be such a possession as would enable the party to maintain trespass. It has been incidentally mentioned that these stamps might be charged in account to A., but that could only be if the transaction was completed. However, we must only take into consideration that which occurred on the last occasion, when the words "accepted" and "F. D. A." were written. Indeed, it appears to me, that on neither of the occasions when these parties met, can the prosecutor be said to have had either the property or the possession of these papers, so as to make the prisoner guilty of larceny in taking the papers out of the house' (*s*).

So an unstamped order for the payment of money, which required a stamp under the Stamp Act, 1815 (55 Geo. III. c. 184), was not a valuable security within the same section. The prisoner was convicted of obtaining an order for the payment of the sum of £2 by false pretences, contained in a letter sent by him in the name of D. F. J. The order was a cheque drawn upon C. and Co., payable to D. F. J. only; it was not payable to order or bearer. Upon a case reserved, the judges were of opinion that it was not a valuable security, as it ought to have been stamped, and therefore the banker would have subjected himself to a penalty of £5 by paying it (*t*).

The prosecutors entered into an agreement with the prisoner that he should draw bills on them up to a certain amount, that they should accept them and that the prisoner should endeavour to get them discounted, and that in the event of his succeeding in so doing, he should pay them a certain proportion of the proceeds, or, in the event of his not succeeding within a certain time, should return the bills. The prisoner drew two bills without inserting the drawer's name, and these were accepted by the prosecutors and handed back to the prisoner, who subsequently completed the bills by inserting the drawer's name, and succeeded in getting them discounted. He converted the proceeds to his own use. It was held that the acceptances at the time of their delivery by the prosecutors to the prisoner were 'securities for the payment of money' within the meaning of 24 & 25 Vict. c. 96, s. 75 (now rep.) (*u*).

The prisoner was charged in different counts with stealing a cheque for £13 9*s*. 7*d*., a piece of paper, value one penny, and an order for the payment of money. The G. W. Railway Co. being indebted for poor rates to the overseers of the poor of T. in the sum of £13 9*s*. 7*d*., a cheque for that amount was drawn at Paddington on their London bankers, and then transmitted to the Superintendent at the T. Station, who handed it to the prisoner (the chief clerk there), ordering him to pay it to the overseer, and to bring him a stamped receipt upon his return. The prisoner cashed the cheque and applied the proceeds to his own use. It was objected, that the cheque, being issued in T., though made within fifteen miles of

(*s*) R. *v.* Hart, 6 C. & P. 106. Bolland, B., and Bosanquet, J., delivered opinions to the same effect. See R. *v.* Smith, 2 Den. 449; *ante*, p. 1233.

(*t*) R. *v.* Yates, 1 Mood. 170. See R. *v.* Mucklow, 1 Mood., *ante*, p. 1240.

(*u*) R. *v.* Bowerman [1891], 1 Q.B. 112. A transfer of shares in a limited liability company has been held to be a security for the payment of money within sect. 75. R. *v.* Smith, 62 J. P. 231.

the bank, could not be read for want of a stamp (*v*), and was not a valuable security. Coleridge, J., thought that the cheque was either issued at Paddington, or not until the cashing of it at T.; and that in the first case it was clearly within the exemption of the Stamp Act, 1815 (*w*); and that in the second it was stolen before the issuing, and that an unstamped cheque, made within distance, but not issued, was a valuable security within the statute. Coleridge, J., also thought that the cheque might be considered as stolen when the prisoner, instead of applying it, as he was ordered, in payment to the overseer, had appropriated it to himself, of which the false statement to the superintendent was evidence, and that the cashing of it afterwards was only further evidence of the appropriation. The cheque was therefore read, and the prisoner convicted; and, upon a case reserved, the judges held the conviction right, as the stealing of the piece of paper was sufficient to sustain a count for larceny (*x*).

Post Office Money Orders.—The first count charged the prisoner with stealing four warrants and orders for the payment of money, to wit, for £5 each, and of the value of £5 each; the second, four warrants and orders for the payment of £5, and of the value of £5 each, commonly called post-office money orders; and the third, four valuable securities, that is to say, four warrants and orders, commonly called post-office money orders. The documents were in the following form:—

'Post-office, Shrewsbury, Sept. 18, 1841.

'No. 1,182. £5 0*s.* 0*d.*

'Credit the person named in my letter of advice the sum of five pounds, and debit the same in this office.

'JOHN W. TOWERS, Postmaster.

'To the Post-office, London.'

And under each was a receipt, which the person receiving the money was to sign. The course of business was that the postmaster who received the money wrote a letter of advice to the post-office in London, stating the orders which he had given. Upon inspection of the letter of advice and the orders there appeared to be a difference in the signature, and some difficulty occurred in ascertaining which was the genuine signature of the postmaster at Shrewsbury. It was clearly proved that the prisoner had stolen the papers. Upon a case reserved, it was held (1) that the document was an order for the payment of money; (2) that the designation or address of the order was sufficient authority by the postmaster to the persons who carried on business at the post-office in London. That it was not necessary the order should be in the handwriting of the postmaster himself; it was enough that it was in the handwriting of the postmaster, or some person by him authorised to sign (*y*).

(*v*) Want of a stamp does not now render any document inadmissible in criminal proceedings, 54 & 55 Vict. c. 39, s. 14 (4).

(*w*) 55 Geo. III. c. 184.

(*x*) R. *v.* Perry, 1 Den. 69; 1 C. & K. 725. Ex parte Bignold, 1 Deac. R. 735, was cited as to issuing a cheque. As the conviction was held right on the count for stealing a piece of paper, no opinion was expressed on any other point, and therefore it must not be assumed that the ruling of Coleridge, J., at the trial was erroneous. See R. *v.* Heath, 2 Mood. 33. R. *v.* Walsh, R. & R. 215; 2 Leach, 1054. R. *v.* Metcalf, 1 Mood. 433.

(*y*) R. *v.* Gilchrist [1841], 2 Mood. 233. See R. *v.* Vanderstein, 10 Cox, 177 (Ir.). As to money orders, including postal orders, see 8 Edw. VII. c. 48, ss. 23, 59 (1), 89, *post*, p. 1429.

Bank Notes.—On an indictment (*z*) for secreting a letter containing *promissory notes*, it was contended for the defence that the notes could not be considered as promissory notes, the money having been paid to the holders of them, while they possessed the character of promissory notes, by the bankers in London; and that as they had not been reissued in pursuance of the statutes, they had not been revived, as those statutes direct, and therefore were not good and valid promissory notes. But, upon a case reserved, a majority of the judges held the conviction right on the ground that these notes, though not reissued, still retained the character, and fell within the description of *promissory notes;* that they were, as promissory notes, valuable to the owners of them (*a*). This decision was followed in R. *v.* West (*b*), in the case of country notes paid into one branch of a bank and sent by post to another branch, to be reissued or otherwise disposed of. The notes were held still to be bank notes, which might be described as money within 14 & 15 Vict. c. 100, s. 18.

Pawnbroker's Ticket.—Upon an indictment for receiving an instrument described in one count as 'a warrant for the delivery of goods, *viz.* for the delivery of a watch,' and in other counts as 'a pawnbroker's ticket' (*c*), and 'a piece of paper,' knowing it to be stolen, it appeared that a pawnbroker's ticket was stolen, and the prisoner received it. The ticket was held to be 'a warrant for the delivery of goods' within 7 & 8 Geo. IV. c. 29, s. 5; that expression comprehending any instrument which warrants or authorises the party holding the goods to deliver them, and requires him so to do. It was also held that the writing might well be described as a pawnbroker's ticket or piece of paper, as it did not fall within the common law rule that certain documents were not the subject of larceny (*d*).

Where there was a burial society at Bolton, and a weekly subscription of one halfpenny, for twenty weeks, entitled the representatives of a deceased member to the sum of £2 10*s.*, and the president of the society was induced by false pretences to sign the following document:—

'Bolton United Burial Society, No. 23.

'Bolton, September 1st, 1853. Mr. W. A. Entwisle, treasurer. Please to pay the bearer £2 10*s.*, Greenhalgh, and charge the same to the above Society. ROBERT LORD.

'BENJAMIN BESWICK, President.'

(*z*) Under 7 Geo. III. c. 50. (Larceny by Post Office servants.) *Vide post*, p. 1427.

(*a*) R. *v.* Ranson, 2 Leach, 1090; R. & R. 232. In a case, *cor.* Ellenborough, C.J., Carlisle, 1802 (mentioned in the notes to 4 Bl. Com. 234, and in 2 Leach, 1061 *n.*), it was ruled that it was not felony within 2 Geo. II. c. 25 (rep.) to steal bank notes which had never been put into circulation, on the ground that no money was due on them. But they would probably be deemed valuable property, and the subject of larceny at common law. See R. *v.* Clark, *ante*, p. 1269. Some of the judges in R. *v.* Ranson thought that 2 Geo. II. c. 25 and 7 Geo. III. c. 50 were in *pari materia*, and that the term 'promissory note' was to be taken in each Act to mean notes on which the money thereby secured still remained due and unsatisfied to the holder thereof; but the majority of the judges, as we have seen, differed. For other decisions on 2 Geo. II. c. 25, see R. *v.* Phipoe, 2 Leach, 673, 2 East, P. C. 599. R. *v.* Walsh, 2 Leach, 1061; R. & R. 215. R. *v.* Chard, R. & R. 488.

(*b*) Dears. & B. 109; 26 L. J. M. C. 6.

(*c*) The legal effect of such tickets then depended on 39 & 40 Geo. III. c. 39, and now depends on the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93).

(*d*) R. *v.* Morrison, Bell, 158. See R. *v.* Kay, L. R. 1 C. C. R. 257, and R. *v.* John, 13 Cox, 100, *ante*, p. 1160, note (*x*).

It was held that this was a valuable security within 7 & 8 Geo. IV. c. 29, s. 5 (*e*).

Where the prisoner was indicted for stealing three deeds, being a security for money, and two of them were a conveyance in fee by lease and release from W. Price to J. Bailey, of certain freehold land, and the third a mortgage by demise of the same property, from J. Bailey and his trustee to J. Walters, for the term of 500 years, for securing the sum of £20; it was held that the mortgage was a security for money within 7 & 8 Geo. IV. c. 29, s. 5 (rep.) (*f*).

C. *Animals, Birds, and Fish.*

Domestic animals, such as horses, oxen, sheep, and the like, are the subjects of larceny at common law (*g*), though the punishment has been increased by statute (*h*). Domestic birds also, as ducks, hens, geese, turkeys, peacocks, &c., and their eggs and young, are clearly the subjects of larceny (*i*).

It is also larceny to steal the produce of such animals, even by taking it from the living animals. Thus it is larceny to milk a cow and steal the milk (*j*), or to pull wool from live sheep with felonious intent (*k*).

Animals 'ferae naturae.'—Larceny may be committed of animals *ferae naturae* if they are fit for the food of man, and dead, reclaimed (and known to be so), or confined. Thus, if hares or deer are so inclosed in a park, that they may be taken at pleasure, or fish in a trunk or net, or as it seems in any other inclosed space which is private property, and where they may be taken at any time, at the pleasure of the owner; or pheasants and partridges are confined in a mew or pen; or pigeons are shut up in a pigeon-house; or swans are marked and pinioned, or (though

(*e*) R. *v.* Greenhalgh, Dears. 267.

(*f*) R. *v.* Williams, 6 Cox, 49. The marginal note states that 'a mortgage deed, and the deeds accompanying it, constitute a security for money'; but all that was contended for by the prosecution was that 'a mortgage was a security for money.' See R. *v.* Powell, 2 Den. 403, *ante*, p. 1093.

(*g*) 1 Hale, 511. 1 Hawk. c. 33, s. 43.

(*h*) *Post*, p. 1321.

(*i*) 1 Hale, 511. 1 Hawk. c. 33, s. 43. Hale's Sum. 68, 69.

(*j*) Anon., 2 East, P. C. 617; 1 Leach, 171.

(*k*) R. *v.* Martin, 1 Leach, 171; 2 East, P. C. 618. In the report in Leach it is given as part of the opinion of the judges, that in order 'to prevent the thoughtless and wanton frolics which might be played with these trifling kinds of property from being prosecuted as petty larcenies, when, perhaps, they were unmixed with any fraudulent or felonious design, the law, proceeding upon the idea *de minimis*, requires the property stolen to be of the value of twelvepence.' The distinction, however, between grand and petty larceny was abolished in 1827 (*vide ante*, p. 1177), but the application of it in this case seems to have been very questionable. Undoubtedly the quantity of wool taken, if considerable, would have been a strong additional circumstance in the evidence of felonious intent necessary to sustain a charge of larceny; but supposing the quantity not to have been of greater value than twelvepence, yet if the felonious intent of the party was manifest, as it might have been from the manner in which the fact was committed, the use to which the property was applied, and the behaviour of the party, there does not appear to have been any good reason why such a taking should not have been considered as petit larceny.

It should be observed also that in the abstract of R. *v.* Martin, in 2 East, P. C., it is not stated as any part of the opinion of the judges that the property stolen should be above the value of twelvepence. And at the conclusion of the report in which that position is advanced, the doctrine appears to be contradicted, where it is said, 'if a wicked disposition be discovered, *une disposition a faire un mal chose*, as it is described by Britton, it may be evidence of felony, notwithstanding the trifling quantity of the thing taken.'

unmarked) kept tame in a moat, pond, or private river; or if any of these creatures is dead and in the possession of anyone—the taking of them with felonious intent will be larceny (*l*). And some things *ferae naturae*, though not fit for food, are the subject of larceny if they be reclaimed, *e.g.* hawks and falcons, when reclaimed are known to be so (*m*); and it is said, young hawks, in the nest (*n*); but not the eggs of hawks or swans, though reclaimed, the reason assigned being that a less punishment, namely, fine and imprisonment, was appointed for taking them by statute (*o*). The stealing a stock of bees seems to be admitted to be larceny (*p*).

Where pigeons (*q*) were shut up in their boxes every night, and stolen out of such boxes during the night, Parke, B., held it to be larceny (*r*). So where pigeons were so tame that they came home every night to roost in boxes at the side of the house of their owner, it was held to be larceny to take them by night out of such boxes, although the boxes were not shut up at night (*s*). And tame pigeons may be the subject of larceny, although they have an opportunity of getting out and enjoying themselves in the open air (*t*).

Where on an indictment for stealing tame pheasants it appeared that pheasants' eggs from the coverts had been hatched by common hens, and the hens with their broods had been removed into a paddock, and confined under coops, through the bars of which the pheasants could at any time easily pass; the coops, with the hens, were moved about from place to place, and the pheasants followed the hens; they were about a month old, and could fly about thirty or forty rods; they were fed daily at the coops, and would come to the keeper when he whistled, and at night they nestled under the hens. In the course of time they would have been allowed to escape into the coverts and would become wild. Lord

(*l*) 3 Co. Inst. 109, 110. 1 Hale, 511. 3 Hawk. c. 33, s. 41. 4 Bl. Com. 235. 2 East, P. C. 607.

(*m*) 1 Hawk. c. 33, s. 36. 3 Co. Inst. 97 *et seq.*, and 3 Co. Inst. 109. 37 Edw. III. c. 19, was repealed in 1827 (7 & 8 Geo. IV. c. 227).

(*n*) 1 Hale, 511. This law had relation to the *trained* hawks of former days.

(*o*) See 1 Hawk. c. 33, s. 42, 2 East, P. C. 607. The old statute, 11 Hen. VII. c. 17, was repealed in 1831. Swans' eggs are protected by the Game Act, 1831 (1 & 2 Will. IV. c. 32), s. 24. 31 Hen. VIII. c. 12, as to hawks, was repealed in 1863 (S. L. R.), but hawks and their eggs are within the Wild Birds Protection Acts, 1880 to 1908.

(*p*) 2 East, P. C. 607, citing Tibbs *v.* Smith, T. Raym. 33. 2 Bl. Com. 392, 393.

(*q*) As to punishment on summary conviction for unlawfully killing, &c., of pigeons, see 24 & 25 Vict. c. 96, s. 23, and Smith *v.* Dear, 88 L. T. 664; 20 Cox, 458.

(*r*) R. *v.* Luke, Rose. Cr. Ev. (11th ed.) 497. The case was determined on the ground that the pigeons were reclaimed, and not on the ground that they were shut up in their boxes at the time they were taken.

(*s*) R. *v.* Brooks, MS. C. S. G., and 4 C. & P. 131, Taddy, Serjt. '*Si autem animalia fera facta fuerint mansueta, et ex consuetudine eunt et redeunt, volant et revolant (ut sunt cervi, cygni, pavones, et columbæ et hujusmodi) eo usque nostra intelliguntur quamdiu habuerint animum revertendi.*' Bracton, lib. 2. c. 1, fol. 9, cited in the case of Swans, 7 Co. Rep. 16 b. See 11 Just. Inst. Tit. I., xv. In the argument of Dewell *v.* Sanders, Cro. Jac. 490, Doderidge, J., said: 'That if pigeons come upon my land I may kill them, and the owner hath not any remedy: but the owner of the land is to take heed that he takes them not by any means prohibited by the statutes.' Ad quod Croke and Noughton accord. But Montague, C.J., held the contrary, and that the party hath *jus proprietatis* in them for that they be as domestics, and have, *animum revertendi*, and ought not to be killed, and for the killing of them an action lies; but, adds the reporter, the other opinion is the best. See also 3 Bl. Com. 392.

(*t*) R. *v.* Cheafor, 2 Den. 361. R. *v.* Luke, as stated in note (*r*), *supra*, was recognised. In R. *v.* Howell, 2 Den. 362 (*n*), Parke, B., had ruled the same way.

Campbell, C.J., told the jury that, if they thought the pheasants were tame, and had in fact never become wild, and were under the control and dominion of the keeper at the time they were taken, the prisoner was guilty of larceny (*u*).

Partridges about three weeks old, and able to fly a little, which had been hatched and reared under a common hen in a coop and after the removal of the coop had remained about the place with the hen as her brood, sleeping under her wings at night, may be the subject of larceny (*v*).

Unreclaimed Animals 'ferae naturae.'—A different doctrine prevails with respect to animals and other creatures *ferae naturae* which are *unreclaimed*, as it is considered that no person has a sufficient property in them to support an indictment for larceny. Thus larceny at common law cannot be committed of deer, hares, or rabbits, in a forest, chase, or warren; of fish, in an open river or pond; of wild fowls, when at their natural liberty; of full-grown pigeons, out of the dove-house (*w*); or even of swans, though marked, if they range out of the royalty (*x*), because it cannot be known that they belong to any person (*y*). The same rule applies to the eggs of wild birds when not reduced into possession by the owner of the land on which they are laid (*yy*). But larceny may be committed of the flesh or skins of any of these or other creatures fit for food, when they are killed, because they are then reduced to a state in which a right of property in them may be claimed and exercised (*z*). It seems that no person has any property in rooks, so that neither they nor their young ones can be the subject of larceny (*a*).

As an animal which is *ferae naturae* can only become the subject of property by being dead, reclaimed, or confined, on an indictment for larceny of such animal it should be described as dead, reclaimed, or kept in confinement, or by words suggesting that it had been reduced into possession or made the subject of private ownership. In R. *v.* Rough (*b*), the prisoner, having been convicted of an indictment for stealing 'a pheasant of the value of forty shillings, of the goods and chattels of H. S.,' it was held that the conviction was bad; because in cases of larceny of animals *ferae naturae* the indictment must shew that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it was not sufficient to add 'of the goods and chattels' of such a one (*c*).

(*u*) R. *v.* Head, 1 F. & F. 350. R. *v.* Cory, 10 Cox, 23. See R. *v.* Garnham, 8 Cox, 451.

(*v*) R. *v.* Shickle, L. R. 1 C. C. R. 158; 38 L. J. M. C. 21.

(*w*) 3 Co. Inst. 109, 110. 1 Hale, 510, 511. 1 Hawk. c. 33, ss. 39, 40. 4 Bl. Com. 235. 2 East, P. C. 607. But see 2 Bl. Com. 392.

(*x*) Subjects are not entitled to have a swan mark except by royal grant or prescription.

(*y*) 1 Hale, 511.

(*yy*) R. *v.* Stride [1908], 1 K.B. 617. Stowe *v.* Bluestead [1909], 25 T. L. R. 546. See 1 & 2 Will. IV. c. 32, s. 24; 25 & 26 Vict. c. 114.

(*z*) 3 Co. Inst. 110. 1 Hale, 511. In 3 Co. Inst. 110, it is said, 'But the deer, &c., being wild, yet when he is killed larceny may be committed of the flesh, and so of pheasant, partridge, or the like; and so note a diversity between such beasts as be *feræ naturæ*, and being made tame, serve for pleasure only, and such as be made tame and serve for food, &c., which diversity not being observed, hath made many men to err.'

(*a*) Hannam *v.* Mockett, 2 B. & C. 934. Under 24 Hen. VIII. c. 10, they were treated as birds of destruction and noisome fowl.

(*b*) 2 East, P. C. 607. Case reserved for all the judges. The report is from the MS. of Buller, J. R. *v.* Stride [1908], 1 K.B. 617, 625. Cf. Fines *v.* Spencer [1571], Dyer, 306 (*b*).

(*c*) 1 Lew. 234, Bolland, B.

In R. *v.* Tate (*cc*), an indictment for stealing hens, judgment was arrested on the ground that the indictment was ambiguous.

In R. *v.* Lonsdale (*d*), where an indictment for stealing three fowls was objected to as ambiguous, Pollock, C.B., said that he would reserve a case on the question whether the offence was sufficiently stated, but the defendant was acquitted.

It would seem from R. *v.* Stride (*dd*), that all these difficulties may be avoided by describing the animal or bird or eggs as 'of and belonging to the person from whom it is said to have been stolen.' The rule never applied to descriptions of parts of a wild animal. In R. *v.* Gallears (*e*), the Court overruled as baseless an objection that in an indictment for stealing a ham, words should have been used to shew that it was not the ham of a wild boar.

The prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded by one or other member of a shooting party, and was picked up or caught while it was alive, but in a dying state, by the prisoner, a boatman on a canal: it was held that the indictment was not proved (*f*).

Animals *ferae naturae* killed wrongfully by one person on the land of another become the absolute property of the owner of the land (*g*). 'But with regard to all property of a like kind to this, such as property annexed to the soil, fixtures, trees, &c. (*h*), before a person can be convicted of larceny of them there must not only be a severance, but also a felonious taking, which must not be a continuous act with the severance. . . . Where a bird is killed and falls on the land, it becomes the property of the owner of the soil, but at the same time that fact does not entitle the owner to maintain an indictment for larceny against the person who kills it and picks it up; in order to support an indictment for larceny in cases of that kind there must be a decided severance between the act of killing and the act of taking away' (*i*).

So where poachers, of whom the prisoner was one, killed rabbits on Crown land, put some in bags and some in bundles, strapped them together by the legs, and concealed them and some nets, in a ditch on the same land, as a place of deposit till they could conveniently remove them. They had no intention of abandoning their wrongful possession of the rabbits. About three hours afterwards the prisoner came back and began to remove the rabbits. It was held that the killing and placing the rabbits in the ditch and the subsequent removal of them was one continuous act, and was not larceny (*j*).

The prisoner was employed to trap wild rabbits, and it was his duty to take them, when trapped, to the keeper. He trapped some rabbits, took them to another part of the land, and put them in a bag with the intention of appropriating them to his own use. The keeper found the rabbits, and in the prisoner's absence took some of them out of the bag and nicked them, in order that he might know them again. Next day

(*cc*) 1 Lew. 234.
(*d*) 4 F. & F. 56, Pollock, C.B.
(*dd*) [1908] 1 K.B. 617; 77 L. J. K.B. 490.
(*e*) 1 Den. 501.
(*f*) R. *v.* Roe, 11 Cox, 554.
(*g*) Blades *v.* Higgs, 11 H. L. C. 621, 34 L. J. C. P. 286. Earl of Lonsdale *v.* Rigg, 1 H. & N. 523; 26 L. J. Ex. 196.
(*h*) *Ante*, pp. 1256 *et seq.*, 1257, 1260.
(*i*) Per Bovill, C.J., in R. *v.* Townley, L. R. 1 C. C. R. 315; 40 L. J. M. C. 144.
(*j*) Ibid.

the prisoner took the bag and rabbits away. It was held that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master and that the case fell within the last decision (*k*).

The prisoner was indicted for stealing fish, the property of a trawling company. He was employed as skipper of a trawler and had full charge and control of the vessel during its fishing voyages. During the course of a voyage he put into port, sold some of the fish that had been caught, and appropriated the proceeds. It was held that the fish had been reduced into the possession of the prosecutors before they were taken out of the hold by the prisoner, and that he had been properly convicted (*l*).

The prisoner was indicted for stealing five pheasants, restrained of their natural liberty, the property of the prosecutor. Upon its appearing that the prosecutor was not a qualified person to keep or shoot game, and that he bred these pheasants for sale, it was objected that he could have no property in them nor any legal possession sufficient to support the indictment; that by the game laws then in force (*m*) unqualified persons were forbidden to have pheasants in their possession; and authority was given to a justice of the peace to take away from such person any pheasant which he might have in his possession. But Grose, J., held that it was a sufficient legal possession for the purposes of the indictment, and the prisoner was convicted (*n*).

Certain animals though reclaimed, are not regarded as the subject of larceny by reason of the *baseness of their nature*. This class includes *dogs* (*nn*) and *cats* (*o*), and other animals which, though wild by nature, are often reclaimed by art and industry, as *bears, foxes, apes, monkeys, polecats, ferrets*, and the like (*p*). This doctrine appears originally to have proceeded on the view that creatures of this kind, for the most part wild in their nature, and not serving, when reclaimed, for food, but only for pleasure, ought not, however the owner might value them, to be so highly regarded by the law that for their sake a man should die (*q*). The doctrine extends to the young of such animals: the rule being that where no felony can be committed of any creature *ferae naturae*, though it be tame or reclaimed, it cannot be committed of the young of such creature in the nest, kennel, or den (*r*).

Where the prisoner was charged in the indictment with stealing 'five live tame ferrets, confined in a certain hutch, &c.,' the property of F., the evidence brought the fact of taking the ferrets clearly home to the prisoner; and it was also proved that ferrets are valuable animals, and that those in question were sold by the prisoner for nine shillings. But the jury having found the prisoner guilty, the case was submitted to the consideration of the judges upon the question, whether ferrets must be considered as animals of so base a nature that no larceny can be

(*k*) R. *v.* Petch, 14 Cox, 116. See also R. *v.* Read, 3 Q.B.D. 131, and cf. R. *v.* Foley, *ante*, p. 1258.

(*l*) R. *v.* Mallison, 20 Cox, 204; 66 J. P. 503.

(*m*) These Acts were repealed by the Game Act, 1831 (1 & 2 Will. IV. c. 32).

(*n*) Jones's case, 3 Burn's Just. tit. 'Larceny' (ed. D. & W.) 457.

(*nn*) *Vide post*, p. 1325.

(*o*) See First Report of Commissioners on Criminal Law, p. 14.

(*p*) 3 Co. Inst. 109. 1 Hale, 511, 512.

(*q*) 1 Hawk. c. 33, s. 36. 4 Bl. Com. 236. 2 East, P. C. 614.

(*r*) 3 Co. Inst. 109. 1 Hale, 512.

committed of them. And the judges held that judgment ought to be arrested (*s*).

D. *Electricity. Gas. Water.*

By the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 23, 'Any person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes, or uses any electricity, shall be guilty of simple larceny and punishable accordingly.'

Gas is the subject of larceny (*t*) and so is water in pipes (*u*).

Sect. X.—Ownership of Goods (*v*).

It is necessary that there should be in some person a sufficient ownership of the things stolen; and that they should be stated in the indictment as the goods and chattels or property of such person (*w*).

On an indictment for stealing a sovereign it appeared that the prisoners went into a shop, and having purchased some trifling articles, laid a sovereign on the counter, and asked for change; the prosecutor turned round to his cash-box for change, and laid it on the counter, when he found the sovereign was gone. He immediately charged the prisoners with having taken it up, but they denied it, and said they saw him take it when he turned to get change; subsequently one of them produced the sovereign, which she said she had found on the ground. It was held that it was a question for the jury whether the prisoners put down the sovereign with the intention of fraudulently appropriating it as soon as the prosecutor turned his back. When they parted with the money and asked for change, they must have intended to divest themselves of the property, and the prosecutor by getting change shewed that he acquiesced in the proposal, and the money was constructively his (*x*).

Partners, Joint Tenants or Tenants in Common.—The ownership must exist as against the person by whom the goods are taken, and joint tenants, or tenants in common of a chattel could not, at common law, be guilty of stealing such chattel from each other (*y*).

The Larceny Act, 1868 (31 & 32 Vict. c. 116), after reciting that 'it is expedient to provide for the better security of the property of co-partnerships and other joint beneficial owners against offences by part owners thereof, and further to amend the law relating to embezzlement,' enacts (sect. 1): 'If any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, or effects,

(*s*) R. *v.* Searing, *cor.* Wood, B., MS., and MS. Bayley, J., and R. & R. 350. But a ferret is 'an animal ordinarily kept in a state of confinement' within sects. 21 and 22 of the Larceny Act, 1861 (*post*, p. 1325), whereby the theft of such animal is punishable summarily. R. *v.* Sheriff, 20 Cox, 334, Darling, J.

(*t*) *Ante*, p. 1180.

(*u*) Ferens *v.* O'Brien, 11 Q.B.D. 21.

(*v*) See 14 & 15 Vict. c. 100, s. 1 (*post*, Bk. xii. c. ii., and R. *v.* Murray [1906], 2 K.B. 385, as to the amendment of the indictment where a mistake is made in the name of the owners of any property.

(*w*) See R. *v.* Hunting, 73 J. P. 12. In R. *v.* Norton, MS. Bayley, J., and R. & R. 510, the owner of the goods was described as Mary Johnson, her real name was Davis, but she had gone under the name of Johnson for some years. The conviction was upheld.

(*x*) R. *v.* Jones, 5 Cox, 156.

(*y*) 1 Hale, 513. 2 East, P. C. 558. See 1 & 2 Vict. c. 96, s. 2, as to larceny by members of joint stock banks.

bills, notes, securities, or other property, shall steal or embezzle any such money, goods or effects, bills, notes, securities, or other property of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners' (*z*).

A prisoner was charged in an indictment under this section that he, being a member of a co-partnership called the B. C. Young Men's Christian Association, feloniously did embezzle certain specified sums of money belonging to the said co-partnership. It appeared that the object of the association was not the acquisition of gain, but the spiritual and mental improvement of its members. It was held, that the participation in profits was essential to the idea of partnership; that the association was therefore not a co-partnership, and that the conviction was therefore bad (*a*).

The prisoner was indicted for that he being a beneficial owner with M. and others of certain monies, to wit, £194 4*s*. 8*d*., feloniously (*b*) stole the said monies belonging to such beneficial owners. Fifteen registered friendly societies appointed a committee of two members from each society for the purposes of a fête, such fête being outside the purposes for which the friendly societies were constituted. The members of the committees of each society personally guaranteed a sum towards the expenses of the fête. The fête committee had to make all arrangements as to the fête, to receive all monies, pay all expenses, and to hand over the balance in equal shares to the fifteen societies. The prisoner and M. were members of the fête committee. After the fête M. had about £200 in hand, and as neither he nor the prisoner had a banking account, they asked one C. to allow the money to be paid into his bank and this was done. The prisoner afterwards obtained cheques from C., alleging that the money was wanted for the purposes of the committee. The prisoner drew the money out of the bank, paid one or two small accounts, and absconded with the rest of the money. The Court upheld the conviction (*c*).

The members of an unregistered club, which has for its object the acquisition of gain by such members, but which is illegal owing to non-compliance with the requirements of the Companies Acts, are the beneficial owners of the property of such club (*d*).

Goods let with a House or Lodging.—The goods of a ready

(*z*) See R. *v.* Smith, L. R. 1 C. C. R. 266; 39 L. J. M. C. 112. Upon an indictment under this statute against a partner or a joint beneficial owner for stealing, charging the prisoner with being a partner in one set of counts, and in another with being a beneficial owner of the property stolen. Held, that if upon the evidence it appears that he is guilty of embezzlement and not of larceny he may, upon a proper direction to the jury, be found guilty of embezzlement upon the indictment by virtue of 24 & 25 Vict. c. 96, s. 72 (*post*, p. 1376). R. *v.* Rudge, 13 Cox, 17.

(*a*) R. *v.* Robson, 16 Q.B.D. 137; 55 L. J. M. C. 55.

(*b*) The word 'feloniously' is properly used in an indictment under this statute. R. *v.* Butterworth, 12 Cox, 132.

(*c*) R. *v.* Neat, 69 L. J. Q.B. 118; 19 Cox, 424. The only point taken at the trial was that there were no persons who together with the prisoner were the beneficial owners of the money. This was the only point reserved and the Court pointed out that they were not deciding whether the facts amounted to larceny.

(*d*) R. *v.* Tankard [1894], 1 Q.B. 548; 63 L. J. M. C. 61.

furnished lodging, if stolen by a third person, should be described as the lodger's goods, and not the goods of the original owner. An indictment was for breaking in the daytime into A.'s house and stealing his goods. The goods were the furniture of a room let by A. to a lodger by the week; and, upon a case reserved, the judges held that the goods should have been described as the goods of such lodger; for A. was not entitled to the possession, and could not have maintained trespass; and that the conviction was, therefore, wrong (*e*).

A Man taking his own Goods from a Bailee.—At common law the owner of property which is for the time being in possession of a bailee for a temporary purpose with the full consent of the owner, is guilty of larceny, though the property is his own, if with fraudulent intent he takes it out of the possession of the bailee. Thus if A. bail goods to B., and afterwards *animo furandi* take the goods from B., with an intent to charge him with the value of them, it is larceny (*f*). And so where A., having delivered money to his servant to carry to some distant place, disguised himself, and robbed the servant on the road, with intent to charge the hundred with the loss (according to the provisions of the repealed statute), it was robbery in A. (*g*). For as against persons so taking even their own goods with a wicked and fraudulent intent, there is a sufficient temporary special property in the bailee or servant to support an indictment (*h*). The box of a friendly society established under 33 Geo. III. c. 54 (rep.), containing upwards of fifty pounds, was left in the custody of the landlord of the house where the society met: the prisoner was one of the members, and broke into the landlord's house in the night-time, and stole the box. Upon an indictment for burglary and stealing the box and its contents, a case was saved upon the question whether, considering the situation in which the prisoner stood with respect to this property, and the conviction was held right, as the landlord was answerable to the society for the property (*i*). An indictment for burglary and stealing the box of a friendly society, in all the counts, except one, laid the property in one of the stewards, and in that one in the landlord of the public-house where it was kept. There were four stewards of the society, and, by the rules, the landlord ought to have had a key of the box, but, in

(*e*) R. *v.* Belstead, MS. Bayley, J., and R. & R. 411. R. *v.* Brunswick, MS. Bayley, J., and 1 Mood. 26. The statement of ownership is now amendable (*vide post*, p. 1972). As to larcenies by tenants and lodgers, see 24 & 25 Vict. c. 96, s. 74, *post*, p. 1449.

(*f*) Staundf. 26 *a*. 3 Co. Inst. 110. 1 Hale, 513. 1 Hawk. c. 33, s. 47. Fost. 123. *Aliquando etiam suæ rei furtum quis committit, veluti si debitor rem, quam creditori pignoris causa dedit, subtraxerit.* Just. Inst. lib. 4, tit. 1, s. 10. See Y.B 7 Hen. VI., pl. 18, p. 43, cited 2 Leach, 840.

(*g*) Fost. 123, 124. 3 Co. Inst. 110. 4 Bl. Com. 231. 2 East, P. C. 558, 654, where the learned author says, that even in this case he sees no objection to laying the property of the goods in the servant; for a delivery to a servant is a bailment. Savage *v.* Walthew, 11 Mod. 135, Holt, C.J. See *post*, p. 1289.

(*h*) See also the argument in R. *v.* Deakin, 2 Leach, 862, 871.

(*i*) R. *v.* Bramley, MS. Bayley, J., and R. & R. 478. In R. *v.* Watson [1908], Victoria L. R. 103, the trustee of a friendly society was indicted for stealing the money of the treasurer. The latter had received money on account of the society and had lodged it in a safe of the society until he could (as directed by the rules) pay it into the banking account of the trustees. One of the trustees abstracted the money from the safe. It was held that the money was properly laid as that of the treasurer and that the trustee was guilty of larceny of money of which the treasurer was temporary custodian.

fact, he had none. The box was deposited in a room in the public-house, and two of the stewards had each a key. Parke, J., intimated that the case must rest on the count which stated the property to be in the landlord. It was then objected that if there was any property in the landlord, it was a joint property between him and the stewards. Parke, J., said, 'I am of opinion that there is sufficient evidence to go to the jury of the property in the landlord alone' (*j*).

On an indictment for stealing the money of H. and others, it appeared that H. had a shop where goods were sold for the benefit of an industrial society. Each member of this society partook of the profit, and was subject to the loss arising from the shop. H. was a member of the society, and had the sole management of the shop, and was answerable for the safety of all the property and money coming to his possession in the course of such management. The prisoner, also a member of the society, assisted in the shop at the time of the offence, and was proved to have taken some of the money belonging to the society, and was convicted on the indictment. On a case reserved, the conviction was affirmed on the ground that as H. was the sole manager, and was answerable for the safety of all the property and money coming into his possession in the course of such management, he was *quoad hoc* the owner of the property in question (*k*). So on an indictment, where one count charged the prisoner with stealing the money of B., another the money of a Co-operative Society, and it appeared that the society had been enrolled, but no trustees had been appointed pursuant to 18 & 19 Vict. c. 63, s. 17 (*l*). The proceeds of the society consisted of the payments of the members in respect of their shares, and the affairs were managed by a committee of shareholders, of which the prisoner was a member; and under their superintendence the actual duties of management were performed by a general manager and treasurer. A store was under the management of B., a boy aged thirteen, and it was his duty to sell the goods at the store; and each day, before shutting up, the treasurer called at the store and stated an account of all money received with B., giving him a duplicate of such account. In consequence of suspicions, one of the members of the committee went with B. to the store, and having taken the money and marked part of it, he restored it to the till, and the prisoner was seen to take some of the marked money from the till. It was objected that, as the prisoner was a member of the society, and a shareholder in the funds, he could not be convicted on either count; that the possession of B. was the possession of the society, and the possession of the society was the possession of the prisoner in common with the other members; but, on a

(*j*) R. *v.* Wymer, 4 C. & P. 391. 'It is not stated in the report whether the prisoner was a member of the society or not; if not, it seems difficult to see how any doubt could arise as to the property being rightly laid in the innkeeper, who had the actual possession, which (unless it be the possession of the *feme covert* or servant, which is, generally speaking, the possession of the husband or master) is enough to support an action of trespass or trover [Armory *v.* Delamirie, 1 Str. 505. 1 Sm. Lead. C. (11th ed., 356)], and an indictment, although the possession were wrongfully obtained; for 'if A. steals the horse of B., and after C. steals the same horse from A., in this case C. is a felon, *both* as to A., and as to B.' 1 Hale, 507. C. S. G. See *post*, p. 1286.

(*k*) R. *v.* Webster [1862], L. & C. 77; 31 L. J. M. C. 17.

(*l*) Repealed. Such societies are now governed by 56 & 57 Vict. c. 39, and 57 & 58 Vict. c. 8.

case reserved, it was held that as B. was employed to sell the goods at the store, and had charge of the till there, from which the money was stolen, and was accountable for the money, he was sufficiently possessed of the money stolen to sustain the conviction on the first count (*m*).

But on an indictment for stealing the money of W. and others it appeared that two sick clubs were held at a tavern kept by W., one called the Ram and the other the Industry, to which the members paid small sums weekly, and were entitled to a weekly allowance in case of sickness. W. was a member and treasurer of both clubs, and the prisoner a member and secretary of both. The prisoner was paid a yearly salary for his services. When a considerable sum was collected, W. handed it over to the prisoner as secretary, who, accompanied by three committee-men, took it to the bank, where it was invested on deposit note in the names of the treasurer and secretary for the time being. This deposit note was taken the next club night and placed in the club box. On the day in question the prisoner told W. that the committee were going to meet him to take the money to the bank. None of the committee came, and after some time W. handed over to the prisoner £15 on account of the Ram club, and £5 on account of the Industry; the prisoner did not pay the money into the bank, but absconded with it; and it was held that W. had parted with the possession of the money absolutely, and therefore the prisoner was not guilty of larceny (*n*).

W. had a quantity of *nux vomica*, and, by means of one C., employed M. and Co., lightermen, to enter it for exportation, and carry it to the ship. Exportation exempted it from the duty, which was two shillings and sixpence per pound. M. and Co. entered it accordingly, and gave bond to the Crown for its exportation, and sent it by their lighter to the ship: and on their way to the ship, W., J., and A., who had charge of this lighter, took out the *nux vomica*, and substituted cinders and rubbish, the object being to get the *nux vomica* duty free. The indictment was against J. and A. for stealing the goods of M. and Co., and upon a case reserved, four of the judges doubted whether this were larceny, because there was no intent to cheat M. and Co., or to charge them, but the intent was to cheat the Crown; but seven judges held it a larceny, on the grounds that M. and Co. had a right to the possession until the goods reached the ship, and had an interest in that possession, and that the intent to deprive them of that possession wrongfully, and against their will, was a felonious intent as against them; because it exposed them to a suit upon their bond; and that even if there had been no intent as against them, the intent to cheat the Crown was in the opinion of most of the seven judges sufficient to make it a larceny (*o*).

Upon an indictment for larceny, it appeared that the prisoner had been the owner of the property alleged to be stolen, but being in difficulties had arranged with the prosecutors, who were creditors, to execute an assignment to trustees for the benefit of his creditors, and that a deed of assignment was executed by him, whereby he assigned to the prosecutors

(*m*) R. *v.* Burgess, L. & C. 299; 32 L. J. M. C. 185.

(*n*) R. *v.* Marsh, 3 F. & F. 523, Keating, J. Neither of the clubs had been enrolled.

(*o*) R. *v.* Wilkinson, MS. Bayley, J., and R. & R. 470. See R. *v.* Wadsworth, 10 Cox, 557.

as trustees, amongst other things, the property in question. No manual possession of the property was taken by the prosecutors prior to its removal by the prisoner, but he remained in possession after the execution of the deed in the same manner as before. The prisoner in the night-time removed property conveyed by the deed, and hid it in the house of one of his workmen. The jury found that the prisoner removed the property with intent fraudulently to deprive the parties beneficially entitled under the deed of the goods, but that he was not in the care and custody of the goods as the agent of the trustees; and, upon a case reserved, it was held that since the jury had expressly found that the prisoner was not in the care and custody of the goods as the agent of the trustees, this clearly negatived a bailment, and that was the only way in which the case could be put on the part of the prosecution. The prisoner, therefore, being in lawful possession of the goods, could not be convicted of larceny (*p*).

Goods, &c., in the Possession of the Wife.—At common law, where goods are in possession of the wife, they must be laid as the goods of her husband; thus if A. were indicted for stealing the goods of B., and it appeared that B. was a *feme covert* at the time, A. must be acquitted (*q*). And even if the wife had only received money as the agent of another person, and she was robbed of that money before her husband received it into his possession, still it was well laid as his money in an indictment for larceny. An indictment charged the stealing of a £5 note, the property of E. W. It appeared that E. W.'s wife had been employed to sell sheep belonging to her father, in which her husband never had any interest, and she received the note in payment for the sheep, and it was stolen from her before she left the place where she received it. It was held that the property was properly laid (*r*). So where a wife found a purse containing money on a highway, and was robbed of it after she had proceeded half a mile further, and the owner of the purse was never discovered, Parke, B., held that the property was rightly laid in the husband (*s*). In one count the prisoner was charged with breaking and entering the shop of E. A., and stealing her property; in another count the property was laid in the Queen. At the time the house was broken into, and the property stolen, the husband of E. A. was in gaol under sentence of imprisonment on a conviction for felony; all the property had been the husband's, and had remained in the house, and the wife continued in possession of the house and the goods, till they were stolen. On a case reserved, it was held that the prisoner could only be convicted of larceny on the second count, which laid the property in the Queen, for the goods were the property of the Crown without office found, but the house was the house of the husband until office found (*t*).

This common law rule was made subject to exceptions by 20 & 21 Vict. c. 85, s. 21, where a wife, deserted by her husband, obtained a protection order for her property, and (sect. 25) in case of a judicial separation.

(*p*) R. *v.* Pratt, Dears. 360.
(*q*) 1 Hale, 513.
(*r*) R. *v.* Roberts, 7 C. & P. 485, Littledale, J., after consulting Patteson, J.
(*s*) R. *v.* Sallows, 2 Cox, 63.
(*t*) R. *v.* Whitehead, 2 Mood. 181; 9 C. & P. 429. See R. *v.* Johnson, 1 Cox, 59. Patteson, J., and Gurney, B. These two cases were decided before the abolition of forfeitures for treason and felony (33 & 34 Vict. c. 23, *ante*, Vol. i. p. 250).

And by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12, the rule is virtually abolished (*u*), as regards a married woman's separate property.

Intermediate Tortious Taking.—The real owner of goods will not be deprived either of the property or possession in law of them by a felonious taking. If, therefore, A. steals the goods of B., and afterwards C. steals the same goods from A., C. is a felon, both as to A. and as to B., and may be indicted for stealing the goods from B. (*v*). 'It is a rule of law equally well known and established that the possession of the true owner cannot be divested by a tortious taking; and therefore if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment that the goods are my property; because these acts of theft do not change the possession of the true owner' (*w*). But a distinction is taken in the following case. If A. steals the horse of B., and afterwards delivers it to C., who was no party to the first stealing, and C. rides away with it *animo furandi*, yet C. is no felon to B.: because, though the horse was stolen from B., yet it was stolen by A., and not by C., for C. did not take it; neither is he a felon to A., for he had it by his special delivery (*x*).

Special Property in the Goods.—Where goods are stolen from a person who has only a *special property* in them; such as a *lessee* for years, a *bailee*, a *pawnee*, a *carrier*, and the like, have such special property; and the indictment will be good, if it lays the property of the goods, either in the real owners, or in the persons having only such special property in them (*y*).

The following clear and succinct observations of Bayley, B., which have been allowed to appear in this work, will, it is conceived, be deemed valuable in pointing out the true legal distinctions which govern cases of this nature: 'If the owner parts with the right of possession for a time, so as to be deprived of the legal power to resume the possession during that time, and the goods are stolen during that time, they cannot be described as the goods of such owner; but if the owner parts with nothing but the actual possession, and has a right to resume possession when he thinks fit, the goods may be described either as his goods, or his bailee's. In the latter case he does not for an instant part with the general right of possession; he confers a qualified right only, which he may put an end to when he will; in the former case, he parts with the

(*u*) See *ante*, p. 1255, and R. *v.* Murray [1906], 2 K.B. 385; 76 L. J. K.B. 593.

(*v*) 1 Hale, 507; 2 East, P. C. 654. Cf. R. *v.* Swinson, 64 J. P. 73, *ante*, p. 1204.

(*w*) R. *v.* Wilkins, 1 Leach, 522, Gould, J., stating the opinion of the twelve judges.

(*x*) 1 Hale, 507.

(*y*) 1 Hale, 513. 1 Hawk. c. 33, s. 47. 2 East, P. C. 652. 'The passage in the text is founded on the passage in East. The passage cited from Hawkins does not support the position in the text, but only shews that the goods may be laid in the bailee; and the passage in Hale is in favour of the distinction drawn by Bayley, B.: it is, "If A. have a special property in goods, as by pledge or a lease for years, and the goods be stolen, they *must* be supposed in the indictment [to be] the goods of A. If A. bail goods to B., to keep for him, or to carry for him, and B. be robbed of them, the felon may be indicted for larceny of the goods of A. or B., and it is good either way; for the property is still in A., yet B. hath the possession, and is chargeable to A. if the goods be stolen, and hath the property against all the world but A."' C. S. G.

whole right of possession for the time. The bailee for safe custody, the carrier, the tailor, the pawnee, have never more than a partial right; the owner may resume the goods, on satisfying their lien, when he will. The agister is in the same situation, and the decision as to him, in R. *v.* Woodward (*z*), only is, that the cattle may be described as his, not that they must. The ground of decision in R. *v.* Belstead (*a*), and R. *v.* Brunswick (*b*), was that the owner had parted with the right of possession for the time, he had nothing but a reversionary interest, and could not have brought trespass' (*c*).

Where goods belonging to a guest at an inn are stolen, they may be laid to be the property either of the innkeeper or the guest (*d*). And linen stolen from a washerwoman, by whom it was taken in to wash in the course of her business, may be laid as her goods (*e*). In cases of this kind it was considered that the parties have a possessory property; being answerable to their employers, and being capable of maintaining an appeal of robbery or larceny, and having restitution (*f*).

On an indictment for stealing certain iron of the goods and chattels of a canal company, it appeared that the iron had been taken from the canal by the prisoner, who was not in the employ of the company, while it was in process of being cleaned; and that if the property found on such occasions in the canal could be identified, it was returned to the owner, otherwise it was kept by the company. It was held, upon a case reserved, that the property was rightly laid in the company; for their property in the iron before it was taken away was of the same nature as that which a landlord has in goods *left behind* by a guest, property so left is in the possession of the landlord for the purpose of delivering it up to the true owner, and he has a sufficient possession to maintain an indictment for larceny (*g*).

So an agent has sufficient special property in goods of his principal in his charge or care to support an indictment, which describes them as his property (*h*).

On an indictment for stealing notes and sovereigns, the money of T., it appeared that T. was in partnership with I., who lived in Belgium, and that the money in question was partnership property. It was held that the property was rightly laid in T., as he had a special and individual trust of the joint property (*i*).

Upon an indictment for stealing sugar, the property of the London Dock Company, it appeared that A., a carman, was employed by B. to convey two hogsheads of sugar, B.'s property, from the London Docks to B.'s warehouse, and that A. sent the prisoner with two delivery notes and one of A.'s horses and carts for that purpose, but that the clerk of the London Dock Company delivered to him, by mistake, two hogsheads of sugar belonging to a third person, from one of which the prisoner

(*z*) R. *v.* Woodward, *post*, p. 1288, note (*l*).

(*a*) R. & R. 411, *ante*, p. 1282.

(*b*) 1 Mood. 26.

(*c*) MS. 3 Burn's Just. (ed. D. & W.) 463. But see R. *v.* Kendall, 12 Cox, 598. This case was not argued for the prisoner, and the point that the goods stolen were let on hire by the person alleged in the indictment to be the owner was not taken.

(*d*) R. *v.* Todd, 2 East, P. C. 653.

(*e*) R. *v.* Packer, 2 East, P. C. 653; 1 Leach, 357.

(*f*) Id. ibid.

(*g*) R. *v.* Rowe, Bell, 93; 28 L. J. M. C. 128.

(*h*) R. *v.* Jennings, Dears. & B. 447.

(*i*) R. *v.* Cole, 4 Cox, 280. Common Serjeant, after consulting Talfourd, J.

afterwards abstracted forty-five pounds of sugar. Upon a case reserved, it was held that property might well be laid in the London Dock Company, as their special property was not divested by its delivery under a mistake to the prisoner (*j*).

On an indictment under 2 Geo. II. c. 25 (rep.), for stealing bank notes laid as the property of P., it was proved that the notes were part of the proceeds of a cheque given by P. to the prisoner, his stock-broker, to pay for a purchase of exchequer bills, and that the prisoner had spent part of the proceeds of the cheque in buying exchequer bills, but had converted the rest of the notes to his own use. It was held that P. had never been in possession of the notes and that the property therein could not be laid in him (*k*).

An agister of cattle has such a special property in them that they may be laid as his goods in the indictment (*l*).

Where upon an indictment for stealing a window-glass and hammer-cloth from a carriage, the property was laid in a coach-master, who had the care of the carriage, which stood in a coach-house in his yard, at the time the articles were stolen from it; an objection that the property should have been laid in the owner of the carriage was overruled (*m*). And the Court cited a case in which a prisoner was convicted of stealing a chariot glass from a lady's chariot which had been put up at a coachyard, on an indictment laying the property in the master of the coachyard (*n*).

On an indictment against a sheriff's officer for stealing goods which he had seized under a writ of *fieri facias* against J. S., it was held that, notwithstanding the seizure, the general property remained in J. S., and that the goods might be described as his and that they need not be laid as the property of the sheriff (*o*).

But to sustain the indictment in its original (or amended) form it must appear in evidence that the party in whom the goods are laid had either the property or the possession of them. Where servants have in their custody the goods of the master the property should be laid in the master (*p*). Where a boy fourteen years of age lived with his father, worked for him, assisted him in his business, and obeyed his orders, and his father supported him, but paid him no wages, and he was left in charge of a stall from which some boots were stolen; it was held that the boy was not a bailee but a servant, and therefore the property in the boots could not properly be laid in him (*q*).

(*j*) R. *v.* Vincent, 2 Den. 464; 21 L. J. M. C. 109.

(*k*) R. *v.* Walsh, R. & R. 215; 2 Leach, 1054, 1082; 4 Taunt. 258, 284. Other points raised in the case are not here material. Cf. R. *v.* Mucklow, 1 Mood. 160 (*ante*, p. 1240). Taylor *v.* Plummer, 3 M. & S. 562.

(*l*) R. *v.* Woodward, 2 East, P. C. 653; 1 Leach, 357 n. There was at first some doubt, one of the judges saying that an agister of cattle is not liable at all events like an innkeeper for the goods of his guest. But ultimately all the judges agreed. 4 Co. Inst. 293, was referred to as shewing that an agister has a possession, and 2 Rolle. Ab. 551, as an authority, that an agister may maintain trespass against anyone who takes the beasts. See Rooth *v.* Wilson, 1 B. & Ald. 59, and R. *v.* Bird, 9 C. & P. 44, *ante*, p. 1099.

(*m*) R. *v.* Taylor, 1 Leach, 356.

(*n*) R. *v.* Statham, 1 Leach, 357.

(*o*) R. *v.* Eastall, Mich. T. 1822, MS. Bayley, J. See Chit. Archb. by Prentice, Vol. i. p. 646.

(*p*) 2 East, P. C. 652, 653.

(*q*) R. *v.* Green, D. & B. 113; 26 L. J. M. C. 17. See R. *v.* Hutchinson, MS. Bayley, J., and R. & R. 412, *ante*, p. 1106. R. *v.* Boulton, 5 C. & P. 537, *ante*, p. 1106. And R. *v.* Ashley, 1 C. & K. 198, *ante*, p. 1085.

Though generally speaking, the possession of the servant is the possession of the master (*r*), yet in some cases a kind of special property exists in the servant. Respecting the case (*s*) of a master delivering money to his servant to carry to a certain place, and then robbing his servant on the road, East says, 'I see no objection to laying the property of the goods in the servant, for though, in general, it may be said that he has no property in them, as against his master, although he has against every other person; yet having a clear right to defend his possession against A.'s unlawful demand, the special property still remains in the servant. But a taking from the servant of the money or goods of his master in his presence, by putting in fear, is a taking from the master, and the offender may be indicted for robbing him' (*t*).

If a servant employed by his master to receive money for him, is robbed of such money before he takes it to his master, the money may be described as the money of the servant (*u*).

The prisoner worked at a mill in the same room with three fellow-workmen, and was sent by them on pay-night for the wages of the four from the cashier of the works. The cashier gave the money for the four in a lump to the prisoner, who then went away and never gave any of it to his fellow-workmen. He was indicted for the larceny, and the indictment laid the property in the money in the workmen. At the trial, the indictment was amended by alleging the property to be in the proprietors of the works, instead of the workmen. Held, that the property was rightly laid as at first, in the men, and not in the masters; and that as the conviction had taken place on the amended indictment, which was wrong, the conviction must be quashed (*v*).

Where a stage-coach had been robbed of a box containing a variety of articles, it became material to determine whether the goods so stolen could be laid as the property of the coachman. The material count in the indictment laid the property in the driver. The box was delivered by the servant of a tradesman in London to the book-keeper at the inn from which the coach set off, who called it over amongst other things in the way-bill, and delivered it to a porter, who put it into the coach; and the

(*r*) *Post*, p. 1359. And see *ante*, pp. 1243 *et seq.* as to the distinction between a bare *charge* and a possession of goods delivered.

(*s*) *Ante*, p. 1282.

(*t*) 2 East, P. C. 654, *ante*, p. 1282.

(*u*) R. *v.* Rudick, 8 C. & P. 237, *ante*, p. 1154. Alderson, B., was inclined to think that the money could not be laid as the property of the master; for it was difficult to see how such an offence as the crime of embezzlement could have been a part of our criminal law if the possession by the servant of the property which had never come to the hands of the master were construed to be the possession of the master; if it were, every servant who converted to his own use property received by him for his master would be guilty of larceny. R. *v.* Bull, 2 Leach, 841, cited in Bazeley's case, shews that the servant would not have been guilty of larceny if he had converted the money to his use; but a distinction seems to exist between cases where the question arises between the master and servant, and between the master and a third person. 'As between the master and servant or agent, where the master has not otherwise the possession than by the receipt of the servant or agent, the servant or agent cannot be charged with a tortious or felonious taking, but as against a third person where there could be no question of a trust, the receipt of effects by an agent by the master's directions might be considered as a receipt by the master himself; and in the common course of business there is often no receipt or possession by the master.' Per Graham, B., R. *v.* Remnant, R. & R. 136, *post*, p. 1290, and see R. *v.* Murray, 1 Mood. 276, *post*, p. 1363. 2 East, P. C. 568, and R. *v.* Deakin, *infra*. C. S. G.

(*v*) R. *v.* Barnes, L. R. 1 C. C. R. 45; 35 L. J. M. C. 204.

coachman drove the coach to a place about thirty-eight miles from London, during which journey the box was stolen from the coach by the prisoners. The proprietors of the coach never called upon the driver to make good any losses, except when they happened by his neglect, and for goods stolen privately from the coach they never expected any compensation from the driver. The jury having found the prisoners guilty, upon a case reserved, a majority of the judges were of opinion that the property was well laid to be in the driver. Hotham, B., who delivered their opinion, said that the material question was, whether the driver had the possession of the goods, or only the bare charge of them; but that the case was not open to that distinction: for although as against his employers, the masters of the coach, the mere driver could only have the bare charge of the property committed to him, and not the legal possession of it, which remained in the coach-master: yet, as against all the rest of the world, he must be considered to have such a special property therein, as would support a count charging them as his goods; for he had in fact the possession of and control over them; and they were entrusted to his custody and disposal during the journey. That the law, therefore, on an indictment against the driver of a stage-coach, on the prosecution of the proprietors, considers the driver to have the bare charge of the goods belonging to the coach; but on a charge against any other person, for taking them tortiously and feloniously out of the driver's custody, he must be considered as the possessor (*w*).

The prisoner was indicted for stealing bank notes, the property of N. It appeared that T., as agent for N., sent the notes to M., another of N.'s agents, and M., as such agent sent them by the coach directed to W.: and the prisoner stole them from the coach. It was urged that the notes could not be described as N.'s as he never had them, except by the hands of his agents; but all the judges thought they had been rightly described, and held the conviction right (*x*). But the property should not be laid in a man who has never had either actual or constructive possession, except so far as it resulted from the possession of the thief and of persons acting under him (*y*).

Ownership of the Clothes, &c., of Children.—Clothes and other necessaries provided for children by their parents are often laid to be the property of the parents, especially while the children are of tender age (*z*): but an indictment is good where the property is laid in the child (*a*).

Where the prisoner was indicted for stealing a pair of trousers, the property of J. J., and it appeared that J. J. bought the cloth of which the trousers were made and paid for it, but the trousers were made for his son T., who was seventeen years of age; and J. J. stated that he

(*w*) R. *v.* Deakin, 2 Leach, 862, 876; 2 East, P. C. 653.

(*x*) R. *v.* Remnant, MS. Bayley, J., and R. & R. 136.

(*y*) See R. *v.* Adams, MS. Bayley, J., and R. & R. 225.

(*z*) 2 East, P. C. 654.

(*a*) In an old case (Anon. 2 East, P. C. 654. 1 Leach, 464 (*n*)), on the judges doubting whether the property of a gold chain, which was taken from a child's neck who had worn it for four years, ought not to be laid to be in the father, a former clerk of the Old Bailey said that it had always been usual to lay it to be the goods of the child in such case; and that many indictments which had lain them to be the property of the father had been ordered to be altered by the judges. If apparel is put on a boy this is a gift in law, for he has capacity to take it. R. *v.* Hayne, 12 Co. Rep. 113.

found clothes for his son, who was not his apprentice, but a labourer like himself, and worked for the same master, but at different work, and lived with his father. Patteson, J., said: 'I think the property is well laid. It may be laid in these cases either in the father or the child; but the better course is to lay it in the child' (*b*).

Property of Surviving Partner.—The prisoner was indicted for stealing sheep, the property of S. D. and other persons of the same name, his grandchildren. S. D. and a son of his, who afterwards died, took a farm as a joint concern, and kept upon it a stock of sheep, their joint property; the son died intestate some years before the offence, leaving a widow, who died soon after him, and several children (those named in the indictment); no division was ever made of the stock; and it was from the same stock that all the sheep upon the farm at the time of the felony committed were bred; some before and some after the son's death. S. D. continued to occupy the farm and use the stock as before, considering himself as acting for his grandchildren who were still infants, in respect of one moiety; and he accordingly kept a regular account with them in his books. Upon a case reserved, it was held that the property was well laid jointly in the grandfather and grandchildren, for though in the case of joint traders there was no *jus accrescendi*, and the remedy survived: yet here it was proved, by the evidence of the grandfather, that he held one moiety for his grandchildren; and he might make distribution among them. Some of the judges also said, that the property might have been laid to be in the grandfather alone, who was in possession of the children's moiety as their agent. The judges were all of opinion that it was not necessary that the property in the thing taken should be the strict legal property (*c*).

On an indictment for stealing some drapery goods, the property of B. D. and S. C., widow, it appeared that the goods had been part of the joint stock in trade of B. D. and one C., the late husband of S. C., who died without a will, leaving S. C. and some young children; and no administration of his effects had been granted; but S. C., from the time of C.'s death, acted as a partner, and regularly attended the business of the shop. The goods in question were stolen on Jan. 6, after the death of the husband: and on Jan. 20 a division was made of the remaining stock in trade; S. C. taking one half, and B. D. the other half. It was contended that the children, in respect of their interest under the statute of distributions, should have been named with B. D. and S. C., as joint proprietors; or that the property should have been alleged to be in the ordinary and surviving partner. But Chambre, J., held that the actual possession in B. D. and S. C. as owners was sufficient; upon which the prisoner was convicted: and the judges afterwards, upon a case reserved, held that the conviction was right (*d*).

Treasure Trove, Estrays, Wrecks, &c.—It is laid down, in some of

(*b*) R. *v.* Hughes, C. & M. 593, and MS. C. S. G. In R. *v.* Forsgate, 1 Leach, 463, it was held that wearing apparel furnished by a father to his son of nineteen, under and in accordance with articles of apprenticeship, was the exclusive property of the son.

(*c*) R. *v.* Scott, 2 East, P. C. 655; R. & R. 13. See 7 Geo. IV. c. 64, s. 14, *post*, p. 1941.

(*d*) R. *v.* Gaby, MS. R. & R. 178. See also Jones's case, *ante*, p. 1279.

the books, that larceny cannot be committed of things wherein no person has any determinate property; and, therefore, that taking away treasure trove, or waif, or stray, before they have been seized by the persons who have a right thereto, cannot be felony (*e*). But, although the lord has no determinate property in waifs, treasure trove, &c., till seizure, the true owner, though unknown, of things lost or stolen, has still a property in them (*f*). And the reason assigned by one writer of these things not being the subject of larceny, namely, the uncertainty of the true owner (*g*), at least, implies that if the owner is known, larceny may be committed of them (*h*).

The true principle would seem to rest on the view of the old law that larceny was violation of possession rather than of ownership (*i*).

Larceny may be committed by stealing goods, the owner of which is *not known* (*j*); and it may be stated in the indictment that the things stolen were the goods of a person to the jurors unknown (*k*). The reason assigned is, that the felony would otherwise go unpunished (*l*). But upon prosecutions of this kind some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino*; and Hale, C.J., said that he never would convict any person for stealing the goods *cujusdam ignoti*, merely because the person would not give an account how he came by them, unless there were due proof made that a felony had been committed of those goods (*m*). With respect to these cases, the true ground upon which persons so indicted may in any instance claim to be acquitted, when the other facts, necessary to constitute the crime of larceny, appear upon the evidence, seems to be a want of proper proof that the taking was felonious, or *invito domino*, and not the want of any property in the true owner, who, by losing his goods, does not lose his property in them until seizure by some other person having a right to seize in such cases (*n*).

An indictment, alleging the goods to be the property of a person unknown, is of course improper if the owner is really known (*o*) or might have been ascertained (*p*).

(*e*) 3 Co. Inst. 108. 1 Hale, 510. 1 Hawk. c. 33, s. 38. R. *v.* Thomas, L. & C. 313; 33 L. J. M. C. 22. R. *v.* Toole, Ir. Rep. 2 C. L. 36; 11 Cox, 75. See Att.-Gen. *v.* Moore [1893], 1 Ch. 576; and *ante*, Vol. i. p. 339.

(*f*) 2 East, P. C. 606 and 651. See Att.-Gen. *v.* British Museum (Trustees) [1903], 2 Ch. 598.

(*g*) Pult. de pace, 131. And so also in 3 Co. Inst. 108, the reason is given that *dominus rerum non apparet*.

(*h*) 2 East, P. C. 606.

(*i*) Pollock and Wright on Possession.

(*j*) In 1 Hawk. c. 33, s. 44, 2 East, P. C. 651, it is said that on a conviction or such indictment the King shall have the goods.

(*k*) 1 Hale, 512. 2 Hale, 181. 1 Hawk. c. 33, s. 44. 2 East, P. C. 651. Anon. Dy. 99 *a*, pl. 61, 285 *a*. 73 E. R. 216, 639. R. *v.* Westbeer, *ante*, p. 1263. And see *post*, p. 1293.

(*l*) Per Fineux, C.J., Keilw. 25.

(*m*) 2 Hale, 290.

(*n*) 2 East, P. C. 651.

(*o*) 2 East, P. C. 651. R. *v.* Deakin, 2 Leach, 862, *ante*, p. 1290. R. *v.* Walker, 3 Camp. 264, Le Blanc, J. And see R. *v.* Campbell, 1 C. & K. 82, and R. *v.* Stroud, 1 C. & K. 187.

(*p*) R. *v.* Robinson, Holt (N. P.) 595. 2 Stark. Ev. 608. The averment in the indictment always is 'to the jurors aforesaid,' *i.e.* the grand jury 'unknown,' and in R. *v.* Cordy, Gloucester Spr. Ass. 1832. MS. C. S. G., upon its being stated in argument that it had been held that if it were alleged that property was stolen by a person unknown, and it was proved at the trial that the person was known, the prisoner must be acquitted; Littledale, J., said: 'That case has been decided, but it is subject to some doubt; the question is whether the person is known to the grand jury. It will be difficult to prove that he was so known, and unless he was known to the grand jury, I should doubt about that case.' If a case should occur

Shrouds, Coffins, &c.—The property in the bells, books, or other goods belonging to a church, has been already spoken of (*q*). There can be no property in a dead corpse (*r*). If a shroud is stolen from a corpse, it may be laid to be the property of the executors, or whoever else buried the deceased; but not as the property of the deceased himself (*s*). And a conviction is recorded of larceny, in stealing leaden coffins out of the vaults of a church, the coffins being laid as the goods of the executors (*t*). If the personal representatives of the deceased cannot be ascertained, or even as it seems, if it appears probable, from the time which has elapsed since the death, that it might be a matter of some difficulty to ascertain them, it will be sufficient to lay such goods as the property of 'a person unknown.' Where the prisoner was indicted for stealing a leaden coffin, the property of a person unknown, it was objected that, though the coffin had laid in the ground near sixty years, yet, as the same family, of which the deceased had been a member, remained on the spot, and as it did not appear that any inquiry whatever had been made to ascertain the personal representative, there was want of reasonable diligence in the prosecutor; but it was ruled to be sufficient after so many years had passed (*u*). In the same case it was also ruled that a count, laying the coffin as the property of certain persons being the then churchwardens, could not be supported (*v*).

Goods of Deceased Persons.—If a man dies intestate, and the goods of deceased are stolen before administration is granted, such goods shall be supposed to be the goods of the ordinary: but if a man dies having made a will and appointed an executor, the goods shall be supposed to be the goods of the executor, even before probate is granted to him (*w*). Where property is stolen before administration is granted, with the will annexed, on refusal by the executor to prove, it cannot be laid in the administrator. Upon an indictment for stealing the property of R., it appeared that a person had made a will and appointed executors, who would not prove it, upon which R. took out letters of administration with the will annexed, but they were not dated till after the time when the felony was committed, and it was held that the property ought to have been laid in the ordinary, as letters of administration only had

where the witnesses who went before the grand jury were wholly ignorant of the party said to be unknown, and it turned out by other evidence, *e.g.* by a witness called for the prisoner, that the party was known, it would deserve consideration whether the prisoner would thereby be entitled to be acquitted. In R. *v.* Deakin, and R. *v.* Walker, *ante*, note (*o*), and R. *v.* Robinson, the grand jury had evidence before them to shew that an owner might be ascertained. It may, however, be difficult to distinguish this part of the indictment from the other parts, and as the prisoner may clearly contradict the other parts of the finding, it would probably be held that he might contradict this part also. C. S. G.

(*q*) *Ante*, p. 1106.

(*r*) 2 East, P. C. 652. This subject is fully discussed in Doodeward *v.* Spence, 6 Austr. C. L. R. 406; 7 N. S. W. State Rep. 727.

(*s*) R. *v.* Haynes, 12 Co. Rep. 113, and 3 Co. Inst. 110, where the theft is called *furtum inavditum*. 1 Hale, 515. 1 Hawk. c. 33, s. 46. 4 Bl. Com. 236.

(*t*) Anon., 2 East, P. C. 652.

(*u*) Anon. Buller, J. 2 East, P. C. 652.

(*v*) Id. ibid., but see R. *v.* Garlick, 1 Cox, 52.

(*w*) 1 Hale, 514. 2 East, P. C. 652. By the Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 19, 'from and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they vested in the ordinary.'

their operation from the time when they were granted, though the rights of an executor commence from the time of the death of the testator (*x*). Neither the ordinary, nor the executor, nor administrator, need shew their title specially, it being founded on their own possession; in which case a general indictment lies without naming themselves ordinary, executor, or administrator (*y*).

Where the deceased had lived in Gloucestershire, and left to go into Worcestershire, and was found dead in Worcestershire, and the property was taken from the body after his death; Patteson, J., held that the property was rightly laid in the Bishop of Worcester as ordinary (*z*).

Upon an indictment for stealing various articles, the property of the Bishop of Peterborough, within that diocese, it appeared that the property had belonged to F. Knight, and a witness stated that she died on Sept. 14; that she made no will, and no letters of administration had been taken out; that the whole of the drawers and boxes of the deceased had been searched and every means taken to find a will, but no will was found; and the witness believed that there was not one. Another witness had searched the register of the proper local Court, but no letters of administration had been taken out; upon a case reserved, it was held that there was abundant evidence of the intestacy (*a*).

Upon an indictment for stealing a number of articles, the property of the ordinary, it is sufficient to prove that any one of them was in the possession of the deceased at the time of his death (*b*).

Goods of Corporations and Trustees.—Property vested in a body of persons ought not to be laid as the property of that body, unless such body is incorporated, but should be described as belonging to the individuals (or one of them by name, 'and others') who constitute such body (*c*).

Where an Act of Parliament gives a corporate capacity and a corporate name to any body of persons, and vests property in them, such property should be stated in the indictment to belong to them in their corporate name, and not in the names of the individual members (*d*).

The prisoner was indicted for stealing a parcel, the property of a railway company. The parcel was stolen from the Lichfield station, which had been in the possession of the company for three or four years,

(*x*) R. *v.* Smith, 7 C. & P. 147, Bolland, B., and Coleridge, J. In Thorpe *v.* Stallwood, 5 M. & G. 760, it was held that an administrator might maintain trespass for acts done after the death of the intestate, but before the grant of administration. See also R. *v.* King, 4 F. & F. 493.

(*y*) 1 Hale, 514.

(*z*) R. *v.* Tippin, C. & M. 545. The father of the deceased proved that he believed that the deceased had left Gloucestershire with a view of coming and living with him in Worcestershire; but he did not know whether he had given up his lodgings in Gloucestershire.

(*a*) R. *v.* Johnson, Dears. & B. 340; 27 L. J. M. C. 52. It is perfectly clear that on such an indictment it is sufficient for the prosecution to prove the death and it then lies on the prisoner to prove a will or letters of administration. There is no presumption that either a will has been made or letters of administration taken out. In ejectment by the heir at law he has only to prove that he is heir, and then the defendant must prove a will, if he can. Roscoe, *Nisi Prius* (18th ed.).

(*b*) R. *v.* Johnson, *supra*. The Court also held that the prosecutor was not bound to confine the case to the articles proved to have been in the possession of the deceased at the time of his death.

(*c*) 7 Geo. IV. c. 64, s. 14. See R. *v.* Sherrington, 1 Leach, 513. R. *v.* Beacall, 1 Mood. 15, where property was vested by statute in certain trustees who were not by the statute incorporated nor given a collective name. See *post*, p. 1941.

(*d*) R. *v.* Patrick, 1 Leach, 253. 2 East, P. C. 1059. R. *v.* West, 1 Q.B. 826. Cf. R. *v.* Hunting, 73 J. P. 12.

by means of their servants; but no statute was produced which authorised the company to purchase the Trent Valley line, on which the station lay. An Act, incorporating the company was, however, produced. It was held that as a corporation is liable in trover, trespass, and ejectment, they might have an actual possession (though it might be wrongful), which would support the indictment (*e*).

It is not necessary to produce the certificate of the incorporation of a company when the existence of the company can be sufficiently proved by evidence that it had carried on business as such (*f*).

The prisoner was indicted for embezzling the money of T. B. and others. T. B. was one of the partners in a joint stock coal company. There were eighty shareholders or partners in the company, and directors were appointed. Over the office door of the company was painted, 'The R. M., and H. Coal Company, "Limited."' The directors appointed the officers of the company by resolutions, which were recorded in a minute book of the company. The prisoner was secretary and cashier of the company, and had given receipts which were headed, 'Dr. to R. M., and H. Coal Company, Limited.' Shares were transferred by certificates, and a share ledger was kept. It was objected that this was not a private partnership, of which the prisoner was clerk or servant; but a corporate body or public company, of which the prisoner was secretary or public officer; and the Joint Stock Companies Acts, 1856 and 1857, were cited; the Court overruled the objection on the ground that there was no sufficient evidence to prove that this was a body corporate or public company; and, on a case reserved, it was held that this ruling was correct (*g*).

Sect. XI.—Arrest, Indictment, and Trial.

Sect. 103 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), provides that, 'Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this Act (except only the offence of angling in the day-time), may be immediately apprehended without a warrant by any person, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law' (*h*).

By sect. 104, 'Any constable or police officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law' (*i*).

(*e*) R. *v.* Freeman, Stafford Spr. Ass. 1851. Greaves, Q.C., after consulting Talfourd, J. MSS. C. S. G.

(*f*) R. *v.* Langton, 2 Q.B.D. 296; 46 L. J. M. C. 136. R. *v.* May, 64 J. P. Rep. 570.

(*g*) R. *v.* Frankland, L. & C. 276; 9 Cox, 273; 32 L. J. M. C. 69.

(*h*) The section also provides for the issuing of warrants to apprehend and search for stolen goods, &c.

(*i*) Any person 'found committing any indictable offence in the night' may be apprehended by any person, 14 & 15 Vict. c. 19, s. 11; and if the person liable to be so apprehended assaults the person apprehending him, &c., he is guilty of a misdemeanor by sect. 12 of the same Act.

Indictment.—It is not intended to enter particularly upon the form of an indictment for larceny, concerning which full information is given in works upon criminal pleading (*j*). The prisoner must be charged with the offence in the technical form, 'feloniously did steal, take, and *carry* away'; or, as it is said to be most proper, when cattle are the subject-matter of the larceny, 'feloniously did steal, take, and *lead* away' (*k*). It is not necessary that the value or price of any matter or thing should be stated, unless the value or price is of the essence of the offence (*l*). And the property must be laid in some person who has in legal consideration a sufficient ownership for that purpose (*m*).

With respect to the proper description of the goods stolen, difficulties sometimes occur. The general rule is, that they should be described with such certainty as will enable the jury to decide, whether the chattel proved to have been stolen is that upon which the indictment is founded, and as to shew judicially to the Court that it could have been the subject-matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel (*n*). And it should appear, on the face of the indictment, that the thing taken is such whereof larceny may be committed.

The property stolen must be accurately and specifically described. It is not sufficient to say that the prisoner stole the goods and chattels of B., without shewing what goods and chattels, as one horse, one ox, &c. (*o*). An indictment charging the stealing of 'one hundred articles of household furniture' would be bad (*p*). But an indictment charging the things stolen to be nine printed books would be good (*q*). In an indictment for stealing a handkerchief, it has been held unnecessary to describe it particularly, as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality (*r*).

The prisoner bought certain residual products from the prosecutors, the actual quantities to be defined by weighing. In collusion with the servant of the prosecutors, who weighed the goods, he obtained 32 tons 13 cwt., but was only charged for 31 tons 3 cwt. He was convicted of stealing 1 ton 10 cwt. of the products and, upon a case reserved, it was held that the indictment identified so far as was reasonably possible the products stolen (*s*).

In an Irish case, R. *v.* Bonner (*ss*), on an indictment for stealing 'one parcel of the value of,' &c., it appeared that the prisoner forced open a box in the hold of a vessel and carried off the parcel in question. No

(*j*) Archb. Cr. Pl. (23rd ed.). 3 Chit. Cr. L. 944. Cro. Circ. Comp. p. 38. Stark. Cr. Pl. 192, 449, and see *post*, p. 1936.

(*k*) 2 Hale, 184. 2 East, P. C. 778. Stark. Cr. Pl. 78, 451. 3 Chit. Cr. L. 950. 'In Stark. Cr. Pl. 78, note (*u*), the learned author says, "It has been said that for stealing a horse it should be *cepit et abduxit*, for stealing a sheep *cepit et effugavit*; but I find no decision which warrants these unprofitable distinctions." See my note to the Crim. Cons. Acts, p. 159 (2nd ed.).' C. S. G.

(*l*) 14 & 15 Vict. c. 100, s. 24, *post*, pp. 1935, 1936.

(*m*) *Ante*, pp. 1280 *et seq.* R. *v.* Ward, 7 Cox, 421 (Ir.).

(*n*) Stark. Cr. Pl. 193. 1 Chit. Cr. Law, 235. See 14 & 15 Vict. c. 100, s. 1 (*post*, p. 1972), as to the amendment in the indictment of the name or description of any matter or thing therein named or described.

(*o*) 2 Hale, 182.

(*p*) R. *v.* Forsyth, R. & R. 274.

(*q*) Per Lord Ellenborough, and Bayley, J., and in R. *v.* Johnson, 3 M. & S. 540.

(*r*) Per Le Blanc, J., ibid.

(*s*) R. *v.* Tideswell [1905], 2 K.B. 273; 74 L. J. K.B. 725.

(*ss*) 7 Cox, 13 (Ir.).

evidence of the contents of the parcel was given, and the prosecutors had no property in it except as carriers. Upon a case reserved, it was held that the description was insufficient (*t*).

Where the prisoner was convicted upon an indictment which charged him with stealing 'one ham of the value of ten shillings of the goods and chattels of T. Heighway'; it was objected that, for anything that appeared on the face of the indictment, it might have been the ham of an animal *ferae naturae*, a wild boar, for instance, that had been stolen; the Court overruled the objection, and upon a case reserved, the judges were unanimously of opinion that the conviction was right, and Patteson, J., said, 'I do not understand the objection. Supposing it turned out on proof to be the ham of a wild boar, why should the prisoner be at liberty to take it from the prosecutor without becoming criminally liable? The doctrine respecting the description of animals in an indictment applies only to live animals, not to parts of the carcases of dead animals, such as a boar's head' (*u*).

In R. *v.* Stride (*v*), the defendants were indicted for stealing and receiving 'one thousand pheasants' eggs of the goods and chattels of and belonging to' Sir Walter Gilbey. Upon a case reserved, it was held that the indictment sufficiently shewed that the eggs had been reduced into possession and were the subject of larceny.

Upon an indictment for stealing twenty-five pounds weight of tin, it appeared that the tin consisted of two pieces, which a witness called 'lumps of tin,' but afterwards admitted that they were called in the trade 'ingots'; but added that that term was applied as well to the pieces of tin as to the mould in which they were cast, and was applied to the shape. It was objected that the tin ought to have been described as two ingots; for whenever an article has obtained a name in a trade, it must be described by it. Coleridge, J.: 'It seems to me that the description is sufficient to answer all the purposes which are required by law. First, it is the subject of larceny equally whether it be an ingot or so many pounds weight of tin. Secondly, as to the facility of pleading *autrefois acquit*, the prisoner stands in the same situation, whether it be one or the other, because there must be some parol evidence in all cases to shew what it was that he was tried for before, and it would be as easy to prove one as the other. The last question is, whether it is described with sufficient certainty, in order that the jury may be satisfied that it is the thing described. If this had been some article, that, in ordinary parlance, had been called by a particular name of its own, it would have been a wrong description to have called it by the name of the material of which it was composed; as, if a piece of cloth were called so many pounds of

(*t*) Monahan, C.J., said: 'The truth is, the prisoner stole something, but what it is nobody knows.' A very good reason for holding that the description was quite sufficient, as under the facts it clearly was. In R. *v.* Gallears, *infra*, Pollock, C.B., said: 'If a person were indicted for stealing "one box" of the goods, &c., that would be sufficient, although a small house in the country is sometimes called a box.' And see R. *v.* Douglass, 1 Camp. 212, *post*, p. 1513.

(*u*) R. *v.* Gallears, 1 Den. 501. Pollock, C.B., intimated a doubt as to the correctness of the ruling in R. *v.* Cox, 1 C. & K. 494, where Tindal, C.J., held that 'three eggs' of the goods and chattels of H. was insufficient. And since R. *v.* Stride [1908], 1 K.B. 617, 625, 628. R. *v.* Cox is of no authority.

(*v*) [1908] 1 K.B. 617. The Court distinguished this case from R. *v.* Rough (*ante*, p. 1277).

wool, because it had ceased to be wool, and nobody could understand that you were speaking of cloth. It would be wrong to say so many ounces of gold, if a man stole so many sovereigns; you would there mislead by calling it gold. If it were a rod of iron, it would be sufficient to call it so many pounds weight of iron '(*w*). And where the prisoner was indicted for stealing ten pounds of copper, and the articles stolen were copper nails; Erle, J., was inclined to hold that they should have been so described (*x*).

Where a prisoner was indicted for stealing, *inter alia*, two shifts, and the only article identified by the prosecutrix was what she called a shirt, which had been made for a little girl six years of age, and the prosecutrix stated that she called such things shirts while girls were so young; Tindal, C.J., said, 'It must be shewn that the article is generally known by the name laid in the indictment, and here the prosecutrix says she should call it a shirt. The prisoner, therefore, must be acquitted' (*y*).

Upon an indictment against the prisoners for stealing six handkerchiefs, it appeared that the handkerchiefs were new and in one piece, but that the pattern designated each, there being a light coloured line between each; and it also appeared that the article was known in the trade as a piece of silk handkerchiefs, and that it was the custom to charge such an article as so many handkerchiefs. The point being saved, the judges held that the property was rightly described as six handkerchiefs, and that the conviction was right (*z*).

When the subject-matter is defined by a statute, the descriptive words contained in the Act should be used in the indictment; and where the Act uses several descriptive terms, one of which, being general, includes the more specific term, an indictment would be bad which used the more general instead of the more special description (*a*). Where an article is described in a statute by a particular name, it is enough to describe it by that name in an indictment for larceny (*b*).

An indictment charging the stealing of a 'brass furnace' is not supported by evidence of stealing the pieces of brass into which the furnace has been broken up (*c*). So an indictment charging the prisoner with stealing a 'spade,' was held not to be sustained by evidence, he only stole the bit or flat iron part of the spade, the handle being off at the time the iron was stolen (*d*). Where the indictment was for stealing 'one bushel

(*w*) R. *v.* Mansfield, C. & M. 140. 'R. *v.* Stott, 2 East, P. C. 752, 753, was cited in support of the objection. There the indictment was for receiving stolen iron, described as so many "pieces of iron, called strokes," so many "pieces of iron," and so many "pieces of iron, called horse-shoes"; and the only question seems to have been whether 29 Geo. II. c. 30, related to metals in their raw state as contradistinguished from wrought goods, and no opinion was given; the counsel for the prisoner waiving the further prosecution of a writ of error, upon a doubt intimated by the Court of B.R., whether any other judgment could be passed than that of transportation, directed by 29 Geo. III. c. 30.' C. S. G.

(*x*) R. *v.* Christance, 1 Cox, 143. The prisoners were acquitted, or the point would have been reserved.

(*y*) R. *v.* Fox, Salop Sum. Ass. 1842, MSS. C. S. G.

(*z*) R. *v.* Nibbs, MS. Bayley, J., and 1 Mood. 25.

(*a*) Stark. Cr. Pl. 193. In R. *v.* Cook, 1 Leach, 105, an indictment under 14 Geo. II. c. 6, and 15 Geo. II. c. 34, for stealing a cow, was held not to be supported by proof of theft of a heifer, both words being used in the statutes. But see R. *v.* McCulley, 2 Mood. 34.

(*b*) R. *v.* Johnson, 3 M. & S. 540.

(*c*) R. *v.* Halloway, 1 C. & P. 127, Hullock, B.

(*d*) R. *v.* Stiles, Gloucester Sum. Ass. 1833, Gurney, B. MS. C. S. G.

of oats, one bushel of chaff, and one bushel of beans, of the goods and chattels of A. B., then and there found'; and the proof was, that these articles, at the time of the felonious taking, were mixed together; Bayley, J., held that the articles ought to have been described as mixed, thus, 'a certain mixture consisting of one bushel, &c.,' and directed an acquittal on this count (*e*). But this ruling is of doubtful authority (*f*).

In an indictment for attempting to steal, it is sufficient to aver that the prisoner attempted to steal the goods of the prosecutor without specifying what the goods were (*g*).

Money.—Under the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 18 (*h*), in an indictment for stealing money or bank notes the amount stolen may be described as money 'of the monies of A. B.,' without specifying any particular coin or bank note (*i*).

Where shillings were described as 'two pieces of the current coin of this realm called shillings, of the value of two shillings, of the *goods and chattels* of F.,' it was held that the indictment was inaccurate, as money does not fall within the legal definition of goods and chattels (*j*); but that the words 'goods and chattels' ought to be rejected as surplusage, and then the indictment sufficiently alleged that the coin was the property of F. (*k*).

The prosecutor, in payment of a debt of sixpence, handed a sovereign to the prisoner and asked him for change. The prisoner ran away with the sovereign and was indicted for stealing nineteen shillings and sixpence. It was held that the Court had power to amend the indictment by altering the description of the thing stolen to 'one sovereign' (*l*) or to 'money' (*m*).

Written Securities.—The Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 5 (*n*), states how an instrument may be described in an indictment for stealing it, and sect. 1 enables the Court to amend immaterial variances.

It is said to have been formerly the practice upon all indictments for stealing notes or other written securities, to set out the notes or other securities at full length (*o*); but it was settled before the above Act that they might be described in a general manner, and need not be set out *verbatim* (*p*). In a case under the 2 Geo. II. c. 25 (rep.), where a prisoner

(*e*) R. *v.* Kettle, 3 Chit. Cr. L. 947 *a*.

(*f*) On this case being cited in R. *v.* Bond, 1 Den. 517, Alderson, B., said: 'I should question the correctness of that ruling if it came before me. A chemical mixture would make a total alteration in each article, and therefore no one would remain what it was before the mixture took place: but there the mixture was merely mechanical.' But, with all deference, what does it signify whether the mixture be mechanical or chemical, where the result is a mixture which is hardly capable of being divided into its separate ingredients, and where the specification of it as a mixture correctly describes the actual state at the time of asportation, and the description by such a quantity of each of its ingredients is calculated to mislead?

(*g*) R. *v.* Johnson, L. & C. 489: 34 L. J. M. C. 24.

(*h*) *Post*, p. 1953.

(*i*) Including bank notes not in circulation, but in course of transmission from one branch of the bank to another. R. *v.* West, D. & B. 109, 26 L. J. M. C. 6.

(*j*) Before 1851 it was necessary to specify some of the pieces. R. *v.* Fry, MS. Bayley, J., and R. & R. 482. And see R. *v.* Bond, 1 Den. 517. R. *v.* Sharp, 2 Cox, 181.

(*k*) R. *v.* Radley, 1 Den. 450.

(*l*) R. *v.* Gumble, L. R. 2 C. C. R. 1; 42 L. J. M. C. 7.

(*m*) Ib. See also R. *v.* Bird, *ante*, p. 1231.

(*n*) *Post*, p. 1951.

(*o*) 3 M. & S. 541.

(*p*) 2 East, P. C. 777. R. *v.* Milnes, 2 East, P. C. 602. R. *v.* Johnson, 2 Leach, 1103 (*n*). Stark. Cr. Pl. 454, note (*k*).

was charged with stealing 'a certain note commonly called a bank note,' of the value, &c., and convicted, an objection which was taken to this description of the note was referred to the judges, who all held the indictment ill-laid; as, in describing the property stolen to be a note 'commonly called a bank note,' it did not follow any of the descriptions of property in the statute, and that the addition 'commonly called a bank note' did not aid such original wrong description (*q*). But if the indictment described the instrument in the words of the statute creating the offence, it was sufficient (*r*).

An indictment for stealing a promissory note was held good which described it as 'one promissory note for the payment of five guineas' (*s*).

An indictment charged the prisoner under 39 Geo. III. c. 85 (rep.), with embezzling 'divers, to wit, nine bank notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of £9 of lawful money of Great Britain, and of the value £9 of like lawful money'; and, upon error to reverse the judgment, on the ground that the notes were insufficiently described, Lord Ellenborough, C.J., said, that he considered that after the statute had made bank notes the subject of larceny, they might be described in the same manner as other things which have an intrinsic value, that is, by any description applicable to them as a chattel; that to describe them as bank notes for the payment of money seemed to be a larger description than the statute strictly required; and that the indictment in question had set forth number, value, and species (bank note being the species, the value £9, and the number nine) and thereby complied with the strict and technical rule of law. Le Blanc, J., said: 'Where a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing that is the subject of larceny' (*t*).

Where a cheque was described as 'a cheque for the sum of £14 6*s*. 3*d*. of the monies of' W., it was held that the indictment might be read as if the words 'of the monies' were not there, and then it was sufficient (*u*).

Reissuable bank notes, which are stolen on their way from the bank in London, at which they have been paid, to the bankers in the country to be reissued, may be described as so many pieces of paper stamped with stamps or as 'money' (*v*). And such reissuable notes, if they cannot properly be described as 'valuable securities,' or 'money,' may be described as goods and chattels (*w*). The halves of country bank notes may also be described as goods and chattels (*x*). An indictment is good which charges the stealing of a certain valuable security (to wit) a cheque of the value specified without stating the drawees to be bankers (*y*). A stamped receipt was held to be sufficiently described as 'one piece of paper

(*q*) R. *v.* Craven, 2 East, P. C. 601; R. & R. 14.

(*r*) R. *v.* Newman, Gloucester Spr. Ass. 1832, MS. C. S. G. In a case before 1851 (R. *v.* Jones, 1 Cox, 105), where the indictment charged theft of a £10 note and the note was a £5 note, Maule, J., held the variance fatal. Probably the ground was because the note was alleged to be for the payment of £10, which is a descriptive averment of the note itself.

(*s*) R. *v.* Milnes, 2 East, P. C. 602.

(*t*) R. *v.* Johnson, 3 M. & S. 540, 552, 553.

(*u*) R. *v.* Godfrey, Dears. & B. 426.

(*v*) R. *v.* Clarke, *ante*, p. 1269. See R. *v.* West, *ante*, p. 1274.

(*w*) R. *v.* Vyse, *ante*, p. 1270.

(*x*) R. *v.* Mead, and R. *v.* Jones, *ante*, p. 1269.

(*y*) R. *v.* Heath, 2 Mood. 33.

stamped with a certain stamp denoting the payment of a duty to our said Lady the Queen of sixpence, of the property, goods, and chattels of A. B.,' or as 'one piece of paper of the value of one penny' (*z*). So a memorandum of a sum of money due to the prosecutor may be described as 'one piece of writing paper, of the value of one penny, one other piece of paper of the value of one penny, and one written memorandum of the value of one penny, of the goods and chattels of J. A.' (*a*). And a cheque which has been paid may be described as a piece of paper (*b*).

If an instrument be both an order and warrant for the payment of money it may well be described as a warrant and order (*c*).

Animals.—An indictment for stealing a dead animal should state that it was dead (*d*). The prisoners stole four *live* tame turkeys in Cambridgeshire; killed them there, and carried them dead into Hertfordshire. They were indicted in Hertfordshire for stealing four live tame turkeys; and upon a case reserved, the judges held that the word *live* in the description could not be rejected as surplusage, and that as the prisoners had not the turkeys in a live state in Hertfordshire, the charge, as laid, was not proved (*e*).

Upon indictment for sheep-stealing it was held that a removal whilst the sheep was alive was essential to constitute the offence (*f*).

The prisoner was indicted for receiving *a lamb* knowing the same to have been stolen, and the lamb had been killed before it was received; upon a case reserved, the judges all agreed that the conviction was good, as it was immaterial as to the prisoner's offence whether the lamb was alive or dead, his offence and the punishment for it being in both cases the same (*g*).

Separate Takings.—Although for some purposes the taking of divers articles at one and the same time may be considered as one entire felony (*h*) yet for other purposes the taking of each article may constitute a distinct felony (*i*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 5, 'It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them (*j*).

By sect. 6, 'If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed,

(*z*) R. *v.* Rodway, 9 C. & P. 784, *ante*, p. 1232.

(*a*) R. *v.* Bingley, 5 C. & P. 602, Gurney, B.

(*b*) R. *v.* Watts, 2 Den. 14. *Post*, p. 1369.

(*c*) R. *v.* Gilchrist, 2 Mood. 233, *ante*, p. 1273.

(*d*) By Holroyd, J., in R. *v.* Edwards, MS. Bayley, J., and R. & R. 497. 'In R. *v.* Halloway, 1 C. & P. 128, Hullock, B., held that an indictment for stealing "two turkeys" was not supported by evidence of stealing two dead turkeys" as "two turkeys" must be taken to mean live turkeys; but this case seems to be overruled by R. *v.* Puckering, *infra*.' C. S. G. (*Vide ante*, p. 1275.)

(*e*) R. *v.* Edwards, R. & R. 497, *post*, p. 1304.

(*f*) R. *v.* Williams, 1 Mood. 107.

(*g*) R. *v.* Puckering, 1 Mood. 242.

(*h*) 1 Hale, 531. 2 East, P. C. 740.

(*i*) 2 Hale, 246.

(*j*) Taken from 14 & 15 Vict. c. 100, s. 16.

unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings' (*k*).

An indictment charged the prisoner with stealing 1000 cubic feet of gas on a particular day. The evidence connected the prisoner with the abstraction for several years of gas from the main of the prosecutors by a pipe which had been used for the purpose of partly lighting a factory by gas, without its passing through the meter. It was held that the circumstances attending the abstraction of gas by that means for the whole of that time were rightly given in evidence, and that the prosecutors need not elect to proceed on one particular act of taking, or on any three acts committed within the space of six months from the first to the last of such acts, under the Larceny Act, 1861, s. 6, for the whole of the acts constituted one continuous taking and did not shew separate takings at different times. *Semble.*—That if the facts had amounted to proof of separate and distinct takings from time to time, though the prosecution might have been called upon to elect upon which taking or takings they would proceed, the evidence would have been equally admissible, as tending to shew the felonious nature of the one taking selected (*l*).

An indictment contained nine counts, in all of which the property was described as 600 lb. of cotton weft, 400 lb. of cotton twist, and 1000 lb. of cotton. The first count charged H. with larceny as a servant. The second count charged H. and four others with simple larceny. The third count charged all five prisoners with feloniously receiving. All these counts laid the offence on Sept. 1, 1863. The fourth count charged H. with larceny as a servant. The fifth count charged all five prisoners with simple larceny. The sixth count charged all the prisoners with feloniously receiving. All these three counts laid the offence on Sept. 2, in the year aforesaid. The seventh count charged H. with larceny as a servant. The eighth count charged all the prisoners with simple larceny. The ninth count charged all the prisoners with feloniously receiving. All these three counts laid the offence on Sept. 24, in the year aforesaid. A motion was made to quash the indictment as there was no allegation that the larcenies were committed within six months; but the sessions refused to quash the indictment; and, upon a case reserved after a verdict of guilty against some of the prisoners of stealing, and against others of receiving, it was held that the conviction was good, but that the proper course in such a case is either to quash the indictment or to put the prosecutor to his election, if there is reason to apprehend that the prisoners will be embarrassed (*m*).

(*k*) Taken from 14 & 15 Vict. c. 100, s. 17. The word 'month' means 'calendar month.' 52 & 53 Vict. c. 63, s. 3, *ante*, Vol. i. p. 3.

(*l*) R. *v.* Firth, L. R. 1 C. C. R. 172; 38 L. J. M. C. 54. See R. *v.* Henwood, 11 Cox, 526. In R. *v.* Lonsdale, 4 F. & F. 56, where the indictment charged separate takings on Feb. 13 and Feb. 15, but did not aver that the larcenies were within six months of each other. Pollock, C.B., put the prosecution to their election.

(*m*) R. *v.* Haywood, L. & C. 451; 33 L. J. M. C. 133.

The prisoner was indicted for stealing a number of articles the property of his master. The indictment did not specify any date when the articles were alleged to have been stolen. A motion was made to quash the indictment on the ground that there was no date specified. The chairman refused to do this, and after conviction, upon a case reserved, it was held that the chairman was right, but Lord Alverstone, C.J., said that when the case comes to be tried the prosecution must prove a date of the taking, and as in this indictment it appeared that there were a number of takings the prosecution might have been put to their election, but that point was not taken (*n*).

On an indictment for stealing robes, silk, and other articles, it appeared that the prisoner was the servant of the prosecutors. Nothing was missed till just before his apprehension, nor had he been seen to take anything out of the house, but after he was apprehended, he admitted having taken a great variety of things, some of which he had sent to one S. One of the prosecutors swore that he had no doubt that the articles were taken at different times, and it appeared probable that that was the case, from the great variety of the articles, and because S. had been in the habit of pledging several articles at different times during a period of between four and five months. Gaselee, J., held that he could not compel the prosecutors to elect what set of goods they relied upon; and that though it was probable the goods were taken at different times, it was not impossible that they had been all taken at one time. On a case reserved, the judges were unanimously of opinion that the learned judge was right in not requiring an election to be made (*o*). So where seventy sheep were put on a common on June 18, and were not missed till November, and the prisoner was in possession of four of the sheep in October, and of nineteen others of them on Nov. 23, Bayley, J., allowed evidence to be given as to both lots of sheep (*p*). But where two horses were stolen from different persons at different times, but were taken at the same time by the prisoner into a different county and it was submitted that the felonies were distinct, and the prosecutor should elect on which he would proceed; Littledale, J., said: 'If you could confine your evidence entirely to a single felony in this county, you need not elect; but this you cannot do; for you must prove that the horses were originally stolen in another county. The possession of stolen property soon after a robbery is not itself a felony, though it raises the presumption that the possessor is the thief; it refers to the original taking with all its circumstances. I think, therefore, that you must, in this instance, make your election' (*q*).

Venue, &c.—Larceny, like every other offence, is ordinarily tried in the same county or jurisdiction in which it was committed: but larceny at common law is considered as committed in every county or jurisdiction into which the thief carries the goods; for the legal possession of them still remains in the true owner, and every moment's continuance of the

(*n*) R. *v.* Nicholls, 68 J. P. 452.

(*o*) R. *v.* Dunn, 1 Mood. 146. Cf. R. *v.* Rye, 2 Cr. App. R. 155, and see R. *v.* Hunt, Hindmarch's Supp. to Deacon's Cr. L. 1583. R. *v.* Bleasdale, 2 C. & K. 765. R. *v.* Johnson, D. & B. 340, *ante*, p. 1294.

(*p*) R. *v.* Dewhirst, 2 Stark. Ev. 614 (3rd ed.).

(*q*) R. *v.* Smith, 2 Mood. 295.

trespass and felony amounts to a new taking and asportation: the felony travels (*r*).

Therefore if a man steals goods in county A., and carries them into county B., he may be indicted for the larceny in county B. But if a compound larceny is committed in one county, and the offender carries the property into another, though he may be convicted in the latter county of the simple larceny he cannot be there convicted of the compound larceny. Thus where the prisoner robbed the mail of a letter either in Wiltshire or Berkshire, and brought it into Middlesex, and was indicted capitally in Middlesex on 5 Geo. III. c. 25, s. 7, and 7 Geo. III. c. 40 (both rep.), the judges, upon a case reserved, held that he could not be convicted capitally out of the county in which the letter was taken from the mail (*s*). So robbery can only be tried in the county where committed (*t*). Though the stealing of things affixed to the freehold was made felony in 1827 (*u*), still the prisoner could not be indicted in any county except the one in which the fixtures were first taken. The prisoner was indicted at common law for stealing lead in Middlesex; the lead had been stolen from a church at I., in Buckinghamshire, and the prisoner was found in possession of it in Middlesex, a place within the jurisdiction of the Central Criminal Court, which I. was not; and it was held that the prisoner could not be convicted within the jurisdiction of the Central Criminal Court (*v*).

The prosecutor and the prisoners were travellers by a train from Paddington to Swansea. At Swindon, in Wiltshire, they got out, and whilst in the refreshment room the prosecutor's watch was stolen by the prisoners. The prosecutor and prisoners went on in the train to Gloucester, where the latter were arrested and subsequently indicted for feloniously stealing the watch from the person. Jelf, J., held that there was no jurisdiction to try the prisoners at Gloucester for the compound offence, and that the jury should not be allowed on this indictment to convict of simple larceny (*w*).

The larceny continued in a second county may, however, in some respects be considered as a new offence, not necessarily including all the qualities of the original larceny. Thus, if the thing stolen is altered in character in the first county so as to be no longer what it was when stolen, an indictment in the second county should describe it according to its altered, and not according to its original state. So where the prisoners were indicted in Hertfordshire for stealing four live tame turkeys, and it appeared they stole them alive in the county of Cambridge, killed them there, and brought them into Hertfordshire, the judges considered that the charge as laid was not proved and the conviction was wrong (*x*).

(*r*) 3 Co. Inst. 113. 1 Hale, 507. 2 Hale, 163. 1 Hawk. c. 33, s. 52. 4 Bl. Com. 304. 2 East, P. C. 771, *ante*, Vol. i. p. 26. It is not necessary to state or prove the particular parish in which the taking occurred. As to parishes in two counties see R. *v.* Parkins, 4 C. & P. 363.

(*s*) R. *v.* Thomson, Hil. T. 1795, MS. Bayley, J.

(*t*) 1 Hale, 536.

(*u*) By 7 & 8 Geo. IV. c. 29, s. 44. *Vide ante*, p. 1258.

(*v*) R. *v.* Millar, 7 C. & P. 665, Park, J., Alderson, B., and Patteson, J.

(*w*) R. *v.* Fenley, 20 Cox, 252. Jelf, J., said he would amend the indictment by striking out the words 'from the person' and would reserve the point as to his power to do so. The prisoners were convicted on another indictment.

(*x*) R. *v.* Edwards, MS. Bayley, J., and R. & R. 497. See R. *v.* Halloway, *ante*, p. 1301, note (*d*).

But a considerable space of time intervening between the theft in one county and the carrying the stolen property into another county will not prevent the case from being considered as a larceny in the county into which the property is carried (*y*).

Four prisoners were indicted for stealing a variety of articles of hardware in the county of *Worcester*. It appeared that the articles in question were made up into a package at Birmingham, and despatched by the canal from that place to Worcester, to be forwarded down the river Severn to Bristol. The package arrived safely at Worcester, where it was transferred from the canal boat to a barge called the Blucher, in which it was to be conveyed a great part of the way down the Severn; namely to a place called Brimspill, in the county of *Gloucester*. The prisoners were bargemen on board the Blucher; and during the voyage from Worcester to Brimspill, the course of which was nearly equal in the two counties of *Worcester* and *Gloucester*, being about thirty miles in each, the articles in question were stolen from the package; but they were not missed till the barge arrived at Brimspill. At that place the cargo was unloaded, and put on board another vessel, to be carried onwards to Bristol; and the Blucher barge returned to Worcester navigated by the prisoners. Suspicion having fallen upon them, they were apprehended in the county of *Worcester*, when their respective bags were immediately searched, and a portion of the stolen articles was found in each of them. Upon their apprehension, and upon being required to account for the possession of the articles, they stated that the package was broken by accident while on board the Blucher, on the voyage from Worcester to Brimspill, when the articles fell out, and they took them and made a division of them immediately. They did not state at what part of the voyage this transaction took place; but it appeared probable that it took place in the county of *Gloucester*, and there was no evidence to rebut that probability. Upon these facts, Holroyd, J., ruled that the indictment could not be supported against the prisoners as for a joint larceny in the county of *Worcester*, and put the counsel for the prosecution to his election; who accordingly proceeded against one only of the prisoners (*z*).

But if two persons are guilty of a felonious taking in one county, and one of them alone carries the property into another county, yet if the other afterwards concurs with him in the second county in securing the possession, both may be jointly indicted in the second county. C. and D. laid a plan to get some coats from the prosecutrix under pretext of buying them. The prosecutrix had them in Surrey at a public-house; the prisoners got her to leave them with D. whilst she went with C., that he might get the money to pay for them; in her absence D. carried them into Middlesex, and C. afterwards joined him there, and concurred in securing them. The indictment was laid against both in *Middlesex:*

(*y*) R. *v.* Parkin, MS. Bayley, J., and 1 Mood. 45.

(*z*) R. *v.* Barnett, Worcester Sum. Ass. 1818, Holroyd, J. 'Separate indictments were afterwards preferred against the three other prisoners (as the grand jury has not been discharged), to which they pleaded guilty. The learned counsel (Sir Wm. Owen) who was retained to defend them, inclined much to put in a plea of *autrefois acquit* on their behalf; and only permitted them to plead guilty on the prosecutor undertaking to recommend them strongly to mercy. And it should seem that such a plea *might* have succeeded. See R. *v.* Dann, 1 Mood. 424.' C. S. G.

and upon a case reserved, their conviction was affirmed, the judges holding that as C. was present aiding and abetting in Surrey at the original larceny, his concurrence afterwards in *Middlesex*, though after an interval, might be connected with the original taking, and brought down his larceny to the subsequent possession in *Middlesex* (*a*).

So if two jointly commit a larceny in one county, and one of them carries the stolen goods into another county, the other still accompanying him, without their ever being separated, they are both indictable in either county; the possession of one being the possession of both in each county as long as they continue in company (*b*).

A count alleged that the prisoner did steal, take, and drive away a sheep in Essex. The sheep was last seen alive in the county of Hertford; but part of the carcase was found in the possession of the prisoner in Essex. There were marks of blood in the field where it had been last seen alive, so that it seemed that it had been slaughtered there. It was objected that the count charged a driving away in Essex, but as it was killed in Hertfordshire that was impossible; but Wilde, C.J., after taking time till the next assizes to consider the question, held that the prisoner might be convicted in Essex (*c*).

On an indictment in Cork for stealing two cow-skins, it appeared that the prisoner had been acquitted of stealing the cows, as they were stolen in Limerick; but the skins were found in the prisoner's possession in Cork. Lefroy, B., doubted whether the indictment could be sustained as he doubted whether the property in the skins had ever been in the prosecutor *qua* skins (*d*).

A chattel was stolen in Liverpool, and was consigned thence as a parcel by the thief in the ordinary course through a railway company, and was delivered by them to the receiver in London for the purpose of being sold and disposed of by him there, and there was no evidence of any possession by the thief in Middlesex, unless either the possession by the railway company or of the receiver could be deemed his possession. Upon a case reserved it was held that the thief retained control over the article in Middlesex, and was therefore liable to be tried there (*e*).

The prisoner must have the stolen property under his control in the second county to render him liable to be indicted there, and it is not enough that he has the mere possession of it, he being in the custody of the constable who apprehended him. Two horses were stolen in Sussex. The prisoner was arrested with them in Surrey. The police took the prisoner and the horses into Kent, where the prisoner escaped. He was after-

(*a*) R. *v.* County, East. T. 1816, MS. Bayley, J.

(*b*) R. *v.* M'Donagh, Carr. Supp. (2nd ed.) 23.

(*c*) R. *v.* Newland, 2 Cox, 283. 'No point was raised in this case on the sheep being wrongly described, which (as the punishment for stealing a live sheep and a dead sheep essentially differ) it seems clearly to have been. See R. *v.* Puckering, 1 Mood. 242, *ante*, p. 1301.' C. S. G.

(*d*) R. *v.* Barry, 2 Cox, 294 (Ir.), Lefroy, B., said he would reserve the point; the prisoner was convicted, but it was not stated whether anything further was done. 'It is quite clear that there was no foundation for the doubt. No alteration in the character of the chattel stolen ever divests the property in it, or in any part of it, out of the owner; and see R. *v.* Cowell, 2 East, P. C. 617, *post*, p. 1479, which is an authority expressly in point; for the receiver could not be guilty of receiving part of the sheep unless the principal had been guilty of stealing that part.' C. S. G.

(*e*) R. *v.* Rogers, L. R. 1 C. C. R. 13; 37 L. J. M. C. 83. The Court referred to 24 & 25 Vict. c. 96, s. 114, *infra*.

wards indicted for stealing the two horses in Kent, but the judges held there was no evidence of stealing in Kent (*f*).

Theft in another Part of the United Kingdom.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 114, 'If any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part' (*g*).

Theft Abroad.—By the Larceny Act, 1896 (59 & 60 Vict. c. 52), s. 1, (1) 'If any person without lawful excuse receives, or has in his possession, any property stolen outside the United Kingdom, knowing such property to have been stolen, he shall be liable to penal servitude for any term not less than three years, and not more than seven years; or to imprisonment for a term not exceeding two years, with or without hard labour, and may be indicted in any county or place in which he has, or has had, the property. (2) For the purposes of this section, property shall be deemed to have been stolen where it has been taken, extorted, obtained, embezzled, converted, or disposed of under such circumstances that if the act had been committed in the United Kingdom the person committing it would have been guilty of an indictable offence according to the law for the time being of the United Kingdom. (3) An offence under this section shall be a felony or misdemeanor, according as the act committed outside the United Kingdom would have been a felony or misdemeanor, if committed in England or Ireland' (*h*).

Proof of Loss.—Upon an indictment for stealing a horse, the prosecutor proved that he had put the horse to be agisted with a person residing twelve miles distant from his own house, and that in consequence of hearing of its loss from that person, he went to the field where the horse had been put, and discovered that it was gone. Gurney, B., said, 'I think you should prove the loss more distinctly, because *non constat* but the prisoners might have obtained possession of the horse honestly. I do not see how we can get at that without the person with whom it was put to agist, or his servant. It is perfectly consistent with what has been proved that the horse might have got out of this person's possession in

(*f*) R. *v.* Simmonds, 1 Mood. 408.

(*g*) Taken from 7 & 8 Geo. IV. c. 29, s. 76 (E). The corresponding section in 9 Geo. IV. c. 55, s. 75 (I), had 'unlawfully taken' instead of 'feloniously taken.' See R. *v.* Prowes, 1 Mood. 349, and R. *v.* Debruiel, 11 Cox, 207. The words 'part of the U.K.,' would seem properly to mean England, Scotland, or Ireland, but see R. *v.* Rogers, *ante*, p. 1306.

(*h*) See R. *v.* Panse, 61 J. P. 536, and R. *v.* Graham, 65 J. P. 248.

some other way, and not by felony' (*i*). Where on a similar indictment it appeared that a servant was sent to turn out a horse in a field, and was sent to fetch it up again the next morning, when it was missed, but the servant was not called as a witness, and the prisoner was found in possession of the horse the next day; it was held, that there was not sufficient proof given of the loss; and that the servant ought to have been called to prove what he did with the horse, as for anything that appeared to the contrary, the servant might have delivered the horse to the prisoner (*j*).

Recent Possession.—The evidence in cases of larceny generally consists (unless the prisoner is detected in the fact) of proof of the felony having been committed, and of the goods stolen having been found shortly afterwards in the possession of the prisoner; and upon such proof the general rule will attach, that whatever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is, that he obtained it feloniously (*k*). This rule, founded on the necessity of the case, which cannot admit offences of this kind to go unpunished, wherever positive and direct evidence is wanting of the guilt of the party, will probably seldom lead to a wrong conclusion if due attention be paid to the particular circumstances, by which such presumption may be weakened, or entirely destroyed (*l*). Amongst the most prominent of these will be the length of time which elapsed between the loss of the property and the finding of it in the possession of the prisoner; the probability of the prisoner's having been, at the time of the theft, near the place from which the property was taken; and more especially the conduct of the prisoner from first to last, with respect to the property found in his possession, and the charge brought against him of having obtained it by stealing.

It has been held that the possession of stolen property sixteen months (*m*), or six months (*n*), or three months (*o*) after it was lost, is not such a recent possession as to put the prisoner upon shewing how he came by it, unless there be evidence of something more than the mere fact of possession at such a distance of time after the loss.

The prisoner was charged in one count with stealing a riddle on Sept. 20, 1862, and in another with stealing five shovels on Jan. 16, 1863, the

(*i*) R. *v.* Yend, 6 C. & P. 176, and MSS. C. S. G.

(*j*) R. *v.* Fellows, MSS. C. S. G. Stafford Sum. Ass. 1830, Bosanquet, J.

(*k*) 2 East, P. C. 656. Phill. Evid. 168 (7th ed.). See R. *v.* Langmead, L. & C. 427; and the other cases cited in the chapter on *receiving stolen goods* (*post*, p. 1465).

(*l*) Hale (2 H. P. C. 289) mentions a case, which he says was tried before a very learned and wary judge where a man was condemned and executed for horse stealing, upon proof of his having been apprehended with the horse shortly after it was stolen; and afterwards it came out that the real thief being closely pursued, had overtaken the poor man upon the road, and asked him to walk the horse for him while he turned aside upon a necessary occasion, upon which the thief made his escape, and the man was apprehended with the horse. And it is probable that, upon this rule, receivers of stolen goods are frequently convicted of stealing them.

(*m*) Anon., 2 C. & P. 459, Bayley, J. It is not stated what the goods were.

(*n*) R. *v.* Cooper, 3 C. & K. 318, Maule, J. (possession of a horse). R. *v.* Harris, 8 Cox, 333, Channell, B. (possession of a sheep). The prisoner made contradictory statements when it was found. R. *v.* Hall, 1 Cox, 231 (a shirt), Pollock, C.B., and Coleridge, J.

(*o*) R. *v.* Adams, 3 C. & P. 600, Parke, J. The goods were an axe, a saw, and a mattock. In R. *v.* Burke, C. C. A. May 27, 1909, the Court held that possession after 150 days of a stolen typewriter was sufficient to create a presumption of guilt. Cf. R. *v.* O'Sullivan, 1 Cr. App. R. 35.

property of his masters. He had been in their employ some years; the riddle and shovels were found in his possession on Jan. 21, 1863, the riddle in his back yard, one shovel in his coal-house, another in his garden covered with ashes, and three others in a distant pigsty of the prisoner's, and a witness proved that in the beginning of January the prisoner brought some tools to his yard where the pigsty was, and stated he had brought them to put at the top of the pigsty to be out of the way. The brand mark had been erased from some of the shovels, and the prisoner's initials substituted. The prosecutors' foreman stated that it was impossible to say when the articles were taken; but a witness had seen a riddle similar to the one in question on the prosecutors' premises in the summer of 1862. It was objected that the riddle not being proved to have been in the possession of the prosecutors for upwards of eighteen months, and the shovels for not less than eight months, there was no sufficiently recent possession by the prisoner proved. The objection was overruled, and, on a case reserved, it was held that it was rightly overruled (*p*).

Upon an indictment for stealing two ends of woollen cloth, which were about twenty yards each in length; it appeared that the cloth was missed on Jan. 23, and found in the prisoner's possession in March following. It was submitted that the length of time since the loss was so great, that no presumption of guilt was raised against the prisoner by the possession of it. Patteson, J., said, 'I think the length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time, but here that is not so: it is a question for the jury' (*q*).

A knife, candlestick, watch, eyeglass, and muffineer were burglariously stolen on March 27, 1843, and all found in the prisoner's house on March 18, 1844, when he stated that he had had some of them in his possession more than a year. Tindal, C.J., told the jury that, 'If there had been nothing found but the knife, as that might change hands frequently, it would be too strong to infer that the prisoner must have been the thief; a small thing that would change hands very easily would be too little after so long a time: but then again it cannot be concealed that if, instead of one, there are several articles that are not likely to have changed from hand to hand, and then to have come together into the custody of the same person, that takes off from the effect that would be produced by the lapse of time' (*r*).

Where on an indictment for stealing two post-letters, containing a bank note for £500 and a Crystal Palace dividend warrant, it appeared that the prisoner was a letter-sorter and letter-carrier in the London Post Office, and that he had been employed as a sorter on Jan. 17, 1861, in sorting letters for the East Central District, and that a bank note for £500 had been sent with the warrant specified in the indictment from Huddersfield to a firm in the East Central Division, in a letter which ought to have arrived on the 17th in London, but the letter was never delivered. In June, 1862, whilst he was still a sorter of letters, the prisoner was apprehended on another charge of abstracting other notes from letters, and asked if he had any other notes at home, and he replied he had

(*p*) R. *v.* Knight, L. & C. 378. See also R. *v.* Cockin, 2 Lew. 235.

(*q*) R. *v.* Partridge, 7 C. & P. 551.

(*r*) R. *v.* Dovey, Worcester Sum. Ass. 1844, MS. C. S. G.

one for £500. The note was found, and on its being produced, the prisoner said that he had picked it up on Finsbury Pavement, in a pocket-book, ten months before, and in his defence he repeated that statement, and added that he had kept it all this time in expectation of seeing a reward offered for it. Bramwell, B., told the jury that 'the possession of stolen property shortly after it has been stolen is strong evidence in the absence of explanation, against the person charged; but here that is not the case; for the note was lost many months before, and although, no doubt, the prisoner had had the note for months in his possession, yet it must be remembered that he volunteered the statement that he had found it in a pocket-book at the spot mentioned. You may have a shrewd suspicion as to how he became possessed of it, but suspicion is not sufficient to convict. If you only entertain a suspicion, acquit the prisoner' (*s*).

On an indictment for stealing a beetle-head, it appeared that the prosecutor had not seen it for fifteen months before it was missed and traced to the possession of the prisoner, who claimed it as his own property and said he had bought it eight years ago at a sale. It was contended that the time was too long to make it necessary for the prisoner to account for the possession. Alderson, B.: 'I would so direct the jury but for the statement of the prisoner, who, in giving an account of how he became possessed of the article, tells a lie, if it be the property of the prosecutor. If he had rested his case upon the position you now take for him, when the property was found and claimed by the prosecutor, he would have been exempt from the charge of stealing it, on the ground stated by you. He would then have admitted the beetle to be the property of the prosecutor; but he denies that by his statement, while he at the same time admits that he had this thing in his possession at a time immediately after its loss, and therefore there is a recent possession.' And the jury were told that, 'If the prosecutor should satisfy the jury that the beetle was his, then the statement of the prisoner, accounting for his possession of it, must be false, and he must be presumed to have stolen it, though it was not found in his possession for fifteen months after the loss. The question, therefore, was simply one of identity (*t*). It is also to be carefully observed that the mere finding of stolen goods in the house of the prisoner where there are other inmates of the house capable of stealing the property is insufficient evidence to prove a *possession* by the prisoner' (*u*).

Where goods were found in the house of a blind man, and the prisoner, his wife, said she had purchased them a long time before: Erle, J., held that as she said she bought the goods, it must be left to the jury to decide whether the goods were in her possession without the

(*s*) R. *v.* Smith, 3 F. & F. 123.

(*t*) R. *v.* Evans, 2 Cox, 270.

(*u*) 2 Stark. Ev. 614, note (*g*) (3rd ed.). 'It must be observed, however, that learned judges have generally considered such evidence as sufficient to call upon the occupier of the house to account for the possession; on the ground that the house being in his occupation, the property was found in his possession, and there seems good reason for this course, because as master of the house, he must be presumed to have the control over it, and to permit nothing to come into it without his sanction; at the same time it is for the jury, under all the circumstances, to say whether the master stole the property, or any of the other inmates of the house.' C. S. G. See R. *v.* Savage, 70 J. P. 36, *post*, p. 1469, note (*w*). R. *v.* Green, 1 Cr. App. R. 124. R. *v.* Orris, 73 J. P. 15.

consent and control of her husband, and if they were, the jury ought to find her guilty (*v*).

Where two brothers, aged fourteen and eleven, were found, the night after a burglary, concealed in a corn-bin in an open gig-house, and some of the property was found hidden in some rubbish near the bin, and some more in a loft over the gig-house, and the boys said they went there to sleep out of the cold, and they did not make any claim to the property; Pollock, C.B., held that, though there might be grounds of suspicion, there was no possession of the property by the prisoners proved (*w*).

Identity of Property.—Where all that can be proved concerning property found in the possession of a supposed thief is that it is *of the same kind* as that which has been lost, this will not in general be deemed sufficient evidence of its having been feloniously obtained, and some proof of identity will be required (*ww*). But where the fact is very recent, and the property consists of articles, the identity of which is not capable of strict proof, from the nature of them, the conclusion may be drawn that the property is the same, unless the prisoner can prove the contrary (*x*). Thus, if a man be found coming out of another's barn, and upon his being searched corn be found upon him, of the same kind as that in the barn, the evidence of the guilt will be pregnant; and cases have frequently occurred where persons employed in carrying sugar and other articles from ships and wharfs have been convicted of larceny, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could not otherwise be proved (*y*).

Where the prosecutor kept a large toy-shop, and the prisoner, a little boy, came into the shop dressed in a smock frock, and after remaining there some time, from suspicion excited, he was searched, and under his smock frock were found concealed a doll, six toy houses, and such other things, and the prosecutor swore that he believed the six toy houses to be his property, because they exactly resembled other toy houses of the same sort which he had in his shop, and he gave the same evidence with regard to all the other articles except the doll, and he swore that the doll had been his, as he found upon it his private mark; but he could not say that he had not sold it, and he had not missed, and could not miss, from the nature of the stock, any of the articles which the prisoner was charged with stealing. Erle, J., directed an acquittal, saying: 'It seems to me that you have failed to establish in this case the *corpus delicti*. It is true the prosecutor swears that the doll was once his, but he cannot state that it was taken from him; and, for aught that appears to the contrary, the prisoner may have come by it in an honest manner' (*z*).

(*v*) R. *v.* Banks, 1 Cox, 238.

(*w*) R. *v.* Coots, 2 Cox, 188. See also R. *v.* Samways, Dears. 371. R. *v.* Howells, 1 Cr. App. R. 197. R. *v.* Pearson, No. 1, 72 J. P. 449.

(*ww*) R. *v.* Pearson, *ubi sup.*

(*x*) 2 East, P. C. 656.

(*y*) Id. 657.

(*z*) R. *v.* Dredge, 1 Cox, 235. The report of this case is anything but satisfactory, and in R. *v.* Burton, *infra*, Maule, J., stated that the boy asserted that the doll was his own, and conducted himself like an honest person, of which there is no mention in this report, which therefore cannot be considered as accurate, and certainly does not warrant the marginal note that 'in a charge of larceny, if the prosecutor cannot swear to the loss of the article, said to be stolen, the prisoner must be acquitted.' In R. *v.* Burton, *infra*, Maule, J., said, 'The offence with which

Upon an indictment for stealing a quantity of pepper it appeared that the prisoner was seen coming out of the lower room of a warehouse in the London Docks, in the floor above which a large quantity of pepper was deposited, some in bags and some loose on the floor. The person having the charge of the warehouse stopped him, and said, 'I think there is something wrong about you.' The prisoner said, 'I hope you will not be hard with me,' and threw a quantity of pepper out of his pocket on the ground. The witness stated that no pepper was missed, and he could not say from the large quantity of pepper that was in the warehouse that any had been stolen; but the pepper found on the prisoner was of the like description with the pepper in the warehouse. The prisoner had no business in the warehouse. It was contended that the *corpus delicti* must be proved; and that there was no evidence to go to the jury; but the objection was overruled, and, upon a case reserved, it was held that the conviction was right. The offence must be proved; but there is no authority that the *corpus delicti* must be expressly proved in every case. The distinction between this case and R. *v.* Dredge (*a*) is plain. There the little boy asserted that the doll was his own, and conducted himself like an honest person; here the prisoner did not say the pepper was his own property, but 'Don't be hard on me' (*b*).

So where the prisoner was indicted for stealing coal, and it appeared that it was his duty to convey a ton of coal from his master's premises to those of a customer, and he left with the coals in a cart at 12 o'clock and delivered them at 1 o'clock; and at 12½ o'clock he sold 190 lb.; but there was no evidence of the quantity delivered at the customer's being less than a ton, or of any other coal having been missed. Willes, J., left the question to the jury whether the 190 lb. weight sold by the prisoner were not part of the ton (*c*).

Value.—Evidence must be given that the property stolen is of some *value*, as if it be of no value, it is not the subject of larceny (*d*). But property may be of value to the owner though not of general value (*e*).

Where the punishment of larceny is aggravated by the amount of the property stolen, as in the case of stealing in a dwelling-house to the value of £5, it must appear that the property, the value of which is taken into computation, was all stolen at the same time. For, in fact, where things are stolen at different times, there are different acts of stealing (*f*). But it seems that if the property of several persons lying together in one

the prisoner is charged must be proved, and that involves the necessity of proving that the prosecutor's goods have been taken; but why is that to be differently proved from the rest of the case? If the circumstances satisfy the jury, what rule is there which renders some more positive and direct proof necessary?' In these cases, it is plain, the proper course is to leave the evidence to the jury. C. S. G. See also R. *v.* Girod, 70 J. P. 514.

(*a*) *Supra.*

(*b*) R. *v.* Burton, Dears. 282, 23 L. J. M. C. 52. Maule, J., said, 'If a man go into the London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed.'

(*c*) R. *v.* Hooper, 1 F. & F. 85. R. *v.* Mockford, 11 Cox, 16.

(*d*) R. *v.* Phipoe, 2 East, P. C. 599, *ante*, p. 1128. Com. Dig. Ind. G. 2 Stark. Cr. Pl. 450.

(*e*) See R. *v.* Clarke, 2 Leach, 1036, *ante*, p. 1269. R. *v.* Bingley, 5 C. & P. 602. R. *v.* Morris, 9 C. & P. 349.

(*f*) 1 Hawk. c. 33, ss. 50, 51. 2 East, P. C. 740. R. *v.* Petrie, 1 Leach, 294. R. *v.* Farley, 2 East, P. C. 740.

bundle or chest upon the same table, or even in the same house, is stolen together at one time, the value of the whole may be put together, for such stealing is one entire felony (*g*). And where a servant steals several articles at different times, but carries them out of his master's house at the same time, he may be convicted of stealing in a dwelling-house to the value of £5, if all the articles amount to that value, although he never took to that amount at any one time (*h*).

Sect. XII.—Punishment.

Punishment.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 4 (*hh*), 'Whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the Court, to be kept in penal servitude (*i*) . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping.'

By sect. 98, 'In case of every felony punishable under this Act every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except only a receiver of stolen property) shall, on conviction, be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . ; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be indicted and punished as a principal offender' (*ii*).

As to the punishment for larceny after a previous conviction for felony, &c., see ss. 7, 8, and 9, of this Act, *ante*, Vol. I. p. 247; and see in general as to punishment for a subsequent felony, and as to the form of the indictment and proof of the previous conviction, see s. 116, *post*, p. 1958.

Sect. XIII.—Restitution of Stolen Property.

By sect. 100 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), 'If any person guilty (*j*) of any such felony or misdemeanor as is mentioned in this Act (*k*), in stealing, taking, obtaining, *extorting*, *embezzling*, converting, *or disposing of*, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted (*j*) for such offence, by or on behalf of the owner of the property, or his executor or

(*g*) 1 Hale, 531. 2 East, P. C. 740.

(*h*) R. *v.* Jones, 4 C. & P. 217, and R. *v.* Hamilton, 1 Leach, 348, *ante*, p. 1117.

(*hh*) Taken from 7 & 8 Geo. IV. c. 29, ss. 3, 4 (E); 9 Geo. IV. c. 55, ss. 3, 4 (I); and 12 & 13 Vict. c. 11, s. 1. The words omitted were repealed in 1892 (S. L. R.).

(*i*) For not more than five nor less than three years, or to imprisonment with or without hard labour for not over two years. *Vide* 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212.

(*ii*) As to accessories, *vide ante*, Vol. i. pp. 104 *et seq.*

(*j*) As to the power of magistrates to order restitution, see 2 & 3 Vict. c. 71, s. 29; 35 & 36 Vict. c. 93, s. 30; 42 & 43 Vict. c. 49, s. 44; 60 & 61 Vict. c. 30. R. *v.* D'Eyncourt, 21 Q.B.D. 109. Leicester *v.* Cherryman [1907], 2 K.B. 101; 76 L. J. K.B. 678.

(*k*) In R. *v.* Jones, 14 Cox, 528, Fry, J., said that he had no power to order restitution of the proceeds of a theft from the post-office, where the prisoner was convicted on indictment under the Post Office Offences Act, 1836, now superseded by 8 Edw. VII. c. 48, *post*, p. 1427.

administrator (*kk*), and convicted thereof, in such case the property (*l*) shall be restored to the owner or his representative; and in every case in this section aforesaid the Court before whom (*m*) any person shall be tried for any such felony or misdemeanor shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner (*n*): Provided, that if it shall appear before any award or order made that any valuable security shall have been *bona fide* paid or discharged (*o*) by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bona fide* taken or received, by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, *extorted, embezzled,* converted, *or disposed of,* in such case the Court shall not award or order the restitution of such security; *provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent, intrusted with the possession of goods, or documents of title to goods, for any misdemeanor against this Act*' (*p*).

The order may not direct restitution both of the stolen goods and of the proceeds (*q*).

(*kk*) As to public prosecution, *vide post*, p. 1924.

(*l*) If a current coin which has been stolen is sold as a curiosity by the thief, who is afterwards prosecuted to conviction, an order of restitution of the coin may be made against the purchaser, but it seems that if a current coin is dealt with and transferred, as such, by a thief, an order of restitution cannot be made against a person who in good faith receives it. Moss *v.* Hancock [1899], 2 Q.B. 111; 68 L. J. Q.B. 657.

(*m*) The High Court (K.B.D.) has no power to order the writ of restitution; R. *v.* Mayor, &c., of London, L. R. 4 Q.B. 371. S. C. as Walker *v.* London (Mayor of), 11 Cox, 280; 38 L. J. M. C. 107. The Court of Criminal Appeal may by order annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and if varied, shall take effect as so varied. Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 6 (2). This provision is merely incidental to the appeal of the convicted person and gives no independent right of appeal to other persons against whom a restitution order has been made. R. *v.* Elliott [1908], 2 K.B. 454 (C. C. A.).

(*n*) The Court before making the order can hear counsel on behalf of the persons who are in possession of the property: R. *v.* Macklin, 5 Cox, 216. The order, if made by a Court of Assize (including the Central Criminal Court) is enforceable by attachment. See R. *v.* Wollez, 8 Cox, 337. Under sect. 1 of the Probation of Offenders Act, 1907, where a person is charged before a Court of Summary Jurisdiction with an offence punishable by such Court, and the Court thinks that the offence is proved, the Court may, under certain circumstances, either dismiss the information or charge, or discharge the offender to be of good behaviour and to appear for conviction, but sect. 1 (4) provides, 'Where an order under this section is made by a Court of Summary Jurisdiction, the order shall, for the purpose of revesting or restoring stolen property, and of enabling the Court to make orders as to the restitution or delivery of property to the owner and as to the payment of money upon or in connection with such restitution or delivery, have the like effect as a conviction.'

(*o*) *e.g.*, where a stolen Bank of England note has been paid and cancelled by the bank. R. *v.* Stanton, 7 C. & P. 431.

(*p*) Taken from 7 & 8 Geo. IV. c. 29, s. 57 (E); and 9 Geo. IV. c. 55, s. 50 (I). It is extended so as to include cases where property has been extorted, embezzled, or disposed of within the meaning of any of the sections of this Act. The last proviso relates to sects. 77–86 of the Larceny Act, 1861, and 1 Edw. VII. c. 10 (*post*, pp. 1407 *et seq.*). See 52 & 53 Vict. c. 45, s. 8; 56 & 57 Vict. c. 71, s. 25. R. *v.* Brockwell, 69 J. P. Rep. 376. Oppenheimer *v.* Frazer [1907], 2 K.B. 50 (C. A.). A certain proviso only excepts prosecutions for misdemeanors from the operation of this section, and leaves all cases of felony within it. The proviso applies to the right to recover as well as to the summary restitution. Chichester *v.* Hill, 52 L. J.Q. B. 150.

(*q*) *Ex parte* Dettmer, 72 J. P. 513.

The above section is not intended to alter the civil rights of the parties but to benefit prosecutors by saving them from the necessity of bringing actions for the return of their property. The owner of goods within the section is entitled to sue for their return, apparently even when the magistrate has made an order for their restitution (*r*), upon terms of compensation.

By sect. 24 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), '(1) Where goods (*s*) have been stolen and the offender is prosecuted to conviction the property in the goods so stolen revests in the person who was the owner of the goods or his personal representative notwithstanding any intermediate dealing with them whether by sale in market overt or otherwise (*t*).

'(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods or his personal representative by reason only of the conviction of the offender' (*u*).

By sect. 6 of the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), 'The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the operation, in case of any such conviction, of the provisions of subsection (1) of section 24 of the Sale of Goods Act, 1893, as to the revesting of the property in stolen goods on conviction, shall (unless the Court before whom the conviction takes place direct to the contrary in any case in which, in their opinion, the title to the property is not in dispute) be suspended (A) in any case until the expiration of ten days after the date of the conviction; and (B) in any case where notice to appeal or leave to appeal is given within ten days after the date of the conviction, until the determination of the appeal; and in cases where the operation of any such order, or the operation of the said provisions is suspended until the determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal (*uu*). Provision may be made by rules of Court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.' (*Vide post*, p. 2015.)

By sect. 30 of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), '. . .

(*r*) Leicester *v.* Cherryman [1907], 2 K.B. 101; 76 L. J. K.B. 678.

(*s*) By sect. 62 (1), 'In this Act unless the context or subject-matter otherwise requires . . . "goods" include all chattels personal other than things in action and *money*.'

(*t*) This enacts the common law as laid down in Cundy *v.* Lindsay, 3 App. Cas. 459.

(*u*) This section limits revesting to larceny, and overrides Bentley *v.* Vilmont, 12 App. Cas. 471. If the goods were obtained in such a manner as to amount in law to larceny the Court can make an order of restitution, although the person obtaining the goods has only been convicted of obtaining them by false pretences. R. *v.* Walker, 65 J. P. 729, Fulton, Recorder. See R. *v.* Bianci, 67 J. P. 443. In R. *v.* George, 65 J. P. 729, Bosanquet, Common Serjeant, after consulting Bigham, J., and Fulton, Recorder, held that where a person had been convicted of obtaining goods by false pretences or other wrongful means, not amounting in law to larceny, and the person defrauded had disaffirmed the transaction, and the goods or the proceeds thereof were in the possession of the defendant, the Court could make an order of restitution. See R. *v.* Stonecliffe, 11 Cox, 318. R. *v.* Goldsmith, 12 Cox, 594, decided before the Sale of Goods Act, 1893, and R. *v.* De Veaux, 2 Leach, 585; 2 East, P. C. 789, before the Larceny Act, 1861.

(*uu*) See R. *v.* Joyce, 72 J. P. 483: R. *v.* Osborne, ibid. 473.

(2) if any person is convicted in any Court of feloniously taking or fraudulently obtaining any goods and chattels, and it appears to the Court that the same have been pawned with a pawnbroker, . . . the Court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the Court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting.'

Restitution of the Proceeds of Stolen Property.—By sect. 1 of the Larceny Act, 1861, 'property' includes 'not only such property as shall have been originally in the possession or under the control of any party but also any property into or for which the same may have been converted or exchanged, and any thing acquired by such conversion or exchange whether immediately or otherwise.'

One stole cattle and sold them in open market at Coventry, and was immediately apprehended by the sheriffs of Coventry, and they seized the money, and the thief was hanged at the suit of the owner of the cattle; and by the Court; the party shall have restitution of the money, notwithstanding the words of 21 Hen. VIII. c. 11, 'the goods stolen,' &c.; and Crooke, J., said that this was usual at Newgate (*v*). And where a servant took gold from his master, and changed it into silver, it was held that the master should have restitution of the silver by 21 Hen. VIII. c. 11 (*w*).

Where a prisoner was convicted of stealing a bill of exchange for £100, and a considerable sum of money in specie, and the evidence tended to shew that he must have purchased a horse with part of the proceeds of the bill, the Court ordered the horse to be delivered to the prosecutor (*x*). It has been held that the Court has jurisdiction under sect. 100 of the Larceny Act, 1861, to entertain an application for the restitution of the proceeds of the property as well as the property itself, but such an application ought only to be granted if the proceeds are in the hands of the convict, or of an agent who holds them for him (*y*).

Mode of Proceeding where the Prisoner pleads Guilty.—A prisoner pleaded guilty to several indictments charging him with stealing a large amount of property, and an order was applied for upon several pawnbrokers to deliver up to the prosecutor the goods which had been pledged with them. It was objected for the pawnbrokers that it might be that the property had never belonged to the prosecutor; or, if it had, that the prisoner had been his agent, and had pledged the goods under circumstances that did not amount to felony, and that the prisoner's confession was no evidence against the pawnbrokers. Alderson, B.: 'I certainly think that the pawnbrokers should not be absolutely bound by the prisoner's confession. It ought not to affect them. But, on the other hand, the Act (*z*) prescribes that where the person robbed has prosecuted

(*v*) Haris's case, Noy, 128; 74 E. R. 1092.

(*w*) Hanberrie's case, cited in Holiday *v.* Hicks, Cro. El. 661; 78 E. R. 900.

(*x*) R. *v.* Powell, 7 C. & P. 640. The Common Serjeant, after consulting Gurney, B., and Williams, J.

(*y*) R. *v.* Central Criminal Court. 17 Q.B.D. 598; 18 Q.B.D. 314.

(*z*) 7 & 8 Geo. IV. c. 29, s. 57. See *ante*, p. 1313, note (*hh*).

the thief to conviction, he shall have an order from the Court that his goods be restored to him. Would not the better course be to bring the goods into Court that they may be identified, and that affidavits should be made on both sides of any matters the parties may think it necessary to state? We should then have an opportunity of forming our judgment upon the facts.' It was suggested that the depositions would disclose what the facts were. Alderson, B.: 'But then even the statement in the depositions would not be conclusive against third persons.' The next day Alderson, B., said: 'We have looked over the depositions and are satisfied that this is not a case within the Factors Act (*a*), that the prisoner was not an agent, and that in making away with the property he was clearly guilty of felony. We shall, therefore, make the order for restitution, subject, of course, to the identity of the goods being established' (*b*).

Judge has Power only as regards Stolen Property and its Proceeds.—A judge has no power either at common law or by statute (*bb*) to direct the disposal of property in the possession of a convicted felon, not belonging to, or not being the proceeds of property that belonged to, the prosecutor. Where, therefore, an order stated that the prisoner had been convicted of stealing a large quantity of gold, and that certain Turkish bonds were found in his possession, and that one-sixth of these bonds had been bought with money produced by the sale of the property so stolen, and that the other five-sixths were held by a trustee for a woman and her child, and it was ordered that the bonds should be delivered to the prosecutor's solicitor to the use of the prosecutor as to one-sixth, and as to the other five-sixths to be settled on the woman and child, it was held that the order was bad as to the five-sixths: for the judges had no power, either by statute or at common law, to order any disposal of these portions of the property (*c*).

Stolen Goods sold in 'Market Overt.'—The order of restitution is cumulative to the ordinary remedy by action, and is not a condition precedent to such remedy, and the only consequence of the Court refusing an order is, to leave the owner to the ordinary remedy by action; and in such case the owner may maintain trover for the stolen goods after the conviction of the thief; for though the goods have been sold in market overt, the property in them is revested in the owner on conviction of the thief (*d*).

(*a*) 5 & 6 Vict. c. 39 (rep.). See now the Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 8, 9; and s. 25 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*b*) R. *v.* Macklin, 5 Cox, 216, Alderson, B., and Martin, B. It was urged that a writ of restitution should be awarded, and then the whole matter might be inquired into. Alderson, B., said, that the only case he could find of such a writ was Burgess *v.* Coney, 1 Trem. Pl. C. 315, and he saw no necessity for it in this case. It seems that the order for restitution will be limited to the property identified at the trial, as being the subject of the indictment. R. *v.* Goldsmith, 12 Cox, 594.

(*bb*) Except under 33 & 34 Vict. c. 23, s. 4, *ante*, Vol. i. p. 250.

(*c*) R. *v.* City of London, 1 E. B. & E. 509. See R. *v.* Pierce, 7 Cox, 206, which is a report of the making of the order in question.

(*d*) 56 & 57 Vict. c. 71, s. 24 (1) (*ante*, p. 1315), embodying the law laid down in Scattergood *v.* Sylvester, 15 Q.B. 506. R. *v.* Stancliffe, 11 Cox, 318, where goods had been pawned to a *bona fide* pawnee. Walker *v.* Matthews, 8 Q.B.D. 109. Horwood *v.* Smith, 2 T. R. 750. As to the meaning of market overt, see Hargreave *v.* Spink [1892], 1 Q.B. 25.

Where Pawnbroker has Advanced Money on Goods.—It was held in Ireland on 9 Geo. IV. c. 55, s. 50 (*e*), that the prosecutor ought not to be ordered to pay a pawnbroker the money advanced by him on stolen goods which are ordered to be restored to the owner (*f*).

Restitution when Goods have been Sold and Money found on the Prisoner.—By the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), sect. 9, where any prisoner shall be convicted, either summarily or otherwise, of larceny or other offence, which includes the stealing of any property, and it shall appear to the Court by the evidence that the prisoner has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any monies have been taken from the prisoner on his apprehension, it shall be lawful for the Court, on the application of such purchaser, and on the restitution of the stolen property to the prosecutor, to order that out of such monies a sum not exceeding the amount of the proceeds of the said sale be delivered to the said purchaser.

Factors Act.—The appellant was the owner of a piano of which he had given possession to B. under a hire purchase agreement. Under this agreement B. was to pay a rent or hire instalment each month, B. might terminate the hiring by delivery of the piano to the appellant, B. being liable for any arrears of rent. After the payment by B. of a fixed number of monthly instalments the piano became B.'s property, but till such full payment had been made the piano remained the property of the appellant. After receiving the piano and paying some of the instalments B. improperly and without the consent of the appellant pledged the piano with the respondents. The House of Lords held that upon the true construction of the agreement B. was under no obligation to buy but had an option either to return the piano or to become its owner by payment in full, that by putting it out of his power to return the piano he had not become bound to buy and therefore that he had not 'agreed to buy goods' within the meaning of the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 9, and that the appellant was entitled to recover the piano from the pawnbroker (*g*).

A mercantile agent who obtains possession of goods from the owner by larceny by a trick is not in possession of them with the 'consent' of the owner within sect. 2 (1) of the Factors Act, 1889, or sect. 25 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) (*h*).

(*e*) *Vide ante*, p. 1317, note (*d*).

(*f*) R. *v.* Sargent, 5 Cox, 499. See 35 & 36 Vict. c. 93, s. 30, *ante*, p. 1316. The refusal of a Court before which a thief had been convicted to make an order of restitution of pawned stolen goods, under sect. 30 of 35 & 36 Vict. c. 93, is no bar to the exercise in the metropolis of the Summary Jurisdiction Act, under sect. 40 of 2 & 3 Vict. c. 71. *Ex parte* Davison, 60 J. P. 608.

(*g*) Helby *v.* Matthews [1895], App. Cas. 471. Sect. 9 provides that 'Where a person having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods . . . the delivery or transfer by that person or by a mercantile agent acting for him of the goods . . . under any sale, pledge, or other disposition thereof . . . to any person receiving the same in good faith and without notice of any lien or other right in the original seller in respect of the goods, shall have the same effect as if the person making the delivery . . . were a mercantile agent in possession of the goods . . . with the consent of the owner.' (See sect. 2.) See also Payne *v.* Wilson [1895], 1 Q.B. 653, 2 Q.B. 537, and Lee *v.* Butler [1893], 2 Q.B. 318, where there was an agreement to buy and as soon as the agreement was entered into, there was an absolute obligation to pay the instalments, and R. *v.* Wollez, 8 Cox, 337.

(*h*) Oppenheimer *v.* Frazer [1907], 2 K.B. 50.

Goods on Sale or Return.—Where a person receives goods on sale or return and pledges them, such person thereby does an act 'adopting the transaction' within sect. 18, 4, of the Sale of Goods Act, 1893, and the property in the goods passes to him and the original owner cannot recover them from the person with whom they are pledged (*i*).

Property in Possession of Police.—By the Police (Property) Act, 1897, sect. 1 (1), 'Where any property has come into the possession of the police in connection with any criminal charge or under [sect. 26 of the Metropolitan Police Act, 1839, sect. 48 of 2 & 3 Vict. c. 94] sect. 103 of the Larceny Act, 1861, or sect. 34 of the Pawnbrokers Act, 1872, a Court of Summary Jurisdiction may, on the application either by an officer of police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrate or Court to be the owner thereof, or if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or Court may seem meet. (2) An order under this section shall not affect the right of any person to take within six months from the date of the order legal proceedings against any person in possession of property delivered by virtue of the order for the recovery of the property, but on the expiration of these six months the right shall cease.'

The plaintiff bought a gig, which was afterwards stolen from him and found in possession of B., who was therefore prosecuted for larceny and acquitted. The solicitors of B. and of the plaintiff each wrote to the police, in whose custody the gig was, and claimed the gig. The police handed it to B. It was held that the plaintiff could maintain an action of trover against the police (*j*).

(*i*) Kirkham *v.* Attenborough [1897], 1 Q.B. 201. The above r. 4 provides that 'When goods are delivered to the buyer on "approval" or "on sale or return" or other similar terms the property therein passes to the buyer, (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed on the expiration of a reasonable time. What is a reasonable time is a question of fact.' This rule is only a *prima facie* rule, and prevails only when a different intention does not appear. See Weiner *v.* Gill [1905], 2 K.B. 172: 74 L. J. K. B. 845.

(*j*) Winter *v.* Bancks, 19 Cox, 687: 65 J. P. 468.

CANADIAN NOTES.

LARCENY.

Definition of Theft.—See Code sec. 344.

The fraudulent conversion and removal of many things which would not be the subject of larceny at common law is now punishable as theft under secs. 344-348 inclusive.

Things Capable of Being Stolen.—See Code secs. 345, 346.

Theft Defined.—See Code sec. 347.

The abandonment of the term "larceny" in Canadian jurisprudence on the enactment of the Criminal Code of Canada subsequent to an extradition convention including such offence, does not affect the liability to extradition of a person charged with what was larceny at common law and is by the Criminal Code still an offence in Canada under the name of "theft" or "stealing." Re Gross (1898), 2 Can. Cr. Cas. 67 (Ont.).

The appropriation, for purposes of loading and shipment, of a railway car intended by the railway company for another person who had a prior statutory right to be supplied with a car, is not a fraudulent taking or conversion of the car from such other person under Code sec. 347, if the latter had not received notice from the railway company that the car had been assigned to him. An applicant for a railway car under the Manitoba Grain Act (Can.) does not acquire a temporary "special property or interest" in the car within Code sec. 347(1*a*) until he is informed of its assignment to him. The King v. McElroy, 11 Can. Cr. Cas. 34.

This section, in defining theft, does not limit the offence to the mere stealing of the right of ownership, but extends to the stealing of any special right of property or interest in it. R. v. Tessier (1900), 5 Can. Cr. Cas. 73, 78 (Que.).

An unqualified instruction to the jury on a prosecution for theft against the finder of goods, that the pledging of same by him constitutes theft, is a misdirection entitling the accused to a new trial. Whether or not the conversion by the finder is theft depends upon the attendant circumstances, such as the class of goods, the place of finding, the interval between the finding and conversion, and the probability of being able to discover the owner. R. v. Slavin (1900), 7 Can. Cr. Cas. 175, 35 N.B.R. 388.

Although the mere fact of possession may not suffice to raise a presumption of guilt by reason of lapse of time, it may be considered when combined with other circumstances, such as a misrepresentation by the prisoner as to his occupation, or a sale of the stolen articles at price much below their value. R. v. Starr (1876), 40 U.C.Q.B. 268.

Upon a charge of theft of merchandise in bulk from a store, evidence of the finding at the defendant's house of the stolen goods and of false keys fitting the store doors, and of the fact that the goods were in a place exposed for sale at the time of the alleged theft and had not been sold, is sufficient to place the onus upon the defendant of accounting for his possession. It is not necessary for the Crown under such circumstances to prove that the goods could not have been stolen by some one else while exposed for sale, or that the storekeeper had not given them away. A proper instruction to the jury in such a case is to decide firstly whether the goods were stolen; if so, then to decide whether the prisoner's possession was exclusive and, if they found affirmatively on both questions, they might convict unless the accused accounted for the possession. R. v. Theriault (1904), 8 Can. Cr. Cas. 460, 11 B.C.R. 117.

Where a person charged with a theft has at the time of the finding of the goods in his possession given a reasonable account of the manner in which he became possessed of them, the presumption arising from his recent possession is rebutted, but semble, the same result does not of necessity follow from a like statement first made by the accused in his evidence given on his own behalf at the trial. R. v. McKay (1900), 6 Can. Cr. Cas. 151.

"If a person in whose possession stolen property is found give a reasonable account of how he came by it, and refer to some known person as the person from whom he received it, the magistrate should send for that person and examine him, as it may be that his statement may entirely exonerate the accused person and put an end to the charge; and it also very often may be that the person thus referred to would become a very important witness for the prosecution by proving, in addition to the prisoner's possession of the stolen property, that he has been giving a false account of how he came by it. R. v. McKay (1900), 6 Can. Cr. Cas. 151.

Section 993 of the Criminal Code provides that when proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen: Provided, that not less than three days' notice

in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession; and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen.

On a charge of theft, where the circumstances were such as to warrant the jury in drawing an inference of guilt from the prisoner's possession of one of the stolen articles, the Judge's comment in his charge that, if the defendant's witness is disbelieved, the prisoner has not given a "satisfactory account" of how he came into possession of the article is not comment on the failure of the accused to give evidence prohibited by the Canada Evidence Act. The King v. Burdell, 10 Can. Cr. Cas. 365.

To demand and obtain possession of goods from a debtor for the purpose of holding them as security for a debt actually owing, is not a demand with menaces made with "intent to steal," although such possession is obtained by means of an unjustified threat of the debtor's arrest made by the creditor's agent without any honest belief that the debtor was liable to arrest. R. v. Lyon (1898), 2 Can. Cr. Cas. 242 (Ont.).

Evidence of other similar criminal acts may be relevant in charge of theft if it bears upon the question whether the taking was designed or accidental. R. v. Collyns (1898), 4 Can. Cr. Cas. 572. And see note under sec. 259 on the relevancy of other criminal acts to prove intent.

Where such evidence is relevant to the issue, it is not necessary for its admission in evidence that it should establish conclusively that the accused had been guilty of such other criminal acts, but it will be received if it tends to shew that the accused had been so guilty. R. v. Collyns, 4 Can. Cr. Cas. 572.

Where the prisoner, being the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to the branch store without charging them or keeping the usual check on them which his employers' system required, and had the goods delivered to a customer of his branch without charging the customer, the prisoner stating that for the benefit of his employers he had merely postponed the charging of the goods in order to give the customer a longer credit than was customary and to so retain the customer's trade; these facts will constitute "theft" under the Code if credence is not given to the prisoner's explanation. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.). The goods having been taken by the prisoner with knowledge that his doing so was contrary to the employer's rules and regulations and with intent to deprive the owner thereof, the taking was fraudulent and without colour of right within Code sec. 347. *Ibid.*

Attempt to Steal.—Section 72 declares that one who, having an intent to commit an offence, does an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended, whether under the circumstances it was possible to commit such offence or not. If, with an intent to steal, the accused puts his hand into an empty pocket, he may be convicted of an attempt to steal, although he could not have committed the complete offence of theft. R. v. Ring (1892), 17 Cox C.C. 491; R. v. Brown (1890), 24 Q.B.D. 357; overruling R. v. Collins (1864), L. & C. 471, *contra*. See as to attempts to commit indictable offences secs. 570, 571.

Embezzlement.—The term "embezzlement" is commonly used to define that class of theft, the essential elements of which are (1) that the defendant was an agent, clerk, servant, or bailee; (2) that by virtue of his position or employment he received the money or property of his principal; (3) that he converted it to his own use intending to steal it. Under the Code the word embezzlement is no longer used to distinguish that class of theft but special provision is made defining theft by agent (sec. 355) misappropriation of property held in trust (secs. 356 and 357) and providing varying maximum penalties for different classes of theft (secs. 358-388).

Extradition.—Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained; fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries, are extraditable offences under the Convention of 1889 with the United States of America.

Agent Pledging Goods, when not Theft.—See Code sec. 348.

Servant not Guilty of Theft, when.—See Code sec. 348.

Instances of Theft.

Theft of Oysters, etc.—See Code sec. 371, 346.

An indictment under sec. (371) shall be deemed sufficient if the oyster bed, laying or fishery is described by name or otherwise, without stating the name to be in any particular country or place. Section 864(*e*).

Stealing from the Person.—See Code sec. 379.

The word "theft" in sec. 773 includes the offence of stealing from the person. R. v. Conlin, 1 Can. Cr. Cas. 41.

Theft from the person is an indictable offence, although the amount is less than $10, and notwithstanding that the case might have been summarily tried by a magistrate with the prisoner's consent. R. v. Conlin (1897), 1 Can. Cr. Cas. 41.

If in such case the prisoner consents to be tried by a police magistrate having the extended powers of a Court of General Sessions,

where such consent is given, he is liable to sentence for the more onerous punishment which the General Sessions might impose in excess of the powers of a "magistrate" as the term is used in the summary trials part, sec. 771. *Ibid.* But if charged before a magistrate not having the extended powers of sec. 777 the punishment is governed by sec. 780.

Where in a charge of pocket-picking the evidence in the opinion of the Court of Appeal goes no further than to support a reasonable surmise or suspicion that the accused was guilty of the offence and lacks the material ingredients necessary to establish guilt, the conviction will be quashed upon appeal under sec. 1018. R. v. Windsor, 3 Can. Cr. Cas. 215 (Man.).

Stealing in Dwelling-house.—See Code secs. 380, 381.

Stealing by Pick-locks, etc.—See Code sec. 381.

If upon a summary trial for the theft of money from a locked box on a ship in port, effected by picking the lock, it is shewn that the accused, one of the ship's seamen, had access in common with the other seamen to the place where the box was kept, that shortly before the theft was committed he had borrowed a small sum of money on the plea that he had none, that shortly after the stolen money was missed he had considerably more money on him, that he had meanwhile received nothing in respect of wages, that on the money being missed he suggested that he should not be suspected as he had borrowed money from another party named, which latter statement was shewn to be untrue, such constitutes legal evidence to support a conviction. R. v. MacCaffery (1900), 4 Can. Cr. Cas. 193 (N.S.). If, however, the trial Judge in making his finding, bases the same upon the theory that, as a matter of law, it would be presumed that it was possible for him to shew how he had come by the money seen in his possession and that the onus was upon him to do so, such is an error in law entitling the accused to a new trial. *Ibid.*

Theft of Goods in and About a Railway.—See Code sec. 384.

A conviction for stealing "in or from" a building charges only one offence and is not, because of the disjunctive, void for duplicity and uncertainty. R. v. Patrick White (1901), 4 Can. Cr. Cas. 430, 34 N.S.R. 436.

Theft of Things not Otherwise Provided for.—Code sec. 386.

Code sec. 777, must first proceed with the charge, if for theft exceeding $10, as on a preliminary enquiry until it is ascertained whether or not the evidence for the prosecution is sufficient to put the accused on his trial. If the magistrate is then of opinion that the evidence for the prosecution is sufficient to put the accused on his trial, and that the case is a proper one to be disposed of summarily, he may proceed with a summary trial under Code sec. 782. R. v. Williams (1905), 10 Can. Cr. Cas. 330, 11 B.C.R. 351.

In R. v. Hayward (1902), 6 Can. Cr. Cas. 399, after the amendment now embodied in sec. 777(3) it was held by Sir John A. Boyd, president of the High Court (Ont.), that the punishment upon summary trial for the theft of property not exceeding $10 in value (and not being the offence of stealing from the person) is governed by Code secs. 773 and 780 and is therefore limited to six months' imprisonment; and that in view of the marginal note to Code sec. 777, *i.e.*, "summary trial in certain other cases," sec. 777 should be considered as applying only to cases not specifically mentioned in sec. 773.

The Hayward Case follows the decision in R. v. Randolph without comment as to the alteration of the statute meanwhile and these decisions are adopted by Hanington, J., in Ex parte McDonald (1904), 9 Can. Cr. Cas. 368 (N.B.).

When a prisoner is convicted, on a summary trial before a police magistrate, of theft, he cannot be sentenced under the second subsection to more than seven years' imprisonment although he has been previously convicted of theft, unless such previous conviction has been charged in the information by analogy to sec. 851 and proved in accordance with sec. 963, and where in such a case a greater punishment is inflicted, the Court of Appeal upon an application under subsec. 2 of sec. 1016 of the Code, will set aside the sentence and pass what it considers a proper sentence. R. v. Edwards (1907), 17 Man. R. 288.

When a previous conviction is not charged in the indictment or information, neither a Judge nor a magistrate has any right to ask a prisoner after conviction, whether he has been previously convicted or not, either with the view of ascertaining whether the prisoner is liable to any increased punishment in such case, or with the view of determining what the proper sentence within the ordinary maximum provided by the statute in the particular case should be. R. v. Edwards (1907), 17 Man. R. 288.

Value of Things Stolen Over $200.—See Code sec. 387.

If the value of anything stolen, or in respect of which any offence is committed for which the offender is liable to the same punishment as if he had stolen it, exceeds the sum of two hundred dollars the offender is liable to two years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence. Code sec. 387.

Theft of Drift Timber.—See Code sec. 394.

In any prosecution, proceeding or trial for any offence under sec. 394 a timber mark duly registered under the provisions of the Timber Marking Act, on any timber, mast, spar, saw-log or other description of lumber, shall be *primâ facie* evidence that the same is the property of the registered owner of such timber mark. Possession

by the accused or by others in his employ or on his behalf, of any such timber, mast, spar, saw-log or other description of lumber so marked, shall in all cases throw upon him the burden of proving that such timber, mast, spar, saw-log or other description of lumber came lawfully into his possession, or into the possession of others, in his employ, or on his behalf. Code sec. 990.

In Robitaille v. Mason, 9 B.C.R. 499, the plaintiff took possession of Mason's float, which he found adrift on a lake. Mason, although aware that the plaintiff claimed a lien for salvage, made no move towards recovering the float until after twelve weeks, when he, in company with a constable demanded it, and on plaintiff refusing to give it up without compensation, he was arrested without a warrant, and taken to gaol, and subsequently an information laid against him under this section of the Code for taking and holding timber found adrift, was dismissed. It was held that the arrest was the joint act of Mason and the constable, and that Mason was therefore liable for damages for false imprisonment.

Sec. 8.—*Husband and Wife.*—See Code sec. 354.

Sec. 9(*a*).—*Theft of Things Attached to Freehold.*—See Code secs. 378, 377, 372.

Theft of Ores or Minerals from Mines.—Code sec. 378.

Theft of Fences, Stiles, or Gates.—Code sec. 377.

Theft of Things Fixed to Buildings or in Land.—Code sec. 372.

Theft of Trees, Saplings, Shrubs, etc.—See Code secs. 374, 375, 376.

Theft of Trees of the Value of $25.00.—See Code sec. 373.

Whenever by the same clause of a statute an offence is declared, and a specific mode of prosecution for such offence is provided, that mode is deemed to be exclusive. A theft of growing trees of a value of less than $25.00 from farm woodland is not an indictable offence but a matter of summary conviction under Code sec. 374, except as a third offence as thereby provided. R. v. Beauvais, 7 Can. Cr. Cas. 494.

Theft of Trees of the Value of 25c.—See Code sec. 374.

A theft of growing trees of a value of less than $25 from farm woodland is not an indictable offence but a matter of summary conviction under Code sec. 374, except for a third offence as thereby provided. R. v. Beauvais (1904), 7 Can. Cr. Cas. 494 (Que.).

If the taking of the trees is done upon a *bonâ fide* claim of right in respect of the title to the land upon which they are growing, the criminal intent will be negatived. Robichaud v. La Blanc (1898), 34 C.L.J. 324 (N.B.).

Theft of Plants Growing in a Garden.—See Code sec. 375.

Theft of Cultivated Plants, etc., Growing Elsewhere.—Code sec. 376.

Possessing Trees without Being Able to Account Therefor.—Code sec. 395.

A conviction stated that C. had on his premises a quantity of chopped wood, to wit, about half a cord, belonging to F., which said F. states was stolen from him, and that said C. could not satisfactorily account for its possession. It was held that the conviction was bad, because the enactment 32 & 33 Vict. ch. 21, sec. 25, under which it was made (re-enacted in Code sec. 395), applied to trees attached to the freehold, not to trees made into cordwood, and because cordwood is not the "whole or any part of a tree" within the statute. R. v. Caswell (1873), 33 U.C.Q.B. 303.

Sec. 9(*b*).—*Theft of Documents, Instruments of Title, etc.*—See Code secs. 396, 362, 363.

Theft of Testamentary Instrument.—See Code sec. 361.

The expression "testimony instrument" includes any will, codicil, or other testimony writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, whether the same relates to real or personal property, or both. Sec. 2(37).

Theft of Documents of Title to Goods.—See Code sec. 362.

The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate warrant or order for the delivery or transfer of any goods or valuable thing, bought or sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possession of such document to transfer or receive any goods thereby represented or therein mentioned or referred to. Sec. 2(11).

The expression "document of title to lands" includes any deed, map, paper or parchment, written or printed or partly written and partly printed, being or containing evidence of the title or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or to any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles, and relating to such title. Sec. 2(12).

Theft of Post Letters, etc.—See Code sec. 364.

Theft of Election Documents.—See Code sec. 367.

Sec. 9*c*.—*Theft of Animals, Birds, Fish, etc.*—See Notes to ch. 11-15.

Sec. 9*d*.—*Theft of Electricity.*—See Code sec. 351.

Sec. 10.—*Theft from Specially Interested Person.*—Code secs. 353, 354.

Defrauding Co-partner.—Code sec. 353.

Husband and Wife.—Code sec. 354.

Theft from Indian Graves.—See Code sec. 385.

Offences Akin to Theft.

Bringing Stolen Goods into Canada.—See Code sec. 398.

When the Crown has proved that the prisoner had taken the goods in the foreign country under such circumstances that if they had occurred in Canada it would have been theft, and that he has the goods in his possession in Canada, a *primâ facie* case is proved without evidence that by the foreign law the taking was felonious, but under certain circumstances it may be necessary to prove the foreign law as an element in the moral quality of the act. Reg. v. Jewell, 6 Man. R. 460.

Theft of Things in and About a Railway.—See Code sec. 384.

Removal or Concealment of Things Capable of Being Stolen.—See Code secs. 396, 397.

The gist of the offence is the concealing for a fraudulent purpose, and it is not incumbent on the prosecution to shew that the fraudulent purpose was accomplished. R. v. Goldstaub (1895), 5 Can. Cr. Cas. 357, 10 Man. R. 497.

The words "capable of being stolen" as used in sec. 397 do not, however, imply that they are capable of being stolen by the accused, but are used in their general sense as in sec. 352 which deals with the statutory offence of theft by a co-owner of the stolen goods. R. v. Goldstaub (1895), 5 Can. Cr. Cas. 357, 10 Man. R. 497.

A conviction on a charge of fraudulent concealment of goods with intent to defraud an insurance company will not be set aside because it appears in evidence that a part of the goods had been removed a month before the date of removal of the remainder, which latter removal took place on the date charged in the indictment as the date of concealment. The date of removal is not necessarily the date of concealment, and the conviction would be valid if the accused were still keeping the goods in concealment on or about the date charged in the count, although the removal took place a month prior thereto. R. v. Hurst (1901), 5 Can. Cr. Cas. 338, 13 Man. R. 584.

On a further count for fraudulent removal of goods with intent to defraud, a removal of part of the goods a month prior to the time of the offence as charged is not to be presumed to be a part of one continuous taking with the removal of the remainder on the date charged. Although evidence of the first taking was admissible to shew the intent on the second taking which constituted the charge against the accused, the Judge should not have told the jury that they could convict for either the first or the second taking or for both, and the Judge having certified his opinion that the jury were materially influenced by the evidence of the first taking the conviction on the count

for fraudulent removal should be set aside. R. v. Hurst (1901), 5 Can. Cr. Cas. 338, 13 Man. R. 584.

Destroying Documents of Title.—See Code sec. 396.

Maliciously destroying an information or record of a police Court is an offence within this section. R. v. Mason (1872), 22 U.C.C.P. 246.

CHAPTER THE ELEVENTH.

OF STEALING CATTLE, ETC.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 10 (*a*), 'Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . ' (*b*).

This enactment merely provides for the punishment of a particular form of common law larceny (*c*).

It is not by express words or necessary intendment limited to the stealing of live animals: but the earlier enactments which it supersedes were read as limited to live animals.

By sect. 11, 'Whosoever shall wilfully kill *any* animal, with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony' (*d*).

The various points upon the definition of larceny, which have been considered in the chapter treating generally of that offence, relate as well to the stealing of cattle as of other property (*e*).

In R. *v.* Williams (*f*), it was held that upon a count under 14 Geo. II. c. 26 (rep.), for stealing a sheep it must be shewn that the sheep was removed whilst it was alive, and that upon a count for killing a sheep with intent to steal the whole of the carcase, evidence of killing with

(*a*) Framed from 7 & 8 Geo. IV. c. 29, s. 25 (E.); 9 Geo. IV. c. 55, s. 25 (I.); 2 & 3 Will. IV. c. 62, s. 1, &c.

(*b*) Nor less than three years. 54 & 55 Vict. c. 69, s. 1, which see *ante*, Vol. i., p. 212, for other punishments. The words omitted were repealed in 1892 (S. L. R.).

(*c*) *Vide ante*, p. 1275

(*d*) Framed from 7 & 8 Geo. III. c. 29, s. 25 (E.), and 9 Geo. IV. c. 55, s. 25 (I.), so far as it relates to the animals mentioned in the preceding section; but extended to the killing of any other animal with the like intent, provided the stealing of such animal would be felony. This clause, therefore, will include the killing of asses, pigs, &c., with intent to steal, &c. 'Upon an indictment for stealing a lamb, it should seem that it must be proved that the lamb was alive when it was stolen, in order to warrant the statutory punishment; for although it has been held that upon an indictment for receiving a lamb, it is no variance if the proof is that the lamb was dead when it was received (R. *v.* Puckering, 1 Mood. 242), yet that decision proceeded on the special ground that the punishment was the same whether the lamb was alive or dead when it was received; but in the case of stealing a live lamb the punishment may be fourteen years' penal servitude, &c., while it can be only three for stealing a dead lamb. But, as stealing a lamb is felony at common law, it would seem that if it appeared on such an indictment that the lamb was dead, the prisoner might be convicted and punished for the common law felony. See the observation of Patteson, J., in R. *v.* M'Culley, 2 Mood. 34, and R. *v.* Beaney, R. & R. 416.' C. S. G.

(*e*) *Ante*, pp. 1177 *et seq*, and see R. *v.* Phillips, 2 East, P. C. 662, as to stealing a ride on a horse.

(*f*) 1 Mood. 107. This case throws doubt on, if it does not overrule, R. *v.* Rawlins, 2 East, P. C. 617.

intent to steal part of the carcase was sufficient. The first count charged the prisoner with stealing three sheep, and the second with killing the sheep with intent to steal the whole of the carcases. The sheep were found killed and cut open, and the inside and entrails taken out, and the tallow and inside fat taken away, and the fat cut off the backs of two of them, and also taken away, but the fat on the back of the third was left. The carcases of the sheep were left, and were found lying in the gripe of the hedge, in the same field where the live sheep had been; the entrails and guts, which remained after the tallow and inside fat had been cut out, were also left, and were found in the adjoining field. There was evidence to satisfy the jury that the prisoner had killed the sheep and stolen the fat; but as the carcases of the sheep, and the entrails and guts, after cutting away the tallow and fat, were left, the learned judge thought the second count, which was for killing the sheep with intent to steal the whole of the carcases, could not be supported, and that the intent ought to have been stated to steal part of the carcases; inasmuch as the statute (rep.) specified both intents, *i. e.* stealing the whole of the carcases, or any part of the carcases; and the cutting out the inside fat was one of the offences stated in the recital of the clause in the statute (*g*). The count for stealing, the learned judge also, in the absence of any case to the contrary, was disposed to think was not supported; for the statute having taken away clergy from such as steal sheep, and having in the same clause made it a capital offence to kill sheep with intent to steal any part of the carcase, the 'driving away or stealing' mentioned in the statute, did not appear to be a removal of the sheep made merely for the purpose of killing on the spot, but a removal made for the purpose of actually getting the sheep in a live state into a man's complete dominion; for if it were otherwise, the clause in the statute about killing would have been quite unnecessary. In the cases in which a slight removal of the article had been held to amount to larceny, there had always been an intent to steal the article itself, but the thief had been prevented from getting the complete dominion over it. But here there was no intention in the removal to steal the living sheep; but the intent in the removal was to commit another offence of which the thief might be capitally convicted, and there would be no failure of public justice, if persons were not held to be guilty of stealing the live animal, because if the indictment was properly prepared they might still be convicted of a capital offence. In all the cases where a slight removal had been held larceny, there was evidence given of an actual removal, and how it was done; but here there was no evidence of the removal of the sheep in a live state, and the removal after their death would not support a count for stealing sheep, which must be intended to be live sheep (*h*). As there was sufficient evidence of the killing with intent to steal the fat, the learned judge directed the jury to find the prisoner guilty, but desired them to say, whether they were of opinion that he killed the sheep with intent to steal the whole, or part of the carcases; and the jury found him guilty, and that he killed the sheep with intent to

(*g*) It would seem from R. *v.* M'Dermot R. & R. 356, R. *v.* Duffin, R. & R. 365, and R. *v.* Horwell, 1 Mood. 405, that if a statute uses words in the alternative, so as to distinguish between them, the distinction must be attended to in the indictment.

(*h*) 1 Mood. 107.

steal part of the carcases only. But the question of removal under the first count was not put to the jury to find particularly. The learned judge reserved the points upon both counts of the indictment for the consideration of the judges, who were of opinion that the second count was supported, and not the first, a removal whilst alive being essential to constitute larceny; and nine of the judges held that the offence of intending to steal a part, was part of the offence of intending to steal the whole, and that the statute meant to make it immaterial whether the intent applied to the whole or only to part (*i*).

On an indictment under 14 Geo. II. c. 6 (rep.), for killing a lamb with intent to steal part of the carcase; it appeared that the prisoner cut off a leg from the animal whilst it was alive, and carried it away before the animal died; but that the cutting necessarily caused the death of the animal. Bayley, J., thought the giving the death wound before the larceny sufficient, and that the animal might be considered as killed by relation from that time, or if not, that the intention to fetch away the leg was an intent to continue the larceny thereof; but he saved the point for the opinion of the judges, who were unanimous, principally upon the first point, that the conviction was right (*j*).

Upon an indictment for killing a sheep with intent to steal the carcase it appeared that the prisoner was interrupted by the prosecutor while in the act of killing the sheep, which was wounded in the throat, the jugular vein being cut on one side, but not altogether through. The wound was sewn up, but the sheep died in two days. The jury having found that the prisoner gave the sheep a deadly wound, of which it died, with intent to steal the carcase, were directed to find the prisoner guilty; and upon a case reserved, the judges were unanimously of opinion that the prisoner was rightly convicted (*k*).

If the animal stolen be mentioned in the statute it should be described and proved to be of that particular description (*l*). An indictment under 15 Geo. II. c. 34 (rep.) for stealing a cow, was held not to be supported by evidence of stealing a heifer (*m*), and one for stealing sheep was held not to be supported by evidence of stealing lambs (*n*), or ewes (*o*), though the word sheep has more recently been held to be a generic term, including rams, lambs, and ewes (*p*). The words 'horse,' 'gelding,' or 'mare' in 2 & 3 Edw. VI. c. 33 (rep.) included a foal and a filly (*q*). The word 'horse' has been held to be a generic term including gelding, &c. (*r*). The Court has now very wide powers of amendment in such cases as the above, where the variance is not material and the defendant cannot be prejudiced thereby (*s*).

(*i*) In R. *v.* Marley, Monmouth Spring Ass. 1842, Cresswell, J., held on the authority of this case that proof of stealing part of the carcase supported an indictment for killing with intent to steal the whole carcase. MSS. C. S G.

(*j*) R. *v.* Clay, MS. Bayley, J., and R. & R. 387.

(*k*) R. *v.* Sutton, 2 Mood. 29; 8 C. & P. 291.

(*l*) See R. *v.* Beaney, R. & R. 416.

(*m*) R. *v.* Cook, 1 Leach, 105; 2 East, P. C. 616, *ante*, p. 1298, note (*a*).

(*n*) R. *v.* Loom, 1 Mood. 160.

(*o*) R. *v.* Puddifoot, 1 Mood, 247. R. *v.* Birket, 4 C. & P. 216. R. *v.* Jewett, 2 Cox, 227.

(*p*) R. *v.* M'Culley, 2 Mood, 34. R. *v.* Spicer, 1 Den. 82. R. *v.* Stroud, 6 C. & P. 535.

(*q*) R. *v.* Welland, R. & R. 494.

(*r*) R. *v.* Aldridge, 4 Cox, 143. Erle, J.

(*s*) 14 & 15 Vict. c. 100, s. 1. *Post*, p. 1972.

A count for killing an animal with intent to steal the carcase can only be tried in the county where the animal was killed. A count found in Essex, charged the prisoner with killing a sheep with intent to steal the carcase; the sheep was last seen alive in a field in the county of Hertford, and there were marks of blood in that field, as if the sheep had been killed there, but part of the carcase was found in the prisoner's possession in Essex; and Wilde, C.J., held that the count could not be supported (*t*).

Upon an indictment which charged the prisoner with stealing one mare, one saddle, and one bridle, without any allegation that the offence was against the form of the statute, the prisoner was convicted and sentenced to be transported for fifteen years. Upon error it was objected that no part of the charge warranted the sentence, which was entirely statutable; but the Court of Queen's Bench held, that as the stealing the mare, as well as stealing the saddle and bridle, was a felony at common law and not created or altered in its nature by 7 & 8 Geo. IV. c. 29, s. 25, 2 & 3 Will. IV. c. 62, s. 1, and 7 Will. IV. & 1 Vict. c. 90, s. 1, the offence was correctly described in the indictment, and the sentence lawful (*u*).

By sect. 8 of the Knackers Act, 1776 (26 Geo. III. c. 71), 'If any person or persons keeping or using any such slaughtering house or place as aforesaid (*v*) shall . . . slaughter any horse, mare, or gelding, foal or filly, ass or mule, or any bull, cow, heifer, ox, calf, sheep, hog, goat, or other cattle for any purpose other than for butchers' meat, or shall flay any horse (or other animal *ut supra*) brought dead to such slaughtering house or other place without taking out such licence (*w*) or without giving such notice as aforesaid, or shall slaughter, kill, or flay the same at any time or times other than except and within the hours hereinbefore limited (*x*), or shall not delay slaughtering or killing the same according to the direction of the inspector so authorised (*y*) to prohibit the same as aforesaid, such person or persons so offending in either of these cases being thereof convicted shall be adjudged, deemed, and taken to be guilty of felony and shall be punished by fine and imprisonment and such corporal punishment by public or private whipping or shall be transported beyond seas for any time not exceeding seven years, as the Court before which such offender or offenders shall be tried shall direct' (*z*).

Licences under this Act are granted in London by the County Council, elsewhere by District Councils (*a*).

Resort is rarely if ever had to the provisions of sect. 8 or sect. 9 which make it a misdemeanor for knackers to destroy hides or commit other offences against the Act.

(*t*) R. *v.* Newland, 2 Cox, 283, *ante*, p. 1306.

(*u*) Williams *v.* R., 7 Q.B. 250. In R. *v.* Newland, *ubi sup.*, Wilde, C.J., expressed a contrary opinion, but no authority was cited.

(*v*) Sect. 1.

(*w*) Sects. 1, 2.

(*x*) By sect. 3.

(*y*) Under ss. 4, 5.

(*z*) See 54 & 55 Vict. c. 69, s. 1, as to present terms of penal servitude or imprisonment, *ante*, Vol. i. pp. 211, 212. As to whipping, *vide ante*, Vol. i. p. 215.

(*a*) 54 & 55 Vict. c. 76, ss. 19, 20; 56 & 57 Vict. c. 73, s. 27.

CANADIAN NOTES.

General Offence of Stealing Cattle.—Code sec. 369.

The indictable offence of "stealing cattle" is theft within the provisions of the North-West Territories Act respecting summary trials without a jury. Although the punishment which may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, a person charged with having stolen cattle, the value of which does not, in the opinion of the trial Judge, exceed $200, has not the right in the North-West Territories to be tried by jury. R. v. Pachal (1899), 5 Can. Cr. Cas. 34 (N.W.T.).

Killing Cattle Capable of Being Stolen with Intent to Steal Carcase.—Code sec. 350.

Fraudulently Taking and Refusing to Deliver up Cattle.—Code sec. 392.

Evidence of Property in Cattle.—Code sec. 989.

CHAPTER THE TWELFTH.

OF STEALING DOGS, BIRDS, ETC.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 18, 'Whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding twenty pounds, as to the said justices shall seem meet (*a*); and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards steal any dog, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour (*b*).

Possession of Stolen Dogs.—Sect. 19, 'Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money, not exceeding twenty pounds, as to such justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour' (*c*).

Taking Money to Restore Dogs.—Sect. 20, 'Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor and being convicted thereof shall be liable,' as in sect. 19 (*d*).

Birds, &c., kept in Confinement.—Sect. 21, 'Whosoever shall steal any bird, beast, or other animal ordinarily kept in a state of confinement, or for any domestic purpose, not being the subject of larceny at common law (*e*), or shall wilfully kill any such bird, beast, or animal with intent to steal the same or any part thereof, shall on conviction thereof before a

(*a*) The defendant can elect to be tried on indictment for this offence. 42 & 43 Vict. c. 49, s. 17, *ante*, Vol. i. p. 17.

(*b*) Taken from 8 & 9 Vict. c. 47, s. 2. There was a similar provision in 14 & 15 Vict. c. 92, s. 5 (I.).

(*c*) Taken from 8 & 9 Vict. c. 47, s. 3. There was a similar provision in 14 & 15 Vict. c. 92, s. 5 (I.).

(*d*) Taken from 8 & 9 Vict. c. 47, s. 6, and extended to Ireland.

(*e*) *Vide ante*, p. 1279.

justice (*e*) of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the bird, beast, or other animal, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any offence in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit' (*f*).

By sect. 22, 'If any such bird, or any of the plumage thereof, or any dog, or any such beast, or the skin thereof, or any such animal, or any part thereof, shall be found in the possession or on the premises of any person, any justice may restore the same respectively to the owner thereof; and any person in whose possession or on whose premises such bird or the plumage thereof, or such beast or the skin thereof, or such animal or any part thereof, shall be found (such person knowing that the bird, beast, or animal has been stolen, or that the plumage is the plumage of a stolen bird, or that the skin is the skin of a stolen beast, or that the part is a part of a stolen animal) shall, on conviction before a justice of the peace (*e*), be liable for the first offence to such forfeiture and for every subsequent offence (*f*) to such punishment, as any person convicted of stealing any beast or bird is made liable to by the last preceding section.'

A ferret is an animal ordinarily kept in a state of confinement within the above sections (*g*).

Sect. 23 imposes a penalty not exceeding £2, recoverable summarily on persons killing, wounding, or taking house doves or pigeons under circumstances not amounting to larceny at common law. It has been held that a prosecution under this section need not be by the owner of the pigeons (*h*).

(*e*) The power of one justice sitting alone is now limited by 42 & 43 Vict. c. 49, s. 20.

(*f*) The defendant can elect to be tried on indictment for this offence. 42 & 43 Vict. c. 49, s. 17, *ante*, Vol. i. p. 17.

(*g*) R. *v.* Sherriff, 20 Cox, 334.

(*h*) Smith *v.* Dear, 67 J. P. 244; 20 Cox, 458. This decision seems to apply equally to sects. 21 and 22.

CANADIAN NOTES.

THEFT OF DOGS, BIRDS, ETC.

General Offence Defined.—See Code sec. 370.

Unlawfully Killing or Wounding Pigeons.—See Code sec. 393.

Killing Animals Capable of Being Stolen with Intent to Steal Carcases.—See Code sec. 350.

Injuries to Animals Other Than Cattle.—See Code sec. 537.

CHAPTER THE THIRTEENTH.

OF STEALING AND DESTROYING DEER.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 12, 'Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase or purlieu, shall for every such offence on conviction thereof before a justice of the peace, forfeit or pay such sum not exceeding fifty pounds, as to the justice shall seem meet (*a*); and whosoever having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed by this or by any former Act of Parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . (*b*), and if a male under the age of sixteen years with or without whipping (*c*).'

Upon an indictment under 7 & 8 Geo. IV. c. 29, s. 26 (rep.), for stealing 'one deer,' it appeared that the animal in question was a fawn, recently fawned, and that the young of deer were known by the name of fawn till a year old, and were not called deer before that time; but Maule, J., held that stealing this animal was within the statute, as the term deer was a general term including all kinds of deer, of all ages, and both sexes (*d*).

Where a prisoner was indicted under 7 & 8 Geo. IV. c. 29, s. 26 (rep.), for a second offence a previous conviction before two justices was held good. And where such a conviction, after stating the venue in the margin in the usual way, set forth that on a certain day at a certain place in the county of Oxford, the prisoner was convicted for that he did on a certain day unlawfully use an engine for the purpose of killing deer in the forest of Wychwood, but omitted to state where or in what county the offence was committed, but proceeded to direct the penalty to be paid to the overseers of D. in the said county, 'where the said offence was committed,' it was held that this sufficiently shewed the offence to have been committed in the county of Oxford (*e*).

(*a*) The powers of one justice sitting alone are now restricted by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 20). And see R. *v.* King, 13 L. J. M. C. 43.

(*b*) The words omitted were repealed in 1893 (S. L. R. No. 2), V. As to imprisonment, *vide ante*, Vol. i. p. 212.

(*c*) Taken from 7 & 8 Geo. IV. c. 29, s. 26, and extended to Ireland.

(*d*) R. *v.* Strange, Gloucester Sum. Ass. 1843, MSS. C. S. G. & 1 Cox, 58.

(*e*) R. *v.* Weale, 5 C. & P. 135, Park, J. 'The second point decided in this case is directly contrary to the decision in R. *v.* Johnson, 1 Str. 261, and seems to have been wrongly decided.' C. S. G.

A person who kills and takes possession of a deer which has strayed outside the boundaries of a forest has not 'unlawfully' killed the deer within the meaning of the above sect. 12 (*f*).

Upon an indictment for a second offence against 42 Geo. III, c. 107 (rep.), by killing deer, objections might be taken to the validity of the previous conviction. An indictment on that statute stated that the prisoner was convicted by a justice for the county of Essex for unlawfully carrying away a deer, and that afterwards he feloniously and unlawfully did offend a second time by feloniously aiding in killing a deer. The conviction was made by a magistrate of Essex at a place in Middlesex, and was a conviction of the prisoner and three other persons. The offence was committed in Essex. It was objected, 1st, that the indictment did not state that the prisoner was duly convicted; 2ndly, that he was not duly convicted, as the conviction was in Middlesex; 3rdly, that the conviction was of four, whereas it was stated in the indictment as of the prisoner only. And, on a case reserved, the judges held that the prisoner ought not to have been convicted of the felony (*g*).

By the Larceny Act, 1861, sect. 13, 'Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . (*h*), and, if a male under the age of sixteen years, with or without whipping (*i*).

An inclosure in the Forest of Dean, made under a statute of Chas. II., for the protection of timber, and surrounded by a ditch and bank, which were sufficient to prevent cattle getting into it, but over which the deer could pass in or out at their free will, was held by Erle, J., to be an inclosed part of a forest within 7 & 8 Geo. IV, c. 29, s. 26 (rep.), and the words, 'wherein deer shall be usually kept,' were held to refer to 'inclosed land' only (*j*).

By the Larceny Act, 1861, sect. 16, 'If any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person entrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, firearms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon

(*f*) Threlkeld *v.* Smith [1901], 2 K.B. 531; 70 L. J. K. B. 921; 20 Cox, 38.

(*g*) R. *v.* Allen, R. & R. 513. The reporters add, the second objection was probably considered fatal.

(*h*) The omitted words were repealed in 1893 (S. L. R. No. 2).

(*i*) Taken from 7 & 8 Geo. IV. c. 29, s. 26. There was a similar provision in 14 & 15 Vict. c. 92, s. 5 (I.), as to coursing, &c., deer in any park, paddock, or inclosed land, wherein deer shall be usually kept. Ss. 14 & 15 create offences punishable summarily (possessing venison, deer skins, or snares, or setting snares, &c. for deer).

(*j*) R. *v.* Money, Gloucester Sum. Ass. 1847. MSS. C. S. G.

pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person entrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this Act, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . (*k*) and, if a male under the age of sixteen years, with or without whipping' (*l*).

By the express words of this section, a demand must be made of the gun, &c., before a seizure (*m*).

On an indictment for unlawfully beating and wounding an assistant keeper of the Forest of Dean, it appeared that the prisoners being found in the forest with a gun, the keeper demanded the gun, and not receiving a reply, collared one of them for the purpose of taking the gun, when the others seized the keeper, and pulled him off the other prisoner, pulled him to the ground, and there held him until the other prisoner had escaped: no other violence was used, nor was the keeper otherwise beaten than by the force necessary to hold him to the ground. Maule, J., held that 7 & 8 Geo. IV. c. 29, s. 29 (*n*), was not satisfied by a mere battery in point of law; it contemplated a beating in the popular sense of the word; and that pulling a man to the ground, and there holding him, was not a beating within the Act (*o*).

(*k*) The omitted words were repealed in 1893 (S. L. R. No. 2).

(*l*) Taken from 7 & 8 Geo. IV. c. 29, s. 29, and extended to Ireland.

(*m*) 'Under 16 Geo. III. c. 30, s. 9 (rep.), which authorised persons entrusted with the care of deer to seize any gun, &c., without expressly requiring a previous demand, it was nevertheless held necessary. R. *v.* Amey, R. & R. 500. A further question, not decided, was whether an assistant keeper, not appointed or confirmed by the owner of the chase, had authority to seize guns unless the head keeper were present: the words "any of his assistants, whether in his presence or not," in sect. 16, seem introduced to meet this point.' C. S. G.

(*n*) Re-enacted as sect. 16, *supra*.

(*o*) R. *v.* Hale, 2 C. & K. 326.

CANADIAN NOTES.

STEALING AND DESTROYING DEER.

Killing Animals Capable of Being Stolen with Intent to Steal Their Carcases.—Code sec. 350.

CHAPTER THE FOURTEENTH.

OF UNLAWFULLY TAKING OR KILLING GAME, HARES, OR RABBITS, ETC.

THE law of England has never recognised the doctrine of the Roman law that any trespasser has a right to the game that he has caught or killed on any man's land (*a*). By the Constitutions of Canute concerning forests, every freeman was entitled to take and dispose of the game on his own land, and no one had a right to enter on the lands of another for such a purpose (*b*). And by the common law the owner of land has a possessory property in the game upon his land, so long as it continues upon that land, and he may maintain an action of trespass against anyone who enters upon the land, and kills or takes any game thereon and carries it away, and may recover damages as well for the trespass as for the value of the game (*c*). The property in living game is called possessory, because it depends on the possession of the game by reason of the possession of the land whereon it is, and as soon as it quits the land of its own free will the possessory property ceases. The owner of land has a property in the game started and killed upon it (*d*).

The Night Poaching Act, 1828 (9 Geo. IV. c. 69), after reciting 57 Geo. III. c. 90, and that 'the practice of going out by night for the purpose of destroying game has . . . very much increased of late years, and has in very many instances led to the commission of murder, and of other grievous offences; and it is expedient . . . to make more effectual provisions than now by law exist for repressing such practice,' enacts (sect. 1) that . . . if any person shall . . . (*e*), by night, unlawfully take or destroy any game or

(*a*) Just. Inst. Lib. II. tit. 1, 12.

(*b*) The law on this subject is stated in different terms in different authors in consequence of different translations having been made of the original Saxon. 4 Co. Inst. 320. The law may be found, Spelm. Gloss. tit. 'Foresta,' p. 242, No. 30 (ed. 1687). 4 Co. Inst. 320. Blackstone (2 Com. 414) cites it as chapter 77, and says that it was the ancient law of the Scandinavian continent, citing Stiernhook de jure Sweon. l. 2, c. 8. Deac. G. L. 40, and also a licence of Canute to the same effect. In 2 Bl. Com. 414, a similar law of Edward the Confessor, c. 36, is cited. In 4 Co. Inst. 293, a charter of the Empress Maud is cited containing a similar law. From a comparison of these several authorities, the following seems to be substantially correct: *Sit quilibet liber homo dignus venatione sua in silva et in agris sibi propriis et in domino suo, sed abstineat omnis homo a venariis regiis.* The following is the statement of Brooke, J., in Y. B. 12 Hen. VIII. 10: 'If I let my falcon fly in my own land at a pheasant, and he kills the pheasant in your land, you do not gain any property in the pheasant; but I can take the pheasant, and shall not be punished except for the entry into your land; for it was by my industry and labour, and when my falcon had caught it, it was in my possession.' And see Sutton *v.* Moody, 12 Mod. 145; 1 Ld. Raym. 250, Holt, C.J. Churchward *v.* Studdy, 14 East, 249.

(*c*) See Osbond *v.* Meadows, 12 C. B. (N. S.) 10. Read *v.* Edwards, 17 C. B. (N. S.) 245.

(*d*) Earl of Lonsdale *v.* Rigg, 11 Ex. 654; 1 H. & N. 923. Blades *v.* Higgs, 11 H. L. C. 621. Kenyon *v.* Hart, 6 B. & S. 249. Affd. in H. L. 12 L. T. (N. S.) 615.

(*e*) The words omitted were repealed in 1888 (51 & 52 Vict. c. 57).

rabbits in any land, whether open (*f*) or inclosed (*g*) or shall by night unlawfully enter or be in any land, whether open or inclosed (*h*), with any gun, net, engine, or other instrument, for the purpose of taking or destroying game (*i*), such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, himself in ten pounds, and two sureties in five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following; and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of six calendar months unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or bond as aforesaid, himself in twenty pounds, and two sureties in ten pounds each, or one surety in twenty pounds, for his not so (*j*) offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so (*k*) offend a third time, he shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported (*l*) beyond seas for seven (*m*) years, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time he shall be liable to be punished in like manner as is hereby provided in each case' (*n*).

By sect. 2, 'Where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person

(*f*) See R. *v.* Harris, 12 L. T. 303.

(*g*) See 24 & 25 Vict. c. 96, s. 17, and 7 & 8 Vict. c. 29, s. 1, *post*, p. 1334.

(*h*) See Tapsell *v.* Crosskey, 7 M. & W. 441, as to the meaning of this word in the Turnpike Act, 1822, 3 Geo. IV. c. 126.

(*i*) The word 'rabbits' is here omitted; so that if poachers enter for the purpose of taking rabbits, but have not either taken or destroyed any, they have committed no offence within sect. 1, and sect. 2 gives no authority to apprehend them. Sect. 9 extends to poachers entering with intent to take both game and rabbits, and is, therefore, in this respect, more extensive than sect. 1. See R. *v.* Ball, 1 Mood. 330, *post*, p. 1338.

(*j*) See in *re* Reynolds [1844], 1 New Sess. Cas. 51, that a conviction that the defendant should enter into recognizances that he should not offend again, omitting the word 'so,' is bad.

(*k*) The previous convictions must be for offences under this section. R. *v.* Lines [1902], 1 K.B. 199; 71 L. J. K. B. 125.

(*l*) Now penal servitude; *ante*, Vol. i. p. 210.

(*m*) And not less than three years. See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. p. 211.

(*n*) Where a person is indicted under this section for night poaching, after two previous convictions, the previous convictions should not be proved until the jury find a verdict on the other facts of the case. R. *v.* Woodfield, 16 Cox, 314.

assisting such gamekeeper or servant, to seize and apprehend such offender upon such land or in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, crossbow, firearms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond seas for seven years (*nn*), or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.'

By sect. 4, . . . ' the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence ' (*o*).

By sect. 8, ' On every conviction under this Act for a first or second offence the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence; and the clerk of the peace shall immediately on such return make or cause to be made a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party.'

By sect. 9, ' If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, [or of the Court of great sessions] of the county or place in which the offence shall be committed, shall be liable at the discretion of the Court to be transported (*p*) beyond seas for any term not exceeding fourteen years, nor less than [seven] (*q*) years, or to be imprisoned and kept to hard labour for any term not exceeding [three] years . . . ' (*r*).

By sect. 12, ' For the purposes of this Act the night shall be considered, and is hereby declared to commence at the expiration of the first hour

(*nn*) Now penal servitude from three to seven years, *vide ante*, Vol. i. p. 211.

(*o*) Ss. 3, 5, and the omitted part of s. 4, were repealed as to England in 1884 (47 & 48 Vict. c. 43); and summary proceedings under the Act are governed by the Summary Jurisdiction Acts. Sect. 6 gives an appeal to any person aggrieved by any summary conviction; and sect. 7 takes away the *certiorari*. See R. *v.* Mellor, 2 Dowl. Pr. Cas. 173, and R. *v.* Hester, 4 Dowl. P. C. 589.

(*p*) Now penal servitude, *ante*, Vol. i., p. 210.

(*q*) Now not less than three years, *ante*, Vol. i., p. 211.

(*r*) *Qu.* Now two years, *vide ante*, Vol. i. p. 212. The omitted portion relates to Scotland.

after sunset, and to conclude at the beginning of the last hour before sunrise' (*s*).

By sect. 13, 'For the purposes of this Act the word "game" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards' (*t*).

The Night Poaching Act, 1844 (7 & 8 Vict. c. 29), after reciting ss. 1, 2, of the Act of 1828, and that 'the provisions of the said Act have of late years been evaded and defeated, by the destruction by armed persons at night of game or rabbits, not upon open or inclosed lands, as described in the said Act, but upon public roads and highways, and other roads and paths leading through such lands, and also at the gates, outlets, and openings between such lands, and roads, highways, and paths, so that not only has the destruction of game and rabbits not been prevented but the risk of murder and other grievous offences contemplated by the said Act has been increased, and great danger and alarm occasioned to persons using such roads, highways, and paths; and that it is expedient that the remedies provided by the said Act against such offences as hereinbefore mentioned should be extended and applied to the like offences committed upon such roads, highways, and paths,' enacts (s. 1) 'that from and after the passing of this Act (July 4, 1844), all the pains, punishments, and forfeitures imposed by the said Act upon persons by night unlawfully taking or destroying any game or rabbits in any land, open or inclosed, as therein set forth, shall be applicable to and imposed upon any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path, where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorised by the said Act to apprehend any offender against the provisions thereof to seize and apprehend any person offending against the said Act or this Act; and the said Act, and all the powers, provisions, authorities, and jurisdictions therein or thereby contained or given, shall be as applicable for carrying this Act into execution as if the same had been herein specially set forth' (*u*).

Hares and Rabbits in Warrens.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 17, 'Whosoever shall unlawfully and wilfully, *between the expiration of the first hour after sunset and the beginning of the last hour before sunrise*, take (*v*) or kill any hare or rabbit in any warren

(*s*) *i.e.*, sunset or sunrise at the place where the offence is committed, and not by Greenwich mean time. See Gordon *v.* Cann, 68 L. J. Q. B. 434.

(*t*) Rabbits are excluded from the definition of game in this Act, but are included in the definition in the Act of 1862, *post*, p. 1335.

(*u*) Sect. 2 was repealed in 1874 (S. L. R. No. 2). The Act seems to have been a mistake in legislation, for 9 Geo. IV. c. 69, included all highways. See R. *v.* Pratt, 4 E. & B. 860. Mayhew *v.* Wardley, 14 C. B. (N. S.) 550.

(*v*) In R. *v.* Glover, R. & R. 269, and MS. Bayley, J., upon 5 Geo. III. c. 14 (rep.), the prisoner was indicted for entering a warren in the night-time, and there *taking* a coney against the will of the occupier of the warren. It appeared that he set wires in the warren at about six o'clock in the evening, and a coney was

or ground lawfully used (*w*) for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor . . .' (*x*).

The Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114) was passed in consequence of the easy manner in which poachers escaped detection and apprehension by the power to apprehend them being confined to cases where they were found upon the land committing the offence. Sect. 1 defines 'game' to include 'any one or more hares, pheasants, partridges, eggs of pheasants and partridges (*xx*), woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game.' Sect. 2 makes it 'lawful for any constable or peace officer in any county, borough, or place in Great Britain and Ireland in any highway, street, or public place, to search (*y*) any person whom he may have good cause (*z*) to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or nets or engines used for the killing or taking of game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing;' and the constable or peace officer is in such case to apply for a summons citing such person to appear before two justices in

caught in one of the wires; and that he came again before six o'clock the next morning, when he was seized by the warrener just as he was about laying hold of the wire in which the coney was caught, the coney being then alive; and, upon a case reserved, the judges thought that the taking by the wire was a taking by the prisoner within the meaning of the statute, and that he had been properly convicted.

(*w*) On an indictment under a repealed Act for destroying conies in the night-time in a ground lawfully used for breeding them, it appeared that the prosecutor kept rabbits, which ran about loose in his rick yard, and that the rabbits were destroyed by poison in the night-time. It was submitted that the statute only applied to warrens, and to places similar to warrens, but which could not legally be called warrens. Patteson, J., held that the case was not within the Act of Parliament; R. *v.* Garratt, 6 C. & P. 369.

(*x*) This offence is punishable like other misdemeanors, by imprisonment or fine, or both. See Vol. i. p. 249. This section is taken from 7 & 8 Geo. IV, c. 29, s. 30. The words in *italics* are substituted for 'in the night-time.' The offence of killing hares or rabbits in any warren, &c., in the day-time is by the same section punishable summarily. This section overlaps so much of 9 Geo. IV. c. 69, s. 1, *ante*, p. 1332, as relates to taking or killing any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits. As to the right of occupiers to kill hares and rabbits see the Ground Game Acts, 1880 (43 & 44 Vict. c. 47), and 1906 (6 Edw. VII. c. 21).

(*xx*) See Stowe *v.* Bluestead [1909], 25 T. L. R. 546.

(*y*) If a constable sees game or rabbits upon a person, it is not necessary that there should be a search to authorise a proceeding under 25 & 26 Vict. c. 114, s. 2, for it cannot be intended that if a man is seen coming out of a plantation with game or rabbits in his possession it should be necessary to go through the process of searching him. Hall *v.* Knox, 4 B. & S. 515. Cf. R. *v.* Ettridge [1909], 2 K.B. 24.

(*z*) See R. *v.* Spencer, 3 F. & F. 854, 857. In this case the prisoners were indicted for assaulting the policeman who endeavoured to apprehend the prisoners in the execution of his duty, and it was proposed to give evidence that the prisoners were habitual poachers, for the purpose of shewing what was passing in the policeman's mind at the time of the endeavour to apprehend, but Martin, B., held that such evidence could not be given. Mr. Greaves doubts the correctness of this case. See *post*, p. 2118, 'Evidence.'

petty sessions, as provided by the 18 & 19 Vict. c. 126, s. 9, in England (*a*) and Ireland, and before a sheriff in Scotland, and 'if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game (*b*) or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall on being convicted thereof forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, guns, parts of guns, nets, and engines,' and the justices are to direct them to be sold or destroyed, and the proceeds of the sale and penalty to be paid to the treasurer of the county or borough; and if no conviction takes place, the game, article, or thing or the value thereof, shall be restored to the person from whom it was seized (*c*).

Limitation of Time for taking Proceedings.—Upon an indictment for night-poaching under the Act of 1828 (9 Geo. IV. c. 69), laying an information before a magistrate is the commencement of the prosecution. The offence was committed on Dec. 4, 1845. The information before the magistrates and warrant were on Dec. 19. One prisoner was apprehended and committed on Sept. 5, 1846; the other Oct. 21, 1846; the indictment was preferred on April 5, 1847; and, upon a case reserved, the judges were unanimously of opinion that the prosecution was commenced in time (*d*).

P. and S. were indicted for night-poaching on Jan. 26, 1861, and a warrant, dated Feb. 5, 1861, was proved to be under the hand of a magistrate, and this warrant recited that information had that day been given of the offence, but no information was given in evidence. S. was apprehended under this warrant on Nov. 27, 1862, and P. on Jan. 14, 1864; and, upon a case reserved, it was held that, for the purpose of shewing that the prosecution was commenced in due time, the information ought to have been given in evidence (*e*).

On the trial of an indictment for night-poaching, it appeared that the offence was committed on Jan. 12, 1844; the indictment was found at the assizes held on March 1, 1845; but the warrant by which the defendant was committed on the present charge was on Dec. 11, 1844; and Pollock, C. B., held that the warrant of commitment shewed that

(*a*) See now the Summary Jurisdiction Acts.

(*b*) It is not necessary under this section to prove from what particular land the game was taken. The only question is, whether it was unlawfully taken from any land. See Brown *v.* Turner, 13 C. B. (N. S.) 485; Evans *v.* Botterill, 3 B. & S. 787.

(*c*) *i.e.* the value at the time of destruction, Stowe *v.* Bluestead, 25 T. L. R. 534. In order to give the magistrates jurisdiction, the game, &c., must be seen by the constable on the person of the accused on the highway, &c. So where a policeman saw a man on a highway with rabbits on his back, who ran across a meadow and threw the rabbits away, and they were then and there taken by the policeman, it was held that the conviction was valid. Lloyd *v.* Lloyd, 14 Q.B.D. 725, commenting on Clarke *v.* Crowder, L. R. 4 C. P. 638. Turner *v.* Morgan, L. R. 10 C. P. 587. By sect. 3, any penalty in England is recoverable under the Game Act, 1831 (1 & 2 Will. IV. c. 32); in Scotland under 2 & 3 Will. IV. c. 68; and in Ireland under the Petty Sessions (Ireland) Act, 1851. Sect. 4 extends the provisions of the Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43), to proceedings under this Act. Sect. 5 takes away the *certiorari*, &c.; and sect. 6 gives an appeal against any conviction under the Act.

(*d*) R. *v.* Brooks, 1 Den. 217. See R. *v.* Wallace, 1 East, P. C. 186. R. *v.* Hull, 2 F. & F. 186.

(*e*) R. *v.* Parker, L. & C. 459; 33 L. J. C. P. 135. This case was only argued for the prisoners. *Quære*, whether the warrant was not evidence that the prosecution was pending at its date; under that warrant the prisoners had been apprehended, examined, and committed.

the prosecution was commenced within twelve calendar months after the commission of the offence (*f*).

Where an indictment had been preferred within a year after the commission of an offence under the Act of 1828, against the prisoner and R., and ignored as to the prisoner, but found against R., who was convicted, and four years afterwards a fresh bill was found against the prisoner; it was considered to be clear that preferring the first bill was the commencement of a prosecution, but it was doubted whether the condition in sect. 4 (*ante*, p. 1333), requiring a prosecution by indictment to be commenced within twelve calendar months, had been complied with by preferring the bill which was ignored (*g*).

Tame Pheasants.—On an indictment for night-poaching, it appeared that some tame pheasants were in coops about 150 yards from a house; but they were not shut up, and could run about, and on this night they were roosting in trees close by. Common hens were in the coops, having been used for rearing the pheasants. The prisoners went to the coops, and one said, 'There is nothing here but an old hen;' they were looking in other coops when they were apprehended. It was held that these birds could not be considered game within the meaning of the statute. As long as they were under the charge of the hen, as long as she was their guardian, and while they were about her, and running about with her, he who took them was guilty of larceny (*h*).

Allegation of previous Convictions.—An indictment alleged that the prisoner was duly convicted before three justices, for that he by night after the expiration of the first hour after sunset, and before the beginning of the first hour before sunrise, did by night unlawfully enter a certain close, &c., describing it, with a gun for the purpose of then and there taking and destroying game; and the prisoner was thereupon adjudged for his said offence, the same being his first offence, to be imprisoned, &c.; and that the prisoner afterwards was duly convicted before two justices, for that he by night unlawfully did enter and be in certain inclosed land, &c., describing it, 'with certain instruments for the purpose of killing, taking, and destroying game thereon, this being his second offence;' and was thereupon adjudged, &c. It was objected on error: 1. That the second conviction alleged was not valid, because the first conviction did not appear to have been set out in it; but it was held that all that was necessary in such an indictment in order to give the Court jurisdiction was to shew that there had been two former convictions under the statute, and that was shewn here. 2. It was objected, that the second conviction only said that the prisoner entered 'with certain instruments,' not specifying what they were, or even that they were used for the purpose of killing game; but it was held that, as it was alleged

(*f*) R. *v.* Austin, 1 C. & K. 621. See R. *v.* Phillips, R. & R. 369. In R. *v.* Casbolt, 11 Cox, 385, Byles, J., allowed the prisoner to withdraw his plea of guilty, in order to raise the point that the prosecution was not commenced in time.

(*g*) R. *v.* Kilminster, 7 C. & P. 228, Coleridge, J. The prisoner was acquitted, otherwise the point would have been reserved for the opinion of the judges.

(*h*) R. *v.* Garnham, 8 Cox, 451. Pollock, C.B., and Williams, J. Pollock, C.B., also said: 'I take it if a man go into a London market, and buy pheasants' eggs, and hatch them under a common hen, when the birds become free from control they would come under the game laws.' See *ante*, pp. 1275–1277.

that the offence was committed by night in the land with instruments for the purpose of taking and destroying game, the latter words being applicable to the instruments as well as to the presence of the party, got rid of all the difficulty. 3. It was objected that the second conviction did not allege that the prisoner entered for the purpose of taking game 'by night,' and that the first conviction did not allege that the act was done by night on the particular close; but it was held that the expression 'by night' preceding the whole clause quite cured the difficulty as to time. Lastly, it was objected, that the first conviction was 'the first hour before sunrise,' instead of 'last hour before sunrise,' and that this was impossible; but the objection was overruled (*i*).

An indictment under 9 Geo. IV. c. 69, s. 1, for a third offence set out the previous convictions, one of which alleged that the prisoner 'entered into certain inclosed land in the parish of A. B. for the purpose of taking and destroying game in the night,' and Maule, J., held that the indictment was bad for not alleging the entry by night (*j*).

On an indictment for a third offence under 9 Geo. IV. c. 69, s. 1, two previous convictions under that section must be alleged and proved. A previous conviction under sect. 9 is not sufficient (*k*).

Authority to Apprehend.—Although three or more poachers are out by night armed, and are guilty of an offence within sect. 9, still they are liable to be apprehended under sect. 2, as they are guilty of an offence under sect. 1, as well as under sect. 9 (*l*). If persons are found actually in the commission of an offence against sect. 1, they may be apprehended by the persons authorised to apprehend by sect. 2, although no notice be given to them of the cause for which they are apprehended; for the circumstances constitute sufficient notice (*m*). And it is not necessary that there should be a written authority; it is sufficient if the party were employed as a watcher of game preserves by the lord of the manor (*n*). And although the persons mentioned in sect. 2 have not authority to apprehend unless the poachers are found upon the manor or land of the persons therein specified (*o*); yet if a poacher be found on the manor by a servant of the lord, and run off it, but being pursued return upon it again, the servant may apprehend him, for it is the same as if he had never been off the manor (*p*). Where a wood was neither the property of the master of an assistant gamekeeper, nor in his occupation, nor

(*i*) Cureton *v.* R., 1 B. & S. 208; 30 L. J. M. C. 149. In Fletcher *v.* Calthorp, 6 Q.B. 880, a conviction which alleged that the defendant entered certain enclosed land by night 'with a net for the purpose of taking game, to wit, partridges and pheasants,' was held bad, because it did not state the intent to take the game there. In Cureton *v.* R., Cockburn, C.J., and Hill, J., expressed their doubts as to the correctness of this decision. See R. *v.* Western, L. R. 1 C. C. R. 122; 37 L. J. M. C. 81.

(*j*) R. *v.* Merry, 2 Cox, 240, and MSS. C. S. G.

(*k*) R. *v.* Lines [1902], 1 K.B. 199; 71 L. J. K. B. 125.

(*l*) R. *v.* Ball, 1 Mood. 330. See note (*i*), *ante*, p. 1332. Persons found committing an offence under sect. 9 may be arrested by any person under 14 & 15 Vict. c. 19. s. 11 (*post*, p. 1339). R. *v.* Sanderson, F. & F. 598.

(*m*) R. *v.* Payne, 1 Mood. 378. R. *v.* Davis, 7 C. & P. 785, Parke, B. R. *v.* Taylor, 7 C. & P. 266, Vaughan, B. See these and other similar cases, *ante*, Vol. i. p. 735, 'Resistance to the Law.'

(*n*) R. *v.* Price, 7 C. & P. 178, Park, and Coleridge, JJ.

(*o*) R. *v.* Addis, 6 C. & P. 388, Patteson, J. R. *v.* Davis, 7 C. & P. 785, Parke, B.

(*p*) R. *v.* Price, *supra*. The authority given by sect. 2 to apprehend 'in case of pursuit in any other place to which he may have escaped,' seems not to have been adverted to in this case.

within any manor which belonged to him, and he had only the permission of the owner to preserve the game there, it was held that the assistant gamekeeper had no authority to apprehend poachers in the wood (*q*). So the gamekeeper of a person who rents the shooting over land has no right to apprehend a poacher; for a person who rents the shooting is neither the owner nor the occupier of the land (*r*). Unless a poacher be found in pursuit of game between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, there is no power to apprehend him under sect. 2 (*s*).

14 & 15 Vict. c. 19, s. 11, which was framed (*t*) in consequence of the many cases which had occurred in which questions had arisen as to the right to apprehend persons committing offences in the night, and especially in poaching cases, recites that 'doubts have been entertained as to the authority to apprehend persons found committing indictable offences in the night,' and enacts that 'it shall be lawful for any person whatsoever (*u*) to apprehend any person, who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.'

The section applies only to the apprehension of persons committing *indictable* offences; whilst, therefore, it authorises the apprehension of any persons committing an offence under sect. 9, it does not authorise the apprehension of any person committing an offence under sect. 1: for that section only creates summary offences, except indeed in the case of a third offence after two previous convictions.

14 & 15 Vict. c. 19, s. 13, which defines 'the time at which the night

(*q*) R. *v.* Addis, *supra*.

(*r*) R. *v.* Price, 5 Cox, 277, Patteson and Talfourd, JJ. R. *v.* Wood, 1 F. & F. 470, Martin, B., where the gamekeeper's master 'had the right of shooting over' the land. R. *v.* Wesley, 1 F. & F. 528, Campbell, C.J., where the gamekeeper's master had 'permission by parol to shoot over the land.'

(*s*) R. *v.* Tomlinson, 7 C. & P. 183, Coleridge, J. By sect. 103 of the Larceny Act, 1861, any person found committing any of the offences under sect. 17 of that Act (mentioned, *ante*, p. 1334) may be immediately apprehended without a warrant by any person. This power only applies to hares and rabbits, and to the places specified. By the Game Act, 1831 (1 & 2 Will. IV. c. 32), s. 31, any person found on any land, &c., in search or pursuit of game, woodcocks, snipes, quails, landrails, or rabbits, may be required by any person having the right of killing game upon such land, or by the occupier or gamekeeper, or servant of either of them, or by the warden, &c., of any forest, &c., forthwith to quit the land whereon he is found, and to tell his Christian and surname, and place of abode; and if such person, after being so required, refuse to tell his real name or place of abode, or give such a general description of his place of abode as shall be illusory for the purpose of discovery, or wilfully continue or return upon the land, he may be apprehended by the party so requiring, or by any person acting by his order and in his aid, and conveyed as soon as conveniently may be before a magistrate. In order to justify the apprehension of an offender under this section he must have been required both to quit the land, and also to tell his name; and the return must be upon the same land as the party was found upon, and for the same purpose, that is, in search or pursuit of game, &c. R. *v.* Long, 7 C. & P. 314, Williams, J. R. *v.* Lawrence, Gloucester Spring Assizes, 1843. MSS. C.S.G., Wightman, J. But in R. *v.* Prestney, 3 Cox, 505, Parke, B., held that the prosecutor was not bound both to require the prisoner to quit the land and also to tell his name and place of abode, but that he was at liberty to require either of those three matters of the prisoner, and that he was bound to comply with whichever the prosecutor demanded.

(*t*) By Mr. Greaves, Q.C.

(*u*) See R. *v.* Sanderson, 1 F. & F. 598.

shall commence and conclude *in any offence against the provisions of this Act*;' appears not to apply to sect. 11, which does not create any offence, but simply authorises the apprehension for any indictable offence committed in the night, whether that offence be an offence at common law or created by statute.

A count alleged that the defendants by night did unlawfully enter certain land armed with guns for the purpose of taking game, and that they 'were then and there in the said land by night as aforesaid by one W. R., the servant of Earl B., found, and that the defendants with the guns aforesaid did then and there assault, &c., the said W. R., the said W. R. being then and there authorised to apprehend the defendants;' it was objected that the count was bad, as it neither stated in the words of the Act, that the defendants were found committing the offence, nor sufficiently referred to the previous averments to incorporate them in the latter part of it, and the judgment was arrested upon this objection (*v*).

Where a count alleged that three entered a close by night with guns for the purpose of taking game, and were found by a servant of the owner of the said close, and that they assaulted him with the said guns; it was objected that this count intended to allege that the prisoners had committed an offence under sect. 9, and therefore the count was bad for not alleging that the prisoners were armed; Patteson, J., asked what answer there was to the objection, and the counsel for the prosecution admitted the force of the objection, and abandoned the count (*w*).

Upon an indictment for wounding with intent to murder a gamekeeper of a nobleman, it appeared that a turnpike-road ran through his estate, upon which the game was extensively preserved; but other proprietors preserved game upon lands which were not more than half a mile distant from the place where the wound was given. The keepers swore that they heard shots fired at night in the preserves in quick succession, as if two or more persons were shooting, and suspecting that the parties would shortly pass along the turnpike-road, the keepers went and secreted themselves at the road-side. Shortly afterwards, six men came along the road; they had gun barrels, which they took from their pockets; and an affray took place, in which the keeper was wounded. Several pheasants were found on the road after the affray was over. Wightman, J., told the jury that the keepers were not justified in endeavouring to apprehend the poachers; as they were not found upon

(*v*) R. *v.* Gurnock, 9 C. & P. 730. 'Gurney, B., after taking time to consider, and, I believe, consulting Coleridge, J. Two other objections were intended to be made: first, that the assault was not alleged to have been upon the land where the defendants were found; secondly, that there was no averment to shew that the keeper was in the execution of his duty when the assault was committed, and unless that were the case the assault was not within this Act. See R. *v.* Cheere, 4 B. & C. 902.' C. S. G.

(*w*) R. *v.* May, 5 Cox, 176. 'It is perfectly clear that there was nothing in the objection. The indictment was on the second section, and that only requires the offenders to be found on the close "committing any such offence," as is mentioned in the first section, *i.e.* entering, "with any gun," &c. It is clear that the count would have been bad if it had alleged the offence in the terms of the ninth section, unless those terms were equivalent to those creating the offence in the first section; and as the count alleged the offence in the terms of the first section, it was clearly good.' C. S. G.

any land committing any offence against the game laws, nor was any pursuit made (*x*).

Where on an indictment under the Act of 1828 (9 Geo. IV. c. 69), s. 2, for assaulting a gamekeeper, the prisoners were proved to have been on land in pursuit of game in the night, and on seeing the keepers made off into a highway, and sat down under a tree, and the keepers went up to them, and were violently assaulted, but the keepers said that they had not followed them with intent to apprehend them; it was held that the assault must be committed at the time when the keepers are attempting to apprehend the poachers, in order to bring the case within the above section (*y*).

Upon an indictment for wounding with intent to prevent their lawful apprehension, it appeared that the two prisoners were seized while poaching in the night on a preserve which had belonged to L., and was then in the possession of his trustees, and the head-keeper had been appointed by L. twenty years before, and regularly paid by L.'s agent to the time in question, but had never had any direct communication with the trustees, and a watcher appointed by the head-keeper, had been wounded by the prisoners whilst apprehending them, and it was held that the evidence of authority was sufficient (*z*).

So, where a covert was the property of A., an infant, and G. had married A.'s mother, and had exercised the right of killing and preserving game on A.'s property for seven years, and had appointed a gamekeeper; it was held that this was sufficient *prima facie* evidence of his right under the Game Act, 1831 (1 & 2 Will. IV. c. 32), s. 36, to demand and take game from a person found in the covert (*a*).

Being Armed.—The ninth section of the Act of 1828 creates two distinct offences, namely, first *entering* on land, one of the party being armed; and, secondly, *being* on the land armed (*b*).

By sect. 9, if several are together, and any one of them is armed, all of them are liable to be convicted (*c*).

Where an indictment for night-poaching charged eight prisoners with 'being respectively armed with guns and other offensive weapons,' and the jury found that two of the prisoners were armed with guns, and the rest with bludgeons; it was objected, that a merely constructive arming was not sufficient under 9 Geo. IV. c. 69, s. 9, and that every prisoner not armed with a gun was entitled to be acquitted, and that no reliance could be placed on the words, 'and other offensive weapons,' for that the statute enumerated by name gun, crossbow, firearms, and bludgeons,

(*x*) R. *v.* Meadham, 2 C. & K. 633.

(*y*) R. *v.* Doddridge, 8 Cox, 335, Channell, B.

(*z*) R. *v.* Fielding, 2 C. & K. 621, Creswell and Patteson, JJ.

(*a*) R. *v.* Wall, 2 Cox, 288, Coleridge, J.

(*b*) Per Coleridge, J., R. *v.* Kendrick, 7 C. & P. 184, and MSS. C. S. G. See also Davies *v.* R., 10 B. & C. 89, *post*, p. 1349. In R. *v.* Mellor, 2 Dowl. Pr. Cas. 173, Taunton, J., held that the words, entering and being,' in sect. 30 of the Game Act, 1831 (1 & 2 Will. IV. c. 32) only constituted one offence; *sed. qu.*, for persons may enter land with an innocent intent, and afterwards begin poaching.

(*c*) See R. *v.* Smith, R. & R. 368, and MS. Bayley, J., decided under 57 Geo. III. c. 90 (rep.). Under that Act it was held that if several were out together and one had arms without the knowledge of the others, the others were not liable to be convicted. R. *v.* Southern, R. & R. 444, and MS. Bayley, J.

and adding 'or any other offensive weapons,' the indictment ought to have specified the offensive weapon in any case, and particularly where the weapon was one of those named in the statute; Coleridge, J., overruled the objection, and upon a case reserved, the judges were of opinion that the conviction was right (*d*).

The defendants had brought with them from a distance some large, heavy, smooth stones and had thrown them at a gamekeeper and his assistants, whereby they had been struck and knocked down; it was left to the jury to say whether the stones had been brought by the defendants to the place or found upon the spot; whether they were of such a description as to be capable of occasioning serious injury to the person if used offensively; and whether they were brought and used for that purpose; for that, if they were satisfied of the affirmative of all those questions, these stones were offensive weapons within the statute (*e*). The prisoner had taken with him when poaching a thick stick, large enough to be called a bludgeon, but which, being lame, he was in the habit of using as a crutch; it was held to be a question for the jury whether he took it out with intent to use it as an offensive weapon, or merely for the purpose to which he usually applied it (*f*). So where the only weapons proved to have been used by the prisoners were sticks, and one, with which a gamekeeper had been knocked down, when produced, proved to be a very small one, fairly answering the description of a common walking-stick; and on its being objected that this stick could not be considered an offensive weapon, it was answered that the use made of it by the prisoner shewed his intention, and the nature of the stick; Gurney, B., said, that if a man went out with a common walking-stick, and there were circumstances to shew that he intended to use it for purposes of offence, it might perhaps be called an offensive weapon within the statute; but if he had it in the ordinary way, and upon some unexpected attack or collision he was provoked to use it in his own defence, it would be carrying the statute somewhat too far to say it was an offensive weapon within the meaning of the Act (*g*). Where the prisoners were found in a field with nets, hares, and dogs, and putting the hares on sticks walked off, and the sticks were about four feet and a half long, and about one and a half inch in diameter, one of them being weighted with an iron ferrule, and another had a large knot at the thick end; Rolfe, B., directed the jury that if the prisoners brought the sticks merely and exclusively for the purpose of carrying hares, then they were not armed within the Act, though it was possible that the sticks might have been very effectively used as offensive weapons in any affray with the keepers. But if the jury thought that the prisoners took the sticks for the double purpose of staking the nets or carrying away the game, and also of attacking the keepers, if occasion should arise for such purpose, then they would be armed within the Act (*h*). So where an indictment on 9 Geo. IV. c. 69, s. 9, alleged that the prisoners were armed with

(*d*) R. *v.* Goodfellow, 1 Den. 81; 1 C. & K. 724. R. *v.* Andrews, 1 Cox, 144. And see R. *v.* Davis, 8 C. & P. 759, Patteson, J.

(*e*) R. *v.* Grice, 7 C. & P. 803, Ludlow, Serjeant, after consulting Parke and Bolland, BB.

(*f*) R. *v.* Palmer, 1 M. & Rob. 70, Taunton, J.

(*g*) R. *v.* Fry, 2 M. & Rob. 42.

(*h*) R. *v.* Turner, 3 Cox, 304.

bludgeons and other offensive weapons; and it was proved that all of them had sticks, and that one of them used his stick against a keeper, R. *v.* Johnson (*i*) was cited to shew that a stick used for offensive purposes was an offensive weapon; and Maule, J., observed that in that case the stick was capable of being an offensive weapon; but here there was no evidence as to the size or length; and left it to the jury to determine whether this stick was an 'offensive weapon' (*j*).

It is a question for the jury in each case whether the defendants were armed with offensive weapons (*k*).

A keeper heard a gun fired in a wood, and called to his man to watch; the persons in the wood immediately abandoned their guns, and had crept away two hundred yards from them, when the keeper and his man discovered and seized them. A case was reserved upon the question, whether they could be considered as found armed when they had got to so great a distance from their guns before they were discovered: and the judges (eleven) held that they were, and that they were rightly convicted (*l*).

Upon an indictment under 57 Geo. III. c. 90 (rep.), which charged the prisoner in every count with having entered a wood, it was proved that a gamekeeper heard nine reports, and saw three flashes in the wood; the prisoner was not seen in the wood, but was soon afterwards seen in a close which adjoined the wood: upon this evidence it was left to the jury to say whether the prisoner was one of the party in the wood; and they having found that he was, the judges, upon a case reserved, held that, as there was evidence to satisfy the jury that he had been in the wood armed, or was one of a party who had been so, it was sufficient (*m*).

Entering.—It is not necessary under the Act of 1828 that the defendants should be actually seen in the close laid in the indictment; it is sufficient if there be evidence to satisfy the jury that they were in fact in the close for the purpose alleged. Thus where the prisoners had been seen in a close which lay between two woods, going in a direction from one of the woods in which shots had been previously heard, towards the other wood, it was left to the jury to say whether they had not been in the wood in which the shots had been heard (*n*).

In R. *v.* Higgs (*o*), Willes, J., is reported to have said: 'I have always held that if people are out at night in pursuit of game, intending to take it when they can find any, they are in pursuit of game in every field that they pass over. If they are out with a general intent to take game, I should say that was an intent to take it in any field they may pass through where game may be found' (*p*).

Where an accomplice proved that all the four defendants went to a preserve called N. Wood for the purpose of killing pheasants, and that all of them, except himself and M., went into the wood, they remaining outside; and on the approach of the gamekeepers the witness and M.

(*i*) R. & R. 492.

(*j*) R. *v.* Merry, 2 Cox, 240, and MSS. C. S. G.

(*k*) R. *v.* Sutton, 13 Cox, 648. R. *v.* Williams, 14 Cox, 59.

(*l*) R. *v.* Nash, MS. Bayley, J., and R. & R. 386, decided under the repealed statute, 57 Geo. III. c 90.

(*m*) R. *v.* Worker, 1 Mood. 165.

(*n*) R. *v.* Capewell, 5 C. & P. 549, and MSS. C. S. G. Parke, B.

(*o*) 10 Cox, 527.

(*p*) See Davies *v.* R., *post*, p. 1349.

went into the wood, and informed the others of it, when they all ran away together; Alderson, B., said: 'The entering on the land by one is to be considered as the entering of all, if the others are at the place and assisting—exactly in the same way that would fix them in a case of burglary, there all are guilty, as well those who actually enter the house as those who are close at hand on the outside of it, waiting to watch or to carry off the property; it is enough if all these persons were at the place, each of them acting his part, and conducing to one common intent, although some only of the party were bodily in the wood' (*q*). And in another case, where one or two out of four poachers were not actually in the wood laid in the indictment, but were waiting outside to watch, the same learned judge said: 'If two persons were in the wood, and the other two outside were of the same party, and there for the same purpose, it would be an offence within the Act. Suppose that some of the party were to go down one side of the hedge, and some down the other, beating the same fence, that would be no offence within the statute, according to R. *v.* Dowsell (*r*); and the same consequence would follow if two went into the wood, and a number of others surrounded the outside: surely the statute meant to include such cases: I have a strong opinion on the point; but out of respect for my brother Patteson's opinion, if the question arises I will reserve the point' (*s*).

Three defendants went out for the purpose of night-poaching; P. and O. were seen setting nets in the hedge-row of the yew tree piece, they being on the other side in a turnpike-road, and N. went into another field; P. and O. sent a dog into the yew tree piece, which drove a hare into one of the nets; it was held that the case was not within the statute, as N. was independently engaged in poaching in the field, he having left the others poaching in the road (*t*).

Upon an indictment against six prisoners for night-poaching in R.'s field, it appeared that the prisoners were in company in a lane adjoining the field in question setting nets between the ditch and the hedge of the field to take game. One of them remained with the nets, and the rest divided into two parties, and went round the field. Three or four of the prisoners armed with bludgeons were seen at one time beating in the field, with two dogs, for game. A witness stated that he saw all the prisoners come out of the field, and go together to the nets and take them up. The prisoners were all associated and engaged in the common purpose of taking game in the field in question. The prisoners were pursued and apprehended, and four of them had sticks or bludgeons, and two of them drew knives from their pockets, and threatened to stab the takers. It was objected that the evidence did not sufficiently prove that all the prisoners had been in the field, and that none could be properly convicted who had not been in the field, and as those who had been in the field could not be identified, all must be acquitted. Wilde, C.J., did not think the

(*q*) R. *v.* Passey, 7 C. & P. 282. See R. *v.* Scotton, 5 Q.B. 493. Stacey *v.* Whitehurst, 18 C.B. (N. S) 344.

(*r*) 6 C. & P. 398.

(*s*) R. *v.* Lockett, 7 C. & P. 300, Alderson, B. The jury having found that all the defendants had entered the wood, the question was not reserved. See R. *v.* Andrews, 2 M. & Rob. 37, Gurney, B.

(*t*) R. *v.* Nickless, 8 C. & P. 757, Patteson, J.

evidence sufficiently certain that all had been in the field, and directed the jury to consider whether all the prisoners were at the time associated and engaged in the common purpose of taking game by some of them going armed into the field, and there beating for game, while others rendered their aid by remaining outside the hedge; and directed the jury that if they were satisfied that all the prisoners were so engaged, they were all liable to be found guilty, although the witness could not identify which of the prisoners entered the field. The case was left to the jury on the assumption that some of the prisoners never entered the field. The jury found the prisoners guilty, and upon a case reserved the conviction was held right. The judges in this case did not think it necessary to decide, whether it would be an offence within the statute if a party of three or more together, one being armed, entered and were in land consisting of two or more enclosures in the same or different occupations, because here the indictment made it essential to prove that the offence was committed in the field occupied by R. Five of the judges (*u*) were of opinion that to constitute the statutable misdemeanor the party must enter into and be bodily in the close, and that if three were in the close and three out the latter were not guilty; and as the three who entered in this case could not be ascertained all were entitled to be acquitted. Seven of the judges (*v*) thought that if three were in the close, one being armed, they were guilty; and that all others who were together with them aiding and assisting were guilty of the same misdemeanor, though they were not in the field (*w*).

On an indictment on sect. 9, it appeared that three persons went out together armed with guns in the night to destroy game, and were together in one of the closes mentioned in the indictment, called T., but not for the purpose of killing game in that close (for there was none there), nor in one adjoining close by shooting from it. They were passing along it to another place. One at least of the three was in a close mentioned in the indictment, called S., which had pheasants in it, for the purpose of destroying game in that close, but the whole three were not; they were all, however, at that time of the same company, and with that common purpose. The fourth count stated that the prisoners were in inclosed land occupied by W. S. and T. were both inclosed and contiguous, being only separated by a fence, and both in the occupation of W. There was a question whether this could make any difference; Parke, B., therefore respited the judgment, and reserved the case for the opinion of the judges, and the following judgments were given: Campbell, C.J., 'The fourth count of the indictment alleges that the prisoners were in inclosed land occupied by W.; and on that count at all events I think the conviction was right and ought to be affirmed. Some confusion seems to have arisen on this matter from not attending sufficiently to the provisions of the Act. It has been treated as though the word "close" occurred

(*u*) Parke, B., Patteson, J., Cresswell, J., Platt, B., and Williams, J.

(*v*) Denman, C.J. Wilde, C.J., Pollock, C.B., Rolfe, B., Coltman, J., Wightman, J., and Erle, J.

(*w*) R. *v.* Whittaker, 1 Den. 310; 2 C. & K. 636. Mr. Greaves considered that this case was wrongly decided. See 4th edition of this work, Vol. i. note (*s*) to p. 657, and note (*o*) to p. 655; and R. *v.* May, 5 Cox, 176, *sed quære*.

in the Act, whereas it only specifies any land open or inclosed ; a practice has consequently prevailed of naming a certain close in the indictment, which is quite needless. It would certainly be requisite to designate some land, and give it some description ; but if that land comprehended fifty closes, and the offence was committed on any part of such land, it would be within the statute. If therefore A., B., and C. all belong to one party with one common intent, A. might be in Blackacre, B. in Whiteacre, and C. in Greenacre, and all guilty under this statute.' Parke, B., ' I am of the same opinion ; though, at one time, I felt some doubt whether there could be a conviction on any count, I now think there may be on the fourth. If the three are all of one party, one or more being armed with an offensive weapon, and with the common object of destroying game in the night, it is immaterial whether they are in the same or in different closes or inclosures. It is necessary to describe the land correctly in the indictment, for the purpose of identifying it ; but if the three are on the land so described together under the circumstances I have mentioned, it is sufficient to bring them within the statute, whether the land be open or inclosed, or in one or more inclosures or in one or several occupations. In Mr. Greaves' very able note (*x*) the reasoning appears to me to be founded on the assumption that the statute provided only for the case of three being together in one and the same piece of inclosed land, if the land was inclosed, or one and the same piece of open land, if it was open, whereas the statute contains no such provision.' Alderson, B., ' The indictment charges the prisoners with entering, &c., certain land, &c. ; it is therefore necessary to describe the land the entering which constitutes the offence charged. The land may consist of different closes, and be in different occupations ; but whatever be the number of closes, or of occupations, the land in question must be rightly described in the indictment ' (*y*).

As to what constitutes an entry within the meaning of this statute, it has been held that if persons standing in a road hang nets on the twigs of a hedge within a close, it is an entry into such close within sect. 9. Some poachers standing in a lane spread their nets upon the twigs of a hedge which separated the lane from the close ; Alderson, B., said : ' I shall tell the jury that if they are satisfied that, in effecting a common purpose by all the defendants, the nets were hung upon the twigs of the hedge so as to be within the field, it was an entry. Lord Ellenborough, C.J., in Pickering *v.* Rudd (*z*), stated that he had once held that firing a gun loaded with shot into a field was a breaking of the close, and I am of opinion that if these defendants so placed the nets within the field it was an entry by them all ' (*a*). Poachers were seen setting nets in the hedge-row of a field, they being on the other side of the hedge in a turn-

(*x*) (4th ed.), Vol. i. p. 655, note (*o*).

(*y*) R. *v.* Uezzell, 2 Den. 274 ; 20 L. J. M. C. 192. Talfourd, J., and Platt, B., concurred. This case was not argued. Mr. Greaves thought this decision erroneous. See Vol. i., p. 659 (4th ed.), note (*v*) ; *sed quære.*

(*z*) 1 Stark. (N. P.) 56 ; 4 Camp. 219. Ellenborough, C.J., held that sending dogs into a plantation to beat for game was a trespass in the plantation. Lord Berkeley *v.* Wathen, *ex relatione* Mr. Bloxsome, who was attorney in the cause. And see R. *v.* Pratt, 4 E. & B. 860, where Campbell, C.J., and Crompton, J., expressed similar opinions. Osbond *v.* Meadows, 12 C. B. (N. S.) 18.

(*a*) R. *v.* Athea, 2 Lew. 191.

pike-road; they also sent a dog into the field, which drove a hare into one of the nets; it was contended that the sending of the dog into the field to drive the hares into the nets was, in point of law, an entering into the field; but Patteson, J., held that it was not (*b*).

Where on an indictment on sect. 9, against three for entering a coppice, it appeared that two of them were seen together running out of the coppice, and the third was almost immediately afterwards seen coming out of it alone, having a gun and a pheasant, and one of the others had a gun. Maule, J., said, 'The three prisoners must be shewn to have acted together and in concert. It is not sufficient to shew that all were in the close at the same time; there must be some proof of an association together. This is often done by shewing that the parties were seen together previously, the day or evening before. There is no evidence of the kind here. It is, however, a question for the jury;' and the case was left to the jury accordingly (*c*).

If the indictment states that the defendants entered into a certain close with intent, then and there, to kill game, it must be proved that the defendants had the intent to kill game in the particular close named (*d*). On an indictment which charged that the prisoners were in the Great Ground with intent then and there to take game, it was proved that they were all in that close at 4 o'clock, A.M., when they were all taking up nets, which were spread against a gate and a gap in the fence; they had dogs with them, and when they had put the nets in a bag, they took up five hares which were lying dead on the ground about seven yards from the nets; it was contended that there was not sufficient evidence to prove that they were in the Great Ground with intent to take game there; and the previous cases were cited. Rolfe, B., 'The cases have certainly gone to that length under this statute, and as the indictment charges an intent then and there to take game, I shall, in deference to those cases, direct the jury that they must be satisfied the prisoners were in the Great Ground with intent then—that is, at that hour— and there—that is, in that spot —to take game. For my own part, however, I must say I should have been inclined to hold that the offence was complete if a man were to be in one close and were to take game in the next.' 'It was no matter here where the hares were taken; though they were taken in another close, the nets were spread in the Great Ground, and the offence was complete, though no game was taken there, if they were there with intent to do so' (*e*).

A doubt is stated in the marginal note of R. *v.* Barham (*f*), whether it is necessary that the defendant should have such an intent in the place in which he is found armed, unless it be so stated in the indictment, and R. *v.* Worker (*g*) is referred to; but in that case, although the indictment was general, no such question arose. Where it appeared that the prisoners

(*b*) R. *v.* Nickless, 8 C. & P. 757, Patteson, J. *Quære*, might not the poachers have been convicted for being on the turnpike road in pursuit of game? See *ante*, p. 1334. See R. *v.* Pratt, 4 E. & B. 860, Campbell, C.J., and Crompton, J., as to the meaning of the words 'commit any trespass by entering or being upon any land,' in 1 & 2 Will. IV. c. 32, s. 30.

(*c*) R. *v.* Jones, 2 Cox, 185.

(*d*) R. *v.* Barham, 1 Mood. 151. R. *v.* Capewell, 5 C. & P. 549. R. *v.* Gainer, 7 C. & P. 231.

(*e*) R. *v.* Turner, 3 Cox, 304.

(*f*) 1 Mood. 151.

(*g*) 1 Mood, 165.

were in Shutt Leasowe, a place named in the indictment, and which adjoined Short Wood, and were apparently going to the wood, Patteson, J., said: 'The intent was evidently to kill game in the wood, into which none of the parties ever got for that purpose; it is true that they are charged with being in Shutt Leasowe, but they had no intention of killing game there; they must be acquitted' (*h*).

Description of Locus in Quo.—The indictment must in some way or other particularise the place; for the defendant has a right to know to what specific place the evidence is to be directed; and stating that in the parish of A. the party entered into a certain close there was held not sufficient under the repealed statute (*i*). But it has been held sufficient to allege that the defendants entered certain land in the occupation of a person named, without stating whether the land was enclosed or not (*k*).

Where an indictment described the land as 'D. Plantation of and belonging to S. H. W.,' and she was a widow generally known as Mrs. Hosier W., and S. H. Hosier W., Hosier having been the name of a former husband, but she would be quite as well known by the name of S. H. W. and could not be mistaken for any other person; it was held that the description in the indictment was sufficient (*l*).

Where an indictment for night-poaching described the land as land 'of and belonging to J. W. D.,' Patteson, J., held that it was sufficient, as that meant that the land was in his occupation (*m*).

An indictment alleged that the prisoners, 'late of the parish of Foffants otherwise called Fofants, otherwise called Fovant,' entered 'certain land called Foffants, otherwise called Fofants, otherwise called Fovant;' and it was objected that the indictment was uncertain as to the parish and the wood, as they were both described under these several names; Coleridge, J., held that there was nothing in the objection, as all the names were *idem sonans* (*n*).

A variance between the allegation of the occupation of land and the proof of the occupation will not if such as to have misled the prisoners be amended at the trial (*o*).

Indictment.—The indictment must allege not only an entry by night,

(*h*) R. *v.* Davis, 8 C. & P. 759. It does not appear whether the indictment had the words 'then and there' in it. In a case like this, in general a jury might find an intention to take game by the prisoners before they got into the wood. See R. *v.* Higgs, *ante*, p. 1343.

(*i*) R. *v.* Ridley [1823]. R. & R. 515. R. *v.* Crick, 5 C. & P. 508, Vaughan, B. R. *v.* Capewell, 5 C. & P. 549. Where the close is described in general terms, it may be prudent to apply for particulars of the close in which the offence is intended to be proved, which it is apprehended the Court would order to be delivered, as it is the usual course in all cases, where an indictment is so general as not to afford the defendant sufficient information. See *ante*, Vol. i. p. 185, and *post* p. 1935 *et seq.*

(*k*) R. *v.* Andrews, 2 M. & Rob. 37, Gurney, B. R. *v.* Morris, 5 Cox, 205. A practice has prevailed of naming a certain close in the indictment, which is needless. See R. *v.* Uezzell, 2 Den. 27; 20 L. J. M. C. 192. In R. *v.* Owen, 1 Mood. 118, decided on 57 Geo. III. c. 90 (rep.) proof that a walk described as the Old Walk was always known as the Long Walk, was held fatal. The marginal note adds that, 'it is not necessary where the name of the owner or occupier of the close is stated to state the name of the close also.' The case, itself, however, contains no such point. C. S. G. It is submitted that in view of the powers of amendment given by 14 & 15 Vict. c. 100, s. 1 (*post*, p. 1972), this decision is of no present importance.

(*l*) R. *v.* Morris, 5 Cox, 205, Talfourd, J.

(*m*) R. *v.* Riley, 3 C. & K. 116.

(*n*) R. *v.* Andrews, 1 Cox, 144.

(*o*) R. *v.* Sutton, 13 Cox, 648, Lindley, J.

but an arming by night. An indictment alleged that the defendants did by night unlawfully enter divers closes and inclosed lands, and were then and there in the said closes and lands, armed with guns for the purpose of then and there taking and destroying game; it was objected that the words 'then and there' did not mean that the defendants were there by night, but only on the day, and at the place aforesaid; and it was held that the indictment was bad. 'If the words "by night" had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence they might have referred to the whole; but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows. The two members of the sentence are distinct; the first states the entry into the closes by night, but does not state that the defendants were armed or the intent with which they entered; the second branch states, that they were in the closes armed, for the purpose of destroying game, but does not state that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct the indictment is bad' (*p*).

In an indictment for night-poaching it is sufficient to allege that the prisoners unlawfully entered, and it is not necessary to allege the facts which make the entry unlawful (*q*). And in such an indictment it is sufficient to allege an intent to take game without specifying the particular kind of game (*r*).

The indictment need not contain any specific allegation that the defendants entered the close between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, the period which by sect. 12 (*s*) it is provided shall be considered night (*t*).

The indictment may contain counts not only on the ninth section but also on the second for assaulting a gamekeeper authorised to apprehend, for assaulting a gamekeeper in the execution of his duty, and for a common assault (*u*), and if there be any doubt as to the number of persons not amounting to three, or the proof of their being out in pursuit of game, it certainly would be prudent to add such counts in all cases where an assault has been committed. Where an indictment, after stating the entry into the land by night, proceeded thus; the defendants 'being then and there by night as aforesaid armed with a gun;' it was objected that this averment was not sufficient, because 'then' meant only the day and year aforesaid, and not the time of the entry; Parke, B., said, he would leave the defendants to their writ of error, but advised the insertion of the words, 'at the time when they so entered,' in such indictments

(*p*) Davies *v.* R., 10 B. & C. 89. The following objections were also taken, but not adverted to by the Court: 1st, that the hour of the night ought to have been stated; 2ndly, that it was not stated that the defendants unlawfully were in the closes for the purpose of destroying game; 3rdly, it was not stated that the defendants were there together for the purpose of destroying game; and 4thly, that the indictment stated that they entered 'divers closes' without specifying any in particular. But see Cureton *v.* R., *ante*, p. 1338.

(*q*) R. *v.* May, 5 Cox, 176, Patteson, J.

(*r*) Ibid.

(*s*) *Ante*, p. 1333.

(*t*) R. *v.* Riley, 1 Lew. 149, Parke, B. R. *v.* Pearson, ibid., 154, Gurney, B.

(*u*) R. *v.* Finucane, 5 C. & P. 551, and MS. C. S. G. Parke, B. R. *v.* Simpson, Stafford Spring Assizes, 1830, Bolland, B. MSS. C. S. G.

in future (*v*). Where an indictment alleged that the defendants did enter, and were in certain land, they 'being then and there by night as aforesaid armed with guns, and other offensive weapons,' and it was objected that the indictment did not contain any sufficient allegation that the defendants were armed when they entered the land; it was held that the indictment was sufficient, as all the requisites of the statute had been complied with (*w*). Where there was one indictment for shooting at a gamekeeper with intent to murder him, and another indictment for night-poaching, both founded on the same transaction, it was held that the prosecutor was not bound to elect which he would proceed upon, as the offences were quite distinct, and one of them could not possibly merge in the other (*x*).

Upon an indictment for night-poaching the case was proved, except that it was shewn that the land was the freehold of S., and in the occupation of a tenant. It was contended that in order to shew that the prisoner was 'unlawfully' there, it must be shewn by direct evidence that he had not the permission either of the tenant or landlord. The jury found the prisoner guilty, and unless the particular proof suggested was necessary, there was abundant evidence, not merely that the prisoner and those with him were on the land, but also in their conduct that they were unlawfully there. Upon a case reserved, it was held that the conviction was right. If persons are found at night armed and using violence to keepers, it cannot be necessary to call the tenant of the land or the owner to prove they were not there by permission (*y*).

(*v*) R. *v.* Wilks, 7 C. & P. 811. See Stead *v.* Poyer, 1 C.B. 782. It seems to be sufficient to shew that the defendants were on the land armed, &c., and that it is not necessary also to allege that they were armed when they entered on the land.

(*w*) R. *v.* Kendrick, 7 C. & P. 184, and MS. C. S. G. Coleridge, J.

(*x*) R. *v.* Handley, 5 C. & P. 565, Parke, B.

(*y*) R. *v.* Wood, Dears. & B. 1; 25 L. J. M. C. 96.

CANADIAN NOTES.

TAKING OR KILLING GAME.

Killing Creatures Capable of Being Stolen with Intent to Steal Their Carcases.—Code sec. 350.

CHAPTER THE FIFTEENTH.

OF UNLAWFULLY TAKING OR DESTROYING FISH.

Common Law.—At common law larceny may be committed of fish confined in a trunk or net (*a*); but not when at their natural liberty in rivers or great waters (*b*). Doubts have been raised whether fish in a pond are the subject of larceny at common law. It would seem, however, upon principle, and according to the better opinions, that larceny may be committed of fish in a pond, if the pond be private inclosed property, and of such kind and dimensions that the fish within it may be considered as restrained of their natural liberty, and liable to be taken at any time, according to the pleasure of the owner (*c*).

Statute.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 24, 'Whosoever shall unlawfully and wilfully take (*d*) or destroy any fish (*dd*) in any water which shall run through or be in any land adjoining (*e*), or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor (*f*); and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall on conviction thereof before a justice of the peace (*g*), forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet: Provided that nothing hereinbefore contained shall extend to any person angling *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset*; but whosoever shall by angling *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset* unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds, and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds as to the justice shall

(*a*) *Ante*, p. 1275. 2 East, P. C. 610.

(*b*) 3 Co. Inst. 109, 1 Hawk. c. 33, s. 39.

(*c*) Staundf. 25 *b*. 3 Co. Inst. 109. Lamb. 274. 1 Hawk. c. 33, s. 39. 2 East, P.C. 610. But the indictment should describe the pond, so that it may appear on the face of it, that taking fish out of such a pond is felony, 2 East, P. C. 611. See also R. *v.* Mallison, 20 Cox, 204, *ante*, p. 1279.

(*d*) 'If fish were inclosed in a net, or hooked on a line, it would seem that the case would come within this section by analogy to R. *v.* Glover, *ante*, p. 1334, although there had been no actual removal of them by the hands of the prisoner.' C. S. G.

(*dd*) Including crayfish. Caygill *v.* Thwaite, 33 W. R. 581: 49 J. P. 614. As to eels, see Woodhouse *v.* Etheridge, L. R. 6 C. P. 570.

(*e*) See R. *v.* Hodges, *ante*, p. 1261, as to the meaning of the term 'adjoining.'

(*f*) This offence is punishable by imprisonment or fine, or both, *vide ante*, Vol. i., p. 249.

(*g*) The powers of a justice of the peace sitting alone are now limited by 42 & 43 Vict. c. 49, s. 20.

seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto' (*h*).

Sect. 25 empowers the owner of the fishery, &c., his servant, or any person authorised by him, to seize the fishing tackle of a person found fishing contrary to this Act, with a proviso that if such tackle be taken from a person unlawfully angling (*i*) in the day-time such person shall not be liable to pay a penalty or damages.

On a demise of land through which a stream runs the right of fishing in the stream passes to the tenant, unless it is expressly reserved to the lessor in the lease. So where persons took trout in a stream passing through lands which had been let to a tenant, and such taking was with the consent of the tenant but without that of the lessor, the Court held that a conviction of the said persons on the prosecution of the lessor under sect. 24, *supra*, for unlawfully taking fish was wrong (*j*).

By sect. 26, 'Whosoever shall steal any oysters or oyster brood from any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny (*k*); and whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster *bed, laying*, or fishery, *being the property of any other person, and sufficiently marked out or known as such*, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding three months with or without hard labour . . . and it shall be sufficient in any indictment to describe either by name or otherwise the bed, laying, or fishery in

(*h*) Taken from 7 & 8 Geo. IV. c. 2, s. 34, and extended to Ireland. The words in *italics* are introduced instead of 'day-time' in the former enactment.

(*i*) As to what constitutes 'angling' see Barnard *v.* Roberts, 96 L. T. 648; 71 J. P. 277.

(*j*) Jones *v.* Davies, 20 Cox, 184.

(*k*) *Ante*, p. 1313. By sect. 28 of the Sea Fisheries Act, 1868, 31 & 32 Vict. c. 45, in this part of this Act (Part iii.) the words 'oysters' and 'mussels' respectively include the brood, ware, halfware, spat, and spawn of oysters and mussels respectively. By sect. 42, whenever it is necessary in any legal proceedings to prove that in pursuance of any Act of Parliament or of an order under this part of this Act, the limits of any oyster or mussel fishery have been duly buoyed or otherwise marked, or notices of such limits have been duly published, &c., a certificate purporting to be under the hand of one of the secretaries or assistant-secretaries of the [Board of Agriculture and Fisheries, 3 Edw. VII. c. 31], certifying that the Board are satisfied the said limits were so buoyed, &c., shall be received as evidence that the same have been so buoyed &c., or that the said notices have been so published, &c. By sect. 51, all oysters or mussel being in or on an oyster or mussel bed within the limits of any such several fishery shall be the absolute property of the grantees, and in all Courts of law and equity and elsewhere, and for all purposes, civil, criminal, or other, shall be deemed to be in the actual possession of the grantees. By sect. 43 the portion of the sea-shore to which an order of the Board of Agriculture, &c., under this Act relates (as far as it is not by law within the body of any county) shall for all purposes of jurisdiction be deemed to be within the body of the adjoining county, or to be within the body of each of the adjoining counties if more than one. See also sects. 52, 55, and 65.

which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: Provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument, or engine adapted for taking floating fish only' (*l*).

Indictment.—Where an indictment charged the prisoner with unlawfully entering a garden adjoining a dwelling-house, and with a certain net stealing out of a pond in the said garden a certain quantity of live gold and silver fish of the goods and chattels of S. T.; the judges held the indictment good, the case being within 5 Geo. III. c. 14 (rep.), without the allegation that the fish were the goods and chattels of any person, and that part of the indictment to be surplusage (*m*).

An indictment on the same statute was held good, although it did not state the means by which the fish were taken or stolen, and although it alleged them to have been feloniously stolen (*n*).

Evidence.—Upon a case reserved upon an indictment for stealing oysters in a tidal river, Cockburn, C.J., in delivering the judgment of the Court said: 'At the trial the prosecutor proved by oral evidence that from the year 1815 to the present time he and his father had been in the possession and enjoyment of the oyster bed, and had asserted an exclusive right thereto; that their exclusive right to this oyster bed was challenged, and that in 1846 an action was brought to try the right, and a verdict given in favour of the prosecutor, and that since then, down to this time, the prosecutor's right had not been challenged. It was said that this evidence was not sufficient, and that the prosecutor's right ought to have been proved by deed. It is quite true that this oyster bed was in a navigable river, where the public had *prima facie* a right to fish; but it is equally true that by ancient grant or prescription a private person may have an exclusive right to a separate fishery therein. Then the only question is, can such an exclusive right be proved by parol? It is clear that prescriptive rights may be proved by parol evidence. Indeed, what better proof can there be against a wrongdoer than that of an uninterrupted user or enjoyment of the right for forty or fifty years? And in such a case a jury would be told that a claimant, from such long continued uninterrupted enjoyment of the right claimed, would have the right. In the present case the evidence was abundantly sufficient to establish the right' (*o*).

(*l*) Taken from 7 & 8 Geo. IV. c. 29, s. 36 (E). There were similar sections in 5 & 6 Vict. c. 106, ss. 11, 12 (I); 8 & 9 Vict. c. 108, s. 18 (I); and 13 & 14 Vict. c. 88, s. 42 (I). The words in *italics* were introduced to remove a doubt as to whether 'oyster fishery' was co-extensive with the words in the beginning of the section.

(*m*) R. *v.* Hundson, 2 East, P. C. 611.

(*n*) R. *v.* Carradice, R. & R. 205. The judges held the conviction wrong on the ground that the fish were not 'bred, kept, or preserved' in the river, as the river ran in its natural course, and there was nothing to keep or preserve the fish within the park, through which the river ran.

(*o*) R. *v.* Downing, 11 Cox, 580.

CANADIAN NOTES.

UNLAWFULLY TAKING OR DESTROYING FISH.

Oysters are Capable of Being Stolen.—See Code sec. 364.

Theft of Oysters, etc.—See Code sec. 371.

An indictment under this section shall be sufficient if the oyster bed, laying or fishery is described by name or otherwise, without stating the same to be in any particular county or place. Code sec. 864(*e*).

CHAPTER THE SIXTEENTH.

OF STEALING IN ANY VESSEL IN PORT, OR UPON ANY NAVIGABLE RIVER, ETC., OR IN ANY CREEK, ETC., AND OF PLUNDERING SHIPWRECKED VESSELS.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), sect. 63 (*a*), 'Whosoever shall steal any goods or merchandise in any vessel, barge, or boat of any description whatsoever *in any haven*, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such *haven*, port, river, or canal (*b*), or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such *haven*, port, river, canal, creek, or basin (*c*), shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*d*).

By sect. 64 (*e*), 'Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . (*d*) and the offender may be indicted and tried either in the county or place in which the offence shall have been committed or in any county or place next adjoining.'

By sect. 65, 'If any goods, merchandise, or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken *or summoned* before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof, and the offender shall, on conviction of such offence before the justice, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall

(*a*) Taken from 7 & 8 Geo. IV. c. 29, s. 17, and the 9 Geo. IV. c. 55, s. 17 (I), with the addition in *italics*.

(*b*) The offence in the first part of the section is stealing *in* any vessel, &c., so that proof of any asportation sufficient to constitute larceny is all that need be proved.

(*c*) In the latter part of the section the offence is stealing *from* any dock, &c., so that there must be an actual removal of the goods from the dock, &c. Cf. 'Stealing from the Person,' *ante*, p. 1155.

(*d*) Nor less than three years or to be imprisoned with or without hard labour for not more than two years. 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted are repealed.

(*e*) The first part of this section is taken from 7 Will. IV. & 1 Vict. c. 87, s. 8; the last part from the last part of 7 & 8 Geo. IV. c. 29, s. 18 (E), and 9 Geo. IV. c. 55, s. 18 (I).

forfeit and pay over and above the value of the goods, merchandise, or articles, such sum of money not exceeding twenty pounds as to the justice shall seem meet' (*f*).

By sect. 66, 'If any person shall offer or expose for sale any goods, merchandise, or articles whatsoever, which shall have been unlawfully taken, or shall be reasonably suspected so to have been taken, from any ship or vessel in distress, or wrecked, stranded or cast on shore, in every such case any person to whom the same shall be offered for sale, or any officer of the customs or excise, or peace officer, may lawfully seize the same, and shall with all convenient speed carry the same, or give notice of such seizure, to some justice of the peace; and if the person who shall have offered or exposed the same for sale, being summoned by such justice, shall not appear and satisfy the justice that he came lawfully by such goods, merchandise, or articles, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the justice) to the person who seized the same; and the offender shall, on conviction of such offence by the justice, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money not exceeding twenty pounds as to the justice shall seem meet' (*g*).

In a case upon 24 Geo. II. c. 45 (rep.), the words 'goods, wares, and merchandise' were considered as restricted to such goods, &c., as were usually lodged in vessels, or on wharfs or quays. So that where the prisoner was indicted upon that statute for stealing a considerable sum of money out of a ship in port, the case was held not to be within the statute, though great part of the money consisted of Portuguese money not made current by proclamation, but commonly current (*h*).

The luggage of a passenger going by a steamer was within the words 'goods or merchandise' in 7 & 8 Geo. IV. c. 29, s. 17 (rep.) (*i*).

Where the master and owner of a ship took some of the goods delivered to him to carry, it was held not to be larceny, as he did not take the goods out of their package (*j*); and it was also held that even if under the circumstances it had amounted to larceny, it would not have been an offence within 24 Geo. II. c. 45 (rep.), as the goods were in the prisoner's own vessel (*k*).

(*f*) Taken from 7 & 8 Geo. IV. c. 29, s. 19 (E). There was a similar clause in 14 & 15 Vict. c. 92, s. 4 (I). The defendant can elect to be tried on indictment for an offence under this section or sect. 66 (42 & 43 Vict. c. 49, s. 17), *ante*, Vol. i. p. 17.

(*g*) Taken from 7 & 8 Geo. IV. c. 29, s. 20 (E). There was a similar clause in 14 & 15 Vict. c. 92, s. 4 (I). The accused may elect to be tried on indictment. *Vide ante*, Vol. i. p. 17.

(*h*) R. *v.* Grimes, 2 East, P. C. 647, Fost. 79 (n). R. *v.* Leigh, 1 Leach, 52. The principle of these cases applies to sect. 63 of the present Act, which relates only to 'goods and merchandise,' and does not refer to other articles mentioned in sects. 64, 65, and 66. Cf. sect. 60 (*ante*, p. 1155), which relates to larceny in a dwelling-house of 'any chattel, money, or valuable security,' and other sections where the same words are used.

(*i*) R. *v.* Wright, 7 C. & P. 159, Park, J., and Alderson, B.

(*j*) But 24 & 25 Vict. c. 96, s. 3, *ante*, p. 1245, would cover such a case.

(*k*) R. *v.* Madox, R. & R. 92.

Where the prisoner was indicted for stealing a quantity of deals 'in a certain barge on the navigable river Thames,' and it appeared that the barge had been brought into Limehouse dock, and there moored; and by the efflux of the tide it was left aground, and in the night the deals were stolen; it was held that the offence laid was not proved within the meaning of the 24 Geo. II. c. 45 (rep.), as the evidence proved that the offence was not committed on the navigable river Thames but upon the banks of one of its creeks (*l*).

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sect. 536 (2), imposes a fine not exceeding £50, in addition to any punishment to which he may otherwise be liable, on any person who (a) impedes or hinders, or endeavours in any way to impede or hinder, the saving of any vessel stranded, or in danger of being stranded, or otherwise in distress on or near any coast or tidal water, or of any part of the cargo or apparel thereof, or of any wreck, (b) secretes any wreck, or defaces or obliterates any marks thereon, or (c) wrongfully carries away or removes any part of a vessel so stranded, &c., or any part of the cargo or apparel thereof, or any wreck.

By sect. 535, 'If any person takes into any foreign port any vessel, stranded, derelict, or otherwise in distress, found on or near the coasts of the United Kingdom, or any tidal water within the limits of the United Kingdom, or any part of the cargo or apparel thereof, or anything belonging thereto, or any wreck found within those limits, and there sells the same, that person shall be guilty of felony, and on conviction thereof shall be liable to be kept in penal servitude for a term not less than three years and not exceeding five years' (*m*).

(*l*) R. *v.* Pike, 2 East, P. C. 647.

(*m*) As to imprisonment in lieu of penal servitude, *vide ante*, Vol. i. p. 212. By sect. 684, 'for the purpose of giving jurisdiction under this Act, every offence shall have been deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same was actually committed, or arose, or in any place in which the offender, or person complained against may be.'

CANADIAN NOTES.

THEFT FROM VESSELS, WHARFS, WRECKS, ETC.

Theft from Vessels.—See Code sec. 382.

Theft from Wrecks.—See Code sec. 383.

The expression "wreck" includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons. Code sec. 2(41).

Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it. Section 347(2). It is, therefore, submitted that an actual removal of the thing from the dock, etc., is not essential to the offence. But see R. v. White (1901), 4 Can. Cr. Cas. 430.

CHAPTER THE SEVENTEENTH.

OF LARCENY BY SERVANTS, AND PERSONS WHO HAVE THE CUSTODY OF GOODS AS SERVANTS, AND NOT THE LEGAL POSSESSION.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 67 (*a*), 'Whosoever being a clerk or servant, *or being employed for the purpose or in the capacity of a clerk or servant*, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years . . . (*b*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*c*).

This enactment does little if anything more than prescribe the punishment for a particular form of common law larceny.

In some cases the clerk or servant may also be a bailee and punishable under 24 & 25 Vict. c. 96, s. 3, *ante*, p. 1245.

As to the prisoner not being entitled to be acquitted where the evidence proves an embezzlement, and not larceny, see 24 & 25 Vict. c. 96, s. 72, *post*, p. 1376.

Common Law.—At common law where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use (*d*). And this rule appears to hold universally in the case of servants whose possession of their master's goods, by their delivery or permission, is the possession of the master himself (*e*).

The rule is recognised in the cases now to be cited.

The prisoner, a sheriff's officer, under a writ of *fieri facias* against one B., seized the goods in B.'s house, amongst which were some engravings in a locked closet. He opened the closet, took out the engravings, and sold them for his own use. Upon an indictment against him for larceny, it was urged that this was a breach of trust only; but, upon the point being saved, the judges held it a larceny; on the ground that the officer

(*a*) Taken from 7 & 8 Geo. IV. c. 29, s. 46 (E), and 9 Geo. IV. c. 55, s. 39 (I). The words in *italics* are taken from the next section in each of those Acts; and their insertion makes this section and the next co-extensive as to the persons to whom they apply. The word 'employer' is taken from 9 Geo. IV. c. 55. s. 39 (I). It would seem that 7 & 8 Geo. IV. c. 29, s. 46, did not apply to persons in the public service of the Crown. R. *v.* Lovell, 2 M. & Rob. 236. Such cases are now within 24 & 25 Vict. c. 96, ss. 69, 70, *post*, p. 1423.

(*b*) The omitted words are repealed. See, as to punishment, *ante*, Vol. i. pp. 211, 212.

(*c*) *Vide ante*, Vol. i., p. 215.

(*d*) 2 East, P. C. 564 *et seq.*, and the authorities there cited. And see as to a bare charge or custody, *ante*, p. 1243.

(*e*) 2 East, P. C. ibid. *Ante*, p. 1244. A number of statutes as to appropriation by servants were repealed by 7 & 8 Geo. IV. c. 27, having been little used in view of the adequacy of the common law rule.

had the custody of the goods only, like a servant, and not the legal possession (*f*).

The prisoner, who was a book-keeper to the prosecutor, at a yearly salary, and paid and received money for him, not living in the house but going there every day for business, received from his master a bill of exchange with directions to send it by post to London; he did not do so, but absconded with the bill, and the judges were of opinion that the case amounted to larceny, as the possession of the bill still continued in the master (*g*).

A carter going away with his master's cart was held to have been guilty of felony (*h*).

The prisoner, who was servant and porter in the general employ of the prosecutor, was sent with a package of goods from his master's house, with directions to deliver them to a customer at a particular place. Instead thereof the prisoner sold the goods, and converted the money to his own use. All the judges, on a case reserved, held this to be felony, on the ground that the possession of the goods still remained in the master (*i*).

The prosecutors [who were cornfactors, had purchased a cargo of oats on board a ship lying in the Thames; and they] sent the prisoner [who was employed in their service as a lighterman,] with their barge, to W., a corn-meter, for as much oats as the barge would carry, which were to be brought in loose bulk. The prisoner [proceeded to the ship, and] received from W. two hundred and twenty quarters of oats in loose bulk, and five quarters in sacks. The five quarters were put into sacks by order of the prisoner; and were afterwards appropriated by him. The question submitted to the judges was, whether this was felony, as the oats had never been in the possession of the prosecutors; or whether it was not like the case of a servant receiving charge of, or bringing a thing for his master, but never delivering it. And the judges held that it was larceny in the prisoner; and a taking from the actual possession of the owner, as much as if the oats had been in his granary (*j*).

On an indictment against the prisoner for stealing coals the property of his master, it appeared that the master directed the prisoner to go to a station with his cart for ten cwt. of coals, and to bring the coals to his house; and the prisoner accordingly went to the station with the prosecutor's cart, and received from the wharfinger of the company with whom the prosecutor dealt ten cwt. of coals, which were put in the cart. The prisoner fraudulently disposed of part of these coals from the cart. It was objected that the possession of the coals had never been in the master; but the Court held that there was a constructive possession in the master; and, upon a case reserved, it was held that the prisoner was properly convicted of larceny. Lord Campbell, C.J.,

(*f*) R. *v.* Eastall, Mich. T., 1822. MS. Bayley, J., *ante*, p. 1288.

(*g*) R. *v.* Paradice, 2 East, P. C. 565.

(*h*) R. *v.* Robinson, 2 East, P. C. 565.

(*i*) R. *v.* Bass, 1 Leach, 251, 524. 2 East, P. C. 566.

(*j*) R. *v.* Spears, 2 Leach, 825; 2 East, P. C. 568. See in R. *v.* Reed, Dears. at p. 263, a copy of this case from the Black Book of the Admiralty, which omits the parts between brackets in the text, and referred to Dy. 5, and 1 Show. 52. The ground of the determination mentioned by Heath, J., in R. *v.* Walsh, 4 Taunt. 276, was that the corn was in the prosecutor's barge, and it was a taking from the master's possession as much as if it had been from the master's granary. See R. *v.* Mallison, *ante*, p. 1279.

said: 'There can be no doubt that, in such a case, the goods must have been in the actual or constructive possession of the master, and that if the master had not otherwise the possession of them than by the bare receipt of his servant, upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet, in respect of the servant himself, this will not support a charge of larceny; because as to him there was no tortious taking in the first instance, and consequently no trespass. Therefore if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement, and not of larceny. But if the servant has done anything which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have, therefore, to consider whether the exclusive possession of the coals continue with the prisoner down to the time of the conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar, of which the prisoner had the charge (*k*). The prosecutor was undoubtedly in possession of the cart at the time when the coals were deposited in it, and if the prisoner had carried off the cart *animo furandi*, he would have been guilty of larceny (*l*). There seems considerable difficulty in contending that if the master was in possession of the cart he was not in the possession of the coals which it contained, the coals being his property and deposited there by his orders for his use. It was argued that the goods received by a servant remain in the exclusive possession of the servant till they have reached their ultimate destination, but no definition of "ultimate destination," when so used, could be given. It was admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or the charge of the coals, as a butler has of his master's plate, or a groom of his master's horse. To this conclusion I should have come upon principle, and I think that *Spear's case* (*m*) is an express authority in support of it.' After stating that case from the Black Book, his lordship proceeded: 'In that case the question was

(*k*) There is no statement in the case that warrants the position that the coals had ever been in the prisoner's possession at all; but it is said by counsel, Dears. 174, 'The coals were in sacks, and then placed in the master's cart;' but it is not stated whose the sacks were, or who placed them in the cart. If they were placed in the cart by the vendor's men, they clearly never were in the prisoner's possession.

(*l*) R. *v.* Robinson, *ante*, p. 1361.

(*m*) *Supra*, p. 1361.

whether the corn, while in the prosecutor's barge in which it was to be brought by the prisoner to the prosecutor's granary, was to be considered in the prosecutor's possession, and the judges unanimously held that from the time of its having been put into the barge it was in the prosecutor's possession, although the prisoner had the custody or charge of it. That case has been met by a suggestion that the whole cargo of corn might have been purchased by the prosecutor (*n*), so that he might have had a title and constructive possession before the delivery to the prisoner: but the very statement of the case in the Black Book, and the authorities there referred to, shew that the judges turned attention to the question whether the exclusive possession of the servant had not been determined before conversion' (*o*).

The prisoner was indicted upon 24 Geo. II. c. 45 (rep.), for stealing five quarters of oats from a vessel on the navigable river Thames. The prosecutors, in whom the property was laid, were cornfactors; and the prisoner was their servant; and had been employed by them many years in superintending the unloading of their corn vessels. The prosecutors had purchased two hundred and forty quarters of oats, on board a vessel lying in the river; and while the corn-meters were in the act of unloading the oats from the vessel into the prosecutors' barge, the prisoner, with another person, came alongside in a boat, handed ten empty sacks on board the vessel, and desired that the sacks might be filled with oats, and tied, as they were going to be put into an up-country lug-boat. He also desired that the account of the oats, put into the sacks, might be carried to the score, and no separate account be made of them. The whole of the two hundred and forty quarters of oats, excepting the five quarters put into the sacks by the prisoner's desire, were loaded, in loose bulk, into the prosecutors' barge. After the sacks were filled a person, by the prisoner's direction, took them away from the vessel to a place where they were delivered to the person who had purchased them of the prisoner. The prisoner had never been employed by the prosecutors to sell corn for them; nor was he authorised so to do. The jury found the prisoner guilty; and, upon a case reserved, the judges were of opinion that the conviction was right (*p*). It is observed that in this case there appears to have been a tort committed by the servant in the very act of the taking; that the property of his masters in the corn was complete before the delivery to him; and that, after the purchase of it in the vessel, they had a lawful and exclusive possession of it as against the world, but the owner of the vessel (*q*).

Upon an indictment for larceny of barilla, laid in one count as the property of B., in another as that of C., it appeared that C.'s firm had bought some barilla lying at the London docks; their clerk went to see it weighed, and after having been weighed in his presence, it was put into one

(*n*) It is so stated in 2 Leach, 825.

(*o*) R. *v.* Reed, Dears. 168, 257; 23 L. J. M. C. 25. Parke, B., would have differed in opinion, but yielded to R. *v.* Spears as directly in point. See R. *v.* Norval, 1 Cox, 95, and R. *v.* Mallison, *ante*, p. 1279.

(*p*) R. *v.* Abrahat, 2 Leach, 824; 2 East, P. C. 569. 'Although it is not expressly so stated in the reports, yet it is clearly to be inferred that the sacks of oats were not put into the prosecutor's barge, and the marginal note in Leach shews that this was the case.' C. S. G. See R. *v.* Bunkall, *ante*, p. 1247.

(*q*) 2 East, P. C. 570.

of B.'s carts, driven by the prisoner H., a servant of B. By contrivance between H. and the other prisoners, he left the cart on his way to C.'s, and the others drove it away and disposed of the barilla. Lawrence, J., told the jury that if H. was to receive any benefit from the disposition, he was equally guilty with the other prisoners; and the jury found all the prisoners guilty; and, upon the point being saved, whether as the barilla was delivered to H. to cart, the taking amounted to larceny, the judges held that it did whether the goods were considered as the property of C. or of B. (*r*).

Upon an indictment containing counts for stealing and embezzling straw, it appeared that the prosecutor had ordered some straw; he sent the prisoner, his servant, to fetch it, and he fetched it and put it down in the prosecutor's yard, and he afterwards put some of the straw into the loft and took the rest and sold it. Tindal, C.J., held that putting the straw in the prosecutor's yard was a delivery of it to the master, and his taking it away afterwards with a felonious intent was larceny and not embezzlement (*s*).

So if money has been in the possession of the master by the hands of one of his clerks, and another of his clerks receives it from such clerk and misappropriates it, this is larceny. The prisoner was a clerk in the employ of A., and received £3 of A.'s money from another clerk to make some payments. He paid 10*s.* and charged A. 20*s.* and fraudulently kept back the balance. Upon a case reserved it was held that this was not embezzlement because A. had had possession of the money by the hands of the other clerk (*t*). So where the prisoner was a foreman over the prosecutor's workmen and it was his duty to enter weekly on a pay sheet the amount due to each workman, to present that to the cashier and, when the total amount had been reckoned up, to receive such total amount and to pay therefrom the amount due to each workman; and he fraudulently represented on the pay sheet that £1 10*s.* 4*d.* was due to a certain workman, whereas only £1 8*s.* 0*d.* was due to him, and he appropriated the 2*s.* 4*d.* to his own use, the Court held that this was larceny, as the money had been handed to the prisoner as the servant of the master, through the hands of the cashier, and was the property of the master and in his constructive possession (*u*).

It is larceny at common law if a person employed to drive cattle to a fair, or to take them to a particular place, converts them to his own use, for he has the custody merely, and not the possession, which remains with the owner, although the intention to convert them to his own use was not conceived until after they were delivered to him. Upon an indictment (*v*) for stealing a heifer it appeared that the prosecutor hired the prisoner to take a heifer from Y. to K. The prisoner having received the heifer, soon after and without authority sold the heifer as his own, and embezzled the proceeds. The jury negatived the existence of any fraudulent intention previous to the delivery of the

(*r*) R. *v.* Harding, R. & R. 125.

(*s*) R. *v.* Hayward, 1 C. & K. 518. It is not stated whether the prisoner carried the straw himself or in what manner he brought it. As to embezzlement *vide post*, p. 1375.

(*t*) R. *v.* Murray, 1 Mood. 276. '*Ergo*, it was larceny.' C. S. G.

(*u*) R. *v.* Cooke, L. R. 1 C. C. R. 295; 40 L. J. M. C. 68.

(*v*) R. *v.* Stock, 1 Mood. 87.

heifer to the prisoner; but found him guilty; and, upon a case reserved, the judges held the conviction right, the possession of the prisoner being that of a servant only (*w*).

In R. *v.* Hey (*x*), where the indictment alleged that the prisoner, whilst the servant of the prosecutors, stole ten pigs, it appeared that the prosecutors, having purchased pigs, which they knew would suit G., engaged the prisoner, a butcher and drover, to go with the pigs by railway to L., and there deliver them to G., and bring back to the prosecutors such sum in post office orders or a banker's cheque as G. should give him on being shewn a paper which the prosecutors gave to the prisoner for that purpose, the contents of which were not in evidence. The prisoner had no authority to sell the pigs, nor to do anything with them but deliver them to G., and no instructions were given to him as to what he was to do with them should G. refuse to accept them. The prisoner took the pigs to L., and went with them to G.'s house in the morning whilst all the inmates were in bed. G. himself was from home, and though his wife was awoke by the prisoner, no attention was paid and no directions given to him. The prisoner then took the pigs to the L. pig market, and sold them to a pork butcher the same morning, received the price, and absconded with it. The prisoner had been frequently employed by the prosecutors, in the capacity of a butcher, to slaughter and cut up pigs, &c., for which he was paid by the job; but he had never before been employed by them as drover. He had two pounds given him for expenses, for which he was to account; nothing was said as to the manner in which he was to be paid for his trouble, but there was an established custom in the trade to remunerate drovers for such services, by a payment of a sum *per diem* for the number of days occupied; nothing was expressed on the subject of the prisoner's being at liberty to drive cattle for any other person at the same time, but by the usage of the trade he was at liberty to do so. There was no evidence of any intention on the part of the prisoner to steal the pigs at the time of their being delivered to him. The jury found the prisoner guilty, and, upon a case reserved, the Court (*y*) held that the conviction was improper as the prisoner was not a servant to the prosecutors; but only a bailee, and there was no evidence that he intended to appropriate the pigs to his own use at the time of the receipt (*z*).

On an indictment for horse-stealing, it appeared that the prisoner was in the employment of a horse-dealer who sent him to deliver a horse to the prosecutor; when he arrived he found the prosecutor on horseback leading a pony, which he intended to offer for sale. They then rode to the house of C. for the purpose of offering the pony for sale there; but C. was not at home, and the prosecutor, being unable to stay, requested the prisoner to remain at the door until C. returned, and then to offer him the pony for £5, and not for less, and if C. would not buy it, to bring it back to him. As soon as the prosecutor was gone the prisoner took the pony to A., and said he was authorised by the prosecutor

(*w*) R. *v.* Jackson, 2 Mood. 32. R. *v.* M'Namee, 1 Mood. 368.

(*x*) 1 Den. 603; 2 C. & R. 983.

(*y*) Parke and Alderson, BB., Coltman, and Coleridge, JJ., diss., Denman, C.J.

(*z*) Cf. R. *v.* Harvey, 9 C. & P. 353, *post*, p. 1365.

to sell it to him for £3, which A. gave him, and with it the prisoner absconded; and it was held that the prisoner was acting in the capacity of a servant, and not of a bailee, and that therefore it was immaterial whether the *animus furandi* existed at the moment of acquiring possession or arose afterwards (*a*).

But in these cases the prisoner must dispose of the property while he has it in his possession. Upon an indictment for stealing a pig, it appeared that the prosecutor had employed the prisoner to drive six pigs from C. to U. fair, and paid him six shillings for so doing; the prisoner had never before been employed by the prosecutor, and had no authority to sell any of the pigs. The prisoner left one of the pigs in his way at M.'s, saying it was too tired to walk any further. The prisoner met the prosecutor at U. fair with the other five pigs, and told him that he had left the pig with M. because it was tired; the prosecutor then desired him to call at M.'s, and ask him to keep the pig for him till the Saturday following, and he would pay him for the keep. The prisoner called at M.'s next day, but instead of asking him to keep the pig for the prosecutor, he sold it to him; and told the prosecutor he had seen the pig at M.'s, and that he would keep it till the Saturday; and it was held that the prisoner was not guilty of larceny, on the ground that the prosecutor had consented to M. being the keeper of the pig, and therefore his custody was the custody of the prosecutor (*b*).

In cases of this kind the rule appears to be, that if the owner parts with the custody only, and not with the possession, and the prisoner converts the chattel to his own use, it is larceny, although he had no felonious intent at the time he received it. Thus where a person sent pigs to a lady to be looked at, and the prisoner sold the pigs, and did not take them to the lady, the first question left to the jury was, whether the prisoner had a felonious intent from the commencement of the transaction; the second, whether he received the pigs as bailee to deal with them, or only as a servant having the custody of them, and whose duty it was to bring them back. If the prosecutor meant the prisoner to leave the pigs, and bring back the money or make a bargain for the sale of them, then he would be in the situation of a bailee, and not guilty of larceny; but if they were delivered to the prisoner simply that he should shew them to the lady, and bring them back bodily, then he had only the custody and not the possession, and was guilty of larceny (*c*).

But if a person employed to drive cattle has not only the custody of them, but also the possession, he is not guilty of larceny at common law. Upon an indictment for stealing six oxen, it appeared that the prosecutor had employed the prisoner once or twice as a drover, and that he put eight oxen into the hands of the prisoner to drive to London; the prosecutor's directions to the prisoner were, if he could sell them on the road he might, and those he did not sell on the road he was to take to the prosecutor's salesman, for him to sell for the prosecutor there; the prisoner was at liberty to drive other cattle as well as the prosecutor's on

(*a*) R. *v.* Stanbury, 2 Cox, 272, Williams and Cresswell, JJ.

(*b*) R. *v.* Charles Jones, Monmouth Spr. Ass. 1842, Cresswell, J., C. & M. 611 and MSS. C. S. G.

(*c*) R. *v.* Harvey, 9 C. & P. 353. This case would be within 24 & 25 Vict. c. 96, s. 3, *ante*, p. 1245.

this occasion; there is a regular charge for drovers, so much a head; so much for cattle driven and so much for cattle sold. The prisoner sold two of the oxen in his way to London, and took the other six to Smithfield, where he sold them; the money was paid into a bank in Smithfield for the prisoner, and he received it there. The prisoner was a salesman as well as a drover. It was the duty of the drover to deliver them to the salesman's drover in the evening, and next morning to come and give him information, and see that he had them; that it was no part of his duty to sell them in Smithfield. The prisoner had brought beasts from the prosecutor before, and delivered them to the salesman's drover. It was held that there was no proof that the prisoner was the servant of the prosecutor, and that there was no felonious taking in the first instance, as the prosecutor had given the prisoner a lawful ownership for a particular purpose (*d*).

A servant going off with money, given to him by his master to carry or pay to another, and applying it to his own use, was held guilty of larceny (*e*). So where the prisoner, who was occasionally employed by the prosecutors as a clerk, having received from them a cheque on their bankers, payable to a creditor, with directions to deliver it to the creditor, appropriated it to his own use, it was held to be larceny (*f*).

Where the prisoner was indicted for stealing ten guineas, it appeared that she was the menial servant of the prosecutor, who was a manufacturer, and frequently in want of silver to pay his workmen; she went to the wife of the prosecutor, and told her that she was acquainted with a person who could give her ten guineas' worth of silver, upon which the wife of the prosecutor gave her ten guineas for the purpose of getting them changed into silver by the person she had mentioned, when instead of getting the guineas changed, she immediately ran away with them and never returned; and it also appeared that her clothes had been previously taken away. Upon this evidence she was found guilty of larceny (*g*).

It has been held to be larceny for a confidential clerk to take a bill of exchange, unindorsed, from its proper place, discount it, and convert the proceeds to his own use, though he had the general management of his master's concerns, and authority to get his bills discounted. It appeared that the prisoner was clerk to the prosecutors, and had the sole management of their cash concerns, that he received bills and money remitted to them, took bills to be discounted whenever he wanted cash, made payments for freight and other things of a similar nature, and settled the balance with the prosecutors at the end of every week. The bill in question was remitted to the prosecutors, by the post, when one of them opened the

(*d*) R. *v.* Goodbody, 8 C. & P. 665.

(*e*) R. *v.* Lavender, 2 East, P. C. 566. See R. *v.* Beaman, C. & M. 595. S. C. as R. *v.* Beavan, MSS. C. S. G. R. *v.* Goode, C. & M. 582.

(*f*) R. *v.* Metcalf, 1 Mood. 433; see also R. *v.* Heath, 2 Mood. 33, and R. *v.* Paradice, *ante*, p. 1360.

(*g*) R. *v.* Atkinson, 1 Leach, 302 (*n*). The doubt in this case would be whether the property in the guineas was not so parted with by the wife of the prosecutor, as to exclude the idea of felony (*ante*, p. 1212). But it would seem that it might be well contended that the property in the guineas was not parted with to the prisoner; and that she had only the possession of them upon a bare charge, or special trust, to get them changed. *Ante*, pp. 1243 *et seq.*

letter, and gave the bill, which was not due, to a clerk to get it accepted, which the clerk accordingly did, and then laid it amongst other bills on the desk of the prosecutors. The prisoner took the bill to the prosecutors' bankers, obtained the money for it and absconded. Heath, J., was clearly of opinion that this was felony, the bill having been once decidedly in the possession of the prosecutors, by the clerk, who got it accepted, putting it amongst the other bills on the prosecutors' desk, and the prisoner having feloniously taken it away from that possession (*h*).

A firm of timber merchants warehoused large quantities of their timber with a dock company, and they gave a written authority to the company to honour transfer or delivery orders of timber signed by their confidential clerk, who also had a limited authority to sell timber to certain recognised customers. This clerk assumed a false name, took an office, and obtained transfers of timber to himself under the false name and sold the timber to another person. The House of Lords held that this was larceny by the clerk (*i*).

The indictment in some counts charged the prisoner with embezzlement, and in others with stealing a piece of paper, the property of G. and others, his masters. The prisoner was employed as a salaried clerk in the office of the Globe Insurance Company, and he was also a shareholder in the concern. The affairs of the company, which was an unincorporated copartnership, were managed by a body of directors, chosen out of the shareholders; and at the time when the offence was committed G. was chairman of the directors. The directors appointed and dismissed clerks and other servants, fixed their salaries, and the particular duties to be discharged by them; and the directors had the charge and custody of all books and papers belonging to the company. The salaries of the clerks were paid out of the funds of the company. The prisoner paid into the London and Westminster Bank for his own account which he kept there, a cheque for £1,400 purporting to be drawn by the Globe Insurance Company on Glyn & Co. [It was cashed by Glyn & Co. (*j*)] together with other cheques for the London and Westminster Bank, entered to the debit of the Globe Insurance Company in their pass-book, and delivered, together with the book, on the following Wednesday to the messenger of the company, who delivered the book and cheque to the prisoner in the usual way. On the 4th of March, in consequence of some suspicion, a search for the cheque for £1,400 was made during his absence amongst the vouchers in his keeping, and it could not be found. The pass-book was examined, and there the entry of the cheque for £1,400 had been erased, and the cheque was never found. There was no evidence to shew that any person on behalf of the company had ever drawn the cheque in question, or that it had been drawn on paper stolen from the company (*k*). It was contended for the prisoner that there was no evidence

(*h*) R. *v.* Chipchase, 2 Leach, 699; 2 East, P. C. 567. See R. *v.* Murray, *ante*, p. 1363.

(*i*) Farquharson *v.* King [1902], App. Cas. 325–7; 71 L. J. K. B. 667.

(*j*) The words between brackets are from 4 Cox, 338.

(*k*) In the argument the Attorney-General said, 'It was on the paper of the Globe cheque book.' Alderson, B., 'There were missing pages in the cheque book, but no

of any property in the parties from whom the cheque was alleged to have been stolen, except as shareholders, and that the prisoner being also a shareholder could not be indicted for stealing the property of which he was a joint owner. Cresswell, J., thought the charge of embezzlement failed; but with regard to the charge of stealing a piece of paper, he told the jury that if the cancelled cheque was returned to the prisoner, and he received it in the usual manner to be kept by him for the use of the directors, and afterwards abstracted or destroyed it, they should find him guilty; the jury found him guilty of stealing a piece of paper. On a case reserved as to whether the direction was right, Wilde, C.J., said: 'We have considered this case, and are all of opinion that the counts which charge the stealing of a piece of paper the property of G. and others, the masters of the prisoner, are supported by the evidence. By the statement of the case it appears that G. and others are the directors of the company, and that by its constitution they have the appointment and dismissal of the servants in the employ of the company; that they fix and pay their salaries, and also fix the duties they have to perform. The prisoner was a salaried clerk in the office, and therefore he was their servant. They have also the ultimate charge and custody of the documents of the company; and by the course of business between the company and its bankers the paid cheques were returned to the directors, were part of the company's documents, and became the vouchers of the directors, and their property as such directors. The paper in question was one of these. One of the prisoner's appointed duties was to receive and keep for his employers such returned cheques: any such paper, therefore, in his custody would be in the possession of his employers. The paper in question, therefore, as soon as it had passed from the hands of the messenger, and arrived at its ultimate destination, the custody of the prisoner for the directors, was really in their possession, and when he afterwards abstracted it for a fraudulent purpose, he was guilty of stealing it from them; as a butler, who has the keeping of his master's plate, would be guilty of larceny, if he should receive plate from the silversmith for his master at his master's house, and afterwards fraudulently convert it to his own use before it had in any other way than by his act of receiving come to the actual possession of the master (*l*). This case is distinguishable from those in which the goods have only been in the course of passing towards the master; as in R. *v.* Masters (*m*), where the prisoner's duty was only to receive the money from one fellow-servant, and pass it on to another, who was the ultimate accountant to the master. Here the paper had reached its ultimate destination when it came to the prisoner's keeping, and that keeping, being for his master's, made his possession theirs. In this view of the case no difficulty arises as to part ownership, from the

evidence that this cheque came from the missing pages.'

(*l*) This dictum goes much further than any case warrants. It has always been held that if a shopman receives money for his master in his master's shop, and embezzles it before it reaches the till or other repository, the offence is not larceny, but embezzlement. R. *v.* Bazeley, 2 Leach, 835, R. *v.* Bull, there cited, and R. *v.* Grove, 1 Mood. 447, shew that there must be a possession in the master other than the mere corporeal possession by the prisoner as his servant.

(*m*) 1 Den. 332; 18 L. J. M. C. 2.

fact that the prisoner was a shareholder in the company; as such he had no property in this paper' (*n*).

The prisoner was indicted for stealing two bank notes of fifty pounds each, in the dwelling-house of the prosecutors. The prisoner was a clerk in the banking-house of the prosecutors, and was intimate with a gentleman named Vale, whom he had induced to open his cash account at the house. On December 19, 1811, he made a fictitious entry in the banking book of Mr. Vale, to his credit, for two hundred pounds, which sum he told Mr. Vale that he had that morning paid in on Mr. Vale's account. On the belief that this false entry and false assertion were true, Mr. Vale, on January 10, 1812, gave him a cheque on the prosecutors

(*n*) R. *v.* Watts, 2 Den. 14; 4 Cox, 338; 19 L.J. M. C. 192. 'The decision as to the property being in the directors is right but on wrong grounds. The moment the messenger received the cheque for his masters the property vested in them. The universal rule is so where the servant receives anything in the due discharge of his duty. If goods are received in the waggon or boat of a master, the property in such goods vests in the master.' R. *v.* Abrahat, 2 Leach, 824; R. *v.* Harding, R. & R. 125, and R. *v.* Reed, *ante*, p. 1362; and so where the living instrument—the servant—receives. R. *v.* Remnant, R. & R. 136, per Graham, B., 2 East, P. C. 568. In the course of the argument in R. *v.* Watts, Coleridge, J., said: 'Suppose my servant goes to a silversmith to get some plate for me; he gets it, and deposits it in the plate chest, and then appropriates it; is not that a stealing?' Cresswell, J., 'Supposing my footman gives to my butler a new piece of plate, and the butler appropriates it: is not that a stealing?' Alderson, B., 'Whose property is the cheque when at Glyn's?' Cockburn *arguendo*, 'It is Glyn's. But that is often made matter of convenience and arrangement. If it is considered to belong to the customer, it is merely by the concession of the banker.' Wilde, C.J., 'I apprehend that the banker has no more right to it than the payee to a bill of exchange has to the bill when paid. It is true that an acceptor may keep it, because it is his voucher, and he can charge no more with it.' Cockburn *arguendo*, 'Bankers are acceptors. The cheque is a voucher; it is the bankers' only discharge.' Wilde, C.J., 'It is always considered that the cheque is the property of the drawer when paid.' Alderson, B., 'If it was the property of the master when in the bankers' hands, then it was in the master's possession at the time.' Cockburn, 'The bankers have a special property in it certainly till the account is settled.' Alderson, B., 'But if he has only a special property, and a right to keep it *pro tempore*, then he only holds it as agent for the customer.' It may deserve consideration whether the proper view is not this. The paper, on which a cheque is written, originally belongs to the drawer, and when he delivers the cheque, he expects ultimately, when the cheque has been paid, to receive that paper again; just in the same way as when a railway ticket is given to a passenger it is expected that it will be returned at the end of the journey. In each case the delivery is for certain purposes only, and when they have been accomplished, the thing itself is intended to be returned. Is it not then correct to hold that the property in the paper remains in the drawer, from first to last, subject to these purposes? Suppose a cheque were paid, but the banker did not get possession of it; would not detinue or trover lie for it at the suit of the drawer? If this view be right, the general property in this cheque was in the prosecutors whilst in their bankers' hands, and the property and possession was in them the instant the book was delivered to the messenger. But if this view be not correct, then by payment of the cheque it became the property of the prosecutors, subject to the rights of the bankers; and as soon as the cheque was delivered to the messenger the property and possession of the cheque were in the directors. But the facts do not shew that the cheque was genuine; and Alderson, B., asked, 'Suppose the prisoner to have forged the cheque, and then to have done with it all that this case supposes, would it have been larceny? That supposition meets all the facts of this case.' Assuming the forgery to have been committed upon paper belonging to the directors, of which there was some evidence, the property in the paper would have been all along in the directors; as the fraudulent use of the paper by the prisoner would not have altered the property and the rights of Messrs. Glyn would not have been different on this supposition from what they would have been if the cheque had been genuine. But supposing the cheque to have been forged on paper not belonging to the prosecutors, when Messrs. Glyn paid the cheque they paid it as agents for the directors, and it may well be urged that they purchased the paper on behalf of the directors.' C. S. G.

dated, by the prisoner's desire, on the day before, for one hundred pounds; for payment of which the prisoner, under colour of serving at the counter, took out of the prosecutor's bank note drawer, in the shop, the two notes stated in the indictment, depositing the cheque among the other paid cheques of the day, and making in the waste book an entry of such payment. By this contrivance and other previous practices of the like kind, Mr. Vale's real balance was turned against him to the amount of several hundred pounds; and in order to prevent the discovery, which must have immediately ensued if the accounts had been suffered to continue in this state, the prisoner made other false entries, to the credit of Mr. Vale, in the ledger of the house. The jury found the prisoner guilty (*o*), and that at the time he made the false entries in the ledger, and in the customer's book, he did it fraudulently, with the design of enabling himself to get the money of the prosecutors. And, on a case reserved on the question whether the offence was a felony, or amounted only to a fraud, the judges held that the taking was felonious, and that the depositing the cheque was not intended to pledge Vale's security, but to prevent detection, as Vale did not give the cheque to pledge his own credit, or to enable the prisoner to get money of his, Vale's, but to enable the prisoner to get away (as he supposed) money of his own. And Grose, J., in delivering their opinion, said: 'The true meaning of larceny is the felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker (*p*). The facts of the case answer every part of this definition. The taking of the property is clear, and that it was taken against the will of the owner, and with a felonious intent, is equally clear, from the circumstance of the prisoner's having fraudulently made these *false entries* with a view to conceal the means he had artfully made use of to obtain it' (*q*).

In all the cases above cited as establishing the common law rule, the property stolen was sufficiently received *into the possession* of the master *before* the taking by the servant. But property is not considered as sufficiently received into the possession of the master, where it has merely been delivered to the servant for the master's use. 'If the servant have done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like, although to many purposes, and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself, upon a charge of larceny at common law, in converting such goods to his own use' (*r*).

Upon this principle, where it appeared upon an indictment for stealing East India bonds, the property of the governor and company of the Bank of England, that the bonds in question, having been taken to the bank for the purpose of being deposited there, were not carried to the usual place for such deposits, namely, a chest in the cellar of the bank,

(*o*) The jury said that as the prisoner had the cheque he had a right to pay himself; but Bayley, J., before whom the prisoner was tried, told them that this was matter of law. Their opinion, however, was stated in the case. MS. Bayley, J.

(*p*) *Ante*, p. 1177.

(*q*) R. *v.* Hammon, 2 Leach, 1083; 4 Taunt. 304; MS. Bayley, J.; and R. & R. 221. Lawrence, J., who was absent, doubted.

(*r*) 2 East, P. C. 568.

but were received by the prisoner, who was a cashier there, and placed by him in his own desk, it was ruled that the prisoner was not guilty of larceny in afterwards selling the bonds, and putting the money into his own pocket. The ground of the decision seems to have been that as the bonds were never put into the cellar in the usual course, the governor and company of the bank had no possession of them, but the possession remained always in the prisoner (*s*).

The same principle was recognised in a case where the prisoner was indicted for stealing a half-crown and three shillings, the property of his master. The master of the prisoner was a confectioner; and the prisoner was his servant, employed to attend the shop. The master, having some suspicion that the prisoner had occasionally purloined the money paid by persons dealing at the shop, procured a customer to come there on pretence of buying something, having previously given to such customer some marked silver of his own. The customer accordingly came to the shop in the absence of the master, and bought some articles of the prisoner, paying for them with the marked silver. Soon afterwards the master came in and examined the till, in which the prisoner ought to have deposited the silver when it was received; and finding only some of the marked silver there, he procured the prisoner to be immediately apprehended and searched, when the rest of the marked money was found upon him. The jury found the prisoner guilty; but, upon a case reserved, the judges were of opinion that the prisoner was not guilty of larceny, but only of a breach of trust; the money never having been put into the till, and, therefore, not having been in the possession of the master, as against the prisoner (*t*). So where a banker's clerk, in the course of his ordinary duty, received money at the counter, but instead of putting it into the proper drawer, kept back some of it, the Court held this was not larceny (*u*). These decisions led to legislation providing for punishment of such embezzlements as felonies (*v*).

A count charged the prisoner with embezzling twenty shillings, and it appeared that the prisoner was a clerk of the prosecutor, and his business was to attend certain markets for the purpose of buying skins and other things for his master, for which it was his duty to pay ready money. Before going to market, the prosecutor was in the habit of giving the prisoner either money or a cheque on his bankers to defray the expenses of the day, and it was the prisoner's duty either to deliver what goods he had purchased, or to account for the money so received the same evening or the next morning, in a book kept for that purpose. On October 8, 1852, the prisoner, having an admitted balance of cash belonging to the prosecutor in his hands of £11 11*s*. 1*d*., received a cheque for £10 from the prosecutor to expend in the course of his employment,

(*s*) R. *v.* Waite, 1 Leach, 28; 2 East, P. C. 570. Carter and Dennison, JJ. Dennison, J., said, that though this might be such a possession in the bank whereon they might maintain a civil action, yet there was a great difference between such a possession and a possession whereon to found a criminal prosecution.

(*t*) R. *v.* Bull, 2 Leach, 841 (*cit.*); 2 East, P. C. 572, per Heath, J.

(*u*) R. *v.* Bazeley, 2 Leach, 835. 2 East, P. C. 571. See also R. *v.* Sullens, 1 Mood. 129, and R. *v.* Hawtin, 7 C. & P. 281. R. *v.* Wright, Dears. & B. 431. R. *v.* Betts, Bell, 90.

(*v*) Now represented by 24 & 25 Vict. c. 96, s. 68. *Post*, p. 1375.

which cheque was cashed by the prisoner. The prisoner entered in his book,

'Richard, 5 sheep, 4*s*. . . . . £1,'

and debited the prosecutor with this payment to Richard, and with several other sums paid to different butchers, amounting to £13 8*s*. 4*d*.; he had not, however, paid Richard any money, but had agreed to pay him for the skins at the end of the quarter. In consequence of the prisoner being back in his accounts, he was to receive no salary from the previous Lady-day. It was objected that the case neither amounted to embezzlement nor larceny; but the sessions held that it amounted to larceny, and, under their direction, the jury found the prisoner guilty of larceny as a servant, but not of embezzlement; and, upon a case reserved, the conviction was held wrong. (*w*). So, where on an indictment for larceny as a servant, it appeared that the prisoner was bailiff to the prosecutor, and it was his duty to receive and make payments on his behalf, and an account of these receipts and payments was kept in a book in the prisoner's custody, which was examined by the prosecutor at intervals, and in this book were several entries of payments made to workmen in the employ of the prosecutor, five of which were proved to be 4*s*. and two others 3*s*. 6*d*. more than had in fact been paid; and, upon examining the account, it appeared that there was a balance of £2 due to the prisoner, which the prosecutor paid him. It was objected that the offence was neither larceny nor embezzlement; the sessions, however, held that the deduction of the several sums of 4*s*. and 3*s*. 6*d*. amounted to larceny; but, upon a case reserved, it was urged that there was no evidence that the prisoner received any money from his master except the £2. Maule, J.: 'For aught that appears, the payments may all have been out of his own money.' Wightman, J.: 'The evidence is, that he entered the money as paid which he had not paid.' Jervis, C.J.: 'And that he did so for the purpose of obtaining thereby a portion of the sum of £2. We are all of opinion that the offence of which the prisoner was guilty was not larceny, whatever else it may have been' (*x*).

Upon an indictment for larceny, it appeared that the prisoner, being in the employ of the prosecutors, had been from time to time entrusted by them with money for the purpose of paying the wages of their workpeople, and it was his duty to keep an account in a book of the monies

(*w*) R. *v.* Goodenough, Dears. 210; 6 Cox, 206. 'There was no argument, and no ground stated for the decision, but the decision is clearly right; for the only evidence against the prisoner was a false entry, and the only thing received from the prosecutor, on the occasion in question, was a cheque, and that had been cashed, and there was no evidence that any part of the balance in his hands had ever been money in the hands of the prosecutor. Now, the marginal note is, "The evidence shewed that the prisoner received at different times several *sums of money* from the prosecutor for the purpose of purchasing skins. The prisoner obtained the skins on credit, and applied *the money* to his own use," &c.; held that the conviction for larceny was wrong. This is a clear mis-statement of the facts; and, if the facts were as stated in the marginal note, it is clear that the case would have been larceny; nor must it be assumed that the case amounted to embezzlement; for the Court came to no decision on that point, and it should seem that the case failed both as to embezzlement and larceny, for want of evidence to prove what money the prisoner misappropriated and whence he received it.' C. S. G.

(*x*) R. *v.* Green, Dears. 323; 6 Cox, 296. The prisoner might have been indicted for obtaining the £2 by false pretences; see R. *v.* Witchell, 2 East, P. C. 830, and *post*, p. 1530, 'False Pretences.'

which he so disbursed. This book was produced at the trial, and it was proved to contain three entries made by the prisoner, in each of which he had charged his employers with more money than he had paid on their account. The book had been balanced by the prisoner; but there was no evidence that he had actually accounted with his employers. Wightman, J., stopped the case. 'The question here is, did the prisoner in fact deliver this account to his employers? True it is that here are certain entries, made by the prisoner, which are incorrect; but they are entries which perhaps he never intended to deliver, or, if he did deliver them, to deliver them with explanations. But this was no accounting; and there must in this case have been an accounting in order to fix the prisoner with larceny' (*y*).

On an indictment against the prisoner and G., for stealing yarn, it appeared that G. was foreman to the prosecutor (a canvas manufacturer), and had authority to give out yarn for the purpose of being worked up into canvas at the manufactory, but had no authority to sell yarn. The prisoner had on two occasions sent his servant to the prosecutor's warehouse for yarn, and on the former of these occasions G. had delivered with the yarn an invoice made out in the prosecutor's name. On the latter occasion the prisoner sent two of his men to get yarn, who found the prisoner and G. at the warehouse, and carried away in the presence of the prisoner and G., certain parcels of yarn, which were pointed out to them as the yarn they were to take to the prisoner's premises. No invoice was shewn to have passed on this occasion, and it did not appear whether the prisoner was or was not aware that G. had no authority to sell; but when the prisoner was charged with having been concerned with G. in the above transactions, he produced the invoice G. had given him on the first occasion, and stated that, except on that occasion, he had had no dealings with him. Coltman, J., told the jury that if the prisoner knew that, in the transaction in question, G. was in fact committing a felony, he as well as G, was guilty of a felony, and that, therefore, the question for them to consider was, whether at the time of the pretended sale by G., the prisoner did or did not know that G. was exceeding his authority, and defrauding his employers. Had the transaction been accompanied by an invoice, as it was on the former occasion, it would have been much less suspicious; because the fact of an invoice being given might easily have misled the prisoner, supposing him to have been ignorant of G.'s real authority. But the absence of an invoice altered the case materially. It is a suspicious circumstance for any one to buy goods to a considerable amount from the servant of a tradesman, without having an invoice in the regular way; and where we find, as in this case, that the transaction is afterwards denied, this suspicion is increased' (*z*).

On an indictment for larceny as a servant, it appeared that the prisoner lived in the house of the prosecutor, and acted as nurse to his sick daughter, and had board and lodging in the house, but no wages, the wife of the prosecutor occasionally making her presents of money as a reward for her services. While the prison erwas so residing, the wife of the

(*y*) R. *v.* Butler, 2 C. & K. 340.

(*z*) R. *v.* Hornby, 1 C. & K. 305. The marginal note to this case in the report is erroneous.

prosecutor gave her the money charged to have been stolen to pay a coal bill, but instead of doing so the prisoner kept the money, and brought back the bill with a forged receipt upon it, and four shillings and sixpence as change. Coleridge, J., held that the prisoner was not the servant of the prosecutor, but that there was evidence of the larceny (*a*).

Upon an indictment under 7 & 8 Geo. IV. c. 29, s. 46 (rep.), charging the prisoner as the servant of the prosecutrix with stealing her purse containing forty sovereigns, it appeared that the prisoner was the driver of a glass coach, which had been hired by the day by the prosecutrix, and that he stole her purse from the coach. It was held that the relation of mistress and servant did not exist between the prosecutrix and the prisoner, and that he could only be convicted of simple larceny (*b*).

It is now settled that a man may be the servant of several persons at the same time (*c*).

Indictment (*d*).—An indictment charged that S., on March 1, 1827, 'being then and there the servant of J. H.' on the same day and year, one ring of the said J. H. did steal; and it was objected, 1st, that there was no positive averment that the prisoner was the servant of J. H.; 2ndly, that it was not sufficiently averred that she was his servant at the time she stole the goods; but it was held, 1st, that 'being the servant of J. H.,' was a description of the person of M. S., and that that was a sufficient allegation that she bore that character; 2ndly, that reading and understanding the language used in the indictment as the rest of mankind would understand the same language, if it were used in other instruments, there could be no doubt that it imported that M. S. was the servant of J. H. at the time she stole the property (*e*).

An indictment alleged that the prisoner was the servant of E. S., and while such servant stole the money of the said E. S., his master. E. S. was the agent of Mrs. S., and the prisoner was her servant, and the money was in the possession of E. S. as her agent at the time it was taken. It was objected that the prisoner could not be convicted either of larceny as a servant or of larceny; but the sessions held that the averment of the prisoner being the servant of E. S. might be rejected as surplusage, and that he had a special property in the money; and, upon a case reserved, it was held that the conviction was right. Proof of the allegation in the indictment that the prisoner was the servant of E. S., would only be necessary for the purpose of convicting the prisoner of the compound offence; but it was quite unnecessary to support the charge of simple larceny. E. S. had a special property in the money as agent of Mrs. S., and therefore the property was well laid in him (*f*).

(*a*) R. *v.* Smith, 1 C. & K. 423.

(*b*) R. *v.* Haydon, 7 C. & P. 445. Patteson, J., and Gurney, B. See Quarman *v.* Burnett, 6 M. & W. 499, and Jones *v.* Scullard [1898], 2 Q.B. 565; 67 L. J. Q. B. 895.

(*c*) R. *v.* Goodbody, 8 C. & P. 665, Parke, B. R. *v.* Batty, 2 Mood. 257.

(*d*) For precedents see Archb. Cr. Pl. (23rd ed.) 465.

(*e*) R. *v.* Somerton, 7 B. & C. 463. The indictment was on 3 Geo. IV. c. 38, s. 2 (rep.). See R. *v.* Page, 9 C. & P. 756. R. *v.* Silversides, 3 Q.B. 406.

(*f*) R. *v.* Jennings, Dears. & B. 447.

CANADIAN NOTES.

OF LARCENY BY SERVANTS, ETC.

Theft by Clerk, Servant, Cashier or Government Employee.—Code sec. 359.

Section 359 deals with the offence of theft by a clerk or servant while sec. 355 includes cases of misappropriation in which the accused though he may not have been either a clerk or a servant of the person to whom he was to account, and though not bound to deliver over the identical money or valuable security received by him, fraudulently converts the same to his own use or fraudulently omits to account for the same or the proceeds, having received the same "on terms requiring him to account for or pay the same or the proceeds thereof, or any part of such proceeds to any other person."

The test as to whether a person is a "clerk or servant" is: Was he under the control of and bound to obey his alleged master? R. v. Negus (1873), L.R. 2 C.C.R. 34, 12 Cox. 492. To constitute the offence formerly designated "embezzlement" there must have been an employment as clerk or servant, the receipt of the money by him must have been for and on behalf of the master, and the fraudulent appropriation by him must have taken place before the money got into the master's possession. Ferris v. Irwin, 10 U.C.C.P. 117.

In Regina v. Topple, 3 Russell & Chesley (Nova Scotia), 566, the accused not having been in the employ of the prosecutor, was sent by him to one M. with a horse, as to which M. and the prosecutor, who owned the horse, had had some negotiations, with an order to M. to give the bearer a cheque, if the horse suited. Owing to a difference in the price the horse was not taken, and the accused brought it back. Shortly afterwards the accused, without any authority from the prosecutor, took the horse to M. and sold it as his own property or professing to have the right to dispose of it, and received the money. It was held the money was not received by the accused as clerk or servant of the prosecutor, and a conviction for embezzlement was set aside. Regina v. Topple, 3 Russell & Ches. 566.

Evidence only of a general deficiency in the clerk's books will not support the indictment; but if in addition to the evidence of general deficiency there is evidence of unlawful appropriation, though no precise sum paid by any particular person is proved to have been taken, it will be sufficient. R. v. Glass (1877), 1 Montreal Leg. News 141; Ramsay's Quebec Cases 186; R. v. Cummings, 4 C.L.J. 182.

Theft by Agent, Factor, or Servant, When not Guilty.—Code sec. 348.

CHAPTER THE EIGHTEENTH.

OF EMBEZZLEMENT BY CLERKS AND SERVANTS.

SECT. I.—STATUTES IN FORCE.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96) sect. 68, (*a*) 'Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel (*b*), money, or valuable security, which shall be *delivered to or* received or taken into possession by him for or in the name of or on the account of his master or employer (*c*), or any part thereof, shall be deemed to have feloniously stolen (*d*) the same from his master or employer, although such chattel, money, or security was not received into the possession of

(*a*) Framed from 7 & 8 Geo. IV. c. 29, s. 47 (E.), and 9 Geo. IV. c. 55, s. 40 (I.). The words of the former enactments were, 'shall *by virtue of such employment*, receive or take into his possession any chattel, &c., for or in the name or on the account of his master.' In the present section the words 'by virtue of such employment' are advisedly omitted in order to enlarge the enactment, and get rid of the decisions on the former enactments. The section is so framed as to include every case where any chattel, &c., is delivered to, received, or taken possession of by the clerk or servant for *or* in the name *or* on account of the master. If therefore a man pay a servant money for his master, the case will be within the statute, though it was neither his duty to receive it, nor had he authority to do so; and it is perfectly just that it should be so; for if my servant receive a thing, which is delivered to him for me, his possession ought to be held to be my possession just as much as if it were in my house, or in my cart. And the effect of this section is to make the possession of the servant the possession of the master wherever any property comes into his possession within the terms of this section, so as to make him guilty of embezzlement if he converts it to his own use. R. *v.* Snowley (4 C. & P. 390), R. *v.* Crow (1 Lew. 88), R. *v.* Thorley, (1 Mood. 343), R. *v.* Hawtin (7 C. & P. 281), R. *v.* Mellish (R. & R. 80), and similar cases are of no authority on this section.

(*b*) 'It is reported to have been held in Ireland that a cow was not a "chattel" within the meaning of 9 Geo. IV. c. 55, s. 40 (rep.).' R. *v.* Deneney, Jebb (C. & P. C.), 255; cited 2 Hayes' Dig. C. L. I. 485. This decision is clearly erroneous. The words, 'chattel, money, or valuable security,' were advisedly inserted in Peel's Acts, 7 & 8 Geo. IV. c. 29 (E.), and 9 Geo. IV. c. 55 (I.), in order at least to include every kind of personal property that was the subject of larceny at common law. Now chattels by the common law 'comprehend all goods movable and immovable, except such as are in the nature of freehold or parcel of it.' Bullen on Distress (2nd ed.) 101, Co. Litt. 118 b. 'Goods or chattels are either personal or real; personal, as horses and other beasts.' Co. Litt. 118, b. And the decision is the more strange, because 'chattel' is derived from catalla, and so is 'cattle'; and catalla 'primarily signified only beasts of husbandry, or (as we still call them) cattle; but in its secondary sense was applied to all movables in general.' 2 Bl. Com. 385, citing 2 Dufresne, 409. Every indictment for stealing a cow alleges it to be of the goods and chattels of the prosecutor, and I have a record of a conviction for horse-stealing in 1307, on an indictment alleging that the prisoner 'equum phaleratum de bonis et *catallis* Adæ de Prestwood felonice furatus est'; which I notice as well for the purpose of shewing the ancient mode of laying the property, as that in those times 'steal' alone was sufficient, and it was due to a later age to add 'take, carry, drive, and lead away.' C. S. G. See R. *v.* Scott, *post*, p. 1569, 'False Pretences.'

(*c*) See R. *v.* Gourlay, Jebb (C. & P. C.), 82, cited 2 Hayes' Dig. C. L. I. 485.

(*d*) See R. *v.* Frampton, D. & B. 585; 27 L. J. M. C. 229, decided on 7 & 8 Geo. IV. c. 29, s. 47 (rep).

such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding fourteen years . . . (*e*)—or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping ' (*f*).

By sect. 71, ' For preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition, hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender, for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against [His] Majesty,' (*vide post*, p. 1423) ' or against the same master or employer, within the space of six months from the first to the last of such acts; and in every such indictment, where the offence shall relate to any money or valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled, *or fraudulently applied or disposed of* any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled *or fraudulently applied or disposed of* any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly ' (*g*).

By sect. 72, ' If upon the trial of any person indicted for embezzlement, *or fraudulent application or disposition as aforesaid*, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, *or fraudulent application or disposition*, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or a servant, *or as a person employed in the public service, or in the police*, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and, if upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, *or fraudulent application or disposition* as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person

(*e*) Nor less than three years. For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

(*f*) *Vide ante*, Vol. i. p. 215.

(*g*) Framed from 7 & 8 Geo. IV. c. 29, s. 48 (E.); 9 Geo. IV. c. 55, s. 41 (I.); 2 & 3 Will. IV. c. 4, s. 3; and 14 & 15 Vict. c. 100, s. 18. The words in *italics* were inserted to supply an omission in 2 & 3 Will. IV. c. 4, s. 3.

is not guilty of larceny, but is guilty of embezzlement, *or fraudulent application or disposition, as the case may be*, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, *fraudulent application or disposition;* and no person so tried for embezzlement, *fraudulent application or disposition*, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, *fraudulent application or disposition*, or embezzlement, upon the same facts' (*h*).

The Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 15, recites that 'The guardians of certain unions and parishes under the authority of the orders of the poor law commissioners and of the poor law board are empowered to appoint collectors of poor rates and assistant overseers for some one or more of the parishes comprised within their union, or for their parish, as the case may be, who collect and receive the money and other property of the parish or parishes for which they are appointed; and in cases of embezzlement or larceny of such money or property by such collector or assistant overseer, difficulty has arisen as to the proper description of his office in the indictment or other proceeding'; and enacts 'that in respect of any indictment or other criminal proceeding, every collector or assistant overseer appointed under the authority of any order of the poor law commissioners or the poor law board (*i*), shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall be so described; and it shall be sufficient to state any such money or property to belong to the inhabitants of such parish without the names of any such inhabitants being specified' (*j*).

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 248—

'(1) A person appointed to any office or service by or under a local marine board (sect. 244) shall be deemed to be a clerk or servant within the meaning of sect. 68 of the Larceny Act, 1861 (relating to embezzlement)...

'(2) If any person so appointed to an office or service

(*a*) fraudulently applies or disposes of any chattel, money, or valuable security received by him (whilst employed in such office or service) for or on account of any local marine board, or for or on account of any other public board or department, for his own use, or any use of purpose other than that for which the same was paid, entrusted to, or received by him, or

(*b*) fraudulently withholds, retains, or keeps back the same, or any part thereof, contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid,

that person shall be guilty of embezzlement within the meaning of the said sect. 68 of the Larceny Act, 1861.

(*h*) Taken from 14 & 15 Vict. c. 100, s. 13, but extended so as to cover cases within ss. 71, 72. Although a prisoner who is indicted for larceny may be convicted of embezzlement, if the evidence proves that he was guilty of that offence; yet, in such a case, the jury must return a verdict that the prisoner is guilty of embezzlement; and if they return a general verdict of guilty where there is no evidence of stealing it is erroneous, for a prisoner cannot be lawfully convicted of stealing if there is only evidence of embezzlement. R. *v.* Gorbutt, Dears. & B. 166. See, however, 7 Edw. VII. c. 23, s. 5 (2). *Post*, p. 2009.

(*i*) Now the Local Government Board.

(*j*) See *post*, p. 1950.

(3) In any indictment under this section it shall be sufficient to charge any such chattel, money, or valuable security as the property either of the local marine board by whom the person was appointed, or of the board or department for or on account of whom the same was received.'

(4) Sect. 71 of the Larceny Act, 1861 (relating to the manner of charging embezzlement), . . . 'shall apply as if an offence under this section were embezzlement under that Act.'

SECT. II.—WHO ARE CLERKS OR SERVANTS.

'The cases have established that a clerk or servant must be under the orders of his master, or employed to receive the moneys of his employer, to be within the statute; but if a man be entrusted to get orders and to receive money, getting the orders when and where he chooses, and getting the money when and where he chooses, he is not a clerk or servant within the statute' (*k*).

The prisoner was employed to solicit orders for the prosecutors, and was to be paid by a commission on the sums received through his means. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. The judge at the trial directed the jury that the prisoner was a clerk or servant within the meaning of the Larceny Act, 1861, sect. 68. Upon a case reserved, it was held, that he was not a clerk or servant within the meaning of that section, and therefore that the direction was wrong; but that, generally speaking, whether a person under such an employment and paid by commission is a clerk or servant, is a question of fact for the jury (*l*).

The prisoner, who carried on an independent business as an accountant and debt collector, was employed by the prosecutors to collect certain debts specified in a list given to him, and to pay over to the prosecutors the amounts received as soon as he collected them. The time and mode of collecting the debts were in his discretion, and he was authorised to sue for them, if necessary, but at his own charge. The jury found that the prisoner was employed in the capacity of clerk, and convicted him. Upon a case reserved it was held that there was no evidence that he was employed as a clerk, and that the conviction could not be sustained (*m*).

Where the prisoner was employed by an overseer to collect the rates and keep the books, and the overseer gave no orders to the prisoner and did not interfere in the collecting of the rates or the keeping of the books,

(*k*) Per Erle, C.J., R. *v.* Bowers, L. R. 1 C. C. R. 441; 36 L. J. M. C. 206. Where it is doubtful whether the person charged is a clerk or servant, an indictment should be framed under the Larceny Act, 1901 (1 Edw. VII. c. 10, *post*, p. 1407). If the contract of service is in writing parol evidence of its contents is inadmissible, unless notice to produce it has been given. R. *v.* Clapton, 3 Cox, 126, per Patteson, J., who said Coleridge, J., had ruled in the same way in several cases. See R. *v.* Dodson, 62 J. P. 729.

(*l*) R. *v.* Negus, L. R. 2 C. C. R. 34; 42 L. J. M.C. 62; *et per* Blackburn, J. 'The test is, was the prisoner under the control and bound to obey his master, if he was bound to bestow his whole time upon his master that would be strong evidence, but it is not essential. It may be that if the whole facts connected with the employment were set out in evidence, the jury might have found that he was a servant, but they were not asked the question, but directed as a matter of law that he was. That was not right.' See also R. *v.* Chater, 9 Cox, 1. Other cases of payment by commission will be found *post*, p. 1383.

(*m*) R. *v.* Hall, 13 Cox, 49.

it was held, upon a case reserved, that the prisoner was not a servant of the overseers within sect. 68 (*n*).

A domestic servant was within the repealed Act 39 Geo. III. c. 85 (*o*), and that enactment was not confined to servants of persons in trade (*p*).

A person may be a servant within the meaning of the Larceny Act, 1861, although he is only occasionally employed when he has nothing else to do (*q*). So, where the prisoner was the secretary of a money club, and was directed to sue upon a promissory note, and did so, and as a result of the action received certain monies which he appropriated, it was held that if the ordinary duties of a person in the employment of another are proximately connected with the receiving of money, the receipt of money by him for his employer and appropriation of it to his own use, would make him liable to the charge of embezzlement, and it was sufficient if there was a specific employment to receive money on one particular occasion (*r*).

The prisoner had sometimes been employed by the prosecutor as a regular labourer, and sometimes as a rounds-man for a day at a time, and had several times before been sent to the bank for money. The prisoner, however, on the day in question, was not working for the prosecutor, but was to be paid 6*d*. for fetching this money from the bank; and it was held that the prisoner was not the servant of the prosecutor within the meaning of the repealed 7 & 8 Geo. IV. c. 29, s. 47 (*s*).

Where a prisoner was charged as the servant of B. in some counts, and as the servant of B. 'and others' in other counts, and it appeared that the prisoner was the schoolmaster of a charity school, the appointment of the prisoner and the funds of the charity were vested in a committee, and B. was the treasurer and a member of the committee. The sole duty of the prisoner was confined to the instruction of the charity children; and he had never, in any instance, been employed to receive any of the contributions, and never did receive any but in this single instance; and was not to have any emolument from this single act of receipt of money; nor was it part of the duty of his office of schoolmaster. The money in question was a voluntary contribution from a charitable fund. B. had for two or three years received this money, but being confined to bed by illness, he had left a written direction for the prisoner to receive the money. The direction was his individual direction, not an order from the committee. The prisoner never stood in the relation of servant to B., unless this single act created such relation. Upon a case reserved, the judges held that the prisoner did not stand in such relation to the treasurer, or committee, as to bring him within 7 & 8 Geo. IV. c. 29, s. 47 (rep.) (*t*).

(*n*) R. *v.* Harris, 17 Cox, 656.

(*o*) R. *v.* Smith, R. & R. 267.

(*p*) R. *v.* Squire, R. & R. 349.

(*q*) R. *v.* Spencer, R. & R. 299. R. *v.* Hughes, 2 Cox, 104. R. *v.* Lynch, 6 Cox, 445. R. *v.* Winnall, 5 Cox, 326. R. *v.* Beechey, R. & R. 319. R. *v.* Smith, R. & R. 516.

(*r*) R. *v.* Tongue, Bell, 289; 30 L. J. M. C. 49.

(*s*) R. *v.* Freeman, 5 C. & P. 534. Parke and Taunton, JJ. In R. *v.* Woolley, 4 Cox, 255. Patteson, J., said that the description of a person employed 'in the capacity of clerk or servant' only applied where the employment was on temporary occasions. It does not seem, however, that such description is necessarily limited to occasional employment.

(*t*) R. *v.* Nettleton, 1 Mood. 259. See also R. *v.* Goodbody, 8 C. & P. 665, *ante*, p. 1366.

A farmer had some beasts in Smithfield, which the prisoner was keeping for him as a drover, and he was employed to drive a cow and calf to a person, to whom they were sold, and bring back £16. He was not in the service of the farmer, but merely the drover; he had, however, been employed by the farmer at different times; but it was not proved that he had any extra reward beyond what was his due for driving and delivering the cattle to the purchaser. Upon a case reserved, it was held that the prisoner was a servant within the meaning of the above Act (*u*).

So where it appeared upon an indictment for embezzlement that the prosecutor employed the prisoner to take some bark to M. to be weighed, and he was directed to bring back a written account of the weight, and of the price bark was selling at, and if M. offered to pay for the bark the prisoner was to receive the money, and bring it to the prosecutor; the prisoner received 1*s.* 6*d.* for his day's work; he had been employed many times before by the prosecutor, but not regularly; and on this occasion he was only employed for this one day, and he had never been employed for the purpose of receiving money before. Littledale, J., held that this case was distinguishable from R. *v.* Nettleton (*v*), as in that case the prisoner was not a servant at all, but only employed on a single occasion to receive money (*w*).

A person employed as a servant of a corporation was a servant within 39 Geo. III. c. 85 (rep.), although he was not duly appointed, nor even appointed at all under the common seal of the corporation (*x*).

In an action for slander the declaration stated that the plaintiff was the servant of the mayor, alderman, and burgesses of the borough of W. It appeared that the plaintiff was one of the four chamberlains of certain commonable lands belonging to the borough of W.; the chamberlains are chosen at the court leet, and sworn in by the steward. Bayley, B., said: 'The 7 & 8 Geo. IV. c. 29, s. 47, appears to me to apply to ordinary clerks or servants having masters to account to for the discharge of their duties. Now, can this plaintiff be said to be such a clerk or servant? He was not nominated chamberlain by the mayor and corporation, or by the commoners, but by the jury at the court leet held annually by the corporation as lords of the manor, and was sworn in there as many other persons are. Then can the mayor and corporation be said to be his masters within this Act? In the cases cited for the plaintiff (*y*) the parties charged with embezzlement stood in the characters of plain and ordinary servants appointed to collect money for, and to pay it over to, their employers, *e.g.*, the party appointed by the overseers to receive money. The parish clerk who received and misapplied the sacrament money was held not to be within the statute, because it could not be said whose servant he was, or in whom the right to the money was. But I am of opinion that this plaintiff is not a clerk or servant within the fair meaning of the Act: for he filled a distinct office of his own, in respect of which he received money which he was entitled to keep till the year ended, and

(*u*) R. *v.* Hughes, 1 Mood. 370. See R. *v.* Hey, 1 Den. 602; 2 C. & K. 983, *ante*, p. 1364.

(*v*) *Ante*, p. 1379.

(*w*) R. *v.* Jones, Monmouth Spring Ass. 1832. MSS. C. S. G.

(*x*) R. *v.* Beacall, 1 C. & P. 457, Park, J. R. *v.* Wellings, 1 C. & P. 315. See R. *v.* Welch, 1 Den. 199; 2 C. & K. 296.

(*y*) R. *v.* Squire, *ante*, p. 1379. R. *v.* Tyers, R. & R. 402. R. *v.* Beacall, *supra*.

was not bound to pay over at any time, as a mere clerk or servant would have been' (*z*).

An accountant of Greenwich Hospital, who was sworn into that office, having embezzled money to a great amount, was indicted under 39 Geo. III. c. 85, which expressly comprehended servants of bodies corporate, and Burrough, J., held that the prisoner did not fall within that statute on account of its being proved that he was a sworn officer, and not employed as an ordinary servant (*a*).

Upon an indictment for embezzlement, stating the prisoner to be clerk in some counts to all the trustees by name, and in others to one of them by name 'and others,' it appeared that the prisoner was clerk to a savings bank, by the regulations of which the institution was to be conducted by managers, a treasurer, and clerk. There were about 200 managers over and above the trustees, patrons, and presidents, who were managers *ex officio*. The clerk was elected every year by ballot at a meeting of the managers. It was held, upon a case reserved, that the prisoner was properly described as clerk to the trustees, and that the conviction was good (*b*).

A. held certain local appointments, and amongst them that of clerk to the local board of W., the business of the board being transacted at his office. A.'s son, who lived with him, assisted him in his office, and in conducting the business of the local board; there was no evidence that the son was paid any salary by his father, and the only evidence was that he in fact assisted him as clerk or servant or assistant in his office. Upon a case reserved it was held that, although the son was not employed as clerk or servant, or in the capacity of clerk or servant to the local board, he was employed in the capacity of clerk or servant to his father, and was properly convicted on an indictment which charged him with having embezzled the monies of A., his master (*c*).

On an indictment for embezzlement as clerk of a company, it appeared that the prisoner, an attorney, had in consequence of his knowledge of parochial affairs, been appointed in writing 'the company's land agent, at a salary after the rate of £200, and that he find security for £300.' The resolution added, 'It is desirable to take steps to secure the services of a person whose knowledge and experience could be brought to bear upon the excessive demands brought against the company by the parish authorities.' His duties were to collect and account for the rents of the company's house and surplus properties, and examine all claims made on the company for all rates and taxes of every description, and to certify as to the correctness of these claims. When he collected rents, it was his duty to account for such moneys as he received, and to pay the money over to the cashiers. It was held that he was a clerk of the company and not merely one of its attorneys (*d*).

A director of a limited company, who is also employed as a servant to collect moneys for them, is liable to be convicted under sect. 68 as a clerk or servant of the company (*e*).

(*z*) Williams *v.* Stott, 1 Cr. & M. 675.

(*a*) Anon., stated as in the text by Bolland, B., in Williams *v.* Stott, *supra*.

(*b*) R. *v.* Jenson, 1 Mood. 434.

(*c*) R. *v.* Foulkes, L. R. 2 C. C. R. 150; 44 L. J. M. C. 65.

(*d*) R. *v.* Gibson, 8 Cox, 436.

(*e*) R. *v.* Stuart [1894], 1 Q.B. 310; 63 L. J. M. C. 63. R. *v.* Steward, 17 Cox, 723.

Upon an indictment for embezzlement, it appeared that the prisoner had been for several years a 'butty collier' at the prosecutor's colliery. He was engaged to raise coal and load it on the carriages of customers, and it was his duty to find and pay for labour, horses, and tools for that purpose; but he had nothing to do with delivering the coal; he was paid 2*s.* 9*d.* for every ton raised by him. He sold coal to private customers, and was allowed 8*s.* 6*d.* for every 20*s.* so sold. It was the prisoner's duty to pay over the gross proceeds of any coal sold by him, to the machine clerk, as he received it. The prisoner might if he liked have taken pits from other coal masters, and worked them in the same manner and at the same time with the prosecutors. The prisoner had sold coal to three persons, received the money, and not accounted for it. It was urged that the engagement of butty collier did not constitute the relation of master and servant, and that being so, the voluntary sale of coal to customers of his own selection did not make him a servant; there was no authority to compel or any obligation so to do in any instance; but Crompton, J., held that the prisoner was a servant (*f*).

The prisoner was indicted as the servant of H. and others for embezzling two sums of money, their property. The prisoner, being in difficulties, assigned his goods, effects, and book-debts to H. and others as trustees, who employed him at a salary to conduct the business for the benefit of the trustees, and he afterwards received the two sums in question, which had been debts previously due to him, and did not account for them; Byles, J., held that the prisoner was not a clerk or servant, or acting in the capacity of a clerk or servant (*g*).

Upon an indictment for embezzling the money of D. and G., two glove sewers, it appeared that the prisoner was a carrier; employed, however, only between the glove sewers and manufacturers in carrying the gloves from and to the one and the other. The manufacturers knew nothing of the individuals who made up their gloves; but the prisoner gave the name of any woman who desired to be employed, and received a certain number of unsewn gloves from the manufactory; the sewers sent back their gloves, when sewed, by the prisoner to the factory. He delivered the parcels, the total amount due was paid to him in one sum, and fresh parcels of unsewn gloves were delivered to him. His duty then was to deliver to each workwoman her money. D. and G. had given him a parcel of sewed gloves to be taken to the manufacturers, which he duly delivered. D.'s work entitled her to receive 2*s.* 2½*d.*, G.'s entitled her to receive 3*s.* These sums, with several others, in one sum, were paid to the prisoner in respect of such work; and he fraudulently applied them to his own use, and denied the receipt of them; and, upon a case reserved, it was held that the relation of master and servant did not exist, but the prisoner was a mere bailee, and the non-delivery of the money, which he had received, was not embezzlement (*h*).

The clerk of a chapelry who received the Sacrament money was held not to be the servant either of the minister, churchwardens, or the poor of the chapelry (*i*).

(*f*) R. *v.* Thomas, 6 Cox, 403.
(*g*) R. *v.* Barnes, 8 Cox, 129.
(*h*) R. *v.* Gibbs, Dears. 445; 24 L. J. M. C. 62.
(*i*) R. *v.* Burton, 1 Mood. 237.

Payment by Commission.—From the cases already referred to (*j*) and those now mentioned it appears that a person, whether he is paid by commission or salary, if he is under orders to go here or there, or is bound to devote at least some portion of his time to the service of the employer, is a clerk or servant within sect. 68, but if he is not under such orders, nor bound to devote any portion of his time to the service of his principal, but may get or abstain from getting orders for his principal as he chooses, is not a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant.

The prisoner was employed by a coal merchant under an agreement whereby 'he was to receive 1*s.* per ton procuration fee, payable out of the first payment, 4 per cent. for collecting, and 3*d.* on the last payment, collections to be paid on Friday evening before 5 p.m., or Saturday before 2 p.m.' He received no salary, was not obliged to be at the office except on Friday or Saturday, to account for what he had received. He was at liberty to go where he pleased for orders. Held, that the prisoner was not a clerk or servant within the statute (*k*).

The prisoner was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. The prisoner had no salary, but was paid by commission. The prisoner might get orders when and where he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time—the whole of every day—to their service. Held, that the prisoner was a clerk and servant within sect. 68, *supra* (*l*).

A prisoner was indicted for embezzling as a servant. He was employed as a traveller of E. Lush, J., in summing up, said, 'Now, was the prisoner a "clerk or servant" within the meaning of the statute? That depends on the terms of his employment. If a person says to another carrying on an independent trade, "If you get any orders for me I will pay you a commission," and that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a "clerk or servant"; but if a man says, "I employ you and will pay you, not by salary, but by commission," then the person employed is a servant. And the reason for such distinction is this, that the person employing has no control over the person employed, as in the first case; but where, as in the second instance I have put, one employs another, and binds him to use his time and services about his (the employer's) business, then the person employed is subject to control. Here T. agrees with E. that he shall and will from the date of the agreement "act as the traveller of the said E., and diligently employ himself in going from town to town and soliciting orders." It is, therefore, clear that he was employed as "clerk or servant" by E., who had full control over his time and services' (*m*).

Where the prisoner was employed to obtain orders for the sale of iron for the prosecutors at a certain commission upon the orders which he

(*j*) See R. *v.* Bowers, R. *v.* Negus, R. *v.* Harris, *ante*, pp. 1378, 1379.
(*k*) R. *v.* Marshall, 11 Cox, 490. See also R. *v.* Mayle, 11 Cox, 150.
(*l*) R. *v.* Bailey, 12 Cox, 56.
(*m*) R. *v.* Turner, 11 Cox, 551, Lush, J.

should obtain, it was held that he was not 'clerk or servant' (words which implied the existence of some one of the power of control), but was a commission agent and no more (*n*).

The prisoner, who kept a refreshment house, and while so doing was engaged by the prosecutor to get orders for manure, which they supplied from their stores; he was to collect the money and pay it at once to them; and also to send them weekly accounts, shewing his sales and receipts. He was to be paid by commission. He had not undertaken to give any definite quantity of time or la'bour to the business, but was to act in a particular district, and in the printed forms given to him on which to make his returns he was called agent for the B. district. It was proved that 'he was to go through the county and see the farmers and get orders. He was to be continually during the season among the farmers.' Subsequently the prosecutors sent large quantities of manure to stores at B., under the control of the prisoner, who took them in his own name and paid the rent to the owner, but was repaid such rent by the prosecutors when the accounts were adjusted. The prisoner supplied the manure from these stores. Afterwards the prisoner signed a proposal to a guarantee society to insure the prosecutors in respect of their connection with him, which stated that his salary was £1 a year besides commission, estimated at £65 a year. This proposal contained a notice that some amount of salary must be payable, or the society would not insure; and the prosecutor swore that he agreed to give the prisoner that salary. On a case reserved, it was held that the evidence did not prove that the prisoner was a servant of the prosecutor (*o*).

Where the prisoner was appointed as an extra collector of poor rates by the parish, and was paid out of the parish funds; not by a fixed salary, but by a percentage on his collections, he was held to be clerk or servant within the meaning of 39 Geo. III. c. 85 (rep.), under which he had been indicted for embezzling the property of the churchwardens and overseers (*p*).

Where More than One Master.—A person employed upon commission to travel for orders, and to collect debts, was held to be a *clerk* within that Act, though he was employed by many different houses, on each journey, and paid his own expenses of each journey out of his commission, and did not live with any of his employers, nor act in any of their counting-houses (*q*).

So where a book-keeper employed by two partners in trade, received and embezzled notes which were the separate property of one of the partners, Bayley, J., held that he was the servant of each (*r*).

(*n*) R. *v.* May, L. & C. 13. On R. *v.* Carr, R. & R. 198, being cited, Cockburn, C.J., said, 'In that case the prisoner was a traveller. Now a traveller, although he travels for more than one person or firm, is to some extent under control, and must go here or there as he is ordered; but in this case the prisoner can in no sense be said to be under control.'

(*o*) R. *v.* Walker, Dears. & B. 600; 27 L. J. M. C. 207.

(*p*) R. *v.* Ward, Gow, N. P. R. 168, Richardson, J.

(*q*) R. *v.* Batty. 2 Mood. 257. R. *v.* Carr, MS. Bayley, J., and R. & R. 198, and R. *v.* Leech, 3 Stark. (N. P.) 70. In R. *v.* Tite, L. & C. 29, it was held that if the control necessary to constitute the relationship of master and servant was shewn to have existed, which was a question of fact for the jury, a commercial traveller paid by commission might clearly be a servant within the meaning of the statute.

(*r*) R. *v.* Leech, 3 Stark. (N. P.) 70.

The railway station at C. was built on land in part belonging to each of four railway companies, whose lines ran to it, and was maintained at their joint cost, and was under the management of a committee of eight directors of the companies, two appointed by each company. This committee appointed, dismissed, and paid out of the said fund the wages of the officers, clerks, and servants employed at the station, and amongst them the delivery clerks. The prisoner was a delivery clerk, and having delivered several parcels, and received the money for their carriage, due to one of the companies, embezzled part of it; and it was held, upon a case reserved, that the prisoner was properly convicted on counts which alleged him to be the servant of the four companies, or of the committee (*s*).

So where the prisoner was indicted for embezzling money received on account of his master, Bricknell, who was part proprietor of a coach, and employed the prisoner to drive for him part of the way, and all the proprietors were interested in the moneys received throughout the line, but Bricknell received the money on the part of the line where the prisoner drove and was accountable to the other proprietors for it, Patteson, J., thought that as between the prisoner and Bricknell the money was received to the use of Bricknell, and that he was his servant, and upon a case reserved, the judges held the conviction right (*t*).

Joint Interest in Money received (*u*).—The prosecutor, who owned a colliery, and barges, employed the prisoner as captain of one of his barges to carry out and sell coals. His duty was to bring back the money for which the coals sold, but he was entitled to two-thirds of the difference between such money and the value at the colliery. He received coals to take down the river to the best market, and he sold them at eighteen shillings per chaldron, the value, when he received them, having been fourteen shillings the chaldron. He embezzled the money. A majority of the judges held that he was a servant within the 39 Geo. III. c. 85 (rep.), and that so much of what he received as equalled the value at the colliery was received solely for the use of the prosecutor (*v*).

A turner's man received an order on his master's account for six dozen coffee-pot handles, his business being to receive orders, take the necessary materials from his master's stock, work them up, deliver out the articles, receive the money for them, and pay over the whole money to his master; but at the end of the week he was entitled to receive a proportion of the money back for his work upon the articles. In the present case he had taken the materials from his master's stock, made the coffee-pot handles, delivered them to the customer, and received the money; but he had concealed the transaction from his master, and kept all the money. Upon a case reserved, all the judges who met thought it was an embezzlement of the money and that the conviction was right (*w*).

The prisoner had entered into an agreement to take charge of the prosecutor's glebe (his wife undertaking the dairy, poultry, &c.) at fifteen

(*s*) R. *v.* Bayley, Dears. & B. 121; 26 L. J. M. C. 4.

(*t*) R. *v.* White, 2 Mood. 91.

(*u*) The following cases mentioned under this sub-title were decided before the Larceny Act, 1868 (31 & 32 Vict. c. 116), *ante*, p. 1280.

(*v*) R. *v.* Hartley, MS. Bayley, J., and R. & R. 139. R. *v.* Solomons, C. C. A. 17 July, 1909 (driver of a taxi-cab). See also R. *v.* Holme, 2 Lew. 256. Anon. ibid., 258, cited, Chambre, J.

(*w*) R. *v.* Hoggins, MS. Bayley, J., and R. & R. 145.

shillings a week, till Michaelmas, and afterwards at a salary of £25 a year, and a third of the clear annual profit, after all expenses of rent, rate, labour, and interest on capital, &c., were paid, on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side were to be given; at the expiration of which time the cottage occupied by the prisoner as bailiff, in addition to his salary, was to be vacated. The prisoner was convicted of embezzling moneys received in the course of the business carried on under this agreement, and on a case reserved, it was held that, *inter se* the prosecutor and the prisoner were not partners, and that the prisoner was a labourer and not a partner (*x*).

The prisoner was a cashier and collector, and had in addition to a fixed yearly salary a percentage on the profits, but was not liable for the losses of the firm and had no control over the management of the business. The jury found that he was a servant within the 7 & 8 Geo. IV. c. 29, s. 47 (rep.). On a case reserved on the question whether they were warranted in so finding, it was held that they were: for, although there might be a partnership *quoad* third persons, there was none *inter se* so as to entitle the prisoner to help himself to his masters' property (*y*).

Friendly Societies.—The Larceny Act, 1868 (31 & 32 Vict. c. 116) (*z*), has removed most of the difficulties experienced under prior statutes in dealing with officers of friendly and other societies guilty of misappropriation of funds in which they had an interest. But the following decisions prior to 1868 are still of some interest and value.

Upon an indictment for embezzling the monies of B., A., and H., it appeared that the prisoner was secretary clerk, and a member of a society. The articles of the society were not enrolled. The members were to pay their monies to the stewards for the time being, which were to be paid by the clerk and one of the stewards into the trustees' account at the bank. B., A., and H. were the trustees of the society. Two stewards had been regularly appointed from time to time from the commencement of the society till within a few months before the offence, but no stewards had been appointed since, the prisoner having neglected to summon the committee as he ought to have done according to his duty. During the time there were no stewards, the secretary had been in the habit of receiving the money from the members on the club nights, and carrying it to the bank, and on the occasion in question he had fraudulently withheld part of the sum so received by him. It was objected (*inter alia*) that the trustees were not properly described as his masters and employers, and that the property in the money received could not properly be laid as the property of the trustees, especially as the articles had not been enrolled. Upon a case reserved, the judges were of opinion that the conviction was right (*a*).

The prisoner was indicted as clerk and servant of D. and others for embezzling their money. D., the prisoner, and many others were members of a benefit society, which was not enrolled and had no trustees.

(*x*) R. *v.* Wortley, 2 Den. 333; 21 L. J. M. C. 44.

(*y*) R. *v.* Macdonald, L. & C. 85; 31 L. J. M. C. 67.

(*z*) *Ante*, p. 1280. And *vide* R. *v.* Robson, and R. *v.* Neat, *ante*, p. 1281.

(*a*) R. *v.* Hall [1836], 1 Mood. 474. And see R. *v.* Miller, 2 Mood. 249. R. *v.* Hastie, L. & C. 269; 32 L. J. M. C. 63. R. *v.* Woolley, 4 Cox, 251, 255. R. *v.* Jenson, 1 Mood. 434.

Prisoner was employed as secretary, and his duties were to receive and pay into the savings' bank or deposit in the box of the society all the subscriptions, fines, and other payments of the members. D. was an ordinary member of the society. The prisoner received as a remuneration for doing the work of secretary, 2*d.* per head per quarter on every member, including himself. It was the duty of the prisoner at certain times, and under certain circumstances, to carry the money he received to the savings' bank; but it was discovered that he had not so carried about £50 to the savings' bank. It was held by Maule, J., that the prisoner was not the servant of D. 'and others,' for others must include himself, and that the money was his own money as he was a partner (*b*).

The prisoner was indicted for embezzlement as clerk and servant of three persons who were named. He was a member and secretary of a properly certified friendly society, and as such secretary received a salary of £1 per annum. No treasurer had ever been appointed, and the prisoner for fifteen years had always at the weekly meetings of the society received all moneys due from the members, giving receipts for the same, and punctually made all payments due from the society, placing the balance in the society's box with the books at the lodge-room. The prisoner always gave correct receipts to the members for their weekly payments, but made false entries in the books kept by him as secretary. By the rules he was to 'attend all meetings of the lodge, take minutes of the proceedings thereof, and keep a correct account of the receipts and expenditure of the lodge,' &c.; but nothing was mentioned as to his receiving any money, and the duty of the treasurer was 'to take charge of the funds of the lodge, and pay all demands,' &c. In consequence of suspicion an examination of the accounts was made, and it was discovered that the prisoner had not entered in the books a large number of subscriptions; and, being called on for an explanation, he at once admitted that he had received the money, and was willing to repay the amount by instalments. It was objected that this was merely a breach of trust, but the objection was overruled; and, on a case reserved, the conviction was held right (*c*).

The prisoner was indicted for embezzlement as servant of L. and others, who were named. These persons and the prisoner were a committee formed from the members of two friendly societies for the purpose of conducting a railway excursion. The committee nominated certain persons including the prisoner to sell the tickets entitling the bearer to share in the excursion, and issued to them the tickets for sale. The duty of the persons appointed to sell the tickets was to pay over the money received from their sale to a person appointed by the committee to receive it for the use of the societies; they received no remuneration for their services. The prisoner sold a number of the tickets and fraudulently disposed of the money received for their sale. Upon a case reserved it was held that he was not a clerk or servant within the meaning of the Larceny Act, 1861 (*d*).

A treasurer of a friendly society (duly enrolled and the rules of which had been certified by the barrister appointed in that behalf) whose duty

(*b*) R. *v.* Taffs [1850], 4 Cox, 169. See R. *v.* Diprose, 11 Cox, 185. See now 31 & 32 Vict. c. 112, *ante*, p. 1280.

(*c*) R. *v.* Proud, L. & C. 97; 31 L. J. M. C. 71.

(*d*) R. *v.* Bren, L. & C. 346; 33 L. J. M. C. 59. See now 31 & 32 Vict. c. 116, s. 1, *ante*, p. 1280.

it was to receive the moneys paid into the society, and hold them to the order of the secretary countersigned by the chairman, or a trustee, and to account whenever called upon, to which office no salary was attached, is not a clerk or servant within the Act of 1861 (*e*).

The trustees of a benefit building society used to borrow money which they had no power as trustees to borrow. On one occasion the prisoner, who was secretary, received the sum borrowed and kept it. The indictment described him as the servant of 'W. and others his masters.' It was held sufficient; for if the money was the property of the society, W. was a member of the society, and the prisoner was properly described as servant of 'W. and others,' *i.e.*, of the society; but if the money was the property of the trustees, W. was also a trustee, and the prisoner was properly described as servant of 'W. and others,' *i.e.*, of the trustees (*f*).

Upon an indictment for embezzling the money of a society it appeared that the members of the society, when they were admitted into it, had an oath administered to them, which was clearly an unlawful oath within 39 Geo. III. c. 79, and 57 Geo. III. c. 19, s. 25 (*g*); and it was held that the prisoner could not be convicted of embezzling the money of the society (*h*).

A society in the nature of a friendly society, but having rules—not enrolled or certified under the Friendly Societies Acts—some of which are in restraint of trade, and therefore void, is not an illegal society in the sense that it is disabled from prosecuting a servant for embezzlement (*i*).

Rate Collectors.—The Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 15 (*j*), was passed in consequence of a case in which it was held that a person appointed by the guardians of a union as assistant overseer for a district within the union, under an order of the poor law board, ought not to have been convicted on an indictment charging him, as the servant of the guardians, with embezzling the money of the guardians, it not appearing that he received the money 'for, in the name, or on the account of,' the guardians, but of the overseers (*k*). So where a collector of rates was appointed under an order of the poor law board, Maule, J., held, on the authority of the preceding case, that he was not indictable for disposing of the money he received; for he was not a servant at all, but an independent officer, between whom and his superiors none of the ordinary attributes of service existed (*l*).

But this enactment does not seem to reach the following case. The prisoner was appointed a collector of poor rates of a union under an invalid order of the poor law board; and in consequence, a vestry meeting duly elected the prisoner assistant overseer for their parish under 59 Geo. III. c. 12, s. 7, and the justices in petty sessions confirmed this appointment, which specified that he should discharge all the duties of overseer. The

(*e*) R. *v.* Tyree, L. R. 1 C. C. R. 177; 38 L. J. M. C. 58. Cf. R. *v.* Murphy, 4 Cox, 101.

(*f*) R. *v.* Redford, 11 Cox, 367.

(*g*) *Ante*, Vol. i., p. 327, and see 59 & 60 Vict. c. 25, s. 32.

(*h*) R. *v.* Hunt, 8 C. & P. 642. Mirehouse, C.S., after consulting Bosanquet and Coleridge, JJ.

(*i*) R. *v.* Stainer, L. R. 1 C. C. R. 230; 39 L. J. M. C. 54. See R. *v.* Tankard [1894], 1 Q.B. 548; *ante*, p. 1281.

(*j*) *Ante*, p. 1377.

(*k*) R. *v.* Townsend [1846], 1 Den. 167. At the trial, Patteson, J., held that the prisoner was not the servant of the overseers, and did not reserve that point.

(*l*) R. *v.* Truman, 2 Cox, 306.

prisoner, having received the money for which he had not accounted, was indicted for embezzling this money; and Rolfe, B., held that the prisoner was, to all intents and purposes, an overseer, and that he was not a clerk or servant either to the overseers of the parish or to the guardians of the union (*m*).

Where the prisoner was appointed under 10 Geo. IV. c. 68, as collector of the poor, church, and improvement rates by a vestry, it was held that he might be indicted as *servant* of the committee of management of the affairs of the parish for embezzling *their* moneys; for it was no objection that he was appointed under the Act of Parliament, as it was quite immaterial how he was appointed; and sect. 2 provided that the moneys should be the moneys of the committee; and the Act meant that though the collectors were to be appointed by the vestry, yet they were to be clerks or servants to the committee of management (*n*).

The indictment charged the prisoner as servant with embezzling the money of B. and F., who were the overseers of the poor of a parish. There were also two churchwardens of the parish. The prisoner collected a rate from the owner of premises, who paid on behalf of his tenant, entered the amount as uncollected, and appropriated the same to his own use. It was argued that the count (*o*) ought to have averred that the prisoner was the servant of the churchwardens and overseers. Parke, B.: 'No; the churchwardens have nothing to do with it. The overseers take upon themselves the duty of collecting: they employ the collector as their agent, and the landlord is the agent of the tenant. The overseers are the parties entitled to the property.' It was then urged that as soon as the money was collected, it became the money of the churchwardens and overseers. Lord Campbell, C.J., said: 'As between the prisoner and the overseers the money is the property of the overseers, whether they may be accountable for it to others or no. The Court are unanimously of opinion that the conviction is good' (*p*).

An assistant overseer of a parish, elected by the parishioners in vestry under 59 Geo. III. c. 12, s. 7, who fixed his duties and salary, was held to be the servant of the inhabitants of the parish, and to have received, as such servant, money collected by him for the poor-rate (*q*).

In another case (*r*), where, however, a person nominated by the inhabitants of a township as an assistant overseer (the nomination not specifying that one of his duties would be to collect and receive money) did collect

(*m*) R. *v.* Sampson, 1 Cox, 335. The case does not state whose clerk or servant he was alleged to be. See R. *v.* Carpenter, *infra*.

(*n*) R. *v.* Callahan, 8 C. & P. 154. See now 12 & 13 Vict. c. 103, s. 15, *ante*, p. 1377. See also R. *v.* Jenson, 1 Mood, 434. In R. *v.* Welch, 1 Den. 199, it was held that the treasurer of the guardians of the poor appointed under a local act was properly indicted as their servant, and that the non-accounting for a portion of the money received by him was an embezzlement, although no precise time could be fixed at which it was the prisoner's duty to pay over the money.

(*o*) There were other counts and other points reserved upon them, but the ruling of the Court seems to have been confined to this count.

(*p*) R. *v.* Adey, 1 Den, 571; 19 L. J. M. C. 149.

(*q*) R. *v.* Carpenter, L. R. 1 C. C. R. 29; 35 L. J. M. C. 169.

(*r*) R. *v.* Coley, 16 Cox, 226. Lord Coleridge, C.J., Pollock, B., Denman, Hawkins, and Stephen, JJ. The decision seems to turn on the fact that under 59 Geo. III. c. 12, s. 7, an assistant overseer can only be appointed for such purposes as are specified in the nomination. It is difficult to reconcile this case with R. *v.* Hall, 1 Mood. 474, which was not cited, and the decision appears to be open to question.

and receive money for the township, and converted it to his own use, it was held, that he could not be convicted of embezzling such money (*s*).

An assistant overseer is now appointed in rural parishes by the parish council or parish meeting (*s*), but he may still in an indictment for embezzling the moneys he has received as assistant overseer be described as the servant of the inhabitants of the parish for which he was appointed, and the money may be laid as the property of such inhabitants (*t*).

SECT. III.—RECEIPT OF MONEY, ETC.: FOR OR IN THE NAME OR ON THE ACCOUNT OF THE MASTER

If a servant receives a cheque for his master and fraudulently appropriates it to his own use, and converts it into money, it is sufficient to allege and prove that he either embezzled the cheque or that he embezzled money. If it be alleged that he embezzled money then it must be proved that the cheque was cashed and so converted into money. So where the indictment alleged an embezzlement of money, and the evidence proved that the prisoner received a cheque, but did not shew that he had turned it into money in any way, it was held that the indictment was not supported by the evidence (*u*). Upon an indictment for embezzling money, a person cannot be convicted of embezzling goods, and where there was nothing to shew whether the deficiency was in money or in stock, a conviction for embezzling money was quashed (*v*).

Upon a charge against a director of a company of unlawfully applying a cheque to his own use belonging to the company, the cheque could not be found, but the counterfoil of the cheque was held to be admissible as evidence against the prisoner (*w*).

For or in Name of Master.—Upon an indictment alleging that the prisoner was the servant of W., and had received £5 10*s.* on account of his master, and embezzled the same, being his money, it appeared that W. had contracted with a railway company to provide them with necessary horses and carmen for the purpose of delivering coals to their customers, and had also contracted with the company that he or his carmen should, day by day, duly account for and deliver to the company's manager all moneys received in payment for such coals. The delivery notes as well as receipted invoices of the coals were handed to the carmen of W., and the delivery notes were taken to his office to be entered in his books, but the receipted invoices were to be left with the customers on payment of the amount. The prisoner was the servant of W., and employed by him as his carman in the delivery of coals pursuant to the contract, and it was his duty to pay over direct to the clerks of the company any money he received for such coals. It did not appear that such moneys so received and paid over to the company ever formed items of account between W. and the company. The prisoner had delivered coals to a customer of the company, received payment for them, and converted the money to his own use. Upon a case reserved, the Court quashed the conviction,

(*s*) 56 & 57 Vict. c. 73, s. 5 (1).

(*t*) R. *v.* Smallman [1897], 1 Q.B. 4; 66 L. J. Q. B. 82.

(*u*) R. *v.* Keena, L. R. 1 C. C. R. 113; 37 L. J. M. C. 43. See 24 & 25 Vict. c. 96, s. 71, *ante*, p. 1376.

(*v*) R. *v.* Clarke, 69 J. P. 150. Alverstone, C.J., said that it was not possible to amend the indictment.

(*w*) R. *v.* Wilkinson, 10 Cox, 537.

holding that there was such privity between the carman and the company as to make the carman the agent of the company in receiving the money, and the money in his hands was not the money of the master but of the company (*x*).

Upon an indictment for embezzling moneys, received for, in the name, and on account of H., it appeared that H. was agent for a railway company for the purpose of carrying out goods; he employed his own servants, drays, and horses, and was answerable to the company for monies collected by his servants for carriage of goods. The prisoner was his servant, and it was his duty to go out with a dray, and take goods and a delivery-book handed to him by a clerk of the company, and to deliver the goods and to receive the amount of carriage due to the company, and then to account for the sums so received to the clerk. He had taken out goods and received for the carriage the sums stated in the said book, which sums were paid to, and received by him, as due to the company, and the receipts for which were given by the prisoner, and made out in the name of the company. The prisoner appropriated these sums and H. paid the amount to the company, in pursuance of his arrangement with them in that behalf. It was objected that the prisoner received the monies not for, in the name and on the account of H., but of the company; but, upon a case reserved, it was held that, although the prisoner received the money in the name of the company, he received it on the account of his master (*y*).

A person is liable under this statute if he receives money on account of his master, and the question is not whether the persons who paid the money to the prisoner paid it on account of his master, but whether he received it on account of his master.

The prisoner was the head manager at the chief office of an insurance company. In the ordinary course of business he received cheques payable to his order from the managers of branch offices, and it was his duty to endorse these cheques and hand them to the cashier. The prisoner, however, endorsed two cheques and cashed them with a friend. The prisoner then took the amount he had received to the cashier to be set off against an overdraft of his salary. He was indicted for embezzling the proceeds of these cheques, and upon a case reserved, it was held that the proceeds of the cheques were received by him on account of his masters, notwithstanding that the person who cashed the cheques was a stranger to his masters (*z*).

Improper use of Master's Property.—Though it is not necessary under the present statute that the money or chattel should be received by the servant by virtue of his employment, it is necessary that it should when received be the master's property. So where a servant, whose duty was to take a barge belonging to his master with cargo from A. to B.,

(*x*) R. *v.* Beaumont, Dears. 270; 23 L. J. M. C. 54. By the terms of the contract W. undertook to 'provide a sufficient number of steady and honest carmen, and other persons, for the delivery of all coals,' &c., 'and also for collecting and receiving, and duly accounting for, the moneys received for the same,' &c., and that 'the parties, whilst in the employment of W., shall obey, in all things connected with the delivery of coals and the receipt and payment of moneys received by them, the orders of the company's coal manager, or such other person as may be appointed by them.' This contract was not set out in the case, but was cited in the argument.

(*y*) R. *v.* Thorpe, Dears. & B. 562; 27 L. J. M. C. 64. See R. *v.* Adey, 1 Den. 578, *ante*, p. 1389.

(*z*) R. *v.* Gale, 2 Q.B.D. 141; 46 L. J. M. C. 134.

and receive back such return cargo, and from such persons as his master should direct, and such only, contrary to the express orders of his master, which were to return empty from B. to C., part of the return voyage to A., took nevertheless a return cargo of manure from B. to C., and received the freight from the owner of the cargo (who knew only the prisoner in the transaction) and did not account to his master for the freight, and denied having carried such return cargo. It was held, upon a case reserved, that the money was not received by him for or in the name of or on the account of his master, and that he was not guilty of embezzlement under section 68 of the Larceny Act, 1861 (*a*).

The prisoner was the town traveller and collector of the prosecutor, and his duty was to go round and take orders from customers, and to enter them in the day or the order book, and also to receive moneys in payment of such orders, but he had no authority whatever to take, or direct, the delivery of any goods from the shop. A customer gave him an order for mixed pickles and for some treacle, which order was entered by him in the order book as for the pickles only. An invoice for the pickles, pursuant to the entry, was made out by the prosecutor's brother, but the prisoner entered the treacle at the bottom of the invoice and caused both the treacle and pickles to be delivered to the customer; he received payment for both but accounted only to the prosecutor for the amount received for the pickles. This was held to be larceny, and not embezzlement of the money received for the treacle (*b*).

Upon an indictment for embezzlement, which in some counts alleged the prisoner to be the servant of the inhabitants of the county of W. and in others of the clerk of the peace for that county and others, it appeared that the prisoner was the miller of a mill in the county gaol, and it was his duty to direct any person bringing grain to be ground to obtain at the porter's lodge at the gaol a ticket specifying the quantity of grain brought. The ticket was his order for receiving the grain. It was his duty to receive the grain with the ticket, to grind it, to receive the money for the grinding, and to account to the governor of the gaol for the money so received. The governor accounted for the same to the treasurer of the county rates. It was a breach of the prisoner's duty to receive or grind grain without such a ticket as above mentioned, and he had no right to grind any grain at the mill for his private benefit. The prisoner was appointed to his situation by the magistrates of the county at a fixed weekly salary, which was paid out of the county rates. The moneys which the prisoner misappropriated he received from persons for grinding their grain at the mill, but none of these persons had obtained a ticket from the porter's lodge, nor had they been directed by the prisoner to obtain such tickets, nor was there, in fact, any ticket at all. It was held, upon a case reserved, that as upon the facts stated it appeared that the prisoner had no right to receive and grind any corn on behalf of his masters, except such as was brought to him with a ticket; the reasonable conclusion to be drawn from his receiving and grinding the grain without a ticket was that he intended to make an improper use of the machinery entrusted to

(*a*) R. *v.* Cullum, L. R. 2 C. C. R. 28; 46 L. J. M. C. 134. See R. *v.* Read, 3 Q.B.D. 131; 47 L. J. M. C. 50.

(*b*) R. *v.* Wilson, 9 C. & P. 27, Law (Recorder) and Patteson, J.

him, by using it not for the benefit of his masters, but for the benefit of himself, and, therefore, that the money which he received was not received on account of his masters, and that he was not guilty of embezzlement (*c*).

Marked Money.—The indictment charged the prisoner, as a servant of one G., with receiving seven shillings from one M., for and on account of his master and embezzling the same. It appeared that G., having reason to suspect the prisoner of dishonesty, procured M. to come to his shop with a marked seven-shilling piece of his own money, there to purchase potatoes, and to pay for them with the seven-shilling piece. She came accordingly, bought potatoes to the amount of one shilling and threepence, and paid the marked seven-shilling piece to the prisoner, who gave her out of his own pocket five shillings and ninepence in change, though he might have given the change out of moneys belonging to his master which had been left in the counting-house for that purpose. The seven-shilling piece was afterwards found secreted in the prisoner's box. It was contended that the Act applied only to cases where the moneys had been paid to the servant by other persons than the master, and not, as in this case, where the monies had come intermediately from the hand of the master; but the Court held that this was embezzlement (*d*).

Money received from Master.—A servant who receives money or goods from his master, for the purpose of paying a third person on his master's account, and wrongfully appropriates the same, is not guilty of embezzlement but of larceny (*e*); and the same applies where he has received the money from any of the master's other clerks (*f*). But where money received by one clerk on account of his master is handed over by that clerk to another clerk to be handed to the master in the ordinary course of business and such latter clerk appropriates the money, he is guilty of embezzlement (*g*).

SECT. IV.—WHAT AMOUNTS TO EMBEZZLEMENT.

If a person duly enters in his books all sums of money that he has received, the mere fact of not paying over the money does not amount to embezzlement (*h*).

Upon an indictment for embezzlement, it appeared that the prisoner was the servant of a baker, and that he had received the three sums in question in payment for bread, and had never accounted for either of these sums or any part of them, and had never paid any part of them over to the prosecutrix; the prisoner, however, had never denied the receipt of either of these sums, and had never delivered any account in writing in which they were omitted; but it was not the duty of the prisoner to deliver written accounts of what he received; it was, however, his duty, on the evening of every day, to render an account to the prosecutrix of all moneys that he had received on her account in the course of that day,

(*c*) R. *v.* Harris, Dears. 344; 23 L. J. M. C. 110.

(*d*) R. *v.* Whittingham, 2 Leach, 912. R. *v.* Bull, 2 Leach, 841 (cit.). R. *v.* Headge, 2 Leach, 1033; R. & R. 160. R. *v.* Gill, Dears. 289; 23 L. J. M. C. 50.

(*e*) R. *v.* Hawkins, 1 Den. 584. R. *v.* Smith, R. & R. 267.

(*f*) R. *v.* Murray, 1 Mood. 276. See R. *v.* Watts, 2 Den. 14, *ante*, p. 1369; R. *v.* Hayward, 1 C. & K. 518. R. *v.* Reed, Dears. 257, *ante*, p. 1363.

(*g*) R. *v.* Masters, 1 Den. 332, *ante*, p. 1368.

(*h*) R. *v.* Hodgson, 3 C. & P. 422. Vaughan, B.

and immediately to pay over the amount. Coleridge, J., held that, as it was the duty of the prisoner every evening to account for and pay over all moneys received by him in the course of the day, if he wilfully omitted to do that, that was clearly quite equivalent to a denial of the receipt of the money (*i*).

Upon an indictment for embezzling the sum of £10, it appeared that the prisoner was employed by the prosecutors to receive remittances from customers, and it was his duty to enter them to the credit of the customers in a day or cash-book, and to make an extract from this book of all remittances received by him, and to take it to the prosecutor's cashier to be compared with the book, and then it became his duty to enter the whole amount contained in such extract on the credit side of the banker's deposit account, and to pay such amount to the credit of the prosecutors with their bankers. The prisoner afterwards, at his own convenience, posted the amounts of money remitted by customers into a ledger, which contained the accounts of the customers. Having received the £10, the prisoner never entered it in the cash or day-book; and he omitted to include it in the amount which he paid on the next occasion to the credit of the prosecutors with their bankers, not was it entered in any subsequent account. It was, however, entered by the prisoner to the credit of the customers in the ledger. The money was applied by the prisoner to his own use; and, upon a case reserved, upon the question whether the entry made in the ledger exempted the prisoner from the operation of the statute, it was urged that by making the entry in the ledger, the prisoner had accounted to his masters, and was not guilty of embezzlement, which necessarily involved secrecy and concealment; but it was held that the conviction was right, and it was said that the entry might have been made in order to deceive (*j*).

On an indictment for embezzlement, it appeared that the prisoner was in the service of the prosecutors, as master of a vessel. The vessel carried culm from [illegible] to P., which, when weighed at P., weighed two hundred and fifteen tons, and the prisoner received payment of the freight accordingly. When he was asked for his account by the owners, he delivered a statement, admitting the delivery of two hundred and ten tons, and the receipt of freight for so much. Being asked whether this was all that he had received, he said there was a difference of five tons between the weighing at

(*i*) R. *v.* Jackson [1844], 1 C. & K. 384. See R. *v.* Winnall, 5 Cox, 326. R. *v.* Williams, 7 C. & P. 338. R. *v.* Lynch, 6 Cox, 445. R. *v.* Tucker, 1 Cox, 235. In R. *v.* Jones, 7 C. & P. 833, Bolland, B., held that the mere fact of not entering a sum was not sufficient to support an indictment for embezzlement, and he thought it necessary that there should be a denial of the receipt of the money, or some false amount. See also R. *v.* Hall, 3 Stark. (N. P.) 67; R. & R. 463.

(*j*) R. *v.* Lister, Dears. & B. 118; 26 L. J. M. C. 26. This case seems to overrule R. *v.* Creed, 1 C. & K. 63. 'A fallacy is perpetually put forward in cases of embezzlement. The offence consists in the conversion of the *thing* received; no entry or statement is anything more than *evidence* bearing on the character of the disposal of the thing; and yet entries are constantly treated as the offence itself. If a man made every entry in due course, it would only at most amount to evidence that he did not, when he made them, intend to convert the money; and yet he might have converted it before, or might do so afterwards. If he were proved to have converted it before he made the entries, the offence would be complete, and no entry afterwards made could alter it. So on the other hand, if he made no entries or false entries, but actually paid the money to his master, he would be innocent.' C. S. G. See also R. *v.* Guelder, Bell, 284; 30 L. J. M. C. 34, and R. *v.* Wolstenholme, 11 Cox, 313.

S. and at P., and that he had retained the balance for his own use, according to a recognised custom between owners and captains in the course of business. But there was no evidence of the alleged difference of weight or of the custom. Cresswell, J., said: 'I think that this does not amount to embezzlement. Embezzlement necessarily involves secrecy; the concealment, for instance, by the defendant of his having appropriated the money. If, instead of denying his appropriation, a defendant immediately owns it, alleging a right or an excuse for retaining the sum detained, no matter how frivolous the allegation, and although the fact itself on which the allegation rests were a mere falsification; as if in the present case, although it should turn out that there was no such difference as that asserted by the defendant between the tonnage as measured at S. and at P., or that there was no such custom as that set up. I do not say to what species of offence this may amount, but in my opinion not to embezzlement' (*k*).

In R. *v.* Jones (*l*), it was objected that there was no embezzlement, as the prisoner had accounted for all the money he had actually received; if no money at all had passed, and it had been entirely a credit transaction on both sides, it would not have been embezzlement, for that crime is merely a statutory larceny, and could only be proved by shewing the actual receipt of the money, and the actual embezzlement of the money itself; and as all that was received was accounted for, the case was the same as if it had been entirely a credit transaction; and this seems to have been a good objection, but this point was not decided, as the prisoner was acquitted on the ground above stated. And where on a similar indictment the same question arose, Coltman, J., after reading R. *v.* Jones, *supra* (*ll*), held that as no money had actually passed, the offence of embezzlement had not been committed (*m*).

But where on an indictment for embezzlement it appeared that the prisoner as a superintendent of police ought to have received certain fines from a police constable, but having to pay him his wages, he did not receive these fines, but they were kept by the police constable, and if they amounted to more than a week's wages in any week, the balance stood over and formed part of the wages for the next week, and if they formed less than the week's wages, the prisoner paid him so much as made up the amount of his wages for that week. The sums were entered in a book as having been received by the prisoner, and the account was signed by the prisoner. Patteson, J., held that this was a constructive receipt of the money, as the prisoner had signed the book as having received the fines (*n*).

(*k*) R. *v.* Norman, C. & M. 501. *Sed quære*, whether any such claim must not have some such colour of right, as in cases of larceny.

(*l*) 7 C. & P. 833, *ante*, p. 1395, note (*i*).

(*ll*) In Russell on Crimes (3rd ed.), Vol. 2. 182, note (*y*), where the case was reported in the same words as appear in the text above.

(*m*) R. *v.* Gaskins, MSS. C. S. G. Gloucester Winter Ass. 1845.

(*n*) R. *v.* Baxter [1850], MSS. C. S. G., and 5 Cox, 302. 'The prisoner pleaded guilty to another indictment, or the point would have been reserved. There is no doubt that such an accounting and striking a balance amounts to payment in point of law; but it is a very different question whether it amounts to an actual receipt of the money so that the money can be said to have been received and afterwards embezzled; for how can a prisoner embezzle money which he has never had in his possession? The only answer which occurs is, that the prisoner shall not be permitted to prove that he did not receive what it was his duty to receive, and what he has admitted in writing that he did receive; but in this case the truth was disclosed on

General Deficiency.—It was at one time considered that an indictment for embezzlement might be supported by proof of a general deficiency of money, without shewing any particular sum received and not accounted for. In R. *v.* Grove (*nn*), the 1st count charged the prisoner with embezzling £500 on the 28th of August; the 2nd, £10 on the 29th; the third, with stealing a note, a sovereign, a half sovereign, &c., as clerk; and the 4th, like the 3rd, omitting to state that he was a clerk. The prisoner was a cashier in a bank, and his duty as cashier was to take charge of the cash when any payment was made into the bank, in money and paper, and the course was for the cashier to hand over the paper to a clerk, and to enter the cash received in a book kept by him (the cashier) called the money-book. It was the duty of the cashier, at the close of the business of each day, to see that the cash in hand agreed with the money book, and to strike a balance, denoting the sum in cash which the cashier had in his charge, and which ought to have been kept either in the drawer in the counter, of which he had the key, or in a box in the banking-house, of which he had the key and charge. On the 28th of August, 1835, the cash in the money-book at the close of business was £1762, which sum was by the prisoner carried forward, as in due course it ought to have been, and formed the first item of the account in the book for the 29th. On the latter day, at the close of business, the prisoner, after crediting himself with money paid by him (it being part of his duty to pay away money), and debiting himself with cash received, made the balance in the money-book £1309, and that sum the prisoner ought to have had in one or the other of the above mentioned places of deposit on the same day (29th of August). Soon after the close of business, one of the partners sent for the prisoner, and required him to produce the money. The prisoner thereupon said that he was short, and being asked how much, replied about £900, and threw himself upon the mercy of his employers. Upon examination, it was found that the prisoner, instead of £1309 in his hands, had only £345, eaving the actual deficiency £964. The prosecutor could not say when the money, or any part of it, had been purloined, from what person or persons it had been received, what sort of money had been abstracted, and whether from the till or upon its receipt from customers. The jury found the prisoner guilty of embezzlement to the amount charged, and not guilty of stealing. Upon a case reserved, it was contended that in order to enable the jury to convict either of larceny or embezzlement, there must be proof of some specific sum abstracted, and the time when. That the only evidence in this case was of a deficiency in accounts, but how that arose was not shewn. There was considerable difference of opinion amongst the judges, and the case was discussed at different meetings, and ultimately eight of the judges (*o*) were of opinion that the conviction was

the part of the prosecution. Under 39 Geo. III. c. 85 (rep.), it was necessary to allege and prove the particular money embezzled, and it is clear that under that Act the case in question would not have been embezzlement, and the power to prove the receipt of any money without proving the particular coin does not alter the offence, but rather assumes the receipt of some money to be necessary. See R. *v.* Wavell, 1 Mood. 224.' C. S. G.

(*nn*) 1 Mood. 447; 7 C. & P. 635.

(*o*) Lord Denman, C.J., Tindal, C.J., Lord Abinger, C.B., J. A. Park, J., Vaughan, B., Bosanquet, J., Gurney, B., and Williams, J.

good, but the other seven (*p*) were of opinion that the conviction was wrong.

And the tendency of legal opinion is to hold that proof of a general deficiency will not, be sufficient, and that there should be proof that some specific sum has been embezzled. Upon an indictment for embezzlement it was opened that the prisoner had been shopman to the prosecutrix, and that it would be proved that there was a deficiency in the prisoner's accounts, but that there was no proof of the embezzlement of any particular sum. Alderson, B., said: 'Whatever difference of opinion there might be in the case of R. *v.* Grove (*q*), that proceeded more upon the peculiar facts of that case than upon the law. It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen (*r*).

The prisoner was clerk and traveller to the prosecutor, and his duty was to receive from the customers moneys paid by them for goods supplied, and also to pay out of such moneys the wages and other outgoings of the establishment; the payments so made being entered in a small book kept by the prisoner, and their weekly total carried into a larger book, which shewed the general debtor and creditor account between the prisoner and his master; and the balance shewn in this last account was from time to time struck, and sometimes paid over, and sometimes brought forward as the commencement of a new account. In September one of the weekly totals, as it appeared in the smaller book, shewed an aggregate of payments to the amount of £25. In the account for that week it was entered in the larger book as £35, and this false entry appeared to have been written on an erasure. In October a balance was struck on the general account; and the sum found to be due upon that balance was carried forward as the first item of a new account, which was settled in December, and the balance at that time paid over to the prosecutor, it being £10 less than it ought to have been by reason of the sum of £35 being inserted as before mentioned instead of £25; there was no evidence to shew any precise sum received by the prisoner on account of his master, and the whole or any part of that very sum appropriated by him to his own use; and Williams, J., held that in the absence of such evidence the indictment for embezzlement could not be sustained (*s*).

The prisoner was indicted for embezzling £270. He was assistant teller to the customs, and it was his duty to receive money from those persons who had to pay sums into the receiver-general's office, and enter such receipts in a cash book. He had also to make certain payments, and these it was his duty to enter on the other side of the same book, and balance the amounts each day; paying over so much of the surplus as was in notes to a superior officer, and retaining the cash, which was carried to the next day's account. One day he was ordered, about eleven o'clock, to make up his accounts. He continued, however, to receive money till

(*p*) Littledale, J., Gaselee, J., Parke, B., Bolland, B., Alderson, B., Patteson, J., and Coleridge, J.

(*q*) *Supra.*

(*r*) R. *v.* Lloyd Jones, 8 C. & P. 288; and see R. *v.* Wolstenholme, 11 Cox, 313.

(*s*) R. *v.* Chapman, 1 C. & K. 119. A ruling given on the mere opening of counsel.

two o'clock, when he left the office and did not return. His desks and books were then examined, and the balance found was £270 less than it ought to have been. The whole of the money was received between ten and two o'clock of that day. It was contended that the evidence failed to prove the appropriation of any particular sum received from any one person, which was necessary to support the charge. Erle, J., 'I think the offence is sufficiently made out, within the meaning of the statute, if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself, and that he absconded or refused, when called upon, to account, leaving a portion of the gross sum deficient. There would be constant failure of justice if I were to decide otherwise, since it is impossible, in cases like the present, where a number of different amounts of money have been received, to specify which sum or sums, or the parts of which sum or sums, have been embezzled' (*t*).

A count alleged that the prisoner, being employed in the public service of the Queen, did, by virtue of his employment, receive certain money, to wit, £5000, on account of the public service, and feloniously applied it to his own use. The prisoner had for several years been an officer of receipts of inland revenue. In that capacity he received income tax, land and assessed taxes, and duties of excise. On each of these accounts he was allowed by the Board of Inland Revenue to retain in his hands a balance of £100 to meet contingent expenses. It was his duty to send in returns shewing the amounts received and remitted by him, and the balance remaining in his hands, according to the accounts so rendered. The general surveyor of Inland Revenue, after examining the prisoner's accounts, produced to him a statement, extracted from his own accounts, making the balance in his hands £5214. He said he knew the balance was about that sum, as he had gone through the accounts a few days before. The surveyor then reminded him that there was a balance of excise duties alone of about £300 standing against him from the previous Monday. The prisoner then produced £281 2*s.* 4*d.*, and said that was all the money he had in the world. The surveyor asked him what he had done with all the rest. He said he had spent it in an unfortunate speculation. Upon a case reserved, after a verdict of guilty, the conviction was held right; for whatever difficulty there might be as to the larger sum, there was none as to the £300, and the evidence with respect to that sum clearly brought the case within the statute. It was proved, out of the prisoner's own mouth, that he had received, no matter from how many different persons, various sums amounting to £300, which

(*t*) R. *v.* Lambert, 2 Cox, 309. 'The prisoner must have been indicted under 2 Will. IV. c. 4, s. 1 (rep.), but the terms in that Act did not so far differ from 7 & 8 Geo. IV. c. 29, s. 47 (rep.), as to make any difference as to the point here decided. The plain answer to the objection in this case is that the prisoner was shewn to have received all the money that morning, and that he must have actually taken away the £270 when he left the office; and that that was the embezzlement of the whole of that sum at that time. As a servant may steal at one time any number of sums received from different persons and put in a till together, so a servant may receive any number of sums from different persons, and embezzle them all at the same time; for till the moment of converting them he may have held them all with an honest intention.' C. S. G.

formed a fund in his hands belonging to the Crown for which he was bound to account; and the question was whether he had fraudulently applied all or any part of it. He himself produced a sum of money, and said, 'I have spent the rest in an unfortunate speculation.' It is not material whether the sum produced was part of the £300 or not; because 'the rest,' which must include part or all of the £300, he had, according to his own statement, expended in an unfortunate speculation. As to the £300, therefore, it appeared that the prisoner had received that sum on behalf of the Crown, and had fraudulently applied part of it to his own use. There therefore was a specific transaction pointed out, as to which the conviction was clearly sustained, and it became unnecessary to decide whether a general deficiency would suffice (*u*).

A conductor of a tramway car was charged with embezzling 3*s*. It was proved that on a certain journey there were fifteen threepenny fares, and twenty-five twopenny fares (altogether 7*s*. 11*d*.), and the conductor was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way bill for the journey debiting himself with only nine threepenny fares and sixteen twopenny fares (altogether 4*s*. 11*d*.). The mode of accounting was to deliver the way bills for each journey to a clerk, and to hand in all the money received during each day on the following morning. The prisoner's money should have been £3 1*s*. 9*d*. according to his way bills for the day, but he paid in only £3 0*s*. 8*d*. Upon a case reserved, it was held, that there was sufficient evidence of the receipt of 7*s*. 11*d*. the total amount of fares of the particular journey, and of the embezzlement of 3*s*., part thereof (*v*).

Where on an indictment, containing only one count, charging the receipt of a sum of money on a particular day, it appeared that that sum was received in various smaller sums on different days, the prosecutor was put to his election and had to confine the evidence to one sum on one particular day (*w*).

Where, however, the gross sum was made up of sums received on several days, but the prisoner's duty was to account and pay over the gross sum on some particular day, and he had not done so, but had embezzled the money, a conviction on counts alleging the embezzlement of such gross sum was upheld.

It was the duty of an agent of a coal society to collect and receive weekly payments from persons who bought coals from the society, and on the Tuesday of every week to send in a weekly account, and to pay the gross amount received by him in the course of the

(*u*) R. *v.* Moah, Dears. 626; 25 L. J. M. C. 66. Cresswell, J., said, 'I by no means say that the indictment is not sustainable as to the £5000.' 'As at present advised, I should say that the prisoner, being shewn by his own accounts to have a balance in hand of £5000, due to the Crown, and he making no attempt to explain it, on the ground of error or loss of the money, merely says that he has expended it for his own purposes, he may, upon that evidence, be convicted of embezzling the money, and that having been once indicted for embezzling the whole amount, and either convicted or acquitted, he never could be indicted again for embezzling any part of it.' Pollock, C.B., seems to have considered the law as to embezzlement not applicable to the case, because the terms of 23 Will. IV. c. 4 (rep.), were larger than those of 7 & 8 Geo. IV. c. 29 (rep.). But the facts seem clearly to have brought the case within the latter Act. R. *v.* Lambert, *supra*, was recognised as in point.

(*v*) R. *v.* King, 12 Cox, 73.

(*w*) R. *v.* Williams, 6 C. & P. 626. Arabin, Serjt., after consulting Gaselee, J., Alderson and Gurney, BB.

week into a bank to the credit of the society. An indictment for embezzlement against the agent, containing three counts, charged in the first count the act of embezzling a sum of £1 1*s.*, and evidence was given on that count that during a certain week payments amounting in the whole to this amount had been made to the prisoner by ten different persons in small sums, and that the prisoner omitted to account at the end of the week or at any time for those several sums, or for any specific amount of £1 1*s.* In the other two counts, sums were charged, being aggregate sums similarly composed and received weekly, but not accounted for weekly in a similar manner, and thirty-one small sums in all were thus shewn not to have been accounted for at three weekly accountings. It was held that the evidence was properly received, and that the indictment did not charge more than three distinct acts of embezzlement, each act of embezzlement being the omission to account weekly for the aggregate sum composed of the several sums received during the week (*x*).

On an indictment against a secretary of a friendly society for embezzling three sums of money, the books of the society kept by the prisoner were tendered generally in evidence by the prosecution; and it was objected that the evidence must be confined to the three entries relating to the three charges in the indictment, but the Court overruled the objection, and the conviction was affirmed (*y*). So where an indictment for embezzlement charged three offences, and it appeared that the prisoner had made correct entries of a number of payments made by him in one week, but had cast up the whole £2 less than the correct amount; and in another week there was a precisely similar error of the same amount, and the same in a third week, and these were the cases charged in the indictment; Williams, J., held that a series of similar errors both before and after those which formed the subject of the indictment were admissible. It was clear that the defence to the three charges would be that these were mere errors in casting up the accounts, and such defence naturally arising, any lawful means might be resorted to whereby such defence might be anticipated, and proved to be ill-founded; and evidence which was admissible for such a purpose was not the less so because it tends to prove the commission of other felonies by the prisoner (*z*).

Embezzlement after termination of Service.—The receipt of the money embezzled must take place whilst the prisoner is in the prosecutor's service, though it appears not to be necessary to allege or prove that the embezzlement took place during such service. The prisoner had formerly been in the prosecutor's employ as farm bailiff; the prosecutor determined to go to America, and promised that if the prisoner would go too, he would pay his passage money, and set him up in business on his arrival; the farm was given up, and in the meantime the prisoner was employed by the prosecutor to collect his outstanding debts, but it did not appear that the prisoner was to be paid anything for so doing. In the course of this employment the prisoner received certain sums which

(*x*) R. *v.* Balls, L. R. 1 C. C. R. 328; 40 L. J. M. C. 148. See also R. *v.* Wright, Dears. & B. 431; 27 L. J. M. C. 65.

(*y*) R. *v.* Proud, L. & C. 97; 31 L. J. M. C. 71.

(*z*) R. *v.* Richardson, 8 Cox, 448. Williams, J., had previously consulted Pollock, C.B., and refused to reserve the point. See also R. *v.* Stephens, 16 Cox, 387, and, generally, as to evidence of this nature, *post*, pp. 2101, 2108.

he appropriated. It was held that he was not a servant when he received the money: his service ended when the farm was given up, and no new service was created (*a*).

Where it was objected that an indictment under 2 & 3 Will. IV. c. 4 (rep.) did not allege that the prisoner embezzled whilst he was the clerk; Coleridge, J., said, 'It is by no means clear that an embezzlement (if such a case be possible) after a person ceased to be clerk or servant of money received whilst he was such, would not be within the Act' (*b*).

SECT. V.—INDICTMENT (*c*), TRIAL, VENUE.

An indictment under 39 Geo. III. c. 85 (rep.) was held defective as it did not aver that the money alleged to have been stolen was the money of the prosecutors (*d*).

An indictment under the same statute was held sufficient which charged that the prisoner 'fraudulently' embezzled, omitting the word 'feloniously,' but concluded, and so the jurors say that he did feloniously embezzle, steal, take, and carry away, &c. (*e*).

As an indictment for embezzlement is so general (*f*) as to afford no information to the prisoner of the precise sums embezzled, or of the persons from whom they were received, the prisoner is entitled to be furnished by the prosecutor with particulars of the charges intended to be made; and if the prosecutor refuses to give such particulars, the Court on motion, founded upon affidavit, will order particulars to be given, and such particulars should contain the names of the persons from whom the sums of money are alleged to have been received (*g*).

The indictment (*gg*) alleged that the prisoner, on November 15, was the servant to Hodges, and did then and there by virtue, &c., receive £2 1*s*. 6*d*. on account of his master; and that the prisoner afterwards and within the space of six calendar months, to wit, on November 16, in the year aforesaid, did receive the further sum of £2 3*s*. on account, &c.; and that the prisoner, afterwards and within the space of six calendar months from the day first aforesaid, to wit, on November 17, in the year aforesaid, did receive the further sum of £2 1*s*. on account, &c.; and that the prisoner on the several days aforesaid, in the year aforesaid, the said several sums of money respectively received by him on each of those days as aforesaid, feloniously did embezzle; and so the jurors do say that

(*a*) R. *v.* Hoare, 1 F. & F. 647.

(*b*) R. *v.* Lovell, 2 M. & Rob. 236.

(*c*) In 3 Chit. Cr. Law 666, a precedent is given of an indictment against a surveyor of highways, for using materials obtained for repairing the highways upon his own premises, for employing the public labourers on his own grounds, and for embezzling the gravel and other materials which had been procured for the parish. This indictment does not appear to have been framed upon the provisions of any statute; but to have charged the offence against the defendant as a misdemeanor at common law; laying the acts to have been done by colour of his office, and in dereliction of his duty as surveyor of the highways.

(*d*) R. *v.* M'Gregor, 2 Leach, 932; 3 B. & P. 106; 2 East, P. C. 576; R. & R. 23.

(*e*) R. *v.* Crighton, MS. Bayley, J., and R. & R. 62. See R. *v.* Johnson, 3 M. & S. 539, *post*, p. 1402.

(*f*) See 24 & 25 Vict. c. 96, s. 71, *ante*, p. 1376.

(*g*) R. *v.* Hodgson, 3 C. & P. 422, Vaughan, B. R. *v.* Bootyman, 5 C. & P. 300, Littledale, J. The affidavit should state that the prisoner did not know the charges intended to be brought against him, that it was necessary for his defence to be furnished with the particular charges, and that he had applied to the prosecutor for particulars and been refused.

(*gg*) Framed on 7 & 8 Geo. IV., c. 29, s. 47 (rep.).

the prisoner, in manner and form aforesaid, feloniously did steal the said several sums of money, against the form of the statute. Upon demurrer, it was objected that the indictment was bad; 1st, because it contained three offences in one count; whereas the statute only authorised the inserting three offences in three different counts; 2ndly, that it did not shew that the three offences were committed within six calendar months; for although the receipt of the money might be within six calendar months, the embezzlement might not be within that period; 3rdly, that the indictment charged a joint stealing on three different days. And lastly, that there was only one *contra pacem* to three different offences. And the indictment was held bad. At common law it would have been bad, because the *contra pacem* could not be applied to one more than to another of the offences charged; and it was not rendered good by 7 & 8 Geo. IV. c. 29, s. 48 (rep.). Under that section it was necessary to allege that the embezzlements were within six calendar months; now the offence is not the receipt of the money, but the embezzlement of it, and in this case, although there was an averment that the moneys were received within six calendar months, there was no allegation that they were embezzled within that period; and therefore the indictment was bad (*h*).

An indictment for embezzlement contained three counts: the first in the usual form; the second alleged that 'afterwards and within six calendar months from the day mentioned in the first count of this indictment, to wit, &c., the prisoner did by virtue of his employment receive, &c., and the said last mentioned money, to wit, on the day and year last aforesaid, feloniously did embezzle.' The third count was in the same form as the second. It was objected that the second and third counts were bad; as there was no allegation that the money was embezzled within six calendar months from the offence charged in the first count, and Cresswell, J., held the second and third counts bad, and confined the counsel for the prosecution to evidence on the first count only (*i*).

Where the prisoner had been convicted upon 39 Geo. III. c. 85 (rep.), upon an indictment, several counts of which charged him with embezzling bank notes, and others with stealing bank notes, in the common form of counts for larceny, it was assigned for error that this was a misjoinder, the counts for embezzlement on the statute and the counts for grand larceny being counts upon which a different judgment ought by law to be given. But the Court of King's Bench were of opinion that the counts for embezzlement might well be joined with the counts for larceny, considering that the statute had in fact made the offence of embezzlement described in it a larceny; and that, having so done, it had attached upon it all the properties and consequences attaching upon the crime of larceny (*j*).

An indictment for embezzlement may be tried either where the money

(*h*) R. *v.* Purchase, Gloucester Spr. Ass. 1842, MSS. C. S. G. and C. & M. 617, Patteson, J., after consulting Cresswell, J. 'The judge expressed no decided opinion whether or not three offences could be included in one count, but said that the safer course was to have three separate counts. His Lordship cited a case of R. *v.* Jeyes, where an indictment, exactly the same as the one in this case, except that the words "within six calendar months" were not introduced, had been held bad by Lord Abinger, C.B., and himself, at Warwick.' C. S. G.

(*i*) R. *v.* Noake, 2 C. & K. 620.

(*j*) R. *v.* Johnson, 3 M. & S. 539.

was received, or where the accused was called upon to account for it, or where he denied the receipt of it.

The prosecutor instructed his servant, the prisoner, to collect some money for him in Shropshire and to bring it to him at Lichfield, in Staffordshire, where he resided and carried on his business. The prisoner received the money in Shropshire, and went to Lichfield, but then denied that he had received any money. He was indicted and convicted in Shropshire under the repealed 39 Geo. III. c. 85. Upon a case reserved, a majority of the judges were of opinion that the conviction was right. Lawrence, J., thought that, embezzling being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other judges were of opinion that the indictment might be in Shropshire where the prisoner received the money, as well as in Staffordshire where he embezzled it by not accounting for it to his master; that the statute having made the receiving property and embezzling it amount to a larceny, made the offence a felony where the property was first taken, and that the offender might therefore be indicted in that or in any other county into which he carried the property (*k*).

The prosecutor, who was a fishmonger in Middlesex, sent his servant, the prisoner, with some herrings to a street in Surrey, to S.; telling him that he was to receive the sum of ten shillings for them. He went with the herrings, and delivered them to S., who paid him the ten shillings; after which he returned to his master, who asked him if he had brought the money; to which he replied, that he had not, as S. had not paid him. He was indicted under the 39 Geo. III. c. 85 (rep.), in Middlesex, and it was contended that he was only liable to be indicted in Surrey, where the money was received. The jury having found him guilty, this point was reserved for the consideration of the judges, who were of opinion that even if there had been evidence of the prisoner having spent the money in the county of Surrey, it would not necessarily confine the trial of the offence to the county of Surrey. But here there was no evidence of any act to bring the prisoner within the statute until he was called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute, until he refused to account to his master. They were, therefore, of opinion that the prisoner was properly indicted in the county of Middlesex (*l*).

Upon the trial of an indictment for embezzlement at the assizes for Nottingham, it appeared that the prisoner was a travelling salesman, and his duty was to go into Derbyshire, and to sell goods and receive the money for them there, and to return with it to his master in Nottingham, where both he and his master lived. The prisoner received the

(*k*) R. *v.* Hobson, 1 East, P. C., *Addenda*, xxiv., and R. & R. 56; 2 Leach, 975 (cit.).

(*l*) R. *v.* Taylor, 3 B. & P. 596; 2 Leach, 974; R. & R. 63.

moneys mentioned in the indictment in Derbyshire, and did not return at all to his master's. There was no evidence of what became of him till two months after, when he was met in Nottingham by his master, who asked him what he had done with the money, and he said he was sorry for what he had done; he had spent it. Upon a case reserved upon the question whether the prisoner could be properly convicted on this evidence of embezzlement in Nottingham, the judges held that there was evidence to go to the jury that the embezzlement was committed in Nottingham (*m*).

A clerk whose duty it was to collect accounts and to remit at once to his employers in Middlesex moneys so collected by him, on April 18th collected at York a sum of money which he never remitted. On April 19th and 20th he wrote and posted from places in Yorkshire, to his employers in Middlesex, letters in which no mention of this sum of money was made, and on April 21st he sent from Yorkshire a letter intended to make them believe that he had not collected this money. He was indicted in Middlesex, and upon a case reserved, it was held that the receipt of the letter of April 21st in Middlesex was sufficient to give jurisdiction to try the prisoner there (*n*).

Where, however, an offence was commenced at one place and there was no evidence at all to shew the completion of the offence at the place where the prisoner was indicted, the conviction was quashed. The prisoner was a commercial traveller and lived at Grantham. It was his duty to remit daily to his employers in London moneys which he had collected. He collected in Newark, about fifteen miles from Grantham, two sums which he did not remit or account for. There was no evidence that he returned to Grantham on either of the days when he collected the above sums. About a month afterwards his employer went to

(*m*) R. *v.* Murdock [1851], 2 Den. 298: 21 L. J. M. C. 22. Campbell, C.J., thought there was evidence that the prisoner had spent the money in Nottingham. Parke, B., was of opinion, 'that the prisoner's not returning and accounting to his master in Nottingham, as it was his duty to do, was equivalent to embezzlement in Nottingham. The mere fact of his spending the money does not itself constitute embezzlement. There must be a refusal to account, or a non-accounting,' citing R. *v.* Taylor, *supra*. Maule, J., differed from Parke, B., in the reasons given by him, and thought 'that the offence was committed when, two months after the receipt of the money, the prisoner met his master in Nottingham, and being asked by his master respecting the money did not account to him for it. The offence was then complete, and the prisoner became liable to be indicted in Nottingham. The mere omission to account, if the prisoner had never returned to Nottingham, would not have rendered him liable to be tried in Nottingham. Suppose that he had gone to Derbyshire, and stayed there six months, and never returned to Nottingham, he would, according to my brother Parke's view, if apprehended in Derbyshire, have been indictable in Nottingham. I cannot think that can be so. Some of the cases say that non-accounting is sufficient evidence of embezzlement; but in all these cases the prisoner is in the county where he breaks his duty, and completes the offence of embezzlement by omitting or refusing to account.' Talfourd, J., was of opinion 'that the offence was completed when the prisoner refused to account to his master in Nottingham.' The case was argued for the Crown, but not for the prisoner. In R. *v.* Davison, 7 Cox, 158, on this case being cited, Alderson, B., said, 'Where there is no evidence of fraudulent embezzlement, except non-accounting, the *venue* may be laid in the place where the non-accounting occurred; because the jury may presume that there the fraudulent misappropriation was made; but this cannot apply where there is a distinct evidence of the misappropriation elsewhere.'

(*n*) R. *v.* Rogers, 3 Q.B.D. 28: 47 L. J. M. C. 11. Kelly, C.B., Field, Lindley, and Manisty, JJ., Huddleston, B. (diss.). Kelly, C.B., said he was by no means prepared to say that the prisoner could not have been indicted in Yorkshire. *Vide ante*, Vol. i. pp. 19 *et seq.*

Grantham and saw the prisoner, and charged him with receiving moneys and not accounting for them. The prisoner thereupon gave him a list of moneys, including the above sums, which he had received and not accounted for. He was indicted at Grantham for embezzling the two above sums. But, upon a case reserved, it was held that there was no evidence of embezzlement in Grantham (*o*).

(*o*) R. *v.* Treadgold, 48 L. J. M. C. 102: 14 Cox, 220. See R. *v.* Oliphant, 69 J. P. 175; and R. *v.* Oliphant [1905], 2 K.B. 67: 74 L. J. K.B. 591.

CANADIAN NOTES.

OF EMBEZZLEMENT BY CLERKS AND SERVANTS.

"Embezzlement" is a term not used in the Canada Criminal Code. It comes within the definition of theft in Code sec. 347. See notes under Chapter 10.

CHAPTER THE NINETEENTH.

FRAUDULENT CONVERSION OF PROPERTY.

By the Larceny Act, 1901 (1 Edw. VII. c. 10) (*a*) :

1.—(1) ' Whosoever—

(a) being entrusted, either solely or jointly with any other person, with any property (*b*), in order that he may retain in safe custody, or apply, pay, or deliver, for any purpose or to any person, the property, or any part thereof, or any proceeds thereof ; or

(b) having, either solely or jointly with any other person, received (*c*) any property for or on account of any other person (*cc*),

fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property, or any part thereof, or any proceeds thereof, shall be guilty of a misdemeanor, and be liable on conviction to penal servitude for a term not exceeding seven years (*vide ante*, p. 211), or to imprisonment, with or without hard labour, for a term not exceeding two years (*d*).

(*a*) Shortly after the decision in R. *v.* Walsh, R. & R. 215, 52 Geo. III. c. 63, was passed for more effectually preventing the embezzlement of securities for money and other effects, left or deposited for safe custody, or other special purpose, in the hands of bankers, merchants, brokers, attorneys, or other agents. This Act, 7 & 8 Geo. IV. c. 29, ss. 49, 50 ; the 9 Geo. IV. c. 55, ss. 42, 43 ; and 24 & 25 Vict. c. 96, ss. 75 and 76, are now repealed.

(*b*) Defined *ante*, p. 1160.

(*c*) In R. *v.* South, 71 J. P. 191, the prisoner was indicted under this subsection. He had traded as a coal dealer under a trade name, and by an agreement with the prosecutor gave the latter the right to trade under that name. The prisoner was to obtain orders for coal, to collect the money, and pay it over to the prosecutor, receiving a certain commission. The prosecutor was to supply the coal. The prisoner collected money from the customers and did not hand it over. It appeared that the customers knew the prisoner under the trade name, but they did not know the prosecutor, nor did they know that they were doing business with him. Bosanquet, Common Serjeant, held there was no evidence to go to the jury that the prisoner had received the money for or on account of the prosecutor. No cases seem to have been cited in argument and the decision requires reconsideration. In R. *v.* Gale, *ante*, p. 1391, a case of embezzlement, Cockburn, C.J., says, ' But the question is not whether these persons paid on account of his master, but whether he (the prisoner) received on account of his master. And he did so because it was his duty to pay over the proceeds at once, in whichever way he received them.'

(*cc*) *e.g.*, a driver of a taxi-cab who appropriates his takings in excess of the amount which he is entitled to retain under the contract by which the cab is entrusted to him. R. *v.* Solomons, C. C. A. 17 July, 1909.

(*d*) Sect. 2 (1) repeals 24 & 25 Vict. c. 96, ss. 75, 76, and by sect. 2 (2) ' this Act shall have effect as part of the Larceny Act, 1861, and sect. 1 of this Act shall be deemed to be substituted for sects. 75 and 76 of that Act, and references in any enactment to those sections shall be construed as references to sect. 1 of this Act.' The Act came into operation on January 1st, 1902. The repealed sections continue in force as to offences committed under them before this date, R. *v.* Webb [1904], 140 C. C. C. Sess. Pap. 627. This Act has disposed of some of the difficulties which arose under the repealed sects. 75 and 76. See R. *v.* Christian, L. R. 2 C. C. R. 94 ; R. *v.* Cooper, L. R. 2 C. C. R. 123 ; R. *v.* Cosser, 13 Cox, 187 ; R. *v.* Tatlock, 2 Q.B.D. 157 ; R. *v.* Brownlow, 14 Cox, 216 ; R. *v.* Fullagar, 14 Cox, 370 ; R. *v.* Newman, 8 Q.B.D. 706 ; R. *v.* Portugal, 16 Q.B.D. 487 ; R. *v.* Cronmire, 16 Cox, 42 ; *Re* Bellencontre [1891], 2 Q.B. 122, and R. *v.* Kane [1901], 1 K.B. 472. It has been held that the

'(2) Nothing in this section shall apply to or affect any trustee on any express trust created by a deed or will, or any mortgagee of any property, real or personal, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage' (*e*).

Safe Custody.—The prisoner was indicted under the repealed sect. 76 of the Larceny Act, 1861, for that he being an attorney and agent and being entrusted with a certain sum of money for safe custody did afterwards convert the said sum of money to his own use. It appeared that certain trust money had been invested on mortgage, the mortgage was paid off and the money came into the hands of the defendant, the family solicitor. The defendant wrote and told the beneficiary that this money had been paid, and asked her how she would like it invested. She wrote back that she would consult a Mr. G. about the investment. About a week or two later, the defendant represented he had invested the money on mortgage, but in fact he had appropriated the money to his own use. Upon a case reserved it was held that the money had been entrusted to the defendant for safe custody within the meaning of the section (*f*). But where a solicitor had been from time to time entrusted with money to invest on mortgage, but instead of doing so he appropriated the same, the Court held that the money so entrusted was not entrusted for safe custody within the section (*g*).

The question as to the meaning of these words arose in an extradition case (*h*), where Wills, J., in his judgment says, 'The one question remains, was he entrusted with the money for safe custody? This section (sect. 76) deals with property of every description, and money is probably the most important and the most common subject in respect of which frauds of this kind are carried out, so I cannot for a moment doubt that the section was meant to have a real and substantial operation with regard to money . . . now to hold, as has been suggested, that the section applies only to money which is put into a bag and given to a man to keep in a drawer would be, to my mind, simply a *reductio ad absurdum* . . . I cannot doubt that it is fully within the meaning of the Act, if the money is entrusted to him under circumstances which would make it his duty to pay it to a special account with a bank, or to keep it in any other reasonable way which men of business ordinarily keep their money, so as to have, not the specific coins, but the equivalents at call when demanded. It

Court has no power to make an order of restitution where a person is convicted under this Act, R. *v.* Brockwell, 69 J. P. 376, Recorder of London. In R. *v.* Gomm, 3 Cox, 64, the prisoner was entrusted with goods for sale, and the authority to sell was afterwards countermanded, but he sold the goods and was held to be within the second part of the repealed 7 & 8 Geo. IV. c. 29, *s.* 49.

(*e*) As to trustees, *vide post*, p. 1411.

(*f*) R. *v.* Fullagar, 14 Cox, 370. See also R. *v.* Mason, Dow. & Ry. (N. P.) 22, under 52 Geo. III. c. 63 (rep.).

(*g*) R. *v.* Newman, 8 Q.B.D. 706. Stephen, J., approved of the direction of Bowen, J., at the trial that 'if they were satisfied that money was entrusted to the prisoner to be invested on mortgage and to be kept safely in his own hands till such mortgage was effected by him, and if, instead of investing the money so entrusted to him, he converted it fraudulently to his own use, they should find the prisoner guilty,' but said he ought to have told the jury that there was no evidence upon which they could say the money was entrusted for safe custody. See also R. *v.* Cooper, L. R. 2 C. C. R. 123; R. *v.* Bakewell, *post*, p. 1421.

(*h*) In *Re* Bellencontre [1891], 2 Q.B. at p. 142.

seems to me that R. *v.* Fullagar (*i*) is absolutely on all fours with some portion of the present case in that respect. . . .'

The prisoner was indicted under the first part of sect. 1 of the Larceny Act, 1901, in a series of counts which charged him for that having been entrusted with certain sums of money belonging to certain persons in order that he might retain the said money in safe custody and pay it back to the said persons, and, in another series of counts, that he having been so entrusted with the said sums in order that he might pay the proceeds back to the persons who had paid the said sums, unlawfully and fraudulently did convert the same to his own use and benefit. It appeared that the prisoner advertised for clerks and travellers to enter his service and to deposit money as security for their honesty during the service. The various persons mentioned in the indictment deposited money with the prisoner and in each case he promised to repay it when the depositor left his service, in some cases he gave a promissory note payable at three months or on the depositor leaving the service. It was held that these facts did not bring the prisoner within either of the above sets of counts (*j*).

But where the defendant was employed by the prosecutors to collect debts due to them from customers, and his duty was to collect the money and pay it over to the prosecutors less five per cent. commission, and he collected various sums which he did not account for at all, or pay over, the Court, upon a case reserved, held that he was properly convicted on an indictment which charged him, under the second part of sect. 1 of the Larceny Act, 1901 (1 Edw. VII. c. 10), for that he having received for and on account of the prosecutors the various sums unlawfully did convert the same to his own use (*k*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), sect. 77, 'Whosoever being entrusted, *either solely, or jointly with any other person,* with any power of attorney for the sale or transfer of any property (*l*) shall fraudulently sell or transfer or otherwise convert the same or any part thereof to his own use or benefit, *or the use or benefit of any person other than the person by whom he was so entrusted,* shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned' (*m*).

Factors.—By sect. 78, 'Whosoever being a factor or agent entrusted (*n*),

(*i*) *Supra.*

(*j*) R. *v.* Hotine, 68 J. P. 143. Bosanquet, C.S. After consulting Phillimore, J., as regards 'proceeds' the Common Serjeant said the word means money that is realised from property which is not money. See also R. *v.* Golde, 2 M. & Rob. 425.

(*k*) R. *v.* Lord, 69 J. P. 467. Darling, J., said the question raised in R. *v.* Hotine (*supra*) might have to be considered again. See 24 & 25 Vict. c. 96, ss. 86, 87, *post,* p. 1414.

(*l*) Defined *ante,* p. 1160.

(*m*) *i.e.,* under 1 Edw. VII. c. 10, s. 1 (1). See sect. 2 (2), *ante,* p. 1407, note (*d*).

(*n*) See Phillips *v.* Huth, 6 M. & W. 572; Hatfield *v.* Phillips, 14 M. & W. 665; 12 Cl. & F. 343; Johnson *v.* Blumenthal, 3 C. P. D. 32, as to the meaning of this word in 6 Geo. IV. c. 94 (rep.). And Heyman *v.* Flewker, 13 C. B. (N. S.) 519; Lamb *v.* Attenborough, 1 B. & S. 831; Cole *v.* North Western Bank, L. R. 10 C. P. 354; Baines *v.* Swainson, 4 B. & S. 270; Tremoille *v.* Christie, 69 L. T. 338. As to its meaning in the 5 & 6 Vict. c. 39 (rep.), see Fuentes *v.* Montis, L. R. 4 C. P. 93, 95, where the agent's authority was revoked. Under the repealed sect. 75, which related to offences committed by a 'banker, merchant, broker, attorney, or other agent,' it was held that the words 'other agent' meant a person *ejusdem generis* with a banker, &c. R. *v.* Portugal, 16 Q.B.D. 487. R. *v.* Kane [1901], 1 K.B. 472. And it seems that the person in s. 77 must be an agent *ejusdem generis* with a factor. R. *v.* Portugal, *supra.* See also R. *v.* Prince, 2 C. & P. 517, 1 M. & M. 21, under 52 Geo. III. c. 63 (rep.).

either solely, or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods (*vide post*, p. 1411), shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, *or the use or benefit of any person other than the person by whom he was so entrusted*, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or document of title so entrusted to him as in this section before mentioned as and by way of a pledge, lien, or security for any money or valuable security (*o*) borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer, or delivery, or intended to be thereafter borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, *or the use or benefit of any person other than the person by whom he was so entrusted*, and in violation of good faith, accept any advance *of any money or valuable security* on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned (*oo*); and every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the same punishments: Provided, that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or document of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent' (*p*).

Definitions.—By sect. 79, 'Any *factor or* agent entrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such *factor or* agent having been entrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been entrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such *factor or* agent shall be deemed to be possessed of such goods or document, whether the same shall be in his actual custody, or shall be held by any other person subject to his control, or for him or on his behalf; and where any loan or advance shall be *bona fide* made to any *factor or* agent entrusted with and in possession of any such goods or document of title, on the faith of any contract or

(*o*) Defined *ante*, p. 1267, and R. *v.* Lanauze, 2 Cox, 362, under 9 Geo. IV. c. 55 (I).

(*oo*) *Ante*, p. 1407, note (*c*).

(*p*) Framed from 7 & 8 Geo. IV. c. 29, s. 51 (E), 9 Geo. IV. c. 55, s. 44 (I); and 5 & 6 Vict. c. 39, s. 6. As to 'document of title to goods,' see *post*, p. 1411. As to punishment, see 1 Edw. VII. c. 10, ss. 1 (1) and 2 (2), *ante*, p. 1407.

agreement in writing to consign, deposit, transfer, or deliver such goods or document of title, and such goods or document of title shall actually be received by the person making such loan to advance, without notice that such *factor or* agent was not authorised to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such *factor or* agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such *factor or* agent; and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section; and a *factor or* agent in possession as aforesaid of such goods or document shall be taken, for the purposes of the last preceding section, to have been entrusted therewith by the owner thereof, unless the contrary be shewn in evidence' (*q*).

By sect. 1, 'The term "document to the title to goods" shall include any bill of lading, *India* warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, *bought and sold note*, or any other document used in the ordinary course of business as proof of the possession or the control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented *or therein mentioned or referred to*' (*r*).

Trustees.—By sect. 80, 'Whosoever, being a trustee of any property (*s*) for the use or benefit, either wholly or partially, of some other person (*t*), or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, *or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid*, or otherwise dispose of or destroy such property or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned (*vide ante*, p. 1407): Provided, that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of His Majesty's attorney-general, or, in case that office be vacant, of His Majesty's solicitor-general: Provided, also, that where any civil proceeding shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding shall

(*q*) Taken from 5 & 6 Vict. c. 39, s. 4, and so altered as to correspond with the terms used in the preceding section.

(*r*) Taken from 5 & 6 Vict. c. 39, s. 4, with the addition of 'transfer' and 'valuable thing,' from 7 & 8 Geo. IV. c. 29, s. 5, and the new words in *italics*.

(*s*) See definition, *ante*, p. 1160.

(*t*) In R. *v.* Fletcher, L. & C. 180, it was held that a trustee of a savings bank was a trustee of property for the benefit of 'other persons' within the meaning of the repealed 20 & 21 Vict. c. 54, s. 1, but (*semble*) not a trustee for a 'public or charitable purpose.' It was also held that the rules of the savings bank were an 'instrument in writing' within the meaning of the repealed 20 & 21 Vict. c. 54, s. 17 (see now 24 & 25 Vict. c. 96, s. 1, *post*, p. 1412).

commence any prosecution under this section without the sanction of the Court or judge before whom such civil proceeding shall have been had or shall be pending' (*u*).

By sect. 1, 'The term "trustee" shall mean a trustee on some express trust created by some deed, will, or instrument in writing (*v*), and shall include the heir, or personal representative of any such trustee, *and any other person upon or to whom the duty of such trust shall have devolved or come*, and also an executor and administrator, and an *official manager, assignee*, liquidator, *or other like officer* acting under *any* present *or future* Act relating to joint stock companies, bankruptcy, or insolvency' (*w*).

Directors, &c., of any Body Corporate or Public Company.—By sect. 81, 'Whosoever, being a director, member, or public officer of any body corporate or public company (*x*), shall fraudulently take or apply for his own use or benefit, *or for any use or purposes other than the use or purposes of such body corporate or public company*, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned' (*y*).

By sect. 82, 'Whosoever, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property (*z*) of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned' (*a*).

By sect. 83, 'Whosoever, being a director (*b*), manager, public officer,

(*u*) Taken from 20 & 21 Vict. c. 54, ss. 1, 13. See as to 'property,' sect. 1, *ante*, p. 1160; and as to punishments, 1 Edw. VII. c. 10, ss. 1 (1), 2 (2), *ante*, p. 1407.

(*v*) A fruit broker obtained from his bankers an advance as against certain goods consigned to him and then at sea. He deposited with them the endorsed bills of lading and signed a letter of hypothecation by which he undertook to hold the goods in trust for the bankers, and to hand over the proceeds as and when received. Day, J., held that this amounted to an express trust under the section. R. *v.* Townshend, 15 Cox, 466. In R. *v.* Piper, 65 J. P. 10, Ridley, J., refused to quash an indictment, under sect. 80, which alleged that the prisoner was a trustee and did not allege that he was such trustee 'on some express trust created by some deed,' &c. See R. *v.* Fletcher (*ante*, p. 1411), and sects. 85, 86, 87, *post*, p. 1414.

(*w*) Taken from 20 & 21 Vict. c. 54, s. 17, with the additions in *italics*.

(*x*) A life assurance society, which was not incorporated, but had been established in 1843 by a deed of settlement, with a board of directors and £100,000 capital, and list of shareholders, and which possessed certain powers under a special Act of Parliament, was held to be a 'public company' within sect. 5 of the Apportionment Act, 1870. *Re* Griffith, 12 Ch. D. 655, 663.

(*y*) Taken from 20 & 21 Vict. c. 54, s. 5, with the additions in *italics*. See sects. 1 (1) and 2 (2) of 1 Edw. VII. c. 10, *ante*, p. 1407, as to punishment, and Nelson *v.* R. [1902], App. Cas. 250, as to the proof of fraud.

(*z*) See sect. 1, *ante*, p. 1160.

(*a*) Taken from 20 & 21 Vict. c. 54, s. 6. As to punishment, *vide ante*, p. 1407.

(*b*) By 8 Edw. VII. c. 69, s. 216, which re-enacts 25 & 26 Vict. c. 89, s. 166, 'if any director, officer, or contributory of any company being wound up, destroys, mutilates, alters, or falsifies any books, papers, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or document belonging to the company, with intent to defraud or deceive any person, he shall be guilty of a misdemeanor, and be liable to imprisonment for any term not exceeding two years with or without hard labour.' Sect. 217 provides prosecution and for payment

or member of any body corporate or public company, shall with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or *valuable* security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to any of the punishments which the Court may award, as hereinbefore last mentioned' (*c*).

By sect. 84, 'Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to any of the punishments which the Court may award as hereinbefore last mentioned' (*d*). A person who in fact manages a limited company is a manager within the meaning of sect. 84, although he may not have been duly appointed, and he is therefore liable to be convicted of offences under that section (*e*). If a director or manager of a public company publishes a false statement of account, knowing that it is false, with the intent that it shall be acted upon by the persons it reaches, an intention to defraud may be presumed (*f*).

The Larceny Act, 1901 (1 Edw. VII. c. 10), is, as has been stated, to be

of the costs out of the assets of the company. By 8 Edw. VII. c. 69, s. 281 (which re-enacts 63 & 64 Vict. c. 48, s. 28, and 7 Edw. VII. c. 50, s. 52 (1)), if any person in any return, report, certificate, balance sheet, or other document required by, or for the purposes of any of the provisions of this Act specified in Fifth Schedule hereto, wilfully makes a statement false in any material particular, knowing it to be false, he is guilty of a misdemeanor, and is liable on conviction on indictment to two years' imprisonment with or without hard labour, and (or) to a fine, and on summary conviction to four months' imprisonment with or without hard labour, and (or) to a fine not exceeding £100.

(*c*) Taken from 20 & 21 Vict. c. 54, s. 7. See *Re* Arton (No. 2) [1896], 1 Q.B. 513. For punishment, *vide ante*, p. 1407.

(*d*) Taken from 20 & 21 Vict. c. 54, s. 8. Where a manager and a secretary were charged with offences under this section, and also with conspiracy to commit them, the prosecution was put to its election as to which set of counts it would proceed on. R. *v.* Burch, 4 F. & F. 407. For punishment, *vide ante*, p. 1407.

(*e*) R. *v.* Lawson [1905], 1 K.B. 541. Gibson *v.* Barton, L. R. 10 Q.B. 329. In R. *v.* Atkins, 64 J. P. 361, where the defendant was charged as a director with offences under sects. 81 and 83, and it appeared that his appointment was informal and he had never been properly appointed; the Recorder held that the prosecution must prove that the director had been properly appointed. This ruling appears to be wrong, and the ruling of Bosanquet, C.S., in a previous trial of the same case to be right. R. *v.* Lawson (*supra*) appears to apply equally to directors and other officers as to managers.

(*f*) R. *v.* Birt, 63 J. P. 328, Ridley, J. See also R. *v.* Brown, 7 Cox, 442, and R. *v.* Esdaile, 1 F. & F. 213. Buckley, J., referring to sects. 83 and 84, said: 'To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.' In *Re* London and Globe Finance Corporation, Ltd. [1903], 1 Ch. at p. 732.

deemed as substituted for the repealed sects. 75 & 76 of the Larceny Act, 1861. The three following sections, as amended, of the Larceny Act, 1861, apply to the 1 Edw. VII. c. 10 (*ante*, p. 1407), and to sects. 77–84 of the Larceny Act, 1861 (*ante*, pp. 1409–13).

By sect. 85 of the Larceny Act, 1861, 'Nothing in any of the last ten (*g*) preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any Court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed (*h*) such act on oath, in consequence of any compulsory process of any Court of law or equity, in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved [or if he shall have first disclosed the same in any compulsory examination or deposition before any Court upon the hearing of any matter in bankruptcy or insolvency'] (*i*).

By sect. 86, 'Nothing in any of the last eleven (*g*) preceding sections of this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action of law or suit in equity against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.'

By sect. 87, 'No misdemeanor against any of the last twelve (*g*) preceding sections of this Act shall be prosecuted or tried at any Court of general or quarter sessions of the peace' (*j*).

(*g*) Sect. 1 of the Act of 1901 (*ante*, p. 1407), as substituted for ss. 75–76 of the Act of 1861.

(*h*) See R. *v.* Gunnell, 16 Cox, 154, *ante*, p. 1264.

(*i*) The first part of this section is taken from 20 & 21 Vict. c. 54, s. 11, and see 7 & 8 Geo. IV. c. 29, s. 52, and 9 Geo. IV. c. 55, s. 45 (I). The words in brackets were repealed by the Bankruptcy Act, 1890, (53 & 54 Vict. c. 71), sects. 27 (1), 29, and sched. Sect. 27 (2) provides that 'a statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanors referred to in the said sect. 85.' The statement of affairs made out and filed by the bankrupt is not within this sect. 27 (2), and is therefore admissible in evidence against him: R. *v.* Pike [1902], 1 K.B. 552. The disclosure must be made *bona fide* and not be a mere voluntary statement made for the express purpose of protecting the person making it from the consequences of his acts. R. *v.* Strahan, 7 Cox, 85, and *vide ante*, p. 1264, note (*s*).

(*j*) Taken from 20 & 21 Vict. c. 54, s. 16. There was a provision in the 20 & 21 Vict. c. 54, s. 14, that if on the trial of any misdemeanor against that Act, it appeared that the offence amounted to larceny, the defendant should not be acquitted. This clause was omitted, because by 14 & 15 Vict. c. 100, s. 12, in such a case the defendant is not to be acquitted, unless the Court think fit to direct the jury to be discharged, and the defendant to be indicted for the felony; and this appeared to be the better provision of the two. See, as to partners, 31 & 32 Vict. c. 116, *ante*, p. 1280.

Officers of Savings Banks.—By the Trustee Savings Bank Act, 1863 (26 & 27 Vict. c. 87, s. 9), if any actuary, cashier, secretary, officer, or other person holding any situation or appointment in any savings bank shall receive any sum or sums of money from or on account of any depositor or person desirous of becoming such, or on account of such savings bank, and shall not forthwith, or, in the case of local receivers acting on behalf of any savings bank, within the time specified in the rules of the said savings bank, duly account for and pay over the same to the trustees or managers thereof, or to such person as may be directed by the rules of the said savings bank, such actuary, cashier, secretary, officer or local receiver, or other person as aforesaid, on being convicted thereof, shall be guilty of a misdemeanor.

Municipal Securities.—By the Municipal Corporations Act, 1882 (*k*), sect. 117, 'If any person authorised to receive money to arise from the sale of any annuities or securities purchased or transferred under the foregoing provisions of this part (*l*), or under any Act repealed by this Act, or any dividends thereon, or any other such money as aforesaid, appropriates the same otherwise than as directed by this Act or by the [*Local Government Board*] in pursuance thereof, he shall be guilty of a misdemeanor, and shall be subject in respect thereof, to the provisions of the Larceny Act, 1861 (24 & 25 Vict. c. 96), applicable to a person guilty of a misdemeanor under sect. 75 of that Act, or to the provisions of any enactment for the time being substituted for that section' (*m*).

(*k*) 45 & 46 Vict. c. 50.

(*l*) *i.e.*, Part relating to Corporate Property and Liabilities.

(*m*) *i.e.* now 1 Edw. VII. c. 10, *ante*, p. 1407. The Local Government Board was substituted for the Treasury by 51 & 52 Vict. c. 41, s. 72. As to Ireland, see 61 & 62 Vict. c. 37, s. 104, and sched. 4.

CANADIAN NOTES.

FRAUDULENT CONVERSION OF PROPERTY.

Theft by Person Required to Account.—See Code sec. 355.

The offence of fraudulent conversion of the proceeds of a valuable security, mentioned in this section, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and, lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. R. v. Hogle (1896), 5 Can. Cr. Cas. 53, R.J.Q. 59. So where the valuable security in respect of which a charge of fraudulent conversion was laid was received and the terms were agreed to in the district of Iberville, and the person to whom the accused was to account for the proceeds resided in that district, but the accused collected the money in the district of Belford, proceedings taken in the district of Iberville were held good. *Ibid.*

A railway conductor who takes from a passenger for his transportation a sum of much less than the authorized fare and issues no ticket or receipt therefor is guilty of theft under Code sec. 355 if he fraudulently omits to account for and pay to the railway company money so received. Money so taken for transportation is money received by the railway conductor "on terms requiring him to account for or pay the same" to the company within the meaning of Code sec. 355. R. v. McLellan (No. 1), 10 Can. Cr. Cas. 1.

The fraudulent conversion by an agent of money received by him upon the account of his principal is punishable under Code sec. 355, although no terms requiring him to account for or pay the same to the principal were imposed by the party paying. Where the person receiving the money thereupon holds it on terms arranged between himself and a third party to whom the money belongs requiring him to account for or pay the same to such third party, such money is money "received on terms requiring him to account for or pay the same," etc., within Code sec. 355. R. v. Unger, 5 Can. Cr. Cas. 355.

A broker who receives money from a customer to purchase stocks on margin from a firm of correspondents, holds them in his own name and allows them to be sold on his account, but subsequently rearranges with his correspondents to resume business and carry the

same stocks, receiving in the meantime remittance from his customer to maintain the margin, without informing him of what has taken place, and who afterwards severs anew his connection with his correspondents and receives at the same time from his customer instructions to sell the stocks, which would have resulted in a comparatively small loss, but instead of doing so, replaces them by purchase of a like quantity of the same kind from another firm whose subsequent failure causes their total loss, is not guilty of the offence of "theft by an agent." R. v. Bastien, 11 Can. Cr. Cas. 306.

The officer of a company who fraudulently signs in the company's name a dividend cheque nominally in favour of a firm of which he is a member, but really for his own benefit, and appropriates the proceeds for his own use upon his own endorsation of the firm name, when neither he nor his firm have any claim to the dividends, may properly be charged either with embezzlement of the money or with theft of the cheque. R. v. Rowe, 8 Can. Cr. Cas. 28.

Defendant held the title of land belonging to A., who lived in the United States. A. exchanged it with H. for other land, and gave an order on defendant to convey to H. When H. presented this order defendant represented that a claim having been made against him for A.'s debts, he had sworn that the farm belonged to himself; and to keep up the appearance of this being true, it was agreed between H. and the defendant that a certain sum should be paid over by H. to defendant on receiving the deed, as for the purchase money, and immediately returned. H. borrowed $700 for the purpose, and they, with H.'s brother and others, went to a solicitor's office, when the deed was drawn, with a consideration expressed of $3,150. The $700 was handed to defendant, and counted over by him as if it were $2,000, and notes given by H. and his brother for the balance of $1,150. Defendant, instead of returning the money and notes, ran away with them. The Court held that though, if no public interests were concerned, H. should not be admitted to state that when he gave the defendant the money openly as a payment, and with the intent that it should be so understood by those who were present, he yet was not in fact paying, but only pretending to do so, as the defendant and he both well understood; this kind of estoppel does not apply to prevent the defendant from being brought to justice for his fraudulent and felonious conduct. R. v. Ewing (1862), 21 U.C.Q.B. 523.

Criminal Breach of Trust.—Code sec. 390.

Where the prisoner, being the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to the branch store without charging them or keeping the usual check on them which his employers' system required, and had the goods de-

livered to a customer of his branch without charging the customer, the prisoner stating that for the benefit of his employers he had merely postponed the charging of the goods in order to give the customer a longer credit than was customary and to so retain the customer's trade; these facts will constitute "theft" under the Code if credence is not given to the prisoner's explanation. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.). The goods having been taken by the prisoner with knowledge that his doing so was contrary to the employers' rules and regulations and with intent to deprive the owner thereof, the taking was fraudulent and without colour of right within Code sec. 347. *Ibid.*

Theft by Persons Holding Power of Attorney.—Code sec. 356.

The power of attorney must be in writing, and evidence of a verbal power will not bring the accused within the scope of this section. R. v. Choinard (1874), 4 Que. Law Rep. 220.

An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property, but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a reserved case as to whether a verdict of guilty on such indictment was valid or not. R. v. Fulton (1900), 5 Can. Cr. Cas. 36, R.J.Q. 10 Q.B. 1.

A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed. *Ibid.*

Misappropriation of Proceeds Held Under Direction.—Code sec. 357.

Penalty under Secs. 356 *and* 357.—Code sec. 358.

Embezzlement, larceny, receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained; fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any company, made criminal by the laws of both countries, are extraditable offences under the Convention of 1889, with the United States of America.

Meaning of "Property."—Code sec. 2(32).

Meaning of "Trustee."—Code sec. 2(39).

No Proceeding Against Trustee Without Consent of Attorney-General.—Code sec. 596.

It is not necessary that the indictment should allege the consent of the Attorney-General. Knowlden v. R. (1864), 5 B. & S. 532; R. v. Barnett (1889), 17 Ont. R. 649. But it seems that if the consent be stated on the record it must be proved if traversed. Knowlden v. R. (1864), 5 B. & S., at p. 549, per Cockburn, C.J.

A conviction for theft may be made against a co-owner fraudulently misappropriating the fund (Code secs. 347, 352), although the facts also prove the offence of criminal breach of trust under sec. 390. McIntosh v. The Queen (1894), 5 Can. Cr. Cas. 254, 23 Can S.C.R. 180.

Theft by Owner Against Specially Interested Person.—See Code sec. 352.

A minor intrusted by his tutor or judicial guardian with chattel property of which he is part owner, who fraudulently converts it to his own use, with intent to deprive his tutor of it, is guilty of theft. Guillet v. The King (1904), 12 Can. Cr. Cas. 186.

Semble, that this section would be applicable to the case of a partner defrauding his co-partner. Major v. McCraney (1898), 2 Can. Cr. Cas. 547, 554 (S.C. Can.); Ex parte Seitz (No. 1), 3 Can. Cr. Cas. 57.

Punishment.—Code sec. 386.

CHAPTER THE TWENTIETH.

OF FALSIFICATION OF ACCOUNTS BY CLERKS AND SERVANTS, ETC.

THE Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24) recites, 'Whereas it is expedient to amend the law so as to punish the falsification (*a*) by clerks, officers, servants, and others of their employers' accounts, books, writings, or documents,' and enacts that:

Sect. 1, 'If any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make, or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanor, and be liable to be kept in penal servitude for a term not exceeding seven years . . . (*b*).

Sect. 2, 'It shall be sufficient in any indictment under this Act to allege a general intent to defraud without naming any particular person intended to be defrauded.'

Sect. 3, 'This Act shall be read as one with the Larceny Act, 1861 (24 & 25 Vict. c. 96).'

The question of the intent to defraud is for the jury, so where the tendency of the summing up by a chairman of quarter sessions was to withdraw from the jury the circumstances bearing on this question, the Court upon a case reserved quashed the conviction (*c*).

It must be alleged in the indictment and proved that the account, &c., belongs to or was in the possession of the employer or had been received by the servant for or on behalf of his employer. So, where the evidence was that the account in question did not belong to the employer, and the indictment contained no allegation that it belonged to him or was in his possession, or had been received by the prisoner for him, the Court, upon a case reserved, held that the words 'any document or account' at the end of the section did not include any document or account not belonging to nor in the possession of the employer, and quashed the conviction (*d*).

(*a*) In an extradition case it has been held not to be forgery at common law for a bank clerk to make false entries in the books of the bank, *re* Windsor, 6 B. & S. 522. In another extradition case, *re* Arton (No. 2), 1896, 1 Q.B. 509, Lord Russell, C.J., at p. 515, says, 'It is clear all falsifications of account do not constitute forgery; while it is equally clear that the falsification of accounts may take such a form as to amount to forgery at common law, or under the Forgery Act, 1861.'

(*b*) The omitted words were repealed in 1893 (S. L. R. No. 2). See, as to other punishments, *ante*, Vol. i., pp. 211, 212.

(*c*) R. *v.* Drewett, 69 J. P. Rep. 37.

(*d*) R. *v.* Palin [1906]; 75 L. J. K. B. 15; 1 K.B. 7.

The indictment alleged that the prisoner did 'make and concur in making' a certain false entry, it was objected that these were separate offences and could not be charged in one count, but the objection was overruled (*e*).

The prisoner was employed to collect money due to his master. It was his duty to render an account each evening to another clerk. On the day in question he collected a sum that was due from S., returned to his master's office, and wrote on a slip of paper the money he had collected that day, but he entered a less sum, as received from S., than he had in fact received. He either handed this slip of paper to the clerk, or read it out to him, and the clerk acting innocently and believing the items to be the whole amount collected, entered them in the cash book. The prisoner knew that in the ordinary course of business the items as communicated by him would be entered in his master's books. He was convicted of making and concurring in making a false entry in the cash book, and upon a case reserved, it was held that the conviction was proper. Coleridge, C.J., said, 'It seems to me clear that the prisoner either made it (the false entry) with the innocent hands of Elford (the clerk), or concurred in the innocent hands of Elford making it' (*f*).

So where the prisoner was employed in Paris by a firm whose head office was in London. It was part of the prisoner's duty to receive money in Paris on account of his employer, to pay such money into a bank in Paris, and to enter on slips an account of all such sums received, and to send such slips to London. From these slips entries were made in London by one of the prisoner's employers in a book called the Paris cash account book. The prisoner knew that this book was kept, and that items omitted from these slips would be omitted from this book. The prisoner received certain sums of money in Paris on behalf of his employer, appropriated these sums to his own use, and fraudulently omitted in the slips sent to London the receipt of those sums, intending that they should be omitted from the Paris cash account book, as in fact they were. He was indicted and convicted for omitting and concurring in omitting these sums from the Paris cash account book, and, upon a case reserved, it was held that he was properly convicted and that as the offence was completed in London where the slips were received, the Court had jurisdiction (*g*).

The defendant was a rate collector and kept a set of books for the overseers. These books shewed the state of accounts as between the overseers and the parish authorities. In one of these books, called the 'overseers' receipt and payment book,' he made an entry, '25th of March 1898, balance in hand £131 10*s*. 5*d*.' That sum was the correct sum for which the overseers were responsible to the parish, and ought to have been in the possession of the defendant, but was not. He was indicted under this section for the falsification of this book by making the above

(*e*) R. *v.* Palin, 69 J. P. Rep. 400. Worsley Taylor, K.C., chairman. This point was not reserved. See R. *v.* Bowen, 1 Den. 22; 1 C. & K. 501; and R. *v.* Bradlaugh, 15 Cox, 223 (*n*).

(*f*) R. *v.* Butt, 15 Cox, 564.

(*g*) R. *v.* Oliphant [1905], 2 K.B. 67; 74 L. J. K. B. 591. Lord Alverstone, C.J., Lawrance, and Ridley, JJ., Kennedy and Channell, JJ., doubting.

entry, but, upon a case reserved, it was held that the entry in this book was not a false entry but, as between the overseers and the parish, was a true entry (*h*). There were other counts in the indictment which charged the prisoner with making the same false entry in another book, which appeared to be an account between the prisoner and the overseers, but upon the trial no evidence was offered on these counts and so no question was reserved on them, but Lord Russell of Killowen, C.J., said, referring to these counts, 'If we were dealing with the other account . . . it would be a matter for different consideration.'

In R. *v.* Solomons (*i*), the driver of a taxi-cab was indicted (*inter alia*) for falsification of accounts. The cab was entrusted to him on the terms that he should comply with certain regulations and should receive no wages, but be remunerated by a proportion of the earnings of the cab, as indicated by the taximeter. He drove customers in the cab without putting the flag down, and so prevented the taximeter from working. He also made a false return of his takings when signing the taximeter sheet (*j*). It was held that the terms of his engagement made him a servant within the Act of 1875, and that the taximeter sheet was an account within the meaning of the Act. The Court also intimated that mechanical means of recording accounts were accounts within the meaning of the Act.

(*h*) R. *v.* Williams, 19 Cox, 239; 63 J. P. 103.

(*i*) C. C. A., 17 July, 1909.

(*j*) This sheet was filled up from the automatic record of the taximeter.

CANADIAN NOTES.

FALSIFICATION OF ACCOUNTS BY CLERKS AND SERVANTS.

Penalty for Altering or Mutilating Book, etc.—Code sec. 415.
False Returns by Revenue Officer.—Code sec. 416.

CHAPTER THE TWENTY-FIRST.

OF EMBEZZLEMENT BY OFFICERS AND SERVANTS OF THE BANKS OF ENGLAND AND IRELAND, AND BY PUBLIC OFFICERS, OR BY THE POLICE.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 73 (*a*), 'Whosoever, being an officer or servant of the governor and company of the Bank of England or of the Bank of Ireland, and being entrusted with any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or with any security, money, or other effects of or belonging to the said governor and company, or having any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or any security, money, or other effects of any other person, body politic or corporate, lodged or deposited with the said governor and company, or with him as an officer or servant of the said governor and company, shall secrete, embezzle, or run away with any such bond, deed, note, bill, dividend or other warrant, security, money, or other effects as aforesaid, or any part thereof, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*b*).

The prisoner was convicted under 15 Geo. II. c. 13, s. 12 (rep.), for embezzling a Bank of England note, entrusted to him as a servant of the Bank. He took it off a cancelled file, to which he had access, and was the person who read from the cash-book the sums and dates to check the cancelled account, and there was evidence that his motive was to get a reward from the bank by shewing how this fraud could be committed. On a case reserved, the conviction was held bad, on the ground that it did not appear by the facts, as stated, that the prisoner was a person *entrusted* with the cancelled note, although he had *access* to it (*c*).

A conviction under the same statute for embezzling 'certain bills, commonly called *exchequer bills*,' was held bad, as the person who signed the bills on the part of the government was not legally authorised so to do by the statute 43 Geo. III. c. 5, under which the bills were issued. The Court held that as the formalities required by the statute, by which the bills were created, had not been complied with, they were not good exchequer bills; and that the circumstances of the Bank of England having purchased them as exchequer bills, and of the bills having in that

(*a*) Framed from 37 Geo. III. c. 46, s. 6; 35 Geo. III. c. 56, s. 6; 15 Geo. II. c. 13, s. 12; 4 & 5 Vict. c. 56, ss. 1, 4; 21 & 23 Geo. III. c. 16, s. 16 (I.); and 5 Vict. Sess. II. c. 28, s. 4 (I.).

(*b*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i., pp. 211, 212.

The omitted words are repealed.

(*c*) R. *v.* Bakewell, MS. Bayley, J., R. & R. 35, and 2 Leach, 943, noticed by Le Blanc, J., in R. *v.* Aslett, 2 Leach, at p. 962, and there said to have gone off upon another point. The cancelling was effected merely by a punch through. See also *ante*, p. 1408.

character answered the purposes for which they were originally created, could have no effect in this case, as they could not alter the nature of the fact (*d*).

But another indictment was preferred against the prisoner, under the same Act, describing the bills in question as *effects* belonging to the governor and company of the Bank of England: stating the effects, in the first count, as paper writings, purporting to be exchequer bills; in the second, as certain papers upon the credit whereof the bank had advanced a large sum of money; and in the third, as certain papers, &c., purporting to be bills commonly called exchequer bills; and in other counts, the exchequer bills in question were called *securities* instead of effects. It was objected by the counsel for the prisoner, before any evidence was called on the part of the prosecution, that, as it had been determined that the papers he was charged with having embezzled were not exchequer bills at the time of the embezzlement, and that though by a remedial statute, 43 Geo. III. c. 60 (rep.), these defective papers had been rendered good and valid exchequer bills for civil purposes, yet, that statute having impliedly declared that these papers were, previously to the passing it, mere waste papers, and of no value at the time the embezzlement of them took place, it could not *ex post facto* make them valuable *effects*, within 15 Geo. II. c. 13, s. 12 (rep.), which word *effects*, it was contended, could apply only to things in themselves of intrinsic value. But Le Blanc, J., observed, that the word 'securities' was used in the statute as well as the word 'effects'; which shewed that the Legislature intended that the statute should extend to other kinds of property than securities; the word 'effects' being of a larger and more comprehensive meaning than the word 'securities'; and he directed that the trial should proceed. The facts of the case were then proved; and the jury having found the prisoner guilty, upon a case reserved, a majority of the judges were of opinion that the bills, or papers, were 'effects or securities,' within the true meaning of the Act, and that the prisoner was properly convicted (*e*).

Public Officers.—50 Geo. III. c. 59, recited that, 'It is most expedient that due provision should be made more effectually to prevent the embezzlement of money or securities for money belonging to the public by any collector, receiver, or other officer entrusted with the receipt, custody, or management thereof'; and enacted by sect. 1 (rep.), 'that if any person or persons to whom any money or securities for money shall be issued for public services, shall embezzle such money, or in any manner fraudulently apply the same to his own use or benefit, or for any purpose whatever except for public services,' every such person shall be guilty of a misdemeanor (*f*).

By sect. 2 (which is not repealed), 'If any such officer, collector, or receiver so entrusted with the receipt, custody, or management of any part of the public revenues, shall knowingly furnish false statements or returns of the sums of money collected by him or entrusted to his care,

(*d*) R. *v.* Aslett (first case), 2 Leach, 954, Macdonald, C.B., Rooke and Lawrance, JJ.

(*e*) R. *v.* Astlett (second case), 1 B. & P. (N. R.) 1; 2 Leach, 958; R. & R. 67.

(*f*) This section was repealed by 2 Will. IV. c. 4 (now repealed).

or of the balances of money in his hands or under his control, such officer, collector, or receiver so offending, and being thereof convicted, shall be adjudged guilty of a misdemeanor, and shall be adjudged to suffer the punishment of fine and imprisonment, at the discretion of the Court, and be rendered for ever incapable of holding or enjoying any office under the Crown.'

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 69 (*g*), 'Whosoever, being employed in the public service of His Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, shall steal any chattel, money, or valuable security (*h*), belonging to or in the possession or power of His Majesty, or entrusted to or received or taken into possession by him by virtue of his employment, shall be guilty of felony, and being convicted thereof shall be liable . . . . to be kept in penal servitude for any term not exceeding fourteen years (*i*).

By sect. 70, 'Whosoever being employed in the public service of His Majesty (*j*), or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, and entrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security (*k*), shall embezzle *any chattel, money, or valuable security which shall be entrusted to or received or taken into possession by him by virtue of his employment*, or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever except for the public service, shall be deemed to have feloniously stolen the same from His Majesty, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years (*l*). . . . and every offender against this *or the last preceding* section may be dealt with, indicted, tried, and punished either in the county or place in which he shall be apprehended or be in custody, or in which he shall have committed the offence; and in every case of *larceny*, embezzlement, or fraudulent application or disposition of any chattel, money, or valuable security in this *and the last preceding* section mentioned, it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall

(*g*) This section was new in 1861. Its object is to place the persons mentioned in it in the same position as ordinary clerks and servants, and it is framed so as to bear the same relation to the next following section as sect. 67 does to sect. 68.

(*h*) See sect. 1, *ante*, p. 1267.

(*i*) The omitted words are repealed. See as to punishment, *ante*, Vol. i. pp. 211, 212.

(*j*) A police constable was employed, with the sanction of the Treasury, by an inspector of prisons to take proceedings against, and recover from, the parents of children committed to reformatory and industrial schools under 29 & 30 Vict. cc. 117 and 118 (both rep.), contributions towards the maintenance of their children. The inspector of prisons was duly authorised to receive these contributions and his duty was to pay the same into the bank of England. The constable misappropriated contributions of parents that the magistrates had ordered to be made, and upon a case reserved the Court held that he was, whilst so employed, in the public service of Her Majesty within this section. R. *v.* Graham, 13 Cox, 57. But where the High Bailiff of a County Court appointed the prisoner under the powers contained in the County Court Acts as a bailiff, to assist him in his duties, it was held that he was not a person employed in the service of Her Majesty, but was the servant of the High Bailiff. R. *v.* Parsons, 16 Cox, 498.

(*k*) See sect. 1, *ante*, p. 1267.

(*l*) As to other punishments, *vide ante*, Vol. i., pp. 211, 212.

be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security in [His] Majesty' (*m*).

For sects. 71, 72, *vide ante*, p. 1376.

By the Customs Laws Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 29, 'Any moneys, chattels, or other valuable securities which shall or may be received by any officer, clerk, or other person in the service of the Customs, either as duties of Customs or under or by virtue of any statute or by order or direction of the Commissioners of Customs or in virtue of his office or employment, or otherwise for the use and service of His Majesty or of any public department, shall be deemed to be moneys, chattels, or valuable securities for the public service, and shall be considered as such within the meaning of the Larceny Act, 1861 (24 & 25 Vict. c. 96), and in any information, indictment, or other instrument relating thereto the same may be laid as the property of [His] Majesty.'

By sect. 85 of the same Act, 'If any goods shall be taken out of any warehouse without due entry, the occupier of such warehouse shall forthwith pay the duties due upon such goods; and every person taking out any goods from any warehouse without payment of duty, or who shall aid, assist or be concerned therein, and every person who shall destroy or embezzle any goods duly warehoused, shall be deemed guilty of a misdemeanor, and shall upon conviction suffer the punishment by law inflicted in cases of misdemeanor (*n*); but if such person shall be an officer of customs or excise not acting in the due execution of his duty, and shall be prosecuted to conviction by the importer, consignee, or proprietor of such goods, no duty shall be payable for or in respect of such goods, and the damage occasioned by such destruction or embezzlement shall, with the sanction of the Treasury, be paid or made good to such importer, consignee, or proprietor by the Commissioners of Customs.'

An indictment upon 2 & 3 Will. IV. c. 4 (rep.), was sufficient, although it did not allege that the prisoner embezzled the money whilst he was employed in the public service. On such an indictment, Coleridge, J., said, 'I am clearly of opinion that the indictment is good. If the fact of the prisoner's continuing clerk be necessary to the offence, the indictment, grammatically taken, would perhaps contain a sufficient averment of that fact. But it is by no means clear that an embezzlement (if such a case be possible) after a person ceased to be clerk or servant, of money received whilst he was such, would not be within the Act. The statute, in its words, does not necessarily imply that he should embezzle whilst clerk or servant, and if it does so imply it, the indictment which pursues the same terms also implies it' (*o*).

(*m*) This section is taken from 2 Will. IV. c. 4, ss. 1, 4, 5, with an insertion of words to include the clause in 22 & 23 Vict. c. 32, s. 25, as to the police. The words of the former enactment were, 'embezzle the same.' The words in *italics* were substituted as more correct. The section is extended as to the venue, commitment, and indictment, so as to include cases falling within the preceding section.

(*n*) See *ante*, Vol. i. p. 249.

(*o*) R. *v.* Lovell, 2 M. & Rob. 236, an indictment for larceny by a servant of the Crown, and for embezzlement under 2 & 3 Will. IV. c. 4.

Evidence of acting in the capacity of an officer employed by the Crown is sufficient to support an indictment under this statute, and the appointment need not be regularly proved (*p*).

Where a prisoner was indicted under 2 & 3 Will. IV. c. 4, s. 1 (rep.), for embezzling money received by him by virtue of his employment as a letter carrier, and it appeared that he was a letter carrier employed to deliver letters, and he had been in the habit of calling at the lodge of the county infirmary, and receiving letters there, and a penny upon each to prepay the postage, and his practice was to deliver these letters at the post-office; he sometimes omitted to call at the lodge, and then the letters were taken by someone else, and put in the post-office; and during his illness, a person who performed his duties had called at the lodge, received the letters and pennies, and delivered them at the post office in the same mannner as the prisoner. No evidence was given of the terms of the prisoner's appointment. There was evidence that the prisoner had embezzled some pence received with the letters. It was objected that there was no evidence that the pence were received by virtue of his employment. It was the mere voluntary act of the prisoner to go and receive the letters. Coleridge, J., said, 'I think there is evidence to go to the jury. The case does not rest simply on what was done by the prisoner, and there is also the fact that the person who performed his duties during his illness pursued the same course as the prisoner' (*q*).

(*p*) R. *v.* Borrett, 6 C. & P. 124. R. *v.* Townsend, C. & M. 178, *infra*.

(*q*) R. *v.* Townsend, C. & M. 178.

CANADIAN NOTES.

THEFT BY PUBLIC OFFICERS, ETC.

Theft by Government or Municipal Employee.—Code sec. 359.

A charge against a city officer for collecting sums of money upon the pretence that they were payable to the city and not thereafter accounting for the same is not sustainable as a charge of theft, if in fact the sums collected were not payable to the city. To constitute the offence of theft (sec. 347), or of theft by a clerk (sec. 359(*a*)), or of theft by municipal employees (sec. 359(*c*)), the person alleged to have been defrauded by the taking must have had a right at the time of the taking either to the ownership or to the possession of the property taken. R. v. Tessier (1900), 5 Can. Cr. Cas. 73 (Que.).

An indictment against a Government or municipal officer for theft or embezzlement under Code sec. 359(*c*) would be demurrable if it did not allege that the officer had received the money by virtue of his employment, but on such being alleged and proved, the wrongful appropriation is an offence under sec. 359(*c*), whether the property be public (or municipal) property or not. *Ibid.*

Public Servants Refusing to Deliver up Property Lawfully Demanded.—Code sec. 391.

Meaning of "Municipality."—Code sec. 2(21).

Property Laid in His Majesty or Municipality.—Code sec. 868.

CHAPTER THE TWENTY-SECOND.

OF LARCENY, EMBEZZLEMENT, ETC., OF POSTAL PACKETS AND MONEY ORDERS AND OF OTHER OFFENCES AGAINST THE POST OFFICE ACTS. (*a*).

SECT. I.—STATUTES IN FORCE.

A. *Letters, Money-Orders, &c.*

The Post-office Act, 1908 (8 Edw. VII. c. 48), which came into force on May 1st, 1909 (*b*), has consolidated most of the statutes relating to the post-office, including those creating criminal offence (*c*).

Stealing mail bag or postal packet.—By sect. 50, 'If any person (a) steals a mail bag (*d*); or (b) steals from a mail bag, or from a post office (*e*), or from an officer of the Post Office, or from a mail, any postal packet (*d*) in course of transmission by post (*f*); or (c) steals any chattel or money or valuable security (*g*) out of a postal packet in course of transmission (*f*) by post; or (d) stops a mail with intent to rob or search the mail; he shall be guilty of felony, and on conviction shall be liable, at the discretion of the Court, to penal servitude for life or any term not less than three years, or to imprisonment, with or without hard labour, for any term not exceeding two years (*h*).

Unlawfully taking away or opening mail bag sent by vessel employed under Post Office.—By sect. 51, 'If any person unlawfully takes away or opens a mail bag (*d*) sent by any vessel employed by or under the Post Office for the transmission of postal packets under contract, or unlawfully takes a postal packet in course of transmission by post out of a mail bag so sent, he shall be guilty of felony, and on conviction shall be liable, at the discretion of the Court, to penal servitude for any term not exceeding fourteen years or not less than three years, or to imprisonment, with or without hard labour, for any term not exceeding two years (*i*).

Receiving stolen mail bag or postal packet.—By sect. 52, 'If any person receives any mail bag (*d*), or any postal packet, or any chattel or money or valuable security (*g*), the stealing, or embezzling, or secreting whereof amounts to a felony under this Act, knowing the same to have been so fraudulently stolen, embezzled, or secreted, and to have been sent, or to have been intended to be sent by post, he shall be guilty of felony

(*a*) The offences here dealt with were formerly punishable under 5 Geo. III. c. 25; 7 Geo. III. c. 50; 42 Geo. III. c. 81; and 62 Geo. III. c. 143; and the Acts scheduled to the Act of 1908. These enactments are all repealed, except a part of sect. 6 of 52 Geo. III. c. 143, which does not relate to the Post Office. The Acts relating to telegrams will be found, *post*, p. 1433.

(*b*) Sect. 93.

(*c*) The enactments relating to the Post Office, but not creating indictable offences, nor regulating procedure for such offences, are not relevant to the subject of this work.

(*d*) Defined, s. 89, *post*, p. 1432.

(*e*) Defined, s. 89, *post*, p. 1432.

(*f*) Defined, s. 90, *post*, p. 1433.

(*g*) Defined, s. 89, *post*, p. 1433.

(*h*) Framed from 7 Will. IV. and 1 Vict. c. 36, ss. 6, 27, 28, 42, and 47 & 48 Vict. c. 76, s. 13.

(*i*) Framed from 7 Will. IV. and Vict. c. 36, s. 26.

and shall on conviction be liable to the same punishment as if he had stolen, embezzled, or secreted the same, and may be indicted and convicted whether the principal offender has or has not been previously convicted, or is or is not amenable to justice (*j*).'

Fraudulent retention of mail bag or postal packet.—By sect. 53, 'If any person fraudulently retains, or wilfully secretes or keeps, or detains, or when required by an officer of the Post Office, neglects or refuses to deliver up—(a) any postal packet (*l*), which is in course of transmission by post and which ought to have been delivered to any other person; or (b) any mail bag, he shall, whether the postal packet or mail bag has been by mistake delivered to him, or has been found by him or by any other person, be guilty of a misdemeanor, and be liable on conviction on indictment to a fine and to imprisonment with or without hard labour' (*k*).

Criminal diversion of Letters from Addressee.—By sect. 54 (*l*),—'(1) If any person not in the employment of the Postmaster-General wilfully and maliciously, with intent to injure any other person, either opens or causes to be opened any letter which ought to have been delivered to that other person, or does any act or thing whereby the due delivery of the letter to that other person is prevented or impeded, he shall be guilty of a misdemeanor, and be liable to a fine not exceeding fifty pounds, or to imprisonment, with or without hard labour, for any term not exceeding six months.

'(2) Nothing in this section shall apply to a person who does any act to which this section applies where he is a parent, or in the position of a parent or guardian, of the person to whom the letter is addressed.

'(3) A prosecution shall not be instituted in pursuance of this section except by the direction or with the consent of the Postmaster-General.

'(4) A letter in this section means a postal packet (*m*), in course of transmission by post, and any other letter which has been delivered by post.'

Stealing, Embezzlement, Destruction, etc. of Postal Packet by Officer of Post Office.—By sect. 55, 'If any officer of the Post Office steals, or for any purposes whatever embezzles, secretes, or destroys a postal packet in course of transmission by post, he shall be guilty of felony, and shall on conviction be liable, at the discretion of the Court, to imprisonment for any term not exceeding two years, with or without hard labour, or to penal servitude for a term not less than three years and not exceeding seven years, or if the postal packet contains any chattel or money or valuable security (*n*), to imprisonment for any term not exceeding two years, with or without hard labour, or to penal servitude for life or any term not less than three years' (*o*).

Opening or delaying Postal Packets.—By sect. 56, '(1) If any officer of the Post Office, contrary to his duty, opens or procures or suffers to be opened any postal packet in course of transmission by post, or

(*j*) Re-enacts 7 Will. IV. and 1 Vict. c. 36, s. 30.

(*k*) Framed from 7 Will. IV. and 1 Vict. c. 36, ss. 31, 42. It meets such cases as R. *v.* Mucklow, 1 Mood. 160, *ante*, p. 1240. R *v.* Fish, 64 J. P. 137, *ante*, p. 1241.

(*l*) Re-enacts 54 & 55 Vict. c. 46, s. 10.

(*m*) Defined, *post*, p. 1432.

(*n*) Defined, *post*, p. 1432.

(*o*) Re-enacts 7 Will. IV. and 1 Vict. c. 36, s. 26.

wilfully detains or delays, or procures or suffers to be detained or delayed, any such postal packet, he shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to imprisonment with or without hard labour, or to a fine, or to both such imprisonment and fine.

'(2) Provided that nothing in this section shall extend to the opening or detaining or delaying of a postal packet returned for want of a true direction, or returned by reason that the person to whom the same is directed is dead, or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereon, or to the opening, detaining, or delaying of a postal packet under the authority of this Act or in obedience to an express warrant in writing under the hand of a Secretary of State: Provided that the warrant in Scotland may be either under the hand of the Secretary of State or of the Secretary for Scotland, in Ireland shall be under the hand and seal of the Lord Lieutenant, and in the Isle of Man shall be under the hand of the Governor issued with the sanction of a Secretary of State (*p*).

Sect. 57 provides for the punishment on summary conviction of negligence and misconduct of officials in carrying or delivering mail bags, &c.

Issuing Money Orders with Fraudulent Intent.—By sect. 58,—'(1) If any officer of the Post Office grants or issues any money order (*q*) with a fraudulent intent, he shall be guilty of felony, and be liable at the discretion of the Court, to penal servitude for a term not exceeding seven and not less than three years, or to imprisonment, with or without hard labour, for any term not exceeding two years.

'(2) If any officer of the Post Office re-issues a money order previously paid he shall be deemed to have issued the order with a fraudulent intent under this section' (*r*).

Forgery and stealing of Money Order.—By sect. 59,—'(1) A money order shall be deemed to be an order for the payment of money and a valuable security within the meaning of this Act and of the Forgery Act, 1861 (24 & 25 Vict. c. 98), and of the Larceny Act, 1861 (24 & 25 Vict. c. 96), and of any other law relating to forgery or stealing which is for the time being in force in any part of the British Islands.

'(2) If any person, with intent to defraud, obliterates, adds to, or alters any such lines or words on a money order as would, in the case of a cheque, be a crossing of that cheque, or knowingly offers, utters, or disposes of any money order, with such fraudulent obliteration, addition or alteration, he shall be guilty of felony, and be liable to the like punishment as if the order were a cheque' (*s*).

Offences in relation to Postal Orders, and the Poundage thereon.—By sect. 60, 'The provisions of law respecting the punishment of offences connected with stamp duties (including the provisions relating to paper and implements used in the manufacture of that paper, and to the punishing of fraud) shall apply in like manner as if any poundage or commission

(*p*) Re-enacts 7 Will. IV. and 1 Vict. c. 36, s. 25.

(*q*) Defined by ss. 23, 24.

(*r*) Framed from 11 & 12 Vict. c. 88, s. 4; 43 & 44 Vict. c. 33, s. 4 (3); 47 & 48 Vict. c. 76, s. 13.

(*s*) Cf. sect. 89, *post*, p. 1432. The section re-enacts 43 & 44 Vict. c. 33, ss. 3, 4. *Vide post*, pp. 1741 *et seq.* tit. 'Forgery.'

chargeable for a postal order were stamp duty, and as if the paper used for postal orders were paper provided by the Commissioners of Inland Revenue for receiving the impression of a die, and in the Isle of Man and Channel Islands as if those provisions extended to those islands' (*t*).

Placing Injurious Substances in or against the Post Office Letter Boxes.—By sect. 61,—'(1) A person shall not place or attempt to place in or against any post office letter box any fire, any match, any light, any explosive substance, any dangerous substance, any filth, any noxious or deleterious substance, or any fluid, and shall not commit a nuisance in or against any post office letter box, and shall not do or attempt to do anything likely to injure the box, appurtenances, or contents.

'(2) If any person acts in contravention of this section, he shall be guilty of a misdemeanor, and be liable on summary conviction to a fine not exceeding ten pounds, and on conviction on indictment to imprisonment, with or without hard labour, for a period not exceeding twelve months' (*u*).

Sect. 62 relates to posting placards on Post Office property and provides for the summary conviction of offenders.

Sect. 63 punishes as a misdemeanor the sending by post of explosive, inflammable, deleterious, or obscene or indecent (*v*) matter.

Sects. 64 and 65 relate to imitation of stamps (*w*).

Endeavouring to procure the commission of any felony or misdemeanor within the Act.—By sect. 69, 'If any person solicits or endeavours to procure any other person to commit an offence punishable on indictment under this Act, he shall be guilty of a misdemeanor, and shall on conviction be liable at the discretion of the Court to imprisonment, with or without hard labour, for any term not exceeding two years' (*x*).

Venue.—By sect. 72 '(1) An offence against this Act may be tried either in the county or place in which it was actually committed, or in any county or place in which the alleged offender is apprehended or is in custody, or (where the offence is in respect of a mail, mail bag, postal packet, or money order, or any chattel, money, or valuable security sent by post) in any county or place through which or any part thereof the mail, mail bag, postal packet, money order, chattel, money or security passed in due course of conveyance by post, and an offence, if committed in Scotland, may also be tried at any sitting of the High Court of Justiciary.

'(2) Where the offence is committed on any highway, harbour, canal, river, arm of the sea, or other water, constituting the boundary of two or more counties or places, it may be tried in any of the said counties or places.

'(3) The offence of being accessory to or aiding or abetting an offence

(*t*) Framed from 43 & 44 Vict. c. 33, s. 4, *vide post*, p. 1709.

(*u*) Re-enacts 47 & 48 Vict. c. 76, s. 3. S. 61, provides for summary punishment of unauthorized advertisements or disfigurement of post offices, boxes, &c.

(*v*) As to such matter, *vide post*, p. 1878.

(*w*) *Vide post*, pp. 1709 *et seq.*

(*x*) Re-enacts 7 Will. IV. and 1 Vict. c. 36, ss. 36, 42. The solicitation is a common law misdemeanor (*ante*, vol. i., p. 203), but under this section hard labour may be awarded.

against this Act may be tried in any county or place in which the last-mentioned offence may be tried ' (*y*).

Extent.—By sect. 84, ' Where there is in any British possession a post established by the Postmaster-General this Act shall apply to that possession in like manner as it applies to the United Kingdom, subject to such modification, if any, as may be made by His Majesty by Order in Council, or as may be made by any enactment of the legislature of the possession ' (*z*).

By sect. 88, ' This Act shall extend to the Isle of Man and to the Channel Islands, and the Royal Courts of the Channel Islands shall register this Act accordingly.'

Procedure.—By sect. 73,—' (1) In any indictment or legal proceeding for any offence committed or attempted to be committed, or any malicious, injurious, or fraudulent act or thing done in, upon, or with respect to, the Post Office or Post Office revenue, or any mail bag, postal packet, money order, or any chattel, money, or valuable security, sent by post, or in anywise concerning any property under the management or control of the Postmaster-General, it shall be sufficient to allege the property to belong to His Majesty's Postmaster-General, and to allege any such act or thing to have been done with intent to injure or defraud His Majesty's Postmaster-General, without in either case naming the person who is Postmaster-General, and it shall not be necessary to allege or to prove upon the trial or otherwise that the mail bag, postal packet, money order, chattel, money, security, or property was of any value.'

' (2) In any indictment or legal proceeding against any officer of the Post Office for any offence committed against this Act, it shall be sufficient to allege that the alleged offender was an officer of the Post Office at the time of the committing of the offence, without stating further the nature or particulars of his employment ' (*b*).

Evidence.—By sect. 74, ' On the prosecution of any offence under this Act, whether on summary conviction or on indictment, evidence that any article is in the course of transmission by post, or has been accepted on behalf of the Postmaster-General for transmission by post, shall be sufficient evidence that the article is a postal packet ' (*c*).

Fines.—By sect. 75 (*d*). ' All fines, forfeitures, and other sums recovered in respect of any offence under this Act shall, notwithstanding anything in any other Act, be paid into the Exchequer unless applied as an appropriation in aid under section two of the Public Accounts and Charges Act, 1891 ' (54 & 55 Vict. c. 24).

Act alternative to Common Law, etc.—By sect. 77, ' When proceedings are taken before any court against a person in respect of an offence under this Act, which is also an offence punishable at common law, or under some Act other than this Act, the court may direct that instead of those proceedings being continued, proceedings shall be taken for

(*y*) Re-enacts 7 Will. IV. and 1 Vict. c. 36, s. 37. As to the former rule see *R. v.* Thomas, 2 Leach, 634; 2 East, P. C. 605, 606.

(*z*) Framed from 7 Will. IV. and 1 Vict. c. 36, s. 48, and 7 & 8 Vict. c. 49, ss. 2, 9.

(*a*) Similar sections appeared in former Post Office Acts, *e.g.*, 7 Will. IV. and 1 Vict. c. 36, s. 48.

(*b*) Framed from 7 Will. IV. and 1 Vict. c. 36, s. 40. Cf. 3 & 4 Vict. c. 96, s. 66, and 11 and 12 Vict. c. 88, s. 5.

(*c*) A re-enactment of 47 & 48 Vict. c. 76, s. 12 (5).

(*d*) Framed from 47 & 48 Vict. c. 76, s. 14.

punishing that person at common law, or under some Act other than this Act' (*e*).

Definitions.—By sect. 89, 'In this Act, unless the context otherwise requires—

'The expression "mail" includes every conveyance by which postal packets are carried, whether it be a carriage, coach, cart, horse, or any other conveyance, and also a person employed in conveying or delivering postal packets, and also any vessel employed by or under the Post Office for the transmission of postal packets by contract or otherwise in respect to postal packets transmitted by the vessel:'

'The expression "mail bag" includes a bag, box, parcel, or any other envelope or covering in which postal packets in course of transmission by post are conveyed, whether it does or does not contain any such packets:'

'The expression "postal packet" means a letter, post card, reply post card, newspaper, book packet, pattern or sample packet, or parcel, and every packet or article transmissible by post, and includes a telegram:'

'The expression "officer of the Post Office" includes the Postmaster-General, and any person employed in any business of the Post Office, whether employed by the Postmaster-General, or by any person under him or on behalf of the Post Office:

'The expression "post office" includes any house, building, room, carriage or place used for the purpose of the Post Office, and any post office letter box:'

'The expression "post office letter box" includes any pillar box, wall box, or other box or receptacle provided by the permission or under the authority of the Postmaster-General for the purpose of receiving postal packets, or any of them, for transmission by or under the authority of the Postmaster-General:'

'The expression "telegraph post" means a post, pole, standard, stay, strut, or other above-ground contrivance for carrying, suspending, or supporting a telegraph as defined by the Telegraph Act, 1869' (32 & 33 Vict. c. 73).

'The expression "indictment" includes an information:'

'The expression "misdemeanor" means as regards the Channel Islands a crime and offence:'

'The expression "valuable security" has the same meaning as in the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 1, *ante*, p. 1267), and includes anything which is a valuable security within the meaning of that Act and any part of any such thing:' (*f*)

'The expression "the purpose of the Post Office" means any purpose of any of the Post Office Acts or of any Acts for the time being in force relating to Post Office money orders, Post Office telegraphs, or Post Office saving banks, and includes any purpose relating to or in connection with the execution of the duties for the time being undertaken by the Postmaster-General or any of his officers:'

(*e*) Framed on 47 & 48 Vict. c. 76, s. 16. p. 6.
Cf. 52 & 53 Vict. c. 63, s. 33, *ante*, Vol. i,

(*f*) *E.g.*, half a bank note.

'The expression "Post Office regulations" means regulations for the time being in force made under this Act by warrant of the Treasury, whether made upon the recommendation of the Postmaster-General or otherwise.' (As to proving them see sects. 36, 82, 83.)

In Course of Transmission by Post: Delivery to or from a Post Office.—By sect. 90, 'For the purposes of this Act—

'(a) A postal packet shall be deemed to be in course of transmission by post from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed; and

'(b) The delivery of a postal packet of any description to a letter carrier or other person authorised to receive postal packets of that description for the post shall be a delivery to a post office; and

'(c) The delivery of a postal packet at the house of office of the person to whom the packet is addressed, or to him or to his servant or agent or other person considered to be authorised to receive the packet according to the usual manner of delivering that person's postal packets, shall be a delivery to the person addressed' (*g*).

Construction.—By sect. 91, '(1) Any reference contained in any enactment, warrant, deed, or document referring to the Post Office Acts, or any of them, or to the Post Office laws, shall be construed, so far as the context permits, as a reference to this Act, and any fines, penalties, and other sums directed to be recovered under the Post Office Acts, or any of them, or the Post Office laws may be recovered in like manner as fines and forfeitures under this Act may be recovered: and any reference in any enactment to an indictable offence under the Post Office laws shall be construed, so far as the context permits, as a reference to any offence punishable on indictment under this Act, whether it is or is not also punishable on summary conviction.

'(2) Where by reason of any Act being declared to be a Post Office Act or its provisions to be Post Office laws any enactment repealed by this Act is applied for any purpose, the corresponding provisions of this Act shall apply in like manner.

'(3) A reference in any enactment other than this Act to a post letter shall be construed to refer to a postal packet within the meaning of this Act.'

B. *Telegrams.*

Divulging Telegrams.—By the Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 20, 'Any person having official duties connected with the post office, or acting on behalf of the Postmaster-General, who shall, contrary, to his duty, disclose or in any way make known or intercept the contents or any part of the contents of any telegraphic messages (*h*), or any message entrusted to the Postmaster-General for the purpose of transmission, shall, in England and in Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and shall upon conviction be subject to imprisonment for a term not exceeding twelve calendar months; and

(*g*) Framed from 7 Will. IV. & 1 Vict. c. 36, s. 47; 38 & 39 Vict. c. 22, s. 10; 47 & 48 Vict. c. 76, s. 19.

(*h*) A conversation through a telephone would, it seems, be a message. Att.-Gen. *v.* Edison Telephone Co., 6 Q.B.D. 244.

the Postmaster-General shall make regulations to carry out the intentions of this section, and to prevent the improper use, by any person in his employment or acting on his behalf, of any knowledge he may acquire of the contents of any telegraphic message' (*i*).

By sect. 21, 'In every case where an offence shall be committed in respect of a telegraphic message sent by or entrusted to the Postmaster-General, it shall be lawful and sufficient, in the indictment or criminal letters to be preferred against the offender, to lay the property of such telegraphic message in [His] Majesty's Postmaster-General, without specifying any further or other name, addition, or description whatsoever, and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise that the telegraphic message was of any value; and in any indictment or in any criminal letters to be preferred against any person employed under the post office for any offence committed under this Act it shall be lawful and sufficient to state and allege that such offender was employed under the post office at the time of the committing of such offence, without stating further the nature or particulars of his employment.' (*Vide ante*, p. 1431.)

By the Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 23 (*j*) '. . . Provided always that nothing in this Act contained shall have the effect of relieving any officer of the post office from any liability which would but for the passing of this Act have attached to a telegraph company, or to any other company or person, to produce in any Court of law, when duly required so to do, any such written or printed message or communication (*k*).

By sect. 24, 'The Telegraph Act, 1868 (*supra*), and this Act shall be Post Office Acts, and the provisions therein contained respectively shall be Post Office Laws within the meaning of the Post Office Offences Act, 1837' (*kk*).

By the Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), s. 11, 'If any person, being in the employment of a telegraph company as defined by this section, improperly divulges to any person the purport of any telegram, such person shall be guilty of a misdemeanor, and be liable, on summary conviction, to a fine not exceeding £20, and on conviction on indictment, to imprisonment with or without hard labour for a term not exceeding one year, or to a fine not exceeding £200.

'For the purposes of this section the expression "telegram" means a written or printed message or communication sent to or delivered at a post office or the office of a telegraph company, for transmission by telegraph, or delivered by the post office or a telegraph company as a message or communication transmitted by telegraph.

'The expression "telegraph company" means any company, corporation, or persons carrying on the business of sending telegrams for the public, under whatever authority, or in whatever manner, such company, corporation, or persons may act or be constituted.

(*i*) See 47 & 48 Vict. c. 76, s. 11, *infra*.

(*j*) The omitted definition of telegrams as post letters is superseded by the definition of postal packet, s. 89, *ante*, p. 1432 and is repealed.

(*k*) By the Telegraph Act, 1870 (33 & 34 Vict. c. 88), the Telegraph Acts, 1868–1869, were extended to the Channel Islands and Isle of Man.

(*kk*) The references in this section must now be read as references to the Post Office Act, 1908; *vide ante*, p. 1433.

'The expression "telegraph" has the same meaning as in the Telegraph Act, 1869, and the Acts amending the same' (*l*).

SECT. II.—DECISIONS ON FORMER POST OFFICE ACTS.

Employment under Post Office.—For definition of "officer of the post office," see sect. 89, *ante*, p. 1432.

It has been held in several cases that it is sufficient to prove that the prisoner acted in the capacity charged in the indictment. Thus where husband and wife were indicted on 52 Geo. III. c. 143, s. 2 (rep.) for embezzling a letter containing a bill of exchange, and it was proved by the postmaster of Carmarthen that he had appointed the husband postmaster of Ferryside, and that that appointment was sanctioned by the Postmaster-General, and that the husband had been postmaster for three years; it was submitted that to support the indictment against the wife she must be employed by or under the post office, and in this case she merely acted as the assistant of her husband in his absence; and with respect to the husband the written appointment ought to have been produced; but Parke, B., held it was sufficient to shew that the prisoners had acted as servants of the post office (*m*).

A person employed as a servant to clean boots and shoes, &c., by a law-stationer at a receiving-house of the general post office, and who used to assist in tying up and sealing the post office bag, was held not to be 'employed by or under the post office,' within the meaning of 52 Geo. III. c. 143 (rep.) (*n*).

But where a postmistress employed the prisoner at a salary of 14*s*. a week to carry the letter bag from D. to B., and she was allowed by the post office the sums she paid him; but the prisoner never sorted the letters or opened any mail bag; it was held that he was a person in the employ of the post office (*o*).

The prisoner was charged as being employed under the post office, and stealing a post letter containing money. He was in the service of a chemist, who was the postmaster of the district where the letter was posted as an assistant in his business, and received a salary from him, but nothing from the post office; he used, however, occasionally to assist him in sorting letters, one of which he was proved to have abstracted. It was the practice for those similarly employed in district offices to go before a magistrate with a paper, get the paper filled up, and take an oath faithfully to perform the duties; and the prisoner's master when he entered

(*l*) The first part of this section relates to forging telegrams and is set out *post*, p. 1760. Other sections relating to injuring post office property are referred to in the chapters dealing with malicious damage.

(*m*) R. *v.* Rees, 6 C. & P. 606. R. *v.* Borrett, 6 C. & P. 124. In R. *v.* Townsend, C. & M. 178, *ante*, p. 1425, it was admitted that it was sufficient to prove that the prisoner acted as a letter carrier. See also R. *v.* Goodwin, 1 Lew. 100. Under 9 Anne, c. 10, s. 41, it was provided that no person should be capable of exercising any employment relating to the post office, &c., unless he should have first taken a certain oath; upon an indictment under the repealed 7 Geo. III, c. 50, charging the prisoner, as a servant of the post office, with embezzling a letter, all the judges held that it was not necessary, to found a conviction, that the person employed should have taken the oath. R. *v.* Clay, 2 East, P. C. 580; 1 Leach 3 (n.).

(*n*) R. *v.* Pearson, 4 C. & P. 572, Littledale and Bosanquet, JJ.

(*o*) R. *v.* Salisbury, 5 C. & P. 155, Patterson, J.

his employ gave him such a paper, telling him to go before a magistrate and take the oath; the prisoner went away, and on his return said he had been before a magistrate, and taken the oath, and shewed the paper properly filled up. Cresswell, J., held that this was sufficient evidence of his being employed under the post office (*p*). So where the prisoner, who was indicted for a similar offence, was in the service of a district postmaster, and occasionally assisted in making up the letter bags, but without being specially employed by, or receiving any remuneration from the post office; but it was proved that he had taken the same oath as the prisoner had in the preceding case; Patteson, J., held that it was quite sufficient, as it brought the case within the preceding case (*q*).

Upon an indictment alleging that the prisoner being employed under the post office stole a letter containing money, it appeared that the prisoner had for some time been employed under the post office to carry letters from C. to T. The letters were delivered in a sealed bag, which it was his duty to deliver as he received it to the postmaster at T., and on such delivery the performance of the duty of his employment was complete. One day the prisoner brought the bag safely, and delivered it to the postmaster, whose duty it was to sort the letters in time to make up the bags for the mail passing through the town. The prisoner consented at the request of the postmaster to assist in the sorting, and whilst sorting stole the letter in question. Upon a case reserved, it was held that the prisoner came within the terms 'employed under the post office;' for he was employed by the postmaster, who was employed by the Postmaster-General (*r*).

Letter containing Money.—Where on an indictment under 7 Will. IV. & 1 Vict. c. 36, s. 26 (*s*), for stealing a post letter containing a penny, the property of the Postmaster-General, it appeared that a female servant took a letter for her mistress to a post office, and a penny for the purpose of paying the postage; but finding the shop shut, put the penny inside the letter and fastened it with a pin, and dropped it into the letter-box, intending that the penny should be applied for the payment of the postage; this letter the prisoner got into his possession at the general post office, whilst engaged in stamping letters there; and it was urged that this was not a money letter; but Lord Denman, C.J., was of opinion that the letter came within the description in the Act of Parliament, viz., a letter containing money; and although the money was not put in for the purpose of its being conveyed in the letter to the country, yet that it was in fact money contained in the letter; and though it was only of small amount yet the intention of the prisoner, and the breach of trust, and the

(*p*) R. *v.* Simpson, 4 Cox, 275. Before the evidence of the oath and the paper was given, Cresswell. J., said: 'The sorting of letters certainly does not appear to come within the legitimate duty of a chemist's apprentice. There may be some difficulty, if no further evidence of employment by the post office can be given.'

(*q*) R. *v.* Simpson, 4 Cox, 276. Until the oath was proved in this case, Patteson, J., entertained similar doubts to Cresswell, J., in the preceding case, and said, 'I am not aware of any case in which it has been held that a person in the employment of a postmaster is in the employ of the post-office.'

(*r*) R. *v.* Reason, Dears. 226: 23 L. J. M. C. 11. During the argument, Coleridge, J., said: 'A postmaster in the country is often assisted by his wife. I have never understood it to be doubted that the wife, in such a case, is employed under the post-office.'

(*s*) Re-enacted as 8 Edw. VII. c. 48, s. 55, *ante*, p. 1428.

dishonesty committed by him, were the same as if the money had been of larger amount, and had been enclosed in the letter to be sent into the country (*t*).

Post Letter.—The present Act defines postal packet (*u*). There have been several decisions as to what constitutes a post letter. The question arose in several cases where test letters were sent to fictitious persons after suspicions of dishonesty had been aroused. It seems that any letter whatever be its address or its object, if it is posted (*v*) in the ordinary way, was a post letter within the statute.

In R. *v.* Harley (*w*) the first count charged the prisoner with stealing notes out of a certain post letter; the second with stealing a post letter from a post office; the third with stealing notes then sent by the post; the fourth was similar; and there were counts also for a simple larceny. A person took the letter containing notes to an inn, and placed it on a table in a passage and placed on the letter twopence to prepay the postage; and the prisoner being near, he pointed out the letter to her, when she said, 'They will be here directly, and I will give it to them;' and he then went away. The post office was at the inn, and the letter box was in the passage, and always kept locked. The prisoner was in the service of the innkeeper, but had not been authorised by him to receive letters for him. Wightman, J., held that the first four counts were not supported as the letter not having been put into the letter box nor delivered to any postmaster, or to any person authorised by the post office, or even authorised by the postmaster to receive letters for him, was not a 'post letter,' nor were the notes contained in it 'sent by the post.'

On an indictment for stealing a £10 Bank of England note from a post letter, it appeared that R. took the letter containing the note to a district receiving-house, and handed it to the postmistress, with a request that it might be registered, and paid the fee for registration; but the postmistress, being busy at the time asked R. to call again, when she would give her a receipt. In the meantime she put the letter under a glass case in the shop, to which the prisoner had access. A short time afterwards R. called again; the letter was taken from the case and stamped, but it was subsequently discovered that the note had been extracted. It was held that this was a post letter and that R. *v.* Harley(*x*) did not apply, there there was no delivery to any person authorised to receive the letter, here it was delivered into the hands of the postmistress herself (*y*).

The prisoner was charged in different counts with stealing, embezzling, and destroying a post letter, he being at the time employed under the post office. The prisoner was the post messenger between G. and L. The postmistress at the office at G. received the letter in question, together

(*t*) R. *v.* Mence, C. & M. 234. There were other counts varying the charge, and probably there was one for stealing a post letter, and whatever doubt there may be as to the ruling as stated, there can be no doubt that this letter was a post letter.

(*u*) *Ante*, p. 1432. Letter is defined only in s. 54, (4) *ante*, p. 1428.

(*v*) See R. *v.* Plumer, R. & R. 264, as to the evidence of postmarks, and 8 Edw. VII. c. 48, s. 12, as to certificates of posting, &c.

(*w*) 1 C. & K. 89. The prisoner was convicted of simple larceny.

(*x*) *Supra.*

(*y*) R. *v.* Rogers, 5 Cox, 293, Cresswell, J.

with £1 for a post-office order to that amount, 3*d*. for the poundage on such order, 1*d*. for the postage, and 1*d*. for the messenger from that office to the one in L., by way of commission or gratuity for his trouble in getting the order. The letter when received was unsealed, and the postmistress in due course delivered it, still unsealed, and with the money to the prisoner, instructing him to obtain the order for the £1 at the L. office, and then, after enclosing the order in it, to post the letter at that place. The prisoner never delivered the letter, and paid no money for the post-office order, nor on account of any such order. It was submitted that the prisoner could not be considered as employed under the post office in this instance, and that the letter was not a post letter, as it was delivered to him in order that he might perform an act of agency with respect to it before it should be actually posted at L. But Cresswell, J., was of opinion that under these circumstances the letter must be considered a post letter, and the prisoner in the employ of the post office (*z*).

Where an indictment stated that the prisoner being employed under the post office, stole a post letter containing a sovereign, and there were counts charging the embezzling the letter and money, and a count for stealing a sovereign, the property of the Postmaster General; and it appeared that the prisoner was a letter carrier, and in consequence of suspicions, an assistant inspector of the letter carriers enclosed a marked sovereign in a letter, directed it, and sealed and marked it as if it had been put into the post office in the regular way as a paid letter; and while the letters were being sorted at the office, where the prisoner was employed, the letter was placed in a heap of letters which he was about to sort, and which he was about to deliver. The letter was not delivered, and the marked sovereign was found in the prisoner's pocket. The sovereign was one of those that are occasionally found on the floor of the general post office, having fallen out of letters; they are collected, and deposited with one of the officers of the post office, and form a fund which is carried to the credit of the public, under the direction of the Postmaster-General. Upon a case reserved, the judges were unanimously of opinion that the objection, that it was not a post letter or a letter put into the post must prevail; the statute only applying to letters put into the post in the ordinary way, but that the conviction for stealing the sovereign was right, the sovereign must be considered in point of law as the property of the Postmaster-General, all the persons in the office being his servants; and therefore the sovereign was correctly described as the sovereign of the Postmaster-General; it was his sovereign against all the world except the owner of it (*a*).

So where upon an indictment for stealing a post letter, it appeared that the post office authorities, suspecting the prisoner, caused to be made up a letter and enclosed money therein, and it had the usual postage stamp on it. An inspector, delivering it in at the window of the outer hall of the general post office personally to another inspector, who handed

(*z*) R. *v.* Bickerstaff, 2 C. & K. 761. See R. *v.* Glass, 1 Den. 215; 2 C. & K. 395, where a letter carrier was entrusted with money in a similar manner to obtain money-orders, and he was held not guilty of stealing the money as he had no intention to steal it when he received it.

(*a*) R. *v.* Rathbone, C. & M. 220: 2 Mood. 242.

it to a third inspector who locked it up for the night, and then handed it to a sorter who took an opportunity when the prisoner did not observe him of taking up some letters, which the prisoner had to sort, and mixed the letter in question with them, and placed the whole on the prisoner's seat, and directed the prisoner when he had sorted them to take them up to an office in due course. The prisoner opened and secreted the letter in question. In the ordinary course of posting a letter at the outer hall of the general post office it would have been placed in the receiving box in the outer hall. Upon a case reserved it was held that the letter was not a post letter within the meaning of the Act; for no one received the letter who was authorised so to do, and the statute only applies to letters put in the post in the ordinary way (*b*).

The prisoner was indicted for stealing a post letter containing a sovereign. In consequence of suspicion a sheet of paper was folded up as a letter by a person connected with the post office and addressed to a feigned address, and a marked sovereign was enclosed; and it was then posted at the post office where the prisoner was on duty. When the bag was made up the postmistress examined the letter, and expressed her opinion that it contained money, in which opinion the prisoner coincided. By mistake the letter was not stamped, but put into the bag in the precise state in which it had been posted. The prisoner went with the letter bag to another post office, as it was his duty, where on examination of the bag it was discovered that the letter was missing, and when about to be searched the prisoner took the letter from his pocket and begged to be forgiven. It was contended that this was not a 'post letter,' as the paper contained no writing, was addressed to an imaginary person, and did not bear any post mark; but the objection was overruled and the prisoner convicted (*c*).

The prisoner was indicted for stealing a post letter containing money. A letter was made up and sealed and half a sovereign was enclosed in it. This letter, with two stamps upon it, was dropped into the box of a receiving-house where the prisoner was employed. The address was fictitious, and the letter was posted only to test the honesty of the prisoner. The prisoner, instead of transmitting this letter to the general post office, abstracted it from the receiving-box, opened it, took out the half-sovereign and kept both the letter and money, meaning to appropriate them to his own use. The jury found the prisoner guilty, and, upon a case reserved, the judges were unanimously of opinion that this was a post letter, and therefore the conviction was right (*d*).

Valuable Security.—Under the present Post Office Act the words valuable security have the same meaning as in the Larceny Act, 1861 and the Forgery Act, 1861 (*e*).

(*b*) R. *v.* Shepherd, Dears. 606: 25 L. J. M. C. 52. The case was held to be governed by R. *v.* Rathbone, *supra*.

(*c*) R. *v.* Newey, 1 C. & K. 630 (n.). Gurney, B., said he would confer with some other judges on the point, but the prisoner was afterwards transported without any notice being taken of this point.

(*d*) R. *v.* Young, 1 Den. 194: 2 C. & K. 466. During the argument, Parke, B., said, 'I cannot understand why it is not a post letter; it has all the ingredients of the definition in the statute; and whether it can be delivered or no, seems beside the question.' In R. *v.* Gardner, 1 C. & K. 628, Pollock, C.B., held that a letter addressed to a fictitious person could not be considered a letter at all and certainly was not a post letter, but in R. *v.* Young (*supra*) he intimated that he had reason to think this dictum was incorrect.

(*e*) *Vide ante*, p. 1432.

It was decided on 7 Geo. III. c. 50 (rep.) that a bill of exchange might be laid in the indictment as a warrant for the payment of money. The prisoner, a clerk employed in a post office was charged in the indictment with stealing from a letter a certain warrant for the payment of money; and it was objected on his behalf that the instrument in question was not according to the true construction of the statute, a warrant for the payment of money, but a post bill, note, or bill of exchange. But the judges held that the indictment was well laid; as the instrument, though it was a bill of exchange, was also a warrant for the payment of money, that it was a voucher to the bankers, or drawees, if genuine, for the payment, and that it might also have been laid as a draft (*f*).

Where the indictment charged the prisoner, as a person employed in sorting letters in the post office, with secreting a letter, containing a draft purporting to be drawn in L., but which appeared to have been drawn at M. without having any stamp upon it, contrary to 31 Geo. III. c. 25, s. 4 (rep.), it was held, that this was not a draft for the payment of money within the repealed 7 Geo. III. c. 50, s. 1 (*g*).

Where the letter embezzled was described as having contained several notes, it was held to be sufficient to prove that it contained any one of them; and also that if the instrument is upon the face of it a note, the maker's signature need not be proved. In the same case it was also held that upon an indictment stating the prisoner to have been employed in two branches of the post office, proof of his having been employed in either is sufficient (*h*).

In R. *v.* Ranson (*i*) upon an indictment on 7 Geo. III. c. 30, s. 1 (rep.), it was held that a servant of the post office who secreted a letter containing the *paid notes* of a country bank, which were in the course of being conveyed from the London bankers, who paid them, to the country bankers, for the purpose of being re-issued, had committed an offence within the statute; as the notes, though not re-issued, were considered as retaining the character and falling within the description of promissory notes.

Evidence.—The post office marks in town or country, proved to be such, are evidence that the letters, on which they appear, were in the office to which those marks belong at the dates which they specified (*j*).

Upon an indictment for stealing a letter the same proof of an asportation is sufficient, as in the case of stealing any other chattel (*k*).

Stealing Letters.—The prisoner intending to steal the mail bags, went one night, about the usual time, to a post office, and, pretending to be the mail guard, obtained from the person who was there, the bags of letters, which were let down to him from out of the window of the post office by a string, from whence he took them, and immediately made off.

(*f*) R. *v.* Willoughby, 2 East, P. C. 581. Cf. R. *v* Shepherd, ibid. 582.

(*g*) R. *v.* Pooley, 2 Leach, 887; 3 B. & P. 311; R. & R. 12. See R. *v.* Yates, 1 Mood. 170, *ante*, p. 1272.

(*h*) R. *v.* Ellins, R. & R. 188.

(*i*) 2 Leach, 1090, R. & R. 232, *ante*, p. 1274. And see R. *v.* Clarke, R. & R. 181, *ante*, p. 1269.

(*j*) In R. *v.* Plumer, R. & R. 264, it seems to have been considered that though a letter found upon the prisoner might properly be read, it was not evidence of the facts stated in it, and that such facts must be proved by other evidence. See *post*, pp. 2099 *et seq.* 'Evidence.'

(*k*) See R. *v.* Poynton, L. & C. 247; 32 L. J. M. C. 29, *ante*, p. 1179.

Upon these facts the prisoner was convicted on a count in the indictment for stealing the letters out of the post office ; and the case being submitted to the consideration of the twelve judges, they were all of opinion that the conviction was right ; and that the artifice of the prisoner, in obtaining the delivery of the letters, in the bag, out of the house, was the same as if he had actually taken them out himself (*l*). In this case the property did not pass ; as the postmaster had no property in the mail bags to part with (*m*).

The prisoner fraudulently induced a postman to retain and hand over to him certain letters coming through the post, instead of delivering them to the persons to whom they were addressed. He was convicted of stealing one of these letters and the Court held the conviction was right. The prisoner was either a principal felon, or an accessory before the fact (*n*).

On an indictment for stealing post letters, it appeared that the prisoner had been in the service of C. & Co., and had been accustomed to go for them and get their letters at the post office ; and after he left their service a person, not identified, went to the post office, and obtained five letters for C. & Co., and on the same day these letters were proved to have been in the prisoner's possession ; Channell, B., left the case to the jury, in accordance with these cases in which it has been held, that prisoners who had obtained goods by fraud were guilty of larceny (*o*).

The words 'every person' of the present statute include persons employed by the post office as well as other persons : though it was supposed to have been decided that 7 Geo. III. c. 50, s. 2 (rep.) did not extend to servants of the post office (*p*). But the report of such decision has been mentioned as incorrect. And it is clear that a person might have been convicted under 52 Geo. III. c. 143, s. 3 (rep.) for stealing a letter though such person had an employment in the post office, especially if such letter did not come to him in the course of his employment. The prisoner was employed by the post office to deliver letters, and not to sort them ; but he did sort them, when by rights he ought not to have done so, and, whilst sorting, stole a letter. The indictment charged him as a sorter with secreting, and as a common person (under sect. 3 of the 52 Geo. III.) with stealing ; but as it appeared that he ought not to have been allowed to sort, he was acquitted of secreting, and it was then urged that he could not be convicted under the third section, because he was a person employed in the post office. A case being reserved, the judges stated that the report of R. *v.* Pooley was, as to the point in question,

(*l*) R. *v.* Pearce, 2 East, P. C. 603, an indictment under 7 Geo. III. c. 50, s. 2 (rep.).

(*m*) This was noticed as distinguishing the case from R. *v.* Atkinson, 2 East, P. C. 673. *Ante*, p. 1210.

(*n*) R. *v.* James, 24 Q.B.D. 439 ; 59 L. J. M. C. 96.

(*o*) R. *v.* Gillings, 1 F. & F. 36. See R. *v.* Jones, 1 Den. 188 (*ante*, p. 1205). In all such cases the postmaster has no power to part with the property in the letter, and therefore the offence is larceny and not false pretences. See R. *v.* Kay, Dears. & B. 231, *ante*, p. 1226, and R. *v.* Dowdeswell, cited Roscoe, Cr. Ev. (13th ed.), p. 541 and R. *v.* Middleton, *ante*, p. 1210.

(*p*) R. *v.* Pooley, R. & R. 31 ; 1 East, P. C. Addenda, xvii. ; 3 B. & P. 315. R. *v.* Skutt, 2 Leach, 904 (*cit.*) Cf. R. *v.* Howatt, 2 East, P. C. 604. A different objection is mentioned as the ground of the acquittal in R. *v.* Skutt in another report of it (1 Leach, 106, 2 East, P. C. 582), namely, that the letters contained *money*, and not any security relating to the payment of money mentioned in the statute.

mistaken; that R. *v.* Simpson (*q*) was in point the other way; that a man who stole was not less a person stealing because he had some employment in the office; and that upon a contrary construction if a person in the office stole, but not in the course of his employment he would be unpunishable (*r*).

One count charged the prisoner, whilst employed in the post office, with stealing two letters containing money, another with secreting the letters. The prisoner's duty was to open the bags brought to the table at which he was placed, take out the letters and separate them. A bag which contained amongst others the letters in question, was brought to the table. Twenty or thirty bags were opened on the same table by the prisoner at the same time, and the letter-bills of the several bags were by him spread before him on the table. It then became his duty to separate the registered letters and unpaid letters from the unregistered paid letters, and to fold the registered letters in the bills, and place them in a drawer. Two registered letters were found in the pan of the water-closet immediately after he left it. The jury found that the prisoner, having committed a mistake in sorting the letters in question, secreted them in the water-closet, in order to avoid the supposed penalty attached to such mistake; and, upon a case reserved, it was held that the evidence supported both counts. First, as to the secerting, no purpose was alleged in the indictment; but the words and object of the Act made it clear that no purpose need be stated. Particular duties are imposed on the servants of the post office; they are not to secrete letters for any purpose whatever. If they secrete letters, be their purpose in doing so what it may, they are equally guilty (*s*). Secondly, as to the larceny. The act was clearly a larceny; the prisoner could have no other intention than to deprive the post office authorities of the letters, which were their property; he put them in a place whence in a moment they would naturally disappear. They were therefore meant to be entirely withdrawn from the owner (*t*).

Under 52 Geo. III. c. 143, s. 3 (rep.) which made it felony to steal 'from or out of any post office or house or place for the receipt or delivery of letters;' it was held that a receiving-house was not a 'post office' but 'a place for the receipt of letters,' and that the whole shop and not merely the letter-box was to be considered 'a place for the receipt of lettters'; and that in order to constitute a stealing from or out of such place the letter must be carried out of the shop, and therefore, if a person took a letter and stole its contents in the shop, that was not an offence within that section of the Act (*u*).

At the Liverpool post office there was a set of pigeon-holes, into which

(*q*) O. B. [1810], Cor. Lord Ellenborough, Thomson, B., and Lawrence, J.

(*r*) R. *v.* Brown, MS. Bayley, J., and R. & R. 32 (n.). And see R. *v.* Salisbury, 5 C. & P. 155, where Patteson, J., held that a letter carrier might be convicted of stealing a letter out of a post-office upon an indictment under 52 Geo. III. c. 143, *supra*.

(*s*) See R. *v.* Douglas, 13 Q.B. 42, and Holloway *v.* R., 17 Q.B. 317; 2 Den. 287.

(*t*) R. *v.* Wynn, 1 Den. 365. 'The moment the prisoner dropped the letters into the water-closet, there was an *asportavit*, and the intent is shewn by the place where they were dropped.' Per Parke, B.

(*u*) R. *v.* Pearson, 4 C. & P. 572, Littledale and Bosanquet, JJ. See also R. *v.* Harley, 1 C. & K. 89, *ante*, p. 1437.

letters for certain merchants, who paid a guinea a year, were placed immediately on their arrival; and by this means those merchants were enabled to get those letters sooner than they otherwise would do. On an indictment under 52 Geo. III. c. 143 (rep.) for stealing such letters the Court overruled an objection that as soon as the letters were deposited in the pigeon-holes they ceased to be in the post office, and consequently that the indictment for stealing from the post office could not be sustained (*v*).

Where a mail rider had fixed the mail portmanteau on the saddle of his horse, containing four bags of letters, and had slung the bridle of his horse on a staple at the stable door of the post office about thirty yards from the door of the house, and then went into the house to put on his great-coat and stayed about two minutes, and in the interval the robbery took place; it was held to be a stealing from the possession of the mail rider within 52 Geo. III. c. 143, s. 3 (rep.) (*w*).

(*v*) R. *v.* Brett, 1 Lew. 228, Vaughan, B.

(*w*) R. *v.* Robinson, 2 Stark. (N. P.) 485, Wood, B. The words of the Act were 'from any carriage or the possession of any person employed to convey letters.'

CANADIAN NOTES.

THEFT OF POSTAL ORDERS, MAILABLE MATTER, ETC.

Theft of Post Letters, etc.—See Code sec. 364.

A confession by an accused person charged with stealing post letters, induced by a false statement made to him by a detective employed by the prosecution, in presence of a post office inspector, that the accused had been seen taking the letters, will render the confession inadmissible in evidence against the accused. R. v. MacDonald (1896), 2 Can. Cr. Cas. 221.

A decoy letter upon which postage had been paid, written by a post office inspector and delivered by him to the proper sorting office for distribution, is a "post letter" within the meaning of Cr. Code secs. 364 and 365, and of the Post Office Act. R. v. Ryan (1905), 9 Can. Cr. Cas. 347, 9 O.L.R. 137.

A decoy letter, duly stamped and placed by post office officials amongst the letters at a post office for the purpose of testing the honesty of the letter carrier whose duty it was to deal with the same, is none the less a "post letter" because of its being directed to a fictitious address. If the carrier should fail to report the letter as required by the post office regulations or to return it within a reasonable time to his superior officer, he would be guilty of unlawfully detaining the letter under the Post Office Act. Mayer v. Vaughan (1901), 5 Can. Cr. Cas. 392, 6 Can. Cr. Cas. 68.

Theft of Post Letters, Parcels, Postal Keys, etc.—See Code sec. 365.

Stealing Letters.—Evidence is admissible of a confession made by the accused in answer to questions put to him prior to the laying of the charge by a person in authority over him, if it be proved affirmatively that no threat was made nor inducement held out in respect thereof. On a Crown witness being interrogated as to an alleged confession made by the accused, and the defendant objecting to its being received, counsel for the defendant may be allowed to intervene on the examination to cross-examine on the question of the confession being a voluntary one, with a view of excluding evidence thereof. R. v. Ryan, 9 Can. Cr. Cas. 347, 9 O.L.R. 137.

A confession by the accused person charged with stealing post letters from a post office box is not admissible in evidence against him if it were induced by a false statement made to him by a detective employed by the prosecution in presence of a post office inspector,

that the accused had been seen taking the letters. R. v. MacDonald (1896), 2 Can. Cr. Cas. 221 (N.W.T.).

Other Postal Offences and Penalties.—See R.S.C. (1906) ch. 66.

(*a*) *Abstracting Letter from Post Bag.*—Sec. 117.

(*b*) *Unlawfully Issuing Money Order.*—Sec. 118.

(*c*) *Forging Postage Stamps.*—Sec. 119.

(*d*) *Forging Post Office Money Order.*—Sec. 120.

(*e*) *Unlawfully Opening Post Bag.*—Sec. 121.

(*f*) *Inclosing Explosive Substance.*—Sec. 122.

(*g*) *Inclosing Letter in Parcel.*—Sec. 123.

(*h*) *Removing Stamps or Marks.*—Sec. 124.

(*i*) *Abandoning or Obstructing Mail.*—Sec. 125.

(*j*) *Carrier Drunk on Duty.*—Sec. 126.

(*k*) *Refusing to Allow Mail to Pass Through Toll Gate.*—Sec. 127.

(*l*) *Detaining Mail at Ferry.*—Sec. 128.

(*m*) *Issuing Money Order Before Payment.*—Sec. 129.

(*n*) *Mutilating Official Books.*—Sec. 130.

(*o*) *Hypothecating Postage Stamps.*—Sec. 131.

(*p*) *Wilfully Contravening Regulations.*—Sec. 132.

(*q*) *Conversion of Public Moneys by a Post Office.*—Sec. 133.

(*r*) *None but Postmasters to Sell Postage Stamps.*—Sec. 134.

(*s*) *Using Postage Stamps Used Before.*—Sec. 135.

(*t*) *Placing Post Office in a House Without Authority.*—Sec. 136.

Stealing Mailable Matter.—See sec. 366.

Destroying Mailable Matter.—Sec. 510(*d*).

CHAPTER THE TWENTY-THIRD.

OF LARCENY AND EMBEZZLEMENT OF NAVAL AND MILITARY STORES (*a*).

THE Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), s. 33, provides that 'every person subject to this Act who shall wastefully expend embezzle, or fraudulently buy, sell, or receive any ammunition, provisions, or other public stores, and every person subject to this Act who shall knowingly permit any such wasteful expenditure, embezzlement, sale, or receipt, shall suffer imprisonment, or such other punishment as is hereinafter mentioned.' (See sects. 52–57 of the Act.)

The Army Act, 1881 (*b*) (44 & 45 Vict. c. 58), s. 17, provides that 'every person subject to military law who commits any of the following offences; that is to say, Being charged with or concerned in the care or distribution of any public or regimental money or goods, steals, fraudulently misapplies, or embezzles the same, or is concerned in or connives at the stealing, fraudulent misapplication, or embezzlement thereof or wilfully damages any such goods, shall on conviction by court-martial be liable to suffer penal servitude, or such less punishment as is in this Act mentioned.' (See sect. 44 of the Act.)

By sect. 18, 'Every soldier who commits any of the following offences; that is to say . . . (4) steals or embezzles or receives knowing them to have been stolen or embezzled any money or goods the property of a comrade or of an officer, or any money or goods belonging to any regimental mess or band, or to any regimental institution, or any public money or goods (*c*). . . . shall on conviction by court martial (*d*) be liable to suffer imprisonment, or such less punishment as is in this Act mentioned' (*e*).

(*a*) 38 & 39 Vict. c. 25, which consolidates and amends the Acts relating to the protection of public stores, will be found *post*, p. 1493.

(*b*) This Act is kept in force by the Army (Annual) Acts. See the Army (Annual) Act, 1909.

(*c*) S. 25 contains provisions relating to false documents.

(*d*) S. 41 provides for offences to be triable in civil Courts.

(*e*) See s. 44 of the Army Act.

CHAPTER THE TWENTY-FOURTH.

OF LARCENY, ETC., OF ARTICLES IN PROCESS OF MANUFACTURE.

PARTICULAR provisions have been enacted by several statutes for punishing the misappropriation of articles in course of manufacture, which, as they relate to petty offenders, (principally workmen employed in particular manufactures) and render them liable to summary conviction, do not come within the scope of this treatise (*a*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 62 (*b*), 'Whosoever shall steal, to the value of ten shillings, any *woollen*, linen, hempen, or cotton yarn, or any goods or article of silk, woollen, linen, cotton, *alpaca, or mohair*, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process or progress of manufacture, in any building, field, or other place, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . ' (*c*).

Questions may arise upon the words 'laid, placed, or exposed during any stage, process, or progress of manufacture in any building, field, or other place.' Where the prisoner was indicted upon 18 Geo. II. c. 27 (rep.) for stealing yarn out of a bleaching-ground, the evidence was that the yarn had been spread upon the ground, but was afterwards taken up and thrown into heaps in order to be carried into the house, in which state some of it was stolen by the prisoner. Thompson, B., held that the case did not come within the statute, as there was no occasoin to leave the yarn upon the ground in the state in which it was taken by the prisoner (*d*).

Under 7 & 8 Geo. IV. c. 30, s. 3 (rep.) it was held that goods remained in a 'stage,' 'process,' 'or 'progress of manufacture,' though the texture was complete, if they were not yet brought into a condition fit for sale (*e*).

(*a*) *E.g.*, 22 Geo. II. c. 27; 17 Geo. III. c. 56, and the Hosiery Act, 1843 (6 & 7 Vict. c. 40).

(*b*) Framed on 7 & 8 Geo. IV. c. 29, s. 16, (E) and 9 Geo. IV. c. 55, s. 16 (I), with the additions in *italics*.

(*c*) The omitted words are repealed. As to punishment see *ante*, Vol. i., pp. 211, 212.

(*d*) R. *v.* Hugill, *cor.* Thompson, B., at York, 4 Bl. Com. 240, note (8) (ed. 1800). In the repealed statute, however, the words were 'laid, placed, or exposed to be printed, &c.'

(*e*) R. *v.* Woodhead, 1 M. & Rob. 549, Coleridge, J.

CANADIAN NOTES.

LARCENY OF ARTICLES IN PROCESS OF MANUFACTURE.

Theft of Goods in Process of Manufacture.—See Code sec. 388.

Fraudulently Disposing of Goods Intrusted for Manufacture.—Code sec. 389.

CHAPTER THE TWENTY-FIFTH.

OF LARCENY BY TENANTS AND LODGERS (*a*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 74 (*b*), 'Whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping; and in case the value of such chattel or fixture shall exceed the sum of five pounds, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . (*c*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping; and in every case of stealing any chattel in this section mentioned it shall be lawful to prefer an indictment in the common form as for larceny, and in every case of stealing any fixture in this section mentioned to prefer an indictment in the same form as if the offender were not a tenant or lodger (*d*), and in either case to lay the property in the owner or person letting to hire' (*e*).

(*a*) It was long doubted whether, as a lodger had a special property in the goods which were let with his lodgings, the stealing of them was felony (Raven's alias Aston's case, Kel. (J.) 81, 1 Hawk. c. 43, s. 2); and it was at length decided by a majority of the judges that it was not. R. *v.* Meeres, 1 Show. 50; 89 E. R. 441. The ground of decision was that the lodger, and not the landlord, has possession during the time for which the lodgings are let, and therefore the landlord cannot maintain trespass for taking the goods. R. *v.* Belstead, MS. Bayley, J., and R. & R. 411. In consequence of this decision, 3 Will. & M. c. 9, s. 5, was passed; but several points of nicety and difficulty arose upon the construction of this statute, and upon the statement of the contract in the indictment, and it was repealed by 7 & 8 Geo. IV. c. 27, and 7 & 8 Geo. IV. c. 29, s. 45, was substituted.

(*b*) Taken from 7 & 8 Geo. IV. c. 29, s. 45 (E); 9 Geo. IV. c. 55, s. 38 (I); and 12 & 13 Vict. c. 11, s. 2.

(*c*) The words omitted are repealed. As to minimum term of penal servitude and term of imprisonment see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*d*) See 24 & 25 Vict. c. 97, s. 31, *ante*, p. 1258.

(*e*) *Vide ante*, p. 1281, and *post*, p. 1940.

CANADIAN NOTES.

Theft by Tenants, Lodgers, etc.—Code sec. 360.
Indictment for.—Code sec. 848.

CHAPTER THE TWENTY-SIXTH.

FRAUDS BY BANKRUPTS AND DEBTORS.

PART II. of the Debtors Act, 1869 (32 & 33 Vict. c. 62), as amended and extended by the Bankruptcy Acts of 1883 and 1890, provides for the punishment of offences by fraudulent debtors.

By sect. 11, 'Any person adjudged bankrupt (*a*), . . . shall, in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour; that is to say,

'(1) If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud (*b*):

'(2) If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud:

'(3) If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intention to defraud:

(*a*) By sect. 163 (2) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), 'The provisions of the Debtors Act, 1869, as to offences by bankrupts shall apply to any person whether a trader or not in respect of whose estate a receiving order has been made as if the term "bankrupt" in that Act included a person in respect of whose estate a receiving order has been made.' The Act of 1869 originally included cases where the debtor liquidated his affairs by arrangement. That form of liquidation was abolished in 1883, and the portions of the sections relating to such liquidation were repealed in 1893 (8. L. R.).

(*b*) The disclosure is not restricted to property in possession of the bankrupt at the commencement of his bankruptcy. On the 15th of May, the prisoner gave an order for six tons of steel. On arrival at his wharf he did not allow it to be unloaded, and on the 13th of June sold it at 14*s.* per cwt. for cash. Its estimated value was 18*s.* per cwt. On the 28th June a petition in bankruptcy was filed against the prisoner. He was adjudicated bankrupt on the 29th. On the 4th of July a receiver was appointed, who was subsequently made trustee, but the bankrupt did not discover the above-mentioned transaction until it was forced out of him on the 26th of July before the Registrar. Held, that there was a case to go to the jury. R. *v.* Bolus, 11 Cox, 610. R. *v.* Michell, 50 L. J. M. C. 76: 14 Cox, 490. The defendant tendered evidence to shew that before he was adjudicated bankrupt he had, at a private meeting of his creditors, disclosed the transaction for which he was indicted. The Court held that this evidence ought to have been received as tending to negative the intent to defraud; R. *v.* Wiseman, 71 L. J. K.B. 128; 20 Cox, 144. See also R. *v.* Hill, 1 C. & K. 168. R. *v.* Hilton, 2 Cox, 318. R. *v.* Ingham, Bell, 181; 29 L. J. M. C. 18. R. *v.* Mamser, 4 F. & F. 45. R. *v.* Gordon, Dears. 586.

'(4) If after the presentation of a bankruptcy petition [by or](*c*) against him . . . or within four months next before such presentation . . . he conceals any part of his property to the value of ten pounds (*d*) or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud:

'(5) If after the presentation of a bankruptcy petition [by or](*c*) against him . . . or within four months next before such presentation . . . he fraudulently removes (*e*) any part of his property (*f*) of the value of ten pounds or upwards:

'(6) If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud:

'(7) If, knowing or believing that a false debt has been proved (*g*) by any person under the bankruptcy . . . he fail for the period of a month to inform such trustee as aforesaid thereof:

'(8) If after the presentation of a bankruptcy petition [by or](*c*) against him . . . he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless the jury is

(*c*) By 46 & 47 Vict. c. 52, s. 163 (1), 'Sects. 11 and 12 of the Debtors Act, 1869, . . . shall have effect as if there were substituted therein for the words "if after the presentation of a bankruptcy petition against him," the words "if after the presentation of a bankruptcy by or against him."'

(*d*) See R. *v.* Forsyth, R. & R. 274. R. *v.* Davison, 7 Cox, 158. R. *v.* Creese, *infra*.

(*e*) Where a bankrupt had removed certain of his goods, as it was alleged, with intent to defraud his creditors. Parke, B., held that if the goods had not been taken possession of by the assignee or the messenger, the indictment must be under the (repealed) Bankruptcy Act (6 Geo. IV. c. 16), s. 112; but that if the assignee or messenger had actually taken possession of the goods, and they were afterwards removed by the bankrupt, an indictment for larceny might be sustained; but in such case, however, the trading, petitioning creditor's debt, act of bankruptcy, &c., must be regularly proved; and even then if the bankrupt meant *bona fide* to dispute the bankruptcy, that would prevent the taking from being a felony. R. *v.* Harris, Monmouth Spring Assizes, 1844, MSS. C. S. G.

(*f*) A debtor, on October 17, 1873, filed his petition for the liquidation of his affairs by arrangement, and a trustee was duly appointed. In December, 1872, he had assigned his property to L. and W., to whom he was indebted (L. having then advanced a further sum of £350 for the purpose of enabling the business to be carried on) upon trust, for the benefit of L. and W., and his scheduled creditors. There were other creditors than those scheduled. On October 14, 16, and 17, 1873, the debtor fraudulently removed portions of the property so assigned to L. and W., and in respect of these removals he was indicted under the Debtors Act, 1869, s. 11, sub-s. 5, for having within four months next before the commencement of the liquidation of his affairs, fraudulently removed part of his property, of the value of £10 and upwards. Held, that the offence was not proved, for the property was not his at the time of the removal, but that of L. and W., the trustees, under the assignment. Secondly, that the assignment required to be registered under the Bills of Sale Act, 17 & 18 Vict. c. 36 (rep.), and was inoperative against the trustees under the liquidation. R. *v.* Creese, L. R. 2 C. C. R. 105; 93 L. J. M. C. 51. But in R. *v.* Humphris [1904], 2 K.B. 89; 73 L. J. K.B. 464, a debtor executed a deed of assignment for the benefit of his creditors, whereby he assigned all his property (and money) to a trustee upon trust to sell, and out of the proceeds to pay his own expenses and to distribute the balance amongst the creditors. The deed, though executed by the trustee and the bankrupt, was not communicated to any of the creditors. The trustee took possession of all the debtor's effects, except a sum of £161, which the debtor retained. The debtor afterwards quitted England, taking with him £120, part of the £161. He was adjudicated bankrupt within four months, and the Court held that the £120 was part of 'his' property which ought by law to be divided amongst his creditors within s. 12 (*post*), and that he was rightly convicted under that section, and distinguished R. *v.* Creese (*supra*).

(*g*) See R. *v.* Beaumont, 12 Cox, 183.

satisfied that he had no intent to conceal the state of his affairs or to defeat the law :

'(9) If after the presentation of a bankruptcy petition [by or] (*h*) against him . . . or within four months next before such presentation (*i*) . . . he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification (*k*) of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :

'(10) If after the presentation of a bankruptcy petition [by or] (*h*) against him . . . or within four months next before such presentation . . . he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law (*l*) :

'(11) If after the presentation of a bankruptcy petition [by or] (*h*) against him . . . or within four months next before such presentation . . . he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs :

'(12) If after the presentation of a bankruptcy petition [by or] (*h*) against him . . . or at any meeting of his creditors within four months next before such presentation . . . he attempts to account for any part of his property by fictitious losses or expenses :

'(13) [If within four months next before the presentation of a bankruptcy petition by or against him or in case of a receiving order made under sect. 103 of the Bankruptcy Act, 1883, before the date of the order (*m*)] . . . he, by any false (*n*) representation or other fraud, has obtained any property on credit (*o*) and has not paid for the same (*p*) :

'(14) [If within four months next before the presentation of a bankruptcy petition by or against him, or in case of a receiving order made under sect. 103 of the Bankruptcy Act, 1883, before the date of the order (*m*)] . . . he, being a trader, obtains, under the false pretence of

(*h*) See note (*c*), p. 1452.

(*i*) 'Such presentation' includes the presentation of the petition *by* as well as *against* the bankrupt. R. *v.* Beck, 16 Cox, 718. See also note (*m*), *infra*.

(*k*) See R. *v.* Leatherbarrow, 10 Cox, 637, where an indictment under the repealed Act against a bankrupt for altering his books with intent to defraud his creditors, did not state that the alteration was done *unlawfully*, and the indictment was held good, Bovill, C.J.

(*l*) See R. *v.* Ingham, Bell, 181 ; 29 L. J. M. C. 18, decided under 12 & 13 Vict. c. 106, s. 252 (rep.).

(*m*) The words in brackets were by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 26, substituted for the words 'if within four months next before the presentation of a bankruptcy petition against him.' The section is not retrospective. R. *v.* Griffiths [1891], 2 Q.B. 145 ; 60 L. J. M. C. 93.

(*n*) By a false representation is meant one which the debtor knows to be false. R. *v.* Cherry, 12 Cox, 32. It is sufficient in arrest of judgment upon an indictment for an offence under sub-sec. 13, to allege that the bankrupt 'by certain false representations did obtain property on credit and has not paid for the same.' R. *v.* Watkinson, 12 Cox, 271. R. *v.* Pierce, 16 Cox, 213 ; 56 L. J. M. C. 85, overruling R. *v.* Bell, 12 Cox, 37.

(*o*) Obtaining goods on approval was not an obtaining of credit within 12 & 13 Vict. c. 106, s. 221 (rep.). R. *v.* Lyons, 9 Cox, 229, Martin, B.

(*p*) The prisoner made false representations in Scotland which induced the person to whom they were made to supply him with goods on credit in England. The Court held that the prisoner might properly be tried in England for offences under this sub-section and under sect. 13 (*post*). R. *v.* Ellis [1899], 1 Q.B. 230, *ante*, Vol. i. p. 54.

carrying on business and dealing in the ordinary way of his trade, any property on credit (*q*) and has not paid for the same, unless the jury is satisfied that he had no intent to defraud :

'(15) [If within four months next before the presentation of a bankruptcy petition by or against him, or in case of a receiving order made under sect. 103 of the Bankruptcy Act, 1883, before the date of the order (*qq*)] . . . he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade (*r*) any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud (*s*) :

'(16) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors, or any of them, to any agreement with reference to his affairs, or his bankruptcy . . . '

By sect. 12, 'If any person who is adjudged a bankrupt (*t*) . . . after the presentation of a bankruptcy petition [by or] (*u*) against him . . . or within four months before such presentation . . . quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour (*v*).

By sect. 13, 'Any person (*w*) shall in each of the cases following be

(*q*) See R. *v.* Boyd, 5 Cox, 502, under 12 & 13 Vict. c. 106, s. 253 (rep.).

(*qq*) See note (*m*), *ante*, p. 1453.

(*r*) The words 'otherwise than in the ordinary way of his trade' govern all the words 'pawns, pledges, or disposes of,' R. *v.* Juston, 61 J. P. 505, Wright, J.

(*s*) A grocer obtained goods of his trade upon credit. Soon after receiving them, and before they were paid for, he executed a bill of sale in favour of his sister who lived with him. This bill of sale, which was given in consideration of a debt owing from him to his sister, passed away all his stock-in-trade and effects whatsoever, including the above-mentioned unpaid-for goods. Having been made bankrupt, he was indicted for misdemeanor under this sub-section. Held, that the production of the adjudication under the seal of the Court was sufficient evidence of the bankruptcy. That disposing of the goods by bill of sale was not disposing of them in the 'ordinary way of trade,' and, therefore, that as the property which the prisoner had obtained on credit, and had not paid for, had passed by the bill of sale, he came within the section unless he had no intent to defraud. But that assigning the whole of his property to one creditor, reserving nothing for the others, shewed an intent to defraud. R. *v.* Thomas, 11 Cox, 535, Lush, J. See R. *v.* Bolus, *ante*, p. 1451, note (*b*). A trader, when insolvent, and within four months of his bankruptcy, obtained goods on credit for exportation, and at once pledged the bill of lading; and could give no account of the application of the money so raised. The trustees reported that he had been guilty of offences under sub-sects. 14 and 15 of sect. 11 of the Debtors Act, 1869, and applied under sect. 16 for an order for his prosecution. Held, that to bring the case within sub-sects. 14 and 15 of sect. 11 you must shew dealings with the goods themselves otherwise than in the ordinary course of trade, and that the application of the money obtained by an ordinary dealing was for this purpose immaterial. *Ex parte* Brett, 1 Ch. D. 159; 45 L. J. Bank. 15.

(*t*) See note (*a*), p. 1451.

(*u*) See note (*c*), p. 1452.

(*v*) It appears that an infant cannot be convicted of appropriating any part of his property 'which ought by law to be divided among his creditors,' where the debts proved against his estate are only trade debts and not necessaries. R. *v.* Wilson, 5 Q.B.D. 28 : 49 L. J. M. C. 13. See also R. *v.* Cole 1 Ld. Raym. 443. Belton *v.* Hodges, 9 Bing, 365. 1 Hawk. c. 49, s. 7. Lovell *v.* Beauchamp [1894], App. Cas. 607. As to the meaning of 'his' property see note (*f*), *ante*, p. 1452.

(*w*) Whether there have been proceedings in bankruptcy or not. R. *v.* Rowlands, 8 Q.B.D. 530 ; 51 L. J. M. C. 51. As to obtaining credit by persons adjudged bankrupt, and as to obtaining credit by undischarged bankrupts, *vide ante*, p. 1453, and *post*, p. 1460.

deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say,—

'(1) If in incurring any debt or liability he has obtained credit under false pretences (*x*), or by means of any other fraud (*xx*):

'(2) If he has with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property:

'(3) If he has with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.'

During the pendency of an action for breach of promise of marriage, but before judgment was given, the defendant made and executed a bill of sale of his furniture and effects with intent to defeat any judgment that the plaintiff might obtain. After judgment had been given in the plaintiff's favour the defendant was prosecuted under the above sub-sect. (2), but the Court held that at the time when the bill of sale was given the plaintiff was not a creditor within the meaning of the sub-section (*y*). Where the defendant was indicted under sub-sect. (3) and the evidence proved an intent to defraud one particular creditor but the chairman of Quarter Sessions did not leave it to the jury to say whether this was any evidence of intent to defraud his creditors generally, but assumed that intent to defraud one was sufficient, the Court quashed the conviction (*z*).

By sect. 14, 'If any creditor in any bankruptcy . . . wilfully and with intent to defraud, makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding one year, with or without hard labour' (*a*).

By sect. 16, 'Where a trustee in any bankruptcy (*b*) reports to any Court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this Act, or where the Court is

(*x*) Renewing a bill of exchange is obtaining credit under this section. R. *v.* Pierce, 16 Cox, 213; 56 L. J. M. C. 85. And see R. *v.* Peters, and R. *v.* Juby, *post*, p. 1461. A person who orders and consumes a meal at a restaurant without having the means to pay for it is liable to be convicted of obtaining credit by means of fraud within the latter part of this sub-section, but not of obtaining goods by false pretences within sect. 88 of the Larceny Act, 1861. R. *v.* Jones [1898], 1 Q.B. 119; 67 L. J. Q.B. 41. Cf. R. *v.* Cosnett, 20 Cox, 6, R. *v.* Burton, 16 Cox, 62. It must be shewn that the prisoner obtained credit for himself, it is not sufficient to shew that he has obtained it for some one else. R. *v.* Bryant, 63 J. P. 376, Fulton, C.S. The defendant was charged under this section with incurring a debt to a person who let apartments. It was held that evidence of other cases where the defendant had shortly before obtained apartments at other houses and had left without paying, was admissible as tending to establish system and negative accident or mistake. R. *v.* Wyatt [1904], 1 K.B. 88; 73 L. J. K.B. 15. R. *v.* Walford, 71 J. P. 215.

(*xx*) An intent to defraud must be proved. R. *v.* Muirhead, 73 J. P. 31; 25 T. L. R. 88.

(*y*) R. *v.* Hopkins [1896], 1 Q.B. 652.

(*z*) R. *v.* Rowlands, *supra*.

(*a*) The words omitted were repealed in 1893 (8. L. R. No. 2).

(*b*) By the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 164, 'Sect. 16 of the Debtors Act, 1869, shall be construed and have effect as if the term "a trustee in any bankruptcy" included the official receiver of a bankrupt's estate, and shall apply to offences under this Act as well as to offences under the Debtors Act, 1869.' By sect. 168 (1), 'The Court' means the Court having jurisdiction in bankruptcy under this Act.

satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the Court shall, if it appears to the Court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence ' (*c*).

Sect. 17 as to costs is repealed by 7 Edw. VII. c. 19, and replaced by the provisions of that Act, *post*, pp. 2039 *et seq*.

By sect. 18, 'Every misdemeanor under the second part of this Act shall be deemed to be an offence within and subject to the provisions of the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), (*post*, p. 1927) and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to shew that the act charged was not committed with a guilty intent ' (*d*).

By sect. 19, ' In an indictment for an offence under this Act it shall be sufficient to set forth the substance of the offence charged in the words of this Act specifying the offence or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication or any proceedings in, or order, warrant, or document of any Court acting under the Bankruptcy Act, 1869 ' (*e*).

By sect. 20, ' So much of the Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38) as excludes from the jurisdiction of justices and recorders at sessions of the peace or adjournments thereof the trial of persons for offences against any provision of the laws relating to bankrupts, is hereby repealed as from the passing of this Act ; and any offence under this Act shall be deemed to be within the jurisdiction of such justices and recorders.'

By sect. 23 (*f*), ' Where any person is liable under any other Act of Parliament or at common law to any punishment or penalty for any offence made punishable by this Act, such person may be proceeded against under such other Act of Parliament or at common law or under this Act, so that he be not punished twice for the same offence.'

Power of Court to commit for Trial.—By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 165 :

' (1) Where there is in the opinion of the Court (*g*) ground to believe that the bankrupt or any other person has been guilty of any offence which is by statute made a misdemeanor in cases of

(*c*) A trustee who prosecutes a debtor without first obtaining an order of the Court under this section will not, as a general rule, be allowed the costs of the prosecution out of the estate, even though the prosecution was sanctioned by the committee of inspection. In *re* Howes, *ex parte* White [1902], 2 K.B. 290; 71 L. J. K.B. 705.

(*d*) See R. *v.* Bell, 12 Cox, 37, and *post*, p. 1928.

(*e*) This sub-section re-enacts sect. 225 of the repealed Bankruptcy Act, 1861 (24 & 25 Vict. c. 134); and the decisions in R. v. Massey, L. & C. 206; R. *v.* Lands, Dears. 567 ; and R. *v.* Jones, 4 B. & Ad. 345, are no longer law.

By sect. 149 (2) of the Bankruptcy Act, 1883, ' Where by any act or instrument, reference is made to the Bankruptcy Act, 1869, the act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions of this Act.' See p. 1453, note (*n*), and *post*, for decisions as to the indictment.

(*f*) Cf. sect. 33 of the Interpretation Act, 1889, *ante*, Vol. i., pp. 4, 6.

(*g*) By sect. 168 (1), ' The " Court " means the Court having jurisdiction in bankruptcy under this Act,' *i.e.*, the High Court and County Courts within sect. 92.

bankruptcy, the Court may commit the bankrupt or such other person for trial.

'(2) For the purpose of committing the bankrupt or such other person for trial the Court shall have all the powers of a stipendiary magistrate as to taking depositions, binding over witnesses to appear, admitting the accused to bail, or otherwise.

'Nothing in this sub-section shall be construed as derogating from the powers or jurisdiction of the High Court.'

By sect. 166, 'Where the Court orders the prosecution of any person for any offence under the Debtors Act, 1869, or Acts amending it, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the director of public prosecutions to institute and carry on the prosecution.' (*Vide post*, pp. 1924 *et seq.*)

By sect. 167, 'Where a debtor has been guilty of any criminal offence, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge, or that a composition or scheme of arrangement has been accepted or approved.'

Evidence.—By sect. 132, '(1) A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

'(2) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date' (*h*).

By sect. 133, '(1) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.'

'(2) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had.'

By sect. 134, 'Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any Court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document, made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall if it appears to be sealed with the seal of any Court having jurisdiction in bankruptcy or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.'

By sect. 136, 'In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any Court in any proceeding

(*h*) See R. *v.* Levi, L. & C. 597, where it was decided under 12 & 13 Vict. c. 106, s. 233 (rep.), that the Gazette was conclusive evidence against the bankrupt in a criminal proceeding, and that the bankrupt could not take advantage of any irregularity in the proceedings which were put in evidence. The provision as to the Gazette is merely cumulative, and the bankruptcy may be proved by the Gazette or otherwise. R. *v.* Thomas, 11 Cox, 535, Lush, J. See R. *v.* Lowe, 52 L. J. M. C. 122. R. *v.* Raudnitz, 11 Cox, 360. R. *v.* Hilton, 2 Cox, 318. R. *v.* Harris, 4 Cox, 140.

under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the Court, or a copy thereof, purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.'

Examination of Debtor.—By sect. 17, sub-section (8), 'The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to [or by (*i*)] and signed by, the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times' (*j*).

Upon an examination under 12 & 13 Vict. c. 106, s. 17 (rep.) a bankrupt was bound to answer all questions touching 'matters relating to his trade dealings or estate, or which may tend to disclose any recent grant, conveyance, or concealment of his lands,' &c., although his answers might criminate him and such answers might afterwards be given in evidence against him on a criminal charge (*k*).

Under the repealed Bankruptcy Act, 1869, courts of bankruptcy had power to compel bankrupts to give answers although they incriminated themselves and such answers were admissible against them in a criminal prosecution (*l*).

Upon an indictment under the Debtors Act, 1869, an examination of the defendant before the registrar of the bankruptcy Court is admissible, although a promise was made to him before his examination that it should not be used against him or filed (*m*).

On an indictment of a trader for obtaining property on credit under the false pretence of dealing in the ordinary way of his trade within four months before his liquidation, contrary to sect. 11 of the Debtors Act, 1869, it was held that whether the summons was regularly issued or not, the trader by appearing and submitting to be examined, waived the irregularity, if any, and the examination under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) s. 97 (rep.), was properly taken and admissible in evidence against the prisoner on the trial of the indictment (*n*).

By the Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69) s. 54 (*o*), 'If any director, manager, or officer of the company wilfully conceals the name of any creditor of the company who is entitled to object to the proposed reduction' (of capital) 'or wilfully misrepresents the

(*i*) Added by Bankruptcy Act, 1890, sect. 2 (1).

(*j*) Sect. 27 makes provision for the discovery of the debtor's property, and gives power to the Court to examine on oath any person summoned before it concerning the debtor, his dealings, or property. A mere witness summoned under this section is entitled to refuse to answer a question on the ground that his answer would tend to criminate him. *Ex parte* Schofield, In *re* Firth, 6 Ch. D. 230.

(*k*) R. *v.* Scott, Dears. & B. 47; 25 L. J. M. C. 128. R. *v.* Cross, Dears. & B. 68.

(*l*) R. *v.* Hillam, 12 Cox, 174. See R. *v.* Robinson, L. R. 1 C. C. R. 80; 36 L. J. M. C. 78. R. *v.* Wheater, 2 Mood. 45. R. *v.* Sloggett, Dears. 656; 25 L. J. M. C. 93.

(*m*) R. *v.* Cherry, 12 Cox, 32. Martin, B., said, 'If it had been made as a voluntary statement it would have been different, but here the defendant was obliged to submit to examination under the Act of Parliament.' See *ante* p. 1414, note (*h*), as to the inadmissibility of the examination on charges of certain misdemeanors.

(*n*) R. *v.* Widdop, L. R. 2 C. C. R. 3; 42 L. J. M. C. 9. *Vide post*, p. 2192.

(*o*) A re-enactment of 30 & 31 Vict. c. 131, s. 19.

nature of or amount of the debt or claim of any creditor, or if any director or manager of the company aids or abets in or is privy to any such concealment or misrepresentation as aforesaid every such director or manager shall be guilty of a misdemeanor' (*p*).

In R. *v.* Walters (*q*), it was proposed to give parol evidence of what the bankrupt said before the commissioners, which it was contended might be done, as it was shewn that what the bankrupt said was not taken down; and because by sect. 36 of the Insolvency Act then in force the commissioners were empowered to examine by parol: Park, J., said, 'I can receive no evidence of the examination but the writing. The examination is required to be in writing by the Act of Parliament; and that part which relates to the examining by parol, applies only to the questions which may be either put by parol or by written interrogatories' (*q*). And in R. *v.* Radcliffe (*r*), where an indictment alleged that after the examination of the bankrupt and after he had subscribed the same, a question was put to the bankrupt, and it was objected to any evidence being given of questions and answers, which were not reduced to writing; it was replied that the material answers alone were taken down; and it sometimes happened that answers which at the time seemed immaterial, aftewards became material. The answers proposed to be given in evidence were given after the examination had concluded in the first instance, but they also were reduced to writing. Williams, J., said, 'I cannot receive parol evidence of any answers to questions that were put to the bankrupt before the commissioners subscribed their names to the examination. I must presume, that all the answers prior thereto that were material, were taken down, and included in the examination before their signatures were affixed to it. But answers to questions put subsequently to such examination may be given in evidence' (*r*).

But under the present law, where notes of the debtor's examination have been taken but have not been read over to or by or signed by him, it has been held that parol evidence of the debtor's statements and admissions therein is admissible evidence against him on his subsequent trial for misdemeanors under the Debtors Act, 1869 (*s*).

Warrant to arrest Debtor under Certain Circumstances.—By the Bankruptcy Act, 1883, s. 25, '(1) The Court (*t*) may, by warrant addressed to any constable or prescribed officer of the Court, cause a debtor to be arrested, and any books, papers, money, and goods in his possession to be seized, and him and them to be safely kept as prescribed until such time as the Court may order under the following circumstances:

'(a) If after a bankruptcy notice has been issued under this Act, or after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable reason for believing that he has

(*p*) For punishment, *vide ante*, Vol. i. p. 249.

(*q*) 5 C. & P. 138.

(*r*) 2 Mood. 68; 2 Lew. 57.

(*s*) R. *v.* Erdheim [1896], 2 Q.B. 260; 65 L. J. M. C. 176. R. *v.* Hirschfeld, 61 J. P. 520. In R. *v.* Kean, 11 Cox, 266, it was held that to render an examination of a bankrupt reduced into writing under 11 & 12 Vict. c. 106, s. 117 (rep.), admissible in evidence as a deposition under the seal of the Court pursuant to 24 & 25 Vict. c. 134, s. 203 (rep.), it must appear that his answers after they were reduced into writing were signed and subscribed by the bankrupt.

(*t*) See p. 1456, note (*g*).

absconded, or is about to abscond (*tt*) with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or of avoiding service of a bankruptcy petition, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him.

'(b) If after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the official receiver or trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods, or any books, documents, or writings, which might be of use to his creditors in the course of his bankruptcy.

'(c) If after service of a bankruptcy petition on him, or after a receiving order is made against him, he removes any goods in his possession above the value of five pounds, without the leave of the official receiver or trustee.

'(d) If, without good cause shewn, he fails to attend any examination ordered by the Court.

'Provided that no arrest upon a bankruptcy notice shall be valid and protected unless the debtor before or at the time of his arrest shall be served with such bankruptcy notice.

'(2) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences.'

Undischarged Bankrupt obtaining Credit.—By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31, 'Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanor, and may be dealt with and punished (*u*) as if he had been guilty of a misdemeanor under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section.'

In order to obtain a conviction under this section, it is not necessary that there should be a stipulation to grant credit, it is sufficient if credit is in fact obtained. So where the prisoner, an undischarged bankrupt, living in Newcastle, agreed to buy a horse from a farmer in Ireland, without informing him that he was an undischarged bankrupt, and by the prisoner's direction (by letter) the farmer sent the horse to the prisoner in England, without making any stipulation as to the time or mode of payment, it was held that there was evidence of an obtaining of credit by the prisoner within the meaning of the section, and that the prisoner

(*tt*) The section originally read "believing that he is about to abscond." But the Bankruptcy Act, 1890, (53 & 54 Vict. c. 71), s. 7, provides that the above sect. 25 'shall be read and construed as if the words "Believing that he has absconded or is about to abscond" were substituted for the former words.'

(*u*) The maximum punishment is imprisonment for one year with or without hard labour: R. *v.* Turner [1904], 1 K.B. 181; 73 L. J. K.B. 46. See Debtors Act, 1869, s. 13, *ante*, p. 1454.

could properly be tried at Newcastle, and that the offence was committed there(*v*). Where the prisoner ordered goods to a less extent than £20, but accepted delivery of goods over £20 in value, it was held that the conviction was good (*w*). Getting a loan of money seems to be obtaining credit within the section (*ww*).

An intent to defraud is not a material ingredient of this offence (*x*).

Married Woman.—A *feme covert* on her own petition, in which she stated herself to be a widow, was adjudicated bankrupt, and she was afterwards indicted for concealment and embezzlement of her property with intent to defraud her creditors. Under the (repealed) Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 221, par. 3, it was held that, on the fact appearing that she was a married woman, the allegation of property was disproved, and that it was the husband's property notwithstanding the adjudication in bankruptcy and that therefore the indictment failed (*y*).

By sect. 1 (5) of the Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75), 'Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole* (*z*).

A married woman carried on a trade as a licensed victualler separately from her husband. She sold the business and gave up possession of the licensed premises and shortly afterwards gave notice to her creditors that she was about to suspend payment of her debts. Two of her creditors, being creditors in respect of beer and spirits supplied to her in her trade as a licensed victualler presented a bankruptcy petition against her and it was held that a receiving order could be made against her (*a*).

A married woman cannot be proceeded against in bankruptcy except in the case provided for by the Married Women's Property Act, 1882 (*supra*) (*b*). So where judgment was obtained against a single woman on a bill of exchange and she afterwards committed an act of bankruptcy and a creditor presented a bankruptcy petition against her, but she married before the receiving order was made, the Court held that, as she was not carrying on a trade separately from her husband, she was not subject to the bankruptcy laws, and the receiving order could not be supported (*c*).

Locus Pœnitentiæ.—A bankrupt was indicted for not delivering up certain account books, and it appeared that the final examination had never been completed, but that it had been adjourned *sine die;* it was held that he must be acquitted, for until the final examination was

(*v*) R. *v.* Peters, 16 Q.B.D. 636; 55 L. J. M. C. 173; Coleridge, C.J., Hawkins, Day, and Grantham, JJ., Manisty, J., dissenting. See also R. *v.* Coyne, 69 J. P. 151. All the judges in R. *v.* Peters agreed that the credit was obtained (if at all) in England, but they did not decide that an indictment would not lie in Ireland. See also R. *v.* Dawson, 16 Cox, 556.

(*w*) R. *v.* Juby, 16 Cox, 160. It is not necessary that all the goods should have been supplied or ordered at the same time, if the total amount of credit obtained is £20 or upwards, ibid.

(*ww*) R. *v.* Salomon, 28 L. J. (newsp.), 879.

(*x*) R. *v.* Dyson [1894], 2 Q.B. 176; 18 Cox, 1.

(*y*) R. *v.* Robinson, L. R. 1 C. C. R. 80.

(*z*) By sect. 152 of the Bankruptcy Act, 1883, 'Nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882.'

(*a*) In *Re* Dagnall [1896], 2 Q.B. 407.

(*b*) *Ex parte* Coulson, 20 Q.B.D. 249. *Ex parte* Jones, 12 Ch. D. 484.

(*c*) In *Re* a Debtor [1898], 2 Q.B. 576. See also *Re* Lynes [1893], 2 Q.B. 113. *Re* Handford [1899], 1 Q B. 566; 68 L. J. Q.B. 386.

concluded, he had a *locus pœnitentiæ*, and might deliver up all his books correctly (*d*). But this case was overruled. In defence to an action the defendant proved his bankruptcy in August, and that he had obtained his certificate; and the plaintiffs, in order the shew that the certificate was void, proved that in September the bankrupt had concealed a large quantity of his goods; but the matter got known, and the bankrupt disclosed all the facts to the commissioners before his last examination was passed; and it was held that the bankrupt had been guilty of concealing his goods within the 5 & 6 Vict. c. 122, s. 32 (now repealed); for under that section 'the bankrupt would be punished as a felon, if, with intent to defraud and before his final examination, he does an act of concealment, and there would be no *locus pœnitentiæ* (*e*). 'If the words "remove" and "embezzle" be read in conjunction with the word "conceal," the idea of a *locus pœnitentiæ* would never occur; for though a person may continue to conceal, it is difficult to see how he can continue to remove or continue to embezzle' (*f*). And the preceding case was overruled (*g*).

Indictment.—An indictment under the (repealed) 24 & 25 Vict. c. 134, alleged that the prisoner was duly adjudged bankrupt, and that, having been so adjudged bankrupt, he, upon his examination in the Court, with intent to defeat the rights of his creditors, did not fully and truly discover, to the best of his knowledge and belief, all his property, to wit, all his personal property in money and in goods, and did not as part of his said property (not being part fully and *bona fide* sold, &c.) fully and truly discover, to the best of his knowledge and belief, how and to whom, and for what consideration, and when he had disposed of, assigned or transferred such part thereof, to wit, £1000 sterling, 1000 sacks of corn, 1000 sacks of flour, ten horses, &c., being part of his said property; and upon error it was objected:—1. That if 24 & 25 Vict. c. 134, s. 221, No. (2) created two offences, the count was bad for duplicity. If the count proceeded on the first part of the clause, it was bad for not describing the offence, with the certainties of number, time, and value. 2. That the second part of the count was bad for not alleging that the prisoner disposed of any part of his property. 3. That the indictment did not shew that the examination of the prisoner had terminated, and until then the offence was not complete. The indictment was held good (a) because duplicity was no objection upon error; (b) because a want of certainty was cured after verdict by 7 Geo. IV. c. 64, s. 21, as the offence was sufficiently described in the words of the statute (*h*).

Where an indictment against a bankrupt for concealing property did not, in stating the property, sufficiently specify particular parts of it, though it sufficiently specified others and those specified might have been of the necessary value, the indictment seems to have been held bad, on the ground that the statement as to the parts not specified tended to embarrass the prisoner. The decision seems to have proceeded upon the principle that where value is essential to constitute an offence, and the

(*d*) R. *v.* Walters, 5 C. & P. 138.
(*e*) Per Parke, B.
(*f*) Per Alderson, B.
(*g*) Courtivron *v.* Meunier, 6 Ex. 74. See R. *v.* Erdheim [1896], 2 Q.B. 260.
(*h*) Nash *v.* R., 4 B. & S. 935; 32 L. J. M. C. 94. See now s. 19, *ante*, p. 1456.

value is ascribed to many articles collectively, the offence must be made out as to every one of those articles; the grand jury having only ascribed that value to all those articles collectively (*i*).

An indictment under 5 & 6 Vict. c. 122, s. 32 (rep.), after stating the trading, &c., alleged that the prisoner surrendered, and was then duly sworn before the commissioner, and duly submitted himself to be examined, and 'that the prisoner at the time of his said examination was possessed of a certain real estate, to wit,' &c., describing it, and that the prisoner, 'at the time of his said examination being so sworn as aforesaid, feloniously did not discover when he disposed of, assigned, and transferred the said real estate.' The prisoner was convicted, and, upon a case reserved, it was contended, first, that the indictment was bad because it nowhere alleged that there ever was an examination of the bankrupt. Secondly, that the allegation that he did not discover when he disposed of his estate was repugnant. And the judges held the indictment bad on the second objection, for the charge was that he did not discover when he disposed of an estate which he was alleged to be then in possession of (*j*).

To an indictment under 7 Geo. IV. c. 57, s. 70 (rep.) for fraudulently omitting ten chairs, ten tables, two carts, &c., the prisoner pleaded *autrefois acquit*. The former indictment was the same as the present, except that the two carts mentioned in the present indictment were not specified in the former one. It was however, submitted that the two charges were substantially the same. The charge in each indictment was, that the prisoner had fraudulently sworn to a schedule which did not contain a true enumeration of his goods. Patteson, J., said, 'I cannot say that the plea of *autrefois acquit* is, in strictness, a good defence to the whole of this indictment. The prisoner may have fraudulently omitted out of his schedule the goods mentioned in this indictment, which were not mentioned in the last; and, in point of law, I think a prosecutor may prefer separate indictments for each such omission. But though the present indictment be in point of law maintainable, I cannot help saying that, excepting under very peculiar circumstances, I think such a course ought not to be pursued; and if the case goes on, I shall strongly advise the jury to acquit the prisoner, unless they think that the goods, now for the first time brought forward, were omitted out of the schedule under circumstances essentially different from the others' (*k*).

H. was tried on an indictment charging that he and others 'unlawfully and wickedly did conspire, combine, confederate, and agree together, contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against the said H., fraudulently to remove part of the property of the said H., to the value of £10 and upwards, that is to say, divers, &c., he, the said

(*i*) R. *v.* Forsyth, R. & R. 274.

(*j*) R. *v.* Harris, 1 Den. 461. No decision was given on the first objection. Where an indictment charged that the defendant, a trader, 'did within four months next before the commencement of the liquidation, by arrangement of his affairs obtain' from W. certain goods, &c., it was held that the count sufficiently averred that the defendant was a person whose affairs were liquidated by arrangement within sect. 11 of the Debtors Act, 1869. R. *v.* Knight, 14 Cox, 31, distinguishing R. *v.* Oliver, 13 Cox, 588. See also R. *v.* Scott, Dears. & B. 47; 25 L. J. M. C. 128.

(*k*) R. *v.* Champneys, 2 M. & Rob. 26. See R. *v.* Moody, 5 C. & P. 23.

H., then and there being a trader and liable to become bankrupt,' and having pleaded not guilty, was convicted and sentenced. Error having been brought on the ground that the indictment contained no allegation that H. ever was adjudged bankrupt. Held, first, that the offence of conspiracy was complete as soon as an agreement had been entered into to remove the goods in contemplation of an adjudication of bankruptcy, even though no such adjudication ever took place; secondly that after verdict it must be taken to have been proved that the agreement was entered into in contemplation of an adjudication, though this was not averred in the indictment, such defect being cured by the verdict; thirdly, that as to aider by verdict at common law, there is no distinction between criminal and civil pleadings (*l*).

Concealment.—Upon an indictment on 5 Geo. II, c. 30 (rep.) qualified by 1 Geo. IV. c. 115, s. 1 (rep.) against a bankrupt for concealing his effects, where the evidence was that the prisoner, on his last examination, stated that a book given in by him contained an account of all his effects, it was held incumbent on the prosecutor to produce the book, or to account for its non-production (*m*).

It was also held at the trial that it was necessary that the goods should be concealed by the prisoner himself, or that he should have had the possession of them after the bankruptcy; but that it was sufficient if another person had them as the agent of and subject to the control of the prisoner, and had taken them by the direction, and with the privity and knowledge of the prisoner, to the place where they were deposited. And it was also held at the trial (*n*) that the indictment might be preferred in Middlesex, if the prosecutor could prove an actual concealment there, although the last examination of the bankrupt took place in London.

(*l*) Heymann *v.* R., L. R. 8 Q.B. 102.
(*m*) R. *v.* Evans, 1 Mood. 70.
(*n*) By Littledale, J.

CANADIAN NOTES.

FRAUDS BY BANKRUPTS AND DEBTORS.

Fraudulent Disposal of Property with Intent to Defraud Creditors.—See Code sec. 417.

Transfer with Intent to Defraud.—It is not essential that the debt of the creditor should at the time of assignment be actually due. R. v. Henry (1891), 21 O.R. 113, following Macdonald v. McCall, 12 A.R. 393.

It is properly left to the jury to say whether the defendant put the property out of his hands, transferred or disposed of it for the purpose of defrauding his creditors, although in the course of that transaction he satisfied a debt due to the creditor to whom the property was assigned. R. v. Potter (1860), 10 U.C.C.P. 39 (Draper, C.J., and Hagarty, J.).

In a case where the nature of the proceedings and the evidence clearly shewed that criminal process issued against S. was used only for the purpose of getting S. to Montreal to enable his creditors there to put pressure on him, in order to get their claims paid or secured, a transfer made by S.'s father of all his property for the benefit of the Montreal creditors was set aside as founded on an abuse of the criminal process of the Court. Shorey v. Jones (1888), 15 Can. S.C.R. 398, affirming the decision of the Supreme Court of Nova Scotia, 20 N.S. Rep. 378.

In Nova Scotia it is held that the disposition of the property under this section must be such as would, if not interfered with, deprive the creditors of any benefit whatever therefrom. R. v. Shaw (1895), 31 N.S.R. 534.

In a proceeding of a penal nature involving deprivation of liberty, and brought under a provincial statute for an alleged concealment of property in fraud of creditors, the rules and principles of the criminal law as to the evidence and its effect are applicable, and there must be clear and conclusive evidence to justify a conviction. A finding that an insolvent has secreted a part of his property with the intent of defrauding his creditors is not supported by evidence merely of a discrepancy between two financial statements made by him a few months apart, and the failure of the insolvent to account for the deficit in his affairs other than as being the result of an extravagant expenditure of capital in living expenses. Bryce v. Wilks (1902), 5 Can. Cr. Cas. 445 (Que.).

The depositions of a judgment debtor upon his examination as to means may be proved in evidence against him upon a criminal charge of disposal of property in fraud of creditors, unless at the time of the examination he objected to answer on the ground that his answer might tend to criminate him. If the examination were before a duly authorized authority, the admissions then made in answer to questions not objected to, may be afterwards used against the accused although such questions were not properly within the scope of the examination. R. v. Van Meter, 11 Can. Cr. Cas. 207.

Destroying or Falsifying Books to Defraud Creditors.—See Code sec. 418.

Vendor Concealing Deeds or Encumbrances or Falsifying Pedigrees.—See Code sec. 419.

Consent to Prosecution.—Code sec. 597.

CHAPTER THE TWENTY-SEVENTH.

OF RECEIVING GOODS STOLEN, ETC.

SECT. I.—COMMON LAW AND STATUTES IN FORCE.

Common Law.—AT common law receivers of stolen goods were punishable only as for a misdemeanor, even after the thief had been convicted of felony in stealing the goods (*a*). The common law has been superseded by statute law as to many forms of receiving, but appears to remain as to any form of receiving not specifically covered by statute (*b*).

Statute.—By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 91, 'Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, *extorting, obtaining, embezzling* (*c*) *or otherwise disposing whereof* shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, *extorted, obtained, embezzled, or disposed of*, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned (*d*) . . . . and, if a male under the age of sixteen years, with or without whipping: Provided, that no person howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence' (*e*).

By sect. 92, 'In any indictment *containing a charge of* feloniously stealing any property it shall be lawful to add a count *or several counts* for feloniously receiving the same *or any part or parts thereof*, knowing the same to have been stolen; and in any indictment for feloniously receiving any property knowing it to have been stolen it shall be lawful to add a count for feloniously stealing the same; and where any such

(*a*) Fost. 273.

(*b*) R. *v.* Payne [1906], 1 K.B. 97, and *ante*, p. 1256.

(*c*) In R. *v.* Frampton, Dears. & B. 585. B. was indicted in different counts for embezzling and stealing goods, the property of his master. F. was charged in the same indictment with receiving the same goods, knowing them to have been stolen. The jury convicted B. on the count for embezzlement only, and convicted the prisoner of receiving the goods, knowing them to have been stolen. The Court held the conviction of the prisoner was right. The present enactment extends to the receipt of goods stolen by a bailee, and R. *v.* Harris, 5 Cox, 151, is no longer law.

(*d*) The omitted words are repealed. For minimum term of penal servitude and term of imprisonment, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*e*) Taken from 7 & 8 Geo. IV. c. 29, s. 54 (E), and 9 Geo. IV. c. 55, s. 47 (I). The words in italics were introduced in order to include all cases where property has been feloniously extorted, obtained, embezzled or otherwise disposed of within the meaning of any section of this Act.

indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same, *or any part or parts thereof*, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving the same, *or any part or parts thereof*, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same *or any part or parts thereof* knowing the same to have been stolen' (*f*).

By sect. 93, 'Whenever any property whatsoever shall have been stolen, taken, *extorted, obtained, embezzled, or otherwise disposed of* in such a manner as to amount to a felony, either at common law or by virtue of this Act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, *and may be tried together*, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice' (*g*).

By sect. 94, 'If upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part *or parts* (*h*) of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part *or parts* of such property' (*i*).

By sect. 95, 'Whosoever shall receive any chattel, money, valuable security or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this Act (*j*), knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver,

(*f*) Taken from 11 & 12 Vict. c. 46, s. 3. The words 'containing a charge of' are substituted for the word 'for' in the former Act, in order that a count for receiving may be added in any indictment containing a charge of stealing any property. It applies to burglary with stealing, housebreaking, robbery, &c. The other words in italics provide for cases which frequently occur, and were not within the former section; *e.g.*, where different prisoners may be proved to have had possession of different parts of the stolen property.

(*g*) Taken from 14 & 15 Vict. c. 100, s. 15, and the first words in italics are added to include receivers in other felonies against this Act. See R. *v.* Hartall, 7 C. & P. 475. R. *v.* Hayes, 2 M. & Rob. 155, cases decided before the Accessories Act, 1861. *Ante*, p. 130. C. S. G.

(*h*) Two or more persons may be indicted jointly for receiving stolen property knowing it to have been stolen, though each successively received the whole of the property at different times, and it makes no difference whether the receipt was direct from the principal felon, or from an intermediate person. R. *v.* Reardon, L. R. 1 C. C. R. 21: 35 L. J. M. C. 171. R. *v.* Dring, Dears. & B 329.

(*i*) Taken from 14 & 15 Vict. c. 100, s. 14. Before this Act, if several persons were charged jointly with receiving stolen goods, a joint act of receiving must have been proved. See R. *v.* Messingham, 1 Mood. 257. R. *v.* Gray, 2 Den. 86. R. *v.* Matthews, 1 Den. 596. R. *v.* Parr, 2 M. & Rob. 346.

(*j*) See R. *v.* Frampton, *ante*, p. 1465, note (*e*).

being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years (*k*) . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping' (*l*).

By sect. 96, 'Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, *or disposed of*, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried, and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with indicted, tried, and punished, in the county or place where he actually received such property' (*m*).

By the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93) sect. 38, 'If a pawnbroker is convicted on indictment of any fraud in his business, or of receiving stolen goods knowing them to be stolen, the Court before which he is convicted may, if it thinks fit, direct that his licence shall cease to have effect, and the same shall so cease accordingly' (*n*).

Application of the Statutes.—The bare receiving of stolen goods knowing them to be stolen did not make an accessory at common law. But if a party received goods from the thief to keep for him, knowing them to have been stolen, or if he received goods to facilitate the escape of the thief, or if he knowingly received them upon an agreement to furnish the thief with supplies out of them, and accordingly supplied him, this made the party an accessory at common law, for it was relieving and comforting (*o*).

Receipt of property, knowing it to be stolen, for the purpose of assisting the thief, or for the purpose of concealment, is within the statute, although the receiver neither gains any profit or advantage by the receipt (*p*).

It is not an offence under sect. 91 of the Larceny Act, 1861, to receive stolen goods knowing them to have been stolen, if the stealing is not a felony either at common law or under the Larceny Act, 1861 (*q*). So

(*k*) For minimum term of penal servitude and term of imprisonment, *vide ante*, Vol. i. pp. 211, 212. The words omitted are repealed.

(*l*) Taken from 7 & 8 Geo. IV. c. 29, s. 55 (E); 9 Geo. IV. c. 55, s. 48 (I); and 20 & 21 Vict. c. 54, s. 9.

(*m*) Taken from 7 & 8 Geo. IV. c. 29, s. 56 (E); and 9 Geo. IV. c. 55, s. 49 (I). 24 & 25 Vict. c. 96, s. 97, provides that, where the stealing or taking of any property is by this Act punishable summarily, the receivers shall be liable summarily to the same forfeiture or punishment as the persons stealing, &c.

As to property received in any part of the United Kingdom and stolen in another, see 24 & 25 Vict. c. 96, s. 114 (*ante*, p. 1307), and as to property received in the United Kingdom, but stolen abroad see 59 & 60 Vict. c. 52 (*ante*, p. 1307). As to the proof of knowledge that the goods were stolen, see 34 & 35 Vict. c. 112, s. 19, *post*, p. 1487.

(*n*) As to authority of pawnbroker to arrest a thief, see 35 & 36 Vict. c. 93, s. 34.

(*o*) 1 Hale, 620, *ante*, p. 126. R. *v.* Smith, *infra*.

(*p*) R. *v.* Richardson, 6 C. & P. 335, Gaselee, J., Vaughan, B., and Taunton, J. R. *v.* Davis, 6 C. & P. 177.

(*q*) R. *v.* Smith, L. R. 1 C. C. R. 266; 39 L. J. M. C. 112. Bovill, C.J., in delivering the judgment of the Court, said: 'There was no count charging the prisoner as accessory either before or after the fact. The statement of fact shews evidence of a receipt of goods stolen by one partner of the firm with knowledge of their being stolen. It further states facts which might, perhaps, have been relied on to sustain a charge of being a simple accessory to the felony if the

although the stealing by a partner of the partnership property is a felony under the Larceny Act, 1868 (31 & 32 Vict. c. 116) sect. 1 (*r*), the Court held that the conviction of a prisoner under the above section 91, for feloniously receiving property stolen by a partner, could not be supported (*rr*). But an indictment for feloniously receiving goods the stealing of which amounted to a felony at common law, or by virtue of the Larceny Act, 1861, need not contain allegations to that effect (*s*).

SECT. II.—WHO IS A RECEIVER—DISTINCTION BETWEEN RECEIVER AND PRINCIPAL.

As a general rule it must be shewn that the receiver had physical possession of the stolen goods either himself or through a servant or agent, by his authority or with his knowledge, or by the thief acting in concert with him (*t*).

Manual possession by the receiver is unnecessary, and there may be joint possession in the receiver and thief. Upon an indictment for receiving a watch, knowing it to have been stolen, it appeared that the prosecutor, in company with D., a prostitute, entered a public-house in which were the prisoner and several others. The prosecutor's watch was there taken from him by some one. The prosecutor immediately missed his watch and taxed the prisoner as the thief. The prisoner and one H. were there all the time. The prisoner said to the prosecutor, 'What would you give to have your watch back again?' Prosecutor said, 'A sovereign.' Prisoner then said, 'Let the young woman come along with me, and I will get you the watch back again.' D. and the prisoner then went together into a room in the prisoner's house, where H. was. H. produced the watch, D. took it to the room where the prosecutor was, and in a few minutes the prisoner and H. came there, and H. asked for the reward. The prosecutor gave H. half a crown, and said he believed the watch was stolen, and told him to be off. H. and the prisoner then left. The prisoner did not then say anything; nor did the witnesses see him receive any money. H. absconded before the trial. The jury were told that if they believed that the prisoner knew that the watch was stolen, and, at the time when he went with D. to the room where it was given up, the watch was in the custody of a person with the cognizance of the prisoner, that person being one over whom the prisoner had absolute control, so that the watch would be forthcoming if the prisoner ordered it, there was ample evidence to justify them in convicting the prisoner. The jury found the prisoner guilty; and that though the watch was in H.'s hand or pocket, it was in the prisoner's absolute control; and upon a case reserved, it was held that the conviction was right. According to the decided cases, as well as to the dicta of judges, manual possession is unnecessary; and there may be a joint possession in the receiver and the thief. The jury might have found that the prisoner was the thief, or that H., being the thief, the watch remained in his exclusive possession, and that the prisoner acted as his agent in restoring the watch to the

indictment had contained a count to that effect.' See also R. *v.* Kenny, 2 Q.B.D. 307, 46 L. J. M. C. 156 (*ante*, p. 1254). R. *v.* Streeter [1900], 2 Q.B. 601 (*ante*, p. 1256). R. *v.* Payne [1906], 1 K.B. 97 (*ante*, p. 1256).

(*r*) *Ante*, p. 1280.

(*rr*) R *v.* Smith, *ante*, p. 1467.

(*s*) R. *v.* Stride [1908], 2 K.B. 617.

(*t*) See R. *v.* Pearson, Nos. 1 & 2 [1908], 73 J. P. 449, 451. 1 Cr. App. R. 77, 79.

prosecutor; but the evidence justified the jury in coming to the conclusion which they did (*u*).

Upon a case reserved the Court upheld a conviction of two prisoners for receiving goods knowing them to have been stolen, upon proof that they were present aiding and abetting a third receiver who was found in actual possession of a box containing the goods, but the two former never had manual possession of the box (*v*).

L. had pleaded guilty to stealing a hat and watch, which the prisoner, H., was indicted for receiving. A policeman proved that he went to the prisoner's house in consequence of something L. told him, and asked the prisoner if L. had brought a hat there, and the prisoner said 'Yes,' and then went and took the hat out of a box in the corner of the room in which he was found in bed. The witness asked him if he knew anything about the watch, and he said he did not; but being taken out of the house, he said he knew where the watch was; that it was planted at W.'s. They went there, but could not find it; and the prisoner then called for a boy, and asked him to get the watch; and the watch was afterwards brought by the boy to the prisoner, who gave it to the policeman. The house where the prisoner lived was a lodging-house. It was objected that there was no evidence of the prisoner's possession of the hat, as he had no exclusive possession of the room, and that all the evidence as to the watch was that he knew where it was: but, on a case reserved, it was held that there was sufficient evidence to go to the jury (*w*).

Upon an indictment for receiving stolen fowls, it appeared that the prisoner's husband sent them without a direction by a coach to B., it being stated at the time of the delivery that a person would call for the box at B. The box arrived at B., and the prisoner went to the coach-office, and inquired for it, when the box was shewn to her by the coachman, and she claimed it as the box she was come for; upon which she was taken into custody, and the box being opened in her presence, was found to contain ten fowls. The prisoner was convicted; but upon a case reserved, the judges were of opinion that the conviction was wrong, and that according to the evidence the prisoner never did in fact receive the fowls, nor ever had the power of doing so. Whoever had possession of the fowls at the coach-office when the prisoner claimed to receive them never parted with the possession. The prisoner by claiming to receive the fowls, which were never actually or potentially (*x*) in her possession, never in fact or law received them (*y*).

(*u*) R. *v.* Smith, Dears. 494; 24 L. J. M. C. 135. Where stolen property was brought by the thief to the prisoner's shop, and the prisoner, with a guilty knowledge, told her servant to take the stolen goods and pawn them for the thief, and the servant did so and brought back the money, which she handed to the thief, in the prisoner's presence, it was held that manual possession of the goods was not necessary, and that the conviction of the prisoner for receiving was proper: R. *v.* Miller, 6 Cox, 353 (I): 37 L. J. M. C. 83.

(*v*) R. *v.* Rogers, L. R. 1 C. C. R. 136; 37 L. J. M. C. 83.

(*w*) R. *v.* Hobson, Dears. 400. Where stolen property is found in a man's house it is a question of fact for the jury whether it was in the man's possession, that is to say, whether it was there with his knowledge and sanction. R. *v.* Savage, 70 J.P. 36, Fulton, Recorder. Cf. R. *v.* Wilmett, 3 Cox, 281, Coltman, J., and R. *v.* Cohen, 8 Cox, 41, Watson, B., and R. *v.* Orris, 73 J.P. 15.

(*x*) In R. *v.* Wiley, *post*, p. 1470, Campbell C.J., said he did not understand the legal meaning of 'potential.'

(*y*) R. *v.* Hill, 1 Den. 453, 2 C. & K. 978. This decision rendered it immaterial

In R. *v.* Wiley (*z*), upon an indictment which charged S. and another with stealing and W. with receiving, it appeared that S. went into the house of W.'s father with a loaded sack. W. lived with his father, and was a higgler, attending markets with a horse and cart. S. remained in the house about ten minutes, and then went out of a back door, preceded by W. with a candle, S. carrying the sack, and went into a stable belonging to the same house. On the policemen going in they found the sack on the floor tied at the mouth, and the men standing round it, as if they were bargaining, but no words were heard. The sack had a hole in it, through which poultry feathers were protruding. The bag was found to contain poultry. W., on being charged with receiving the poultry knowing it to have been stolen, said he did not think he would have bought the hens. The Court told the jury that the taking of S. with the stolen goods as above by W. into the stable, over which he had control, for the purpose of negotiating about the buying them, he well knowing the goods to have been stolen, was a receiving of the goods by him within the meaning of the statute. The jury convicted, and upon a case reserved eight of the judges (*a*) were of opinion that the prisoner could not be taken to have received the fowls. That the possession of the thieves seemed to exclude the notion of possession by the prisoner (*b*), as the thieves never intended to part with the goods until the bargain was concluded (*c*). That there must be a control over the goods by the receiver, which there was not in this case (*d*). That, although there might be 'a joint possession of goods in a thief and a receiver,' there was no evidence of that in this case, as 'the thieves seem always to have had possession of the goods, and the prisoner to have only had the intention of receiving them, not the actual receipt' (*e*). That 'receiving must mean a taking into possession, actual or constructive,' which there was not here, as the prisoner 'never accepted the goods in any sense of the word, except upon a contingency, which, as it happened, did not arise' (*f*). Four of the judges (*g*) were of opinion that the prisoner was shewn to have received the goods. In the view of Mr. Greaves the minority of the judges were clearly right (*h*).

to determine another question reserved, namely, how far the fact of the fowls having been sent to the prisoner by her husband could be an excuse for her receiving them.

(*z*) 2 Den. 37; 20 L. J. M. C. 4.

(*a*) Parke, B., Alderson, B., Patteson, J., Coleridge, J., Maule, J., Platt, B., Talfourd, J., and Martin, B.

(*b*) Talfourd, J.

(*c*) Martin and Platt, BB.

(*d*) Patteson, J.

(*e*) Alderson, B.

(*f*) Parke, B., added, 'I think the possession of the receiver must be distinct from that of the thief; and that the mere receiving a thief with stolen goods in his possession would not alone constitute a man a receiver.'

(*g*) Campbell, C.J., Cresswell, Erle, and Williams, JJ. Erle, J., added, '*The rules of the criminal and civil law are in many respects different*, and have little or no bearing on each other,' a dictum that ought ever to be kept in remembrance in considering criminal cases.

(*h*) He says, 'It is clear, upon the evidence, that the taking of the sack to the stable was by the direction of W.; the other two prisoners, therefore, were his agents in taking it, and trespass would have lain against all for a joint asportation of the goods at the suit of the owner of them. Again, W., by lighting them, was aiding S. in carrying the bag, and the case is identically the same as the goods had been taken in a cart, and had led the horse along the road to the stable, because it was too dark for the others to find the road. It is not necessary that the thief should part or intend to part with the possession. A. steals goods and meets with B., and informs him that he has stolen the goods, and asks B. to carry them for him, which B. does. It cannot be doubted that B. is a receiver, though he

Upon an indictment against two principals for stealing goods, and against M. and H. for receiving the goods knowing them to have been stolen, it appeared that the principals brought the goods to H.'s warehouse, and left them with M., who, after some hesitation, accepted them; H. was at this time absent; but it was clear on the facts that, shortly after he came home, he was aware of the goods having been left, and there was strong ground for suspecting that he knew that they had been stolen; it was also clear that his servant M. soon after the goods were left with him was aware they had been unlawfully procured, as he was found disguising the barrels in which they were contained. Maule, J., told the jury that if they were satisfied that H. had directed the goods to be taken into the warehouse, knowing them to have been stolen, and that M., in pursuance of that direction, had actually received them into the warehouse, he also knowing them to have been stolen, they might properly convict both of the prisoners (*i*).

Where a husband and wife were jointly indicted for receiving stolen goods, and the jury found that the wife received them 'without the control or knowledge of and apart from her husband, and that the husband afterwards adopted his wife's receipt,' it was held that, upon this finding the conviction could not be supported. The word 'adopted' might mean that the husband passively consented to what his wife had done without taking any active part in the matter, and in that case he would not be guilty of receiving. Or it might mean that he did take such active part; but this rigid construction ought not to be put upon the word 'adopted' (*j*). But where on an indictment against a husband for receiving, the actual delivery of the stolen property was made by the principal to the wife in the absence of the husband, and she then paid sixpence on account, but the amount to be paid was not then fixed, and afterwards the husband and the principal met, agreed on the price, and the husband paid the balance; it was objected that when the wife received the stolen property, guilty knowledge could not have come to the husband; but the jury were told that until the subsequent meeting, when the act of the wife was adopted by the husband, the receipt was not so complete as to exclude the effect of guilty knowledge acquired at that meeting; and, upon a case reserved upon the question whether this direction was correct, it was held that it was. The contract for the sale of the goods was not complete until the husband and the principal met; the husband then acquired a guilty knowledge, and ratified the receipt; which amounted to a receipt at that time with guilty knowledge (*k*).

Where a husband and wife are jointly indicted for receiving goods

was never out of A.'s company, and it was never intended that he should buy or have the goods for his own use. A. steals goods and carries them to B., who was waiting for A. at a distance, and then B. accompanies A., who still carries the goods, with intent to assist B. in disposing of them, knowing them to be stolen, B. is clearly a receiver. See R. *v.* Kelly, R. & R. 421. R. *v.* King, R. & R. 332.' C. S. G.

(*i*) R. *v.* Parr, 2 M. & Rob. 346.

(*j*) R. *v.* Dring, D. & B. 329. See R. *v.* M'Athey, L. & C. 250; 32 L. J. M. C. 35. R. *v.* Orris, 73 J. P. 15; 1 Cr. App. R. 199.

(*k*) R. *v.* Woodward, L. & C. 122; 31 L. J. M. C. 91. Blackburn, J., said, 'If a thief were to leave stolen goods with a pawnbroker's apprentice in the absence of the master, and the pawnbroker, on his return, being told of the circumstances, and knowing that the goods were stolen, were to say, "It is all right; put them away," no one could doubt that he would be rightly convicted of receiving stolen property.'

knowing them to have been stolen, the mere fact of marital relation does not raise any presumption of the husband's control, and, even if the husband was in the neighbourhood, it is a question of fact for the jury whether the wife was taking an independent part. So where it was proved that the wife received some stolen property in the absence of her husband, and there was no evidence that she acted under her husband's control, the Court held that the conviction was proper, although the specific question whether there had been a separate receiving by the wife was not left to the jury (*l*).

Distinction between Receiver and Principal.—A person assisting in the stealing is a principal in the first or second degree, and a receiver must be a person who is not a principal felon. An indictment charged S. with stealing 18*s.* 6*d.*, and C. with receiving the same. The facts were: S. was a barman at a refreshment bar, and C. went up to the bar, called for refreshments, and put down a florin. S. served C., took up the florin, and took from his employer's till some money, and gave C., as his change, 18*s.* 6*d.*, which C. put in his pocket and went away with it. On entering the bar signs of recognition took place between S. and C., and C. was present when S. took the money from the till. The jury convicted S. of stealing and C. of receiving. It was held that there was no evidence which the judge ought to have left to the jury of receiving, although there was evidence upon which C. might have been convicted as a principal in the second degree; and that therefore the conviction of C. for receiving could not be sustained (*m*).

A. and B. were indicted for stealing barilla, the property of H., which was on board a ship, consigned to H. H. employed A., who was the master of a large boat, for the purpose of bringing it on shore; and B. was employed as a labourer, together with several others, in removing it to H.'s warehouses after it was landed. The jury found that while the barilla was in A.'s boat, some of his servants, without his privity, consent or participation, severed some of the barilla from the rest where it was stowed, and removed it to another part of the boat, where they concealed it under some rope. But they also found that A. afterwards assisted the other prisoner and the persons on board, who had before separated this part from the rest, *in removing it from the boat for the purpose of carrying it off*. It was objected, for the prisoner A., that his offence was not that of a principal, as laid in the indictment, but that of receiver or accessory after the fact. But Graham, B., was of opinion that, though for some purposes, as with respect to those concerned in the actual taking and separation, the offence would have been complete by the severance and removal of the barilla to another part of the boat, as being an asportation in point of law, yet, with respect to A., who joined in the scheme *before* the barilla had been actually taken out of the boat, where it was properly deposited for the purpose of being landed, and who assisted in the act of carrying it off from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such

(*l*) R. *v.* Baines, 69 L. J. Q. B. 681. See also Brown *v.* Att. Gen. for New Zealand [1898], A. C. 234; and R. *v.* Archer, 1 Mood. 143, and see also Vol. i., pp. 91 *et seq.*

(*m*) R. *v.* Coggins, 12 Cox, 517. See R. *v.* Hilton, Bell, 20, *post*, p. 1474; and R. *v.* Perkins, 2 Den. 459; 21 L. J. M. C. 152.

place of deposit; and that A., having assisted in the act of carrying it off, was therefore guilty as principal in the larceny (*n*).

Another case arose out of the same transaction. The rest of the barilla was lodged in H.'s warehouse; while it was there several persons, employed as labourers or servants by H., entered into a conspiracy to steal some of it; accordingly some of them, who had access to the warehouse, removed a parcel of it nearer to the door than it was before in the course of the morning; and about nine at night these persons, together with the prisoners A. and O., who had in the meantime agreed to purchase it of the others, came to the warehouse yard and assisted the others who took it out of the warehouse in carrying it away from thence. They were all indicted as principals in the felony; and the same objection was made as before that A. and O. were only receivers or accessories after the fact, the felony being complete before their participation in the transaction. But it was ruled that, so long as the goods remained in the warehouse, which was the lawful place of their deposit, although to some purposes, as to those who severed this parcel from the rest for the purpose of stealing it, and more conveniently removing it afterwards, the felony might be said to be complete; yet it was a continuing transaction as to those who joined in the same plot before the goods were finally carried away from the premises; and that all the defendants, having concurred in, or being present at the act of removing them from the warehouse wherein they were lawfully deposited, were principals (*o*).

But where the goods had been so entirely taken away from the premises or actual possession of the owner, that their further removal could not be deemed a continuing part of the original taking, different considerations apply and the party concerned only in such further removal is not guilty of stealing the goods. Upon an indictment for stealing butter and cheese, it was proved that two men, in the absence of the prisoner, broke open the warehouse of the prosecutor, stole the butter and cheese in question, carried them into the adjoining street, and deposited them at a distance of about thirty yards from the door of the warehouse: after which they went for the prisoner, brought him to the place, and informed him of what they had done; and he assisted in carrying the property to a cart, which was kept in waiting at some distance to be ready to convey it away. It was objected that the prisoner could not be found guilty of stealing, as the felonious taking of the property was complete before he had any part in the transaction. On a case reserved, the judges were of opinion that as the property was removed from the owner's premises before the prisoner was present, he could not be considered as a principal; and that the conviction of him as a principal was therefore wrong (*p*). So going towards the place where a felony was to be committed in order to assist in carrying off the property, and assisting accordingly, was held not to make the party a principal, if he was at such

(*n*) R. *v.* Dyer, 2 East, P. C. 767, 768. Graham, B., conferred with Le Blanc, J., and afterwards said that he was fully satisfied that his opinion was well founded. See R. *v.* Wiley, 2 Den. 37, 47, Cresswell J., *ante*, p. 1470.

(*o*) R. *v.* Atwell, tried by Graham, B., at the same time as R. *v.* Dyer, and decided after the like consideration. See other cases on this subject, Vol. i. pp. 106 *et seq.*

(*p*) R. *v.* King, R. & R. 332. And see R. *v.* M'Makin, R. & R. 333, note (*b*).

a distance at the time of the felonious taking as not to be able to assist in it. The prisoner, and J. S., went to steal two horses; J. S. left the prisoner half a mile from the place in which the horses were, and brought the horses to him, and both rode away with them. Upon a case reserved the judges thought the prisoner an accessory only, not a principal, because he was not present at the original taking (*q*). But where a man committed a larceny in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice who was waiting to receive it, the judges came to a different conclusion, and held that such accomplice was a principal, and that the conviction of him as a receiver was wrong (*r*).

An indictment against H. and M. charged them in one count with stealing a purse containing money from the person of the prosecutrix, and in another with receiving the purse containing the money, knowing it to have been stolen. H. was walking by the side of the prosecutrix, and M. was seen just previously following behind her. The prosecutrix felt a tug at her pocket, found her purse was gone, and on looking round saw H. behind her walking with M. in the opposite direction, and saw H. hand something to M. The jury were told that if they did not think from the evidence that M. was participating in the actual theft, it was open to them on these facts to find him guilty of receiving; which they did, and, on a case reserved, it was held that the direction to the jury was right (*s*).

Where a servant is entrusted with goods by his master, the possession of the servant is the possession of the master; but such possession is determined by the felonious act of the servant, and where the servant delivers his master's goods to another person, who is his accomplice, it frequently becomes material to ascertain at what time the servant committed the felonious act, because if he committed it at the time when he delivered the goods to his confederate, both are guilty of larceny as principals; but if he committed it in the absence of his confederate, and afterwards delivered the goods to him, the servant is the principal, and his confederate a receiver. B. and G. were indicted as principals for stealing some fat. B. being in the service of the prosecutor, was sent by him to deliver some fat to A., but he did not deliver all the fat to A., having previously given part of it to G.; it was objected that G. ought to have been charged as a receiver; but it was held that it was a question for the jury whether G. was present at the time of the separation, as the fat was in the master's possession till the separation; and the case was left to the jury to say whether G. was present at the time when the separation was made, or received the fat afterwards (*t*). So where G. was indicted for stealing a quantity of hay, and H. for receiving the hay, knowing it to have been stolen, and it appeared that G., who was a carter, and allowed by his master a small quantity of hay for the use of the horses on their

(*q*) R. *v.* Kelly, MS. Bayley, J., and R. & R. 421.

(*r*) R. *v.* Owen, 1 Mood. 96.

(*s*) R. *v.* Hilton, Bell, 20. In R. *v.* Coggins (*ante*, p. 1472), Blackburn, J., referring to R. *v.* Hilton, said that the above direction to the jury was a proper direction and that there was evidence in that case on which the jury might have found a verdict on either count.

(*t*) R. *v.* Butteris, 6 C. & P. 147, Gurney, B.

journey, took from his master's stables two trusses of hay above the quantity which was allowed, and that H. came to the tail of the waggon and received the two trusses of hay from G., and carried them to the stable; it was objected that, if H. had committed any offence at all, it was that of stealing, as the hay being in the master's waggon was in the master's possession, and the act of the prisoner in removing it from the waggon constituted a larceny and not a receiving; but it was held that the indictment was properly framed, on the ground that as the hay was not hay appropriated by the master for the horses, the moment it got into the waggon, *animo furandi*, the larceny was complete. If, however, it had been hay allowed for the horses which had been stolen, it would have been otherwise (*u*).

B., having stolen a cheque, went to her father, and they and Mrs. B. went to a lodging-house some forty miles off, where they met with R.; there they all got drunk, and quarrelled. The next day R. tried to change the cheque but was apprehended, and said before the magistrate that he met the B.'s by accident, and that they quarrelled, and that he picked up the cheque in the room after the B.'s had gone to bed, and that, not knowing whose it was, he had tried to change it. When B., the father, was told of R.'s being taken up for presenting the cheque, he said that he could only have obtained it by robbing him or his wife when they were all drunk. Parke, B., held that this evidence did not support the charge of receiving against R. There was nothing to contradict his statement, and that was all the case against him as a receiver. If the case amounted to anything it shewed a larceny to have been committed either by stealing the cheque from B., or by finding it and appropriating it under such circumstances as would amount to a larceny (*v*).

Resumption of Possession.—Where on an indictment for receiving stolen goods it appeared that the goods were found in the pockets of the thief by the owner, who sent for a policeman, who took the goods and gave them to the thief, and the latter was then sent by the owner to sell them where he had sold others; and the thief then went to the prisoner's shop, and sold them, and gave the money to the owner as the proceeds of the sale; it was contended that the owner had resumed possession of the goods, and therefore there was no receiving of stolen goods within the Act; but the jury were directed that the prisoner was liable to be convicted of receiving; but, upon a case reserved, it was held that the conviction was wrong. Campbell, C. J., said, 'I do not see how it could be supported unless the doctrine were laid down that if at any period of the history of a chattel, which has been stolen and has been restored to the owner, who has long had it in his possession, the same chattel should be received from the owner by a person who knew that it had been once stolen, such a receiving would be an offence within the statute. I think such a receiving could never be said to be an offence within the statute, any more than it could make the receiver an accessory at common law to the felony. If an article once stolen has been restored to the master

(*u*) R. *v.* Gruncell, 9 C. & P. 365. Mirehouse, C. S., after consulting Patteson, J., who went very carefully through the cases on the subject, and was clearly of opinion the indictment was properly framed. See R. *v.* Roberts, 3 Cox, 74.

(*v*) R. *v.* Brett, 1 Cox, 261. See also R. *v.* Wade, 1 C. & K. 739.

of that article, and he, having had it fully in his possession, bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the Act?' In this case 'the owner had possession of the goods just as much as if he had taken them into his own hands, and had delivered them from his own possession to another person for a particular purpose. He was the bailor of the goods subsequently to the theft, and the other person was the bailee. After that the goods are carried by the thief by the direction of the master of the goods to the prisoner, who receives them. That is not a receiving within the meaning of the Act' (*w*).

The prisoner was convicted of feloniously receiving stolen goods under the following circumstances: The goods were stolen, and sent by the thief in a parcel by railway, addressed to the prisoner. A policeman belonging to the railway company, from information he had received, examined the parcel at the railway station at the place of its destination, and stopped it. It was called for by one of the thieves on the day of its arrival, and refused to him. A porter of the company, the next day, by the direction of the policeman, took it to a house which the thief who had called for it designated, and it was there received by the prisoner. It was held that the conviction was wrong, as the goods had ceased to be stolen goods, within the statute, at the time of the receipt by the prisoner (*x*).

Sect. III.—Form of Indictment—Venue.

The indictment must shew on the face of it that the Court has jurisdiction to try the receiver (*y*). Upon an indictment, which charged one prisoner with stealing in Yorkshire, and another with receiving in the same county, it appeared that the property was stolen in Yorkshire and received in Lancashire, and it was objected that the indictment should have laid the receiving in Lancashire, and then have introduced averments to shew that 7 & 8 Geo. IV. c. 29, s. 56 (*z*), applied; but Maule, J., held that that section justified this method of indictment (*a*).

Upon an indictment in Wiltshire for receiving the half of a £5 note

(*w*) R. *v.* Dolan, Dears. 436; 24 L. J. M. C. 59. Cresswell, J., said, 'If it were necessary to hold that the policeman, by taking possession of the stolen goods from the pocket of the thief, restored the possession of the master, I should dissent from that proposition. I think we cannot put the policeman out of the question. The goods were in the custody of the law for the purpose of the administration of the criminal justice of the land, and the master could not have demanded them of the policeman. But I think that when the goods where taken back by the policeman to the thief, and the master desired him to go and sell them, it may be considered that the master employed the thief as his agent for that purpose, and that the prisoner did not receive them as stolen goods within the meaning of the statute.' This case overruled R. *v.* Lyons, C. & M. 217. 'It is submitted that there are two cases in which a receiving is not within the Act,—1, where the owner has had the goods again in his possession, whether actual or constructive; 2, where they are delivered to the prisoner by the authority of the owner. C. S. G.

(*x*) R. *v.* Schmidt, L. R. 1 C. C. R. 15; 35 L. J. M. C. 94. Martin, B., Keating and Lush, JJ., Erle, C.J., and Mellor, J., diss. This case and R. *v.* Dolan (*supra*) were followed in R. *v.* Villensky [1892], 2 Q.B. 597. See also R. *v.* Hancock, 14 Cox, 119.

(*y*) R. *v.* Martin, 1 Den. 398; 18 L. J. M. C. 137.

(*z*) Repealed but re-enacted as 24 & 25 Vict. c. 96, s. 96, see *ante*, p. 1467.

(*a*) R. *v.* Hinley, 2 M. & Rob. 524. And since 14 & 15 Vict. c. 100, s. 23 (*post*, p. 1937), the indictment in such a case would be sufficient if it merely had the venue, Yorkshire, in the margin.

knowing it to have been stolen, it appeared that the half note was posted by a tradesman at S. in Wiltshire in a letter to a person in Bristol, and stolen in its transit by some one in some way unknown. The prisoner had received the half note with a guilty knowledge, and enclosed it in a letter to the bank at S. requesting payment of it, and posted the letter at A., and it arrived with its contents in due course at S.; but there was no evidence that the half note was received by or ever in the possession of the prisoner in Wiltshire, unless the bankers at S., to whom the half note had been remitted, or the post office servants in that county could be regarded as his agents, and their possession in that county treated as his possession; and, upon a case reserved, it was held that the prisoner was triable in Wiltshire under sect. 56 (now repealed) of 7 & 8 Geo. IV. c. 29. It was plain that if he had employed a private agent to give the half note to the bankers in order to get it cashed, the possession, in point of law, would all along have remained in the prisoner, and there was no reason why it should the less be considered in his possession because it was transmitted through a public agent by means and on behalf of the prisoner (*b*).

Where an indictment contained five counts, all alleging a breaking into the house of M.; but each count describing the goods stolen as the property of a different person; and the indictment also contained five other counts for receiving the goods, in which the property was laid in the same manner as in the five counts for stealing; it was objected that 11 & 12 Vict, c. 46, s. 3 (*c*), only made it lawful to add one count for receiving; but on a case reserved, the judges were unanimously of opinion that the indictment was good (*d*).

In R. *v.* Ward (*e*), it was contended that a count for stealing certain goods could not be joined with a count for receiving the same and other goods. Willes, J., after consulting Pollock, C. B., thought it better to put the prosecutor to elect as to which count he would proceed with (*f*).

The first count charged the stealing '£100 in money, one purse, &c.,' from the dwelling-house of G.; the second the receiving '£35 in money, one smelling-box, one purse, one opera-glass, and one bag of the money, &c., of the said G., then lately before feloniously stolen.' It was objected that it did not appear that the property mentioned in the second was the same as that in the first count, which was necessary under 11 & 12 Vict. c. 46, s. 3 (rep.), and it was held that the Crown must elect on which count to proceed (*g*).

The indictment charged four prisoners with a burglary and stealing a number of articles, and the fifth prisoner with receiving a part of the stolen goods from the other prisoners, and another count charged the fifth prisoner with a substantive felony in receiving the same part of the goods from a certain evil-disposed person. It was objected that there was a misjoinder of counts; that the statute allowed the party to be indicted in one way or the other, but not in both; and that by joining

(*b*) R. *v.* Cryer, Dears. & B. 324; 26 L. J. M. C. 192. See R. *v.* Jones, 1 Den. 551, *post*, p. 1562. R. *v.* Rogers, *ante*, p. 1469.

(*c*) Repealed, but re-enacted with additions, 24 & 25 Vict. c. 96, s. 92, *ante*, p. 1465.

(*d*) R. *v.* Beeton, 1 Den. 414; 18 L. J. M. C. 117.

(*e*) 2 F. & F. 19.

(*f*) Willes, J., said, 'This was not to be taken to be a final decision, but that he would consult the other judges.'

(*g*) R. *v.* Sarsfield, 6 Cox, 12 (I). Pigot, C.B., and Richards, B. See s. 92, *ante*, p. 1466.

the two counts in one indictment, the prisoner was deprived of the benefit of pleading *autrefois acquit*, which was given him by 7 & 8 Geo. IV. c. 29, s. 54; but it was held that there was no misjoinder. And Parke, B., afterwards said, 'There was an objection taken on the ground of a misjoinder of counts, where a count for receiving was added as for a substantive felony. I had some doubt on the point; but I have conferred with my brother Bolland, and looked at authorities, and I now find that it is a matter quite in the discretion of the judge. It is not open to a demurrer; neither is it a ground for quashing the indictment. Therefore, whenever it is clear that there is only one offence, and the joinder of the counts cannot prejudice the prisoner, we think that the objection ought not to prevail. We have accordingly directed the officer to draw these indictments in the manner which we understand has prevailed on the circuit, and at the Old Bailey' (*h*).

An indictment charging the principal with killing a sheep with intent to steal one of the hind legs of the sheep, and the accessory with receiving nine pounds of the mutton so stolen as aforesaid, cannot be supported against the accessory, but if such an indictment also contain a count for a substantive felony in receiving the mutton from a certain evil-disposed person, the accessory may be convicted upon it (*i*).

A count charging a person with being accessory before the fact may be joined with a count charging him with being accessory after the fact to the same felony, and the prosecutor cannot be compelled to elect upon which he will proceed, as the party may be found guilty upon both (*j*). And so a count charging the prisoner as accessory before the fact may be joined with a count for receiving, and the prisoner may be convicted on both (*k*); or a count charging the prisoner as principal may be joined with a count for receiving, and the prisoner may be convicted on both (*k*). And a case has occurred, in which a party was indicted for receiving stolen goods, and also for receiving, harbouring, and comforting the felons, and the prisoner was convicted (*l*).

It was settled upon the repealed statutes that a party might be indicted for receiving goods stolen by a person unknown, when such person was unknown; the great view of the statutes being to reach the receivers, where the principal thieves could not easily be discovered (*m*). But where the principal was known, it ought not to have been stated in the indictment that he was unknown (*n*).

(*h*) R. *v.* Austin, 7 C. & P. 796.

(*i*) R. *v.* Wheeler, 7 C. & P. 170, Coleridge, J., who at first doubted, first, whether, if the principal were known, his name should not be stated, and if not known, whether it should be charged that he was not known; secondly, that the count was for receiving stolen goods, and was joined not with a count for stealing, but with a count for killing with intent to steal, which seemed to be an offence of a different nature. His lordship, however, left the case to the jury, and the prisoners were found guilty, and afterwards sentenced.

(*j*) R. *v.* Blackson, 8 C. & P. 43, Parke, B., and Patteson, J.

(*k*) R. *v.* Hughes, Bell, 242; 29 L. J. M. C. 71.

(*l*) Anon., mentioned by Parke, B., 8 C. & P. 44. In many cases it is advisable to insert such counts, as the evidence may fail to prove the receipt of the stolen property, and yet may be sufficient to obtain a conviction for comforting and assisting the felon. See R. *v.* Lee, 6 C. & P. 536; and R. *v.* Caspar, 2 Mood. 101; 9 C. & P. 289.

(*m*) R. *v.* Thomas, 2 East, P. C. 781.

(*n*) 2 East, P. C. 781. R. *v.* Walker, 3 Camph. 264. And S. P. by Dallas, J., Anon. Worcester Lent Ass. 1815. R. *v.* Caspar, *ubi sup.* See R. *v.* Bush, R. & R. 372.

The second count of an indictment charged the prisoner with having received goods stolen by 'a certain evil-disposed person,' and it was objected that it ought either to have stated the name of the principal, or else to have stated that he was unknown. Tindal, C.J., 'It will do. The offence created by the Act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question, therefore, will be whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen. The objection is founded on the too particular form of the indictment. The statute makes the receiving the goods, knowing them to have been stolen, the offence' (*o*).

Proceeds of Stolen Property.—It is sufficient if the thing received be the same in fact as that which is stolen, though passing under a new denomination; so that where the indictment charged the principal with stealing a live sheep, and the accessory with receiving 'twenty pounds of mutton, part of the goods,' &c., the conviction was held to be proper (*p*).

But where an indictment charged one prisoner with stealing six promissory notes of £100 each, and the other prisoner with receiving the said promissory notes knowing them to have been stolen, and the only evidence against the receiver was that at one time he shewed a number of £20 notes, which he said were part of the prosecutor's money, and at another time he threw down a sovereign, saying, 'I had a hundred sovereigns of the captain's money, and this is one of them;' it was held that if the prisoner never received either of the £100 notes into his possession, he must be acquitted upon that indictment. He was not here charged with the receiving the proceeds; this indictment imputed that he received 'the said promissory notes;' now the only notes mentioned in the indictment were the notes of £100 each (*q*).

Averment of Guilty Knowledge.—Where a count alleged that L. feloniously received certain steel of the goods and chattels of B., then lately feloniously stolen, he the said B. knowing the same to have been feloniously stolen; it was held that the count was bad on the face of it, in not correctly alleging the scienter, and that the count could not be amended after verdict by substituting L. for B., so as correctly to allege a guilty knowledge in the prisoner (*r*).

In a case where an indictment charged the prisoner by the name of Francis M. with receiving stolen goods, 'he the said *Thomas* M. knowing, &c.,' it was held that the words 'the said Thomas M.' might be rejected as surplusage (*s*).

(*o*) R. *v.* Jervis, 6 C. & P. 156.

(*p*) R. *v.* Cowell, 2 East, P. C. 617.

(*q*) R. *v.* Walkley, 4 C. & P. 132, Taddy, Serjt. 'It is conceived that no indictment could be framed for receiving the proceeds of stolen property. The section only applies to receiving *the* chattel stolen, knowing *that* chattel to have been stolen. In the case of gold, silver, &c., if it were melted after the stealing, an indictment for receiving it might be supported, because it would still be *the same* chattel, though altered by the melting; but where a £100 note is changed for other notes, the identical chattel is gone, and a person might as well be indicted for receiving the money for which a stolen horse was sold, as for receiving the proceeds of a stolen note.' C. S. G. See R. *v.* Chapple, 9 C. & P. 355.

(*r*) R. *v.* Larkin, Dears. 365.

(*s*) R. *v.* Morris, 1 Leach, 109. And see also R. *v.* Redman, 1 Leach, 477. In R. *v.* Kernon, Hil. T. [1788], MS. Bayley, J., when the indictment alleged that the receiver knew the 'goods to have stolen' the judges thought the indictment bad, as it omitted the word 'been,' but they afterwards took time to consider.

Receiving Goods obtained by False Pretences.—An indictment upon 7 & 8 Geo. IV. c. 29, s. 55 (rep.), for receiving goods obtained by false pretences, must have alleged the goods to have been obtained by false pretences, and that the receiver knew that they were so obtained (*t*).

The gist of the offence is the receipt of the goods with the knowledge that they have been unlawfully obtained by *some* false pretence. An indictment therefore under 24 & 25 Vict. c. 96, s. 95 (*ante*, p. 1467) for receiving goods knowing them to have been unlawfully obtained by false pretences is good without setting out the false pretences (*u*).

An indictment under sect. 95, charged that defendant 'unlawfully did receive goods which had been unlawfully, and knowingly, and fraudulently obtained by false pretences with intent to defraud, well knowing that the goods had been obtained by false pretences with intent to defraud, as in this count before mentioned, but omitting to set out what the particular false pretences were, the Court held that the objection, if any, not having been taken before plea, was cured by the verdict of guilty (*v*).

Sect. IV.—Trial—Evidence.

In prosecutions for the *misdemeanor* of receiving stolen goods under 22 Geo. III. c. 58 (rep.), it was settled that the principal felon though not convicted or pardoned, was a competent witness against the receiver (*w*).

Where the only evidence against the alleged receiver is that of the thief, the judge will advise the jury to acquit (*x*).

Where the thief, who had pleaded guilty, had admitted to a constable in the presence of the prisoner, who was indicted as a receiver, that he had stolen the property, and this was the principal evidence of the larceny; Crowder, J., left this confession of the thief to the jury as evidence against the receiver (*y*).

In cases where the principal and receiver are joined in the same indictment, and tried together, there is no doubt that the receiver may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; and in cases where the principal has been previously convicted, though the record of the conviction will be sufficient presumptive evidence that everything in the former proceeding was rightly and properly transacted, yet according to great authority, it is competent to the receiver to controvert the guilt of the principal, and to shew that the offence of which he was

(*t*) R. *v.* Wilson, 2 Mood. 52. It is essential to prove that the prisoner knew that the goods were obtained by false pretences. R. *v.* Rymes, 3 C. & K. 326.

(*u*) Taylor *v.* R. [1895], 1 Q.B. 25; 64 L. J. M. C. 11. The objection was taken on demurrer. The Court (Mathew and Charles, JJ.) did not follow R. *v.* Hill (Gloucester Spr. Ass. 1851, MSS. C. S. G.), nor R. *v.* Mackay, 17 Cox, 713. Nor did they adopt the dictum of Bramwell, B., in R. *v.* Goldsmith (*infra*), note (*v*).

(*v*) R. *v.* Goldsmith, L. R. 2 C. C. R. 74; 42 L. J. M. C. 94, Bramwell, B., said, 'Had the present objection been taken on demurrer or motion to quash, I am not prepared to say the count would have been good.' See note (*u*), *supra*.

(*w*) R. *v.* Haslam, 1 Leach, 418. 2 East, P. C. 782. R. *v.* Patram, 1 Leach, 419 (n). 2 East, P. C. 782, Grose, J.

(*x*) R. *v.* Robinson, 4 F. & F. 43. R. *v.* Pratt, 4 F. & F. 315. *Vide post*, p. 2286.

(*y*) R. *v.* Cox, 1 F. & F. 90. A confession of the principal in the absence of the receiver is not evidence against the latter. R. *v.* Turner, 1 Mood. 347. See R. *v.* Smith, 18 Cox, 470.

convicted did not amount to felony in him, or not to that species of felony with which he was charged (*z*).

The prisoner was indicted for receiving stolen goods, and the indictment alleged that he received them from the person who stole them, and that the person who stole them was a certain ill-disposed person to the jurors unknown; it was proved that the person who stole the property handed it to J. S., and that J. S. delivered it to the prisoner; and Parke, J., held that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and he would not allow it to go to the jury to say whether the person from whom he was proved to have received it was an innocent agent or not of the thief (*a*). So where an indictment charged W. with stealing a gelding and L. with receiving it, knowing it to have been 'so feloniously stolen as aforesaid,' and W. was acquitted; Patteson, J., held that L. could not be convicted upon this indictment, and that he might be tried on another indictment, charging him with having received the gelding, knowing it to have been stolen by some person unknown (*b*).

The first count charged C. with stealing a promissory note for £10 from the person of H.; the second count with stealing a bank note for £10 from the person of the said H.; and the third count with feloniously receiving 'the goods and chattels aforesaid, *so as aforesaid feloniously stolen*.' The jury found the prisoner not guilty upon the two first counts, but guilty of receiving under the third count; and, upon a case reserved, it was contended that the judgment ought to be arrested, because the words 'so as aforesaid' were descriptive, and meant 'stolen by C. aforesaid.' Pollock, C. B. said: 'The several counts are wholly independent of each other. The fact of the prisoner having been acquitted on the two first counts has no bearing whatever on the charge contained in the third, and it cannot be used as evidence on that count either for or against him. That count stands or falls on its own merits. If it must mean the goods so stolen by C., still if *in rerum naturâ* a man can possibly be a receiver of goods stolen by himself, which he clearly may be, then there is no objection to this indictment on its face. The objection, being merely technical, may be met by an answer equally technical. Assuming the count to allege the goods to have been stolen by the said C., then after verdict we must assume that such allegation was proved. It is quite immaterial that there may seem to be a contradiction on the face of the record owing to the acquittal on the other counts.' . . . 'The Court are all of opinion that the conviction is right. If we hold that the words must be construed as is suggested, then after verdict it must be taken that such a stealing was proved; if, on the other hand, as some of the Court think, the words need not be construed so as to create such seeming repugnancy, the objection is wholly groundless' (*c*). So where a prisoner was charged, in the first count with stealing

(*z*) Fost. 365. R. *v.* Smith, 1 Leach, 288. In R. *v.* Dunn, 4 C. & P. 543, Bosanquet, J., thought that the record of the principal's conviction on his own confession was *primâ facie* evidence against the accessory; but see R. *v.* Turner, 1 Mood. 347.

(*a*) R. *v.* Elsworthy, 1 Lew. 117. It is not necessary to allege, as was done in this and the following cases, by whom the goods were stolen.

(*b*) R, *v.* Woolford, 1 M. & Rob. 384.

(*c*) R. *v.* Craddock, 2 Den. 31; 20 L. J. M. C. 31.

twenty yards of tweed, and in the second count with receiving the goods and chattels aforesaid "so as aforesaid feloniously stolen," and acquitted on the first count, but convicted on the second; it was contended that the conviction could not be sustained, because a person cannot be said to have feloniously received goods stolen by himself; but it was held, on a case reserved, that "so as aforesaid feloniously stolen," might be construed to mean simply "stolen goods," and therefore such goods as the prisoner might be convicted of receiving' (*d*).

An indictment charged three prisoners with stealing a carpet bag and a number of articles therein contained, and two other prisoners with receiving separately certain of the goods so stolen as aforesaid, and there were two other counts, each of them charging one of the two last-mentioned prisoners with a substantial felony in separately receiving portions of the same goods, and the jury acquitted the three principals, but found the receivers guilty; it was moved, in arrest of judgment, that the principals having been acquitted, no judgment could be given against the receivers; that a larceny committed by another person could not be given in evidence upon this indictment; and although a count for a substantive felony might be inserted, such count was only introduced to prevent an acquittal, if it turned out that the property was received from some other person, but still the principal must be proved to have committed the felony; but the objection was overruled, and judgment given against the receivers (*e*).

Where several prisoners are jointly indicted for receiving stolen goods, and one of them convicted and the others acquitted, and one of the prisoners who was acquitted is afterwards separately indicted for receiving the same goods, a plea of *autrefois acquit* on the former indictment is good (*f*).

Where upon an indictment for receiving stolen re-issuable notes, the prisoner's counsel in cross-examination attempted to shew that no means had been taken to inform the public of the number and particulars of the notes, and the counsel for the prosecution then proposed to read an advertisement; it was objected to, unless it could be shewn that it had come to the knowledge of the prisoner; but upon a case reserved the judges were of opinion that under the particular circumstances of the case it was properly received (*g*).

Recent Possession (*gg*).—The possession of property that has been recently stolen is evidence either that the person in possession stole the property, or that he received it knowing it to be stolen according to the other circumstances of the case. So where the prisoner was found in the possession of some sheep that had been recently stolen, of which he could give no satisfactory account and it might reasonably be inferred from the circumstances that he did not steal them himself and he was convicted of receiving it was held upon a case reserved that there was evidence for the jury that he received them knowing them

(*d*) R. *v.* Huntley, Bell, 238; 29 L. J. M. C. 70. It is clear a person may steal, hand over to another, and afterwards receive from him again, and so be both a principal and a receiver, just as a person may be an accessory before the fact, and afterwards receive the goods knowing them to have been stolen. See R. *v.* Hughes, Bell, 242; 29 L. J. M. C. 71.

(*e*) R. *v.* Pulham, 9 C. & P. 280, Gurney, B. See R. *v.* Austin, *ante*, p. 1478.

(*f*) R. *v.* Dann, 1 Mood. 424.

(*g*) R. *v.* Vyse, 1 Mood. 218.

(*gg*) *Vide* also *ante*, p. 1308.

to have been stolen. In delivering judgment, Pollock, C.B., said: 'If no other person is involved in the transaction, and the whole of the case against the prisoner is that he was found in possession of the stolen property, the evidence would no doubt point to a case of stealing rather than a case of receiving; but in every case, except indeed where the possession is so recent that it is impossible for any one else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from some one else. If there is no other evidence, the jury will probably consider, with reason, that the prisoner stole the property; but if there is other evidence, which is consistent either with his having stolen the property, or with his having received it from some one else, it will be for the jury to say which appears to them the more probable solution.' Blackburn, J., said: 'When it has been shewn that property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver, according to the circumstances. If he had been seen near the place where the property was kept before it was stolen, they may fairly infer that he was the thief. If other circumstances shew that it is more probable that he was not the thief, the presumption would be that he was the receiver. The jury should not convict the prisoner of receiving unless they are satisfied that he is not the actual thief' (*h*).

It has been held that there should be some evidence to shew that the goods were in fact stolen by some other person, and recent possession of the stolen property is not alone sufficient to support such an indictment, as such possession is evidence of stealing and not of receiving (*i*).

On an indictment for receiving a stolen shirt it appeared doubtful whether the principal felony had not been committed by several persons, and the only evidence against the prisoner was the possession of the shirt, and a statement made by her that she had received it from another person; it was objected that there was no evidence of receiving; Littledale, J., 'In a case on the early part of this circuit the only evidence was recent possession, and the counsel for the prosecution urged that that was evidence of receiving, but I held that it was not. I hold it essential to prove that the property was in the possession of some one else before it came to the prisoner; here the prisoner said some one brought the shirt to her; that is an admission that it had been in the possession of some one else. That is evidence of receiving' (*j*).

Evidence of Guilty Knowledge.—The necessary evidence of the offender knowing the goods which he has received to have been originally stolen may be collected from the circumstances of the particular case; and it is said that the buying goods at an under value is presumptive evidence that the buyer knew they were stolen (*k*).

(*h*) R. *v.* Langmead, L. & C. 427; 9 Cox, 464. See R. *v.* McMahon, 13 Cox, 275 (I). and the cases quoted *ante*, p. 1308, and as to *onus* of proof, R. *v.* Stoddart, 25 T.L.R. 612; 2 Cr. App. R. 217, 241.

(*i*) R. *v.* Densley, 6 C. & P. 399. This case was quoted in R. v. Langmead (*supra*). See R. *v.* Arundel, 1 Lew. 115. R. *v.* Deer, L. & C. 240; 32 L. J. M. C. 33.

(*j*) R. *v.* Sarah Cordy, Gloucester Lent Ass. 1832, MSS. C. S. G.

(*k*) 1 Hale, 619. 2 East, P. C. 765.

Before the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112) s. 19 (*post*, p. 1487), it was held that upon an indictment for receiving stolen goods, evidence might be given of different receipts of goods stolen *from the same person* in order to shew guilty knowledge in the receiving, at least of such receipts as were prior to the one charged in the indictment; but where on an indictment for receiving certain articles, it appears that they were received at different times, the prosecutor must elect on which receipt he will proceed. Upon an indictment against a principal and receiver, the evidence against the receiver was that many of the goods were found in her possession; others pledged by herself, and others by her direction, with different pawnbrokers at different times for a period of between four and five months, and other parcels were proved to have come into her possession at several and distinct times, and she admitted that all these things had been given to her by the principal; it was submitted that the prosecutor should elect what articles he meant to rely upon, and Gaselee, J., decided that as there was evidence that some of the things came at different times, these were several distinct acts of receiving, and that the prosecutor must elect what act of receiving he relied upon to support the felonious receiving. The prosecutor then elected to go upon the receiving of two particular pieces of silk. It was then objected that evidence ought not to be allowed of the receiver having pledged or disposed of, or having in her possession the other articles of stolen property, in order to raise an inference of guilty knowledge; but as all the property had been stolen from the same persons and had all been brought to her by the principal, Gaselee, J., thought it was admissible, and proper to be left to the jury, as an ingredient to make out the guilty knowledge; and he told the jury that they might take into their consideration the circumstances of her having the various articles of stolen property in her possession, and pledging or otherwise disposing of them at various times, as an ingredient in coming to a determination whether, when she received the two pieces of silk, she knew them or either of them to have been stolen. The jury found the prisoners guilty; and, upon a case reserved, the judges were unanimously of opinion that evidence of other acts of receiving was properly admitted against the receiver, and the conviction was therefore right (*l*). So where upon an indictment for receiving stolen goods, it was proposed to prove other receipts of stolen articles, besides those laid in the indictment; Gurney, B., held that any receipts that were before those laid in the indictment were evidence, and that, strictly speaking, the receiving another article the subject of another indictment was admissible (*m*). In the same case it was held that evidence might be given not only of the finding of the goods mentioned in the indictment in the house of the prisoner, but also of the finding of many other goods marked with the mark of the prosecutor,

(*l*) R. *v.* Dunn, 1 Mood. 146. The marginal note seems to limit the evidence of all other receipts to such as were 'prior to that on which the prosecutor elects to proceed'; but no such point seems to have been raised in the case; but see the next case.

(*m*) R. *v.* Davis, 6 C. & P. 177, and MSS. C. S. G. Gurney, B., thought if the receipt charged in the other indictment were given in evidence on this, that, as a matter of candour, the other indictment ought to be waived.

with a view to the *scienter* (*n*). So upon an indictment for receiving stolen tin it was held that evidence might be given that when the constable went to search the prisoner's warehouse for stolen iron, he saw the prisoner endeavouring to conceal some brass in some sand, and that after he was taken away in custody, his wife carried some tin under her cloak from a warehouse on the premises (*o*). In the same case it was held that what the prisoner said to the constable not only relating to the tin which was stolen, and for which the constable was not searching, but also relating to the iron for which he was searching, was admissible in evidence (*o*).

Where the prisoner was indicted for stealing and receiving certain cloth, which was stolen on the 3rd March and found in the prisoner's possession on the 10th, and evidence was given that there was found in his house two other pieces of cloth, and also that in the previous December he had been in possession of two other pieces of cloth, and that the four pieces had been stolen early in that month and were the property of different owners, upon a case reserved the Court held the evidence inadmissible and quashed the conviction (*p*).

N. pleaded guilty to an indictment for stealing lead, and on the trial of C. for receiving the lead, Cockburn, C.J., held that, in order to prove guilty knowledge, it was admissible to give evidence that on different occasions between the early part of January and 11th February, a marine store dealer had bought from C. and N. lead of the same description as that stolen. N. having proved that he had stolen portions of the lead on different occasions, evidence was received that C. and N. had gone to the marine store dealer together on seven occasions and sold portions of lead of a similar description, and the jury were directed to take this evidence into their consideration in forming their conclusion as to the guilty knowledge of the prisoner (*q*).

The prisoner was indicted for receiving certain stolen jewellery. No jewellery was found in his possession, but it was proved that the jewellery, the subject of the indictment, was stolen by C. and handed by him to B., who disposed of it to the prisoner. Evidence was admitted to prove that on occasions both before and after the one in question C. had stolen other jewellery from other persons and had handed it to B., and that B. had disposed of such jeweller yto the prisoner (*r*).

A father and son were jointly indicted, the son as the thief, and the father as the receiver of boots, shoes, and leather. There was only

(*n*) Ibid.

(*o*) R. *v.* Mansfield, C. & M. 140, Coleridge, J.

(*p*) R. *v.* Oddy, 2 Den. 264: 20 L. J. M. C. 198. Campbell, C.J., said, 'So under the third (receiving) count, the evidence would only shew the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue, viz., that at the time of his receiving these specific articles he knew them to be stolen.' Evidence of the other property found in the prisoner's possession would now be admissible. See 34 & 35 Vict. c. 112, s. 19, *post*, p. 1487.

(*q*) R. *v.* Nicholls, 1 F. & F. 51, Cockburn, C.J., Here the evidence was of other receipts of similar property which had been stolen from the same owner. R. *v.* Oddy (*supra*) was referred to.

(*r*) R. *v.* Hobinstock [1902], 135 Cent. Cr. Ct. Sess. Pap. 169; 37 L. J. (Newsp.) 106, Fulton, Recorder. R. *v.* Dunn (*supra*) and R. *v.* Oddy (*supra*) were cited. Though the jewellery was stolen from different persons, the prisoner received it from the same person.

one count against the son; but two against the father, the one for receiving the goods stolen by the son, the other for receiving the goods stolen by an evil-disposed person. The son had been in the prosecutor's employ from March to November, and the prisoners lived together till April, when the father removed to P., and took a hamper with him, which passed and repassed repeatedly between them until October. On the 10th of November, the day laid in the indictment, a quantity of shoes and leather belonging to the prosecutors was found in the son's lodgings, and sundry letters from the father to the son, the contents of which caused the shop of the father at P. to be searched, and there was also found property of the prosecutors, of the value of £150, and also letters of the son to the father. The letters from the father to the son, and from the son to the father, were stated to bear dates at various periods between May and October, and to refer to the transmission of goods of the nature of those found in the father's shop. It was urged that these letters could not all be read, but that the prosecution must elect one offence, and give evidence on that alone. It was answered that the letters were all evidence against the father to shew guilty knowledge, and R. *v.* Dunn (*s*) was relied on. Maule, J., 'It is true that judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment, where the effect of doing so will be to create confusion, or to surprise the prisoner, or otherwise embarrass the defence. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if more than one) took place; the whole, according to the opening, seems to constitute a continuous transaction; therefore I shall admit the evidence relating to any takings and receivings, under the circumstances suggested, provided the indictment contains corresponding charges' (*t*).

On an indictment for receiving stolen lead, Bramwell, B., told the jury that 'the knowledge charged in the indictment need not be such knowledge as would be acquired if the prisoner had actually seen the lead stolen; it is sufficient if you think the circumstances accompanying the transaction were such as to make the prisoner believe that it had been stolen' (*u*).

Where on an indictment for receiving the silver tops of a whip and of two walking-sticks, a boy had been convicted of stealing them, and the prisoner, a general dealer, had proved on the trial of the boy that he gave three shillings for the articles, and that the boy said he got them from the coachman of B.; but it appeared that the boy had been in the service of B., whose man had sent him repeatedly to the prisoner with articles of a very varied character to sell, and that on the first occasion the prisoner asked him who he was, and had a note of introduction from B. or his man, and the boy had never told the prisoner that he had left the service of B., but said that the prisoner only gave him seventeen pence for the articles, the value of which was stated to be three times the sum the prisoner said he gave for them; Martin, B.,

(*s*) *Ante*, p. 1484.
(*t*) R. *v.* Hinley, 2 M. & Rob. 524.
(*u*) R. *v.* White, 1 F. & F. 665.

told the jury that if they thought the prisoner did not know that the boy had left B.'s service, they should acquit him (*v*).

By sect. 19 of the Prevention of Crimes Act, 1871 (*w*) 'where proceedings are taken against any person for having received goods (*x*) knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months (*y*), and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

'Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen (*z*); provided that not less than seven days' notice (*zz*) in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.'

The other stolen property must be found in the possession of the prisoner; and upon an indictment for receiving stolen property, evidence that before the stealing of the property in respect of which the prisoner was being tried he had been in possession of other similar stolen property which he had disposed of before the larceny in question had been committed, is inadmissible (*a*).

Evidence under this statute ought not to be admitted if the real offence charged is stealing and not receiving. The mere fact that there is a receiving count in the indictment does not render the evidence admissible. If the evidence is admitted, but fails to reasonably shew that the property so found was in fact stolen, the judge ought to withdraw such evidence from the consideration of the jury.

The prisoners were indicted for stealing and receiving on the 18th

(*v*) R. *v.* Wood, 1 F. & F. 497.

(*w*) 34 & 35 Vict. c. 112.

(*x*) It was doubted whether bank notes were goods within the similar section, 11 of 32 & 33 Vict. c. 99 (rep.). See R. *v.* Harwood, 11 Cox, 388, per Keating, J.

(*y*) And this may be so notwithstanding that the property forms the subject of another indictment. R. *v.* Jones, 14 Cox, 3, Lopes, J. Cf. R. *v.* Bond [1906], 2 K.B. 389; 75 L. J. K. B. 693.

(*z*) See R. *v.* Davis, L. R. 1 C. C. R. 272; 39 L. J. M. C. 134; and R. *v.* Harwood, 11 Cox, 388 (*supra*), where it was held that the repealed 32 & 33 Vict. c. 99, s. 11, which was somewhat differently worded from the present section did not, when the previous conviction had been proved, throw the onus upon the prisoner of proving that he had not guilty knowledge when he received the goods. Under the present statute the previous conviction is only evidence of such guilty knowledge.

(*zz*) It is not necessary to serve a notice to produce this notice: R. *v.* Whitley, 72 J. P. 272.

(*a*) R. *v.* Carter, 12 Q.B.D. 522. R. *v.* Drage, 14 Cox, 85. See also R. *v.* Bond [1906], 2 K.B. 389; 75 L. J. K. B. at 703 per Kennedy, J.

April certain property belonging to Lewis & Allenby, Ltd. Evidence was given that, when the property the subject of this indictment was found in the possession of the prisoners there was also found in their possession a belt and a blouse, and evidence was admitted purporting to prove that the belt had been stolen from a shop on the 9th April and that the blouse had been stolen from another shop on the 21st April (*b*). The chairman directed the jury that there was evidence that the blouse and belt had been stolen by some one and that they might take that evidence into consideration in determining whether the prisoners, or either of them, were guilty upon the indictment on which they were being tried. The jury convicted both prisoners, and, upon a case reserved, it was contended that the evidence was not admissible under this statute. The statute was only intended to apply to a real case of receiving and not of stealing (*c*), and that in the present case either the prisoners stole the property, or no one. Alverstone, C.J., said, 'We are all agreed that if the real offence was stealing it was most improper to admit the evidence under the Prevention of Crimes Act, 1871.' It was further contended that the evidence was not admissible to rebut the defence of accident, and that assuming the evidence had been properly admitted in the first place, it should have been withdrawn from the jury, as there was no evidence that the blouse had been stolen at all. The Court were all of opinion that there was no evidence that the blouse was stolen property and that the evidence, if properly admitted in the first instance (*d*), ought to have been withdrawn from the jury, and that the conviction must be quashed (*e*).

(*b*) There were also indictments against the prisoners for stealing and receiving the belt and the blouse. Kennedy, J., during the argument of the case said, 'In Peter Robinson's case (the blouse), I see that the property was alleged to have been stolen after the property the subject matter of the indictment upon which the defendants were tried, but the section says, "stolen within the preceding period of twelve months."' Darling, J., 'Does not the "preceding period of twelve months" date from the time when proceedings are taken?' The section is not very clear, but probably the twelve months dates from the finding the property in the prisoner's possession.

(*c*) R. *v.* Carter (*supra*) as reported in the "Times" Newspaper, April 7th, 1884, was referred to. See also R. *v.* Bromhead, 71 J. P. 103.

(*d*) Alverstone, C.J., was of opinion that the evidence had been properly admitted in the first instance. Kennedy, J., said he was not prepared to agree that the evidence was properly admitted in the first instance. Darling, Walton, and A. T. Laurence, JJ., did not express an opinion on the point.

(*e*) R. *v.* Girod [1906], 70 J. P. 514; 22 T. L. R. 720. Other points were reserved in the case, but it was unnecessary to decide them.

CANADIAN NOTES.

RECEIVING STOLEN GOODS, ETC.

Receiving Property Obtained by Crime.—See Code sec. 399.

In the offence of receiving stolen goods the stolen goods must have been taken and stolen by a person other than the person accused of receiving. R. v. Lamoureux (1900), 4 Can. Cr. Cas. 101. The essential elements of the offence of receiving stolen goods are not included in the offence of "house-breaking and theft," and a conviction for receiving stolen goods cannot be rendered on the "speedy trial" of a person charged only with house-breaking and theft. *Ibid.*

A person having a joint possession with the thief may be convicted as a receiver. Section 402; McIntosh v. R. (1894), 23 Can. S.C.R. 180, 193. And so may the person who aids in concealing or disposing of it. Section 402.

And a person may steal, hand over to another and afterwards receive from him, and so be both a principal and a receiver just as a person may be an accessory before the fact and afterwards receive the goods knowing them to have been stolen. R. v. Hughes (1860), Bell C.C. 242.

It is legal to charge a stealing and a receiving in the same indictment. Code sec. 856. Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing. McIntosh v. R. (1894), 5 Can. Cr. Cas. 254 (Can.); Reg. v. Hilton, Bell C.C. 20.

Receivers of Stolen Property.—Code sec. 849.

Receivers May be Joined in Indictment.—Code sec. 849(2).

Having in Possession, Meaning of.—Code sec. 5.

Knowledge of the party receiving stolen goods that they were stolen may be established by facts and circumstances, such as possession of property recently stolen, disposing of it for much less than its value, making contradictory statements as to how possession of the same was obtained, secreting it or dealing with it in a way it would not be dealt with by an honest person. Desaulniers v. Hird (1906), 15 Que. K.B. 394, 398; and by falsely denying possession. Archbold Cr. Pl. 519.

Receiving Stolen Property.—See Code sec. 400.

As to the offence of theft of post letters and mailable matter, see secs. 364-366, and as to indictment for offences respecting letters and property sent by post, see secs. 850, 867 and 869.

Receiving Property Obtained by Offence Punishable on Summary Conviction.—See Code sec. 401.

A person having a joint possession with the thief may be convicted as a receiver, although a conviction for stealing would have been supported by the same evidence if the jury had so found. McIntosh v. R., 5 Can. Cr. Cas. 254.

When Receiving is Complete.—See Code sec. 402.

CHAPTER THE TWENTY-EIGHTH.

OF TAKING A REWARD FOR HELPING TO THE DISCOVERY OF STOLEN PROPERTY (*a*).

By the Larceny Act, 1861 (24 & 25 Vict. c. 96) s. 101, 'Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted or disposed of, as in this Act before mentioned, shall (unless he shall have used all due diligence to cause the offender to be brought to trial for the same) be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . (*b*) or to be imprisoned . . . and, if a male under the age of eighteen years, with or without whipping(*c*).

In a case upon the repealed 4 Geo. I. c. 11, it was considered proper to aver that the defendant had not apprehended or caused to be apprehended the principal, &c., such reservation being in the enacting clause, and part of the description of the offence (*d*). In a case where the principal felon was dead, and had not been convicted of the offence, it was objected that the person receiving the reward to help to the stolen goods could not be convicted, and the point was reserved for the consideration of the judges; but their opinion was never publicly communicated, though it was presumed, from the prisoner being discharged after remaining some time in gaol, that the objection prevailed (*e*). With respect, however, to another objection, that the principal felon had not been convicted of the offence, it was well observed that this could not have been the ground of the prisoner's discharge, inasmuch as the statute, by the very terms of it, precluded the supposition of a conviction of the principal being a necessary preliminary to the trial and punishment of the offender; for it stated that the offender should be guilty of felony, &c., 'unless he did apprehend, or cause to be apprehended, the felon who stole the goods, and cause such felon to be brought to his trial for the same, and give evidence against him.' And it was therefore suggested that the true

(*a*) *Vide ante*, Vol. i. p. 579, 'Compounding offences.'

(*b*) The omitted words are repealed. As to other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*c*) Taken from 7 & 8 Geo. IV. c. 29, s. 58 (E) and 9 Geo. IV. c. 55, s. 51 (I), and extended to all cases of extorting, embezzling, and disposing of property within the meaning of any of the sections of this Act. The words of the former enactment were 'unless he caused the offender to be apprehended and brought to trial for the same.' That might be an impossibility, and therefore the words have been altered. In this section the age up to which whipping can be inflicted is 'eighteen,' whereas under most statutes it is 'sixteen.'

(*d*) 2 East, P. C. 771.

(*e*) R. *v.* Drinkwater, 1 Leach, 15. 2 East, P. C. 770. And see R. *v.* Wild (on 5 Anne, c. 31, s. 6 (rep.). 2 East, P. C. 746.

ground of the doubt was, that by the death of the principal, the stipulated condition had become impossible to be performed without any default of the defendant (*f*).

There is a case where the principal felon was admitted as a witness against the party indicted for taking the reward; namely, the case of the notorious Jonathan Wild, whose extensive traffic in the taking of such rewards is said to have been the occasion of the passing of this clause in the repealed statute (*g*).

It was held to be an offence within 4 Geo. I. c. 11, s. 4 (rep.) to take money under pretence of helping a man to goods stolen from him though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had no power to restore them (*h*).

The prisoner was indicted for receiving from the prosecutrix certain reward under pretence of helping her to certain cheeses which had before been stolen, he not having caused the person by whom the cheeses were stolen to be apprehended. The prosecutrix had had her house broken open and fourteen cheeses stolen. The prisoner, who was a tradesman employed by the prosecutrix, called on her in the course of his business, and told her that he had some suspicion of the persons who had broken open her house. He proposed and executed a plan by which he brought to her house the persons whom he suspected of being concerned in the robbery; and upon the prosecutrix seeing them she at once recognised them as persons who had been in her house the day previous to the night on which the robbery was effected. The prisoner asked the prosecutrix if she did not think they were implicated in the robbery; she said, 'Yes;' he said, 'So do I.' She said, 'I wish you would try if you could buy a bit of cheese of them;' to which he assented; and she gave him three pounds for that purpose. The prosecutrix saw the prisoner several times, when he told her that the cheese would come. The prosecutrix said, 'You have got the money, and you don't mean to send me the cheese;' he said she might have the money back whenever she pleased. Three questions were left to the jury. First, Did the prisoner mean to screen the guilty parties or to share the money with them? Secondly, Did the prisoner know the thieves, and intend to assist them in getting rid of the cheese by procuring the prosecutrix to buy it? On either of the above suppositions the jury were directed that the case was within the statute. Thirdly, Did the prisoner know the thieves and assist the prosecutrix as her agent, and at her request, in endeavouring to purchase the cheese from them, not meaning to bring the thieves to justice? To the first two questions the jury answered, 'No.' To the third, 'Yes.' Whereupon the jury were directed to find the prisoner guilty, and, upon a case reserved, the judges were of opinion that, upon the facts found by the jury the receipt of the money by the prisoner was a corrupt receiving of such money within the meaning of the statute, the facts found being that the prisoner knew the thieves, and assisted in endeavouring to purchase the stolen property from the thieves, not meaning to bring

(*f*) 2 East, P. C. 770.

(*g*) 4 Bl. Com. 132. R. *v.* Wild, 1 Leach, 17 (n); 2 East, P. C. 770. 4 Bl. Com. 132. See R. *v.* Haslam, *ante*, p. 1480.

(*h*) R. *v.* Ledbitter, 1 Mood. 76.

them to justice; and this finding established all the facts necessary to constitute the offence described in the statute (*i*).

On an indictment for feloniously receiving £6 on account of helping the prosecutor to a mare which had been stolen, without causing the thief to be brought to trial, it appeared that the prosecutor's son went to the prisoner with the mare to assist him in drawing out manure, and at night turned out the mare in the prisoner's field, from which she was shortly afterwards missed. The prosecutor had bought a farm from the prisoner, and had paid part of the purchase money to an agent, being the amount of rent due by the prisoner, and the residue to the prisoner. The day after the mare was missed the prisoner proposed to the prosecutor, that if he would get the agent to return £8 or £9 of the money paid to him, three or four of the neighbours would go and find the mare, and that unless the matter was settled the mare would be removed a day's journey; the prosecutor proposed to the prisoner to pay him £5 or £6 if he would get the mare for him; this the prisoner declined, and proposed that one S. should decide how much the prosecutor should pay; at length the prisoner proposed to take £12, which the prosecutor refused to give, but he gave S. £6 to give the prisoner, desiring him to be very careful not to part with the money till he saw the mare coming home. S. told the prisoner that he could not part with the money till the mare was returned, and the mare was in fact at home before he gave the money to the prisoner. It was objected that as the mare was returned before the money was paid the case was not within 9 Geo. 4, c. 55, s. 51 (rep.); (*j*) but upon a case reserved it was held that, as the prisoner was aware he was to get the money, and return the mare on that account, and afterwards get the money, it came within the words 'upon account of helping any person to any chattel' (*k*).

On an indictment on (7 & 8 Geo. 4, c. 29, s. 58) (rep.), for corruptly receiving money from S. under pretence of helping him to a watch which had been stolen from him, S. proved that he was robbed of his watch, and mentioned the robbery in the presence of the prisoner and others, and offered five shillings to any one who would recover it for him. The prisoner said he thought he could, and on that account obtained about ten shillings from S., but did not restore the watch, or money, or do anything towards the prosecution of the thief. It was urged that there was no evidence to connect the prisoner with the thief, and that some such evidence was necessary to make out the offence. Tindal, C.J., told the jury that 'the taking of money here intended is certainly a corrupt and dishonest taking under false pretences; for the word "pretence" in itself implies that something has been done with a false and sinister design. You must, therefore, be satisfied that when the prisoner took the money, he took it dishonestly, with some corrupt motive; for which many grounds might be suggested. A person may believe himself capable of finding out the thief, and if he obtains the money for that purpose, then he is not guilty of this offence. But there are also many instances in which he would be guilty; if, for instance,

(*i*) R. *v.* Pascoe, 1 Den. 456; 18 L. J. M. C. 184.

(*j*) This section corresponds with 24 & 25 Vict. c. 96, s. 101, *ante*, p. 1489.

(*k*) R. *v.* O'Donnell, 7 Cox, 337.

he saw the thief take the watch, it would be very corrupt in him to wait and take money for helping the person who had been robbed of his property, instead of immediately apprehending the thief, whose guilty act he had seen; or again, if he had anything to do with the commission of the theft itself, it would not be otherwise than corrupt to receive money for the restitution of the property. The questions for you are —first, whether the watch was stolen; and secondly, whether the prisoner did take the prosecutor's money under a corrupt pretence, and not honestly meaning to detect the thief if possible. If you think that he had any object of a wicked nature at the time, then you will say that he is guilty; but if you believe that he honestly meant to use such means as he could to bring the offender to justice, then your verdict must be "not guilty"' (*l*).

Where before the Larceny Act, 1861, an indictment alleged that the prisoner received certain money on account of helping the prosecutor to certain goods lately stolen, the prisoner not *then* having caused the offenders to be apprehended, it was urged that the Act specified no time within which the party was to cause the offenders to be apprehended; and at any rate he must have a reasonable time so to do; and therefore the indictment was bad; but Erle, J., overruled the objection (*m*).

By sect. 102 of the Larceny Act, 1861, 'Whosoever shall publicly advertise a reward for the return of any property whatsoever (*n*) which shall have been stolen or lost, and shall in such advertisement use any words purporting that no question will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered, with full costs of suit (*o*).'

By the Larceny (Advertisements) Act, 1870 (33 & 34 Vict. c. 65), s. 3, every action against the printer or publisher of a newspaper (*p*) to recover a forfeiture under sect. 102 of the Larceny Act, 1861, shall be brought within six months after the forfeiture is incurred, and no such action against the printer or publisher of a newspaper shall be brought unless the assent in writing of His Majesty's attorney-general or solicitor-general for England, if the action is brought in England, or for Ireland, if the action is brought in Ireland, has been first obtained to the bringing of such action.

(*l*) R. *v.* King, 1 Cox, 36.

(*m*) R. *v.* Hicks, 1 Cox, 145.

(*n*) Dogs are included in the words 'any property whatsoever,' Mirams *v.* 'Our Dogs' Publishing Co., Ltd. [1901], 2 K.B. 564; 70 L. J. K. B. 879.

(*o*) Taken from 7 & 8 Geo. IV. c. 29, s. 59 (E.); 9 Geo. IV. c. 55, s. 52 (I.); and 8 & 9 Vict. c. 47, s. 4.

(*p*) In this Act the term 'newspaper' means a newspaper as defined for the purposes of the Acts for the time being in force relating to the carriage of newspapers by post.

CHAPTER THE TWENTY-NINTH.

OF UNLAWFULLY RECEIVING OR HAVING POSSESSION OF PUBLIC STORES.

By the Public Stores Act, 1875 (38 & 39 Vict. c. 25) (*a*).

Sec. 3. 'This Act shall apply to all stores under the care, superintendence, or control of a Secretary of State or the Admiralty, or any public department or office, or of any person in the service of His Majesty, and such stores are in this Act referred as to His Majesty's stores. The Secretary of State, Admiralty, public department, office, or person having the care, superintendence, or control of such stores, are hereinafter in this Act included in the expression public department' (*aa*).

Sect. 4. 'The marks described in the first schedule (*b*) to this Act may be applied in or on stores therein described in order to denote His Majesty's property in stores so marked; and it shall be lawful for any public department, and the contractors, officers, and workmen of such department, to apply those marks, or any of them, in or on any such stores; and if any person without lawful authority (proof of which authority shall lie on the party accused) applies any of those marks in or on any such stores he shall be guilty of a misdemeanor, and shall on conviction thereof be liable to be imprisoned for any term not exceeding two years, with or without hard labour.'

(*a*) This Act consolidates and amends the Acts relating to the protection of public stores.

(*aa*) By sect. 2. 'The term "stores" includes all goods and chattels, and any single store or article;' 'Secretary of State' is defined in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (3); and 'the Admiralty' in sect. 12 (4) ibid. See also, as to naval and military stores, *ante*, p. 1445.

(*b*) FIRST SCHEDULE.

Marks appropriated for use in or on His Majesty's Stores.

Stores.	Marks.
Hempen cordage and wire rope	White, black, or coloured worsted threads laid up with the yarns and the wire respectively.
Canvas, fearnought, hammocks, and seamen's bags	A blue line in a serpentine form.
Buntin	A double tape in the warp.
Candles	Blue or red cotton threads in each wick or wicks of red cotton.
Timber or metal . . . Any stores not before enumerated, whether similar to the above or not . .	The name of His Majesty, his predecessors, his heirs or successors, or of any public department, or any branch thereof, or the broad arrow, or a crown, or His Majesty's arms, whether such broad arrow, crown, or arms be alone or be in combination with any such name as aforesaid, or with any letters denoting any such name.

By sect. 5, 'If any person with intent to conceal His Majesty's property in any stores takes out, destroys, or obliterates, wholly or in part, any such mark as aforesaid, or any mark whatsoever denoting the property of His Majesty in any stores, he shall be guilty of felony, and shall on conviction thereof be liable, in the discretion of the Court before which he is convicted, to be kept in penal servitude for any term not exceeding seven years . . . ' (*c*).

By sect. 6, 'A constable of the metropolitan police force may, within the limits for which he is constable, and any constable, if deputed by a public department, may, within the limits for which he is constable, stop, search, and detain any vessel, boat, or vehicle in or on which there is reason to suspect that any of His Majesty's stores stolen or unlawfully obtained may be found, or any person reasonably suspected of having or conveying in any manner any of His Majesty's stores stolen or unlawfully obtained.

'A constable shall be deemed to be deputed by a public department within the meaning of this section if he is deputed by any writing signed by the person who is the head of such department, or who is authorised to sign documents on behalf of such department.'

By sect. 7, 'If any person is brought before a Court of Summary Jurisdiction charged with conveying or with having in his possession (*d*) or keeping any of His Majesty's stores reasonably suspected of being stolen or unlawfully obtained, and does not give an account to the satisfaction of the Court how he came by the same, he shall be deemed guilty of a misdemeanor, and shall be liable, on summary conviction, to a penalty not exceeding five pounds, or, in the discretion of the Court, to be imprisoned for any term not exceeding two months, with or without hard labour ' (*e*).

By sect. 10, 'For the purposes of this Act stores shall be deemed to be in the possession or keeping of any person if he knowingly has them in the actual possession or keeping of any other person, or in any house, building, lodging, apartment, field, or place, open or enclosed, whether occupied by himself or not, and whether the same are so had for his own use or benefit or for the use or benefit of another.'

By sect. 11, 'A conviction in England under any provision of this Act of a dealer in old metals shall, for the purposes of registration and its

(*c*) The omitted words are repealed. As to other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*d*) Upon the construction of the former statutes it was observed (2 East P. C. 765) that the King's mark denoted the original ownership, and that the *onus probandi* was thrown upon the party having public stores in his possession, to account satisfactorily for that possession according to the regulations prescribed. But though the bare fact of possession ordinarily concludes the party, it is open to explanation; and the presumption arising from it may be rebutted by circumstances.

This principle was acted upon by Foster, J. (Anon. Fost. App. 439 (ed. 1792); 2 East, P. C. 765; 8 Cox, 477 *n.*), in a case where a widow was indicted on 9 & 10 Will. III. c. 41 (rep.) for having in her custody divers pieces of canvas marked with His Majesty's mark in the manner described in the Act, she not being a person employed by the commissioners of the navy to make the same for His Majesty's use. And again by Kenyon, C.J., in a subsequent case (R. *v.* Banks, 1 Esp. 145) of an information upon 9 & 10 Will. III. c. 41 (rep.), and 17 Geo. II. c. 40, s. 10 (rep.). See also R. *v.* Wilmett, 3 Cox, 281. R. *v.* Cohen, 8 Cox, 41. R. *v.* Sleep, L. & C. 44. R. *v.* Dixon, 3 M. & S. 11. R. *v.* Sunley, Bell, 145.

(*e*) Sects. 8 and 9 create other offences punishable on summary conviction.

consequences under the Old Metal Dealers Act, 1861 (*f*) be equivalent to a conviction under that Act.'

By sect. 12, 'The following sections of the Larceny Act, 1861, are hereby incorporated with this Act, and shall for the purposes of this Act be read as if they were here re-enacted, namely, sections ninety-eight to one hundred (*g*), one hundred and three (*h*), one hundred and seven to one hundred and thirteen (*i*), and one hundred and fifteen to one hundred and twenty-one (*j*), all inclusive; and for this purpose the expression, "this Act," where used in those sections, shall be taken to include the present Act.'

By sect. 13, 'The provisions of this Act relative to the taking out, destroying, or obliterating of marks, or to the having in possession or keeping His Majesty's stores, shall not apply to stores issued as regimental necessaries or otherwise for any soldier, militiaman, or volunteer; but nothing herein shall relieve any person from any obligation or liability to which he may be subject under any other Act in respect of any such stores.'

Sect. 14 states how proceedings are to be taken for the punishment of offences for which a person is liable under this Act on summary conviction, and for the recovery of penalties.

By sect. 15, 'Any pecuniary penalty or other money recovered under this Act in relation to any stores shall, in such manner as the Treasury from time to time direct, be paid into the receipt of the Exchequer, and carried to the Consolidated Fund; and this section shall supersede any enactment to the contrary contained in any Act relating to municipal corporations or the metropolitan police, or in any other Act.'

By sect. 16. 'Nothing in this Act shall prevent any person from being indicted under this Act or otherwise for any indictable offence made punishable on summary conviction by this Act, or prevent any person from being liable under any other Act or otherwise to any other or higher penalty or punishment than is provided for any offence by this Act, so that no person be punished twice for the same offence.' (*Vide ante*, Vol. I. p. 6.)

(*f*) 24 & 25 Vict. c. 110.

(*g*) Sect. 98, *ante*, p. 1313, relates to the punishment of principals in the second degree, and accessories. Sect. 99 provides for the punishment of aiders and abettors of any offence punishable on summary conviction. Sect. 100, *ante*, p. 1313, provides for the restitution of property stolen, &c.

(*h*) This section provides for the apprehension of offenders and for search warrants.

(*i*) These sections relate to summary convictions before justices, and to proceedings against persons acting under the Act. By 24 & 25 Vict. c. 96, sect. 109, 'In case any person convicted of any offence punishable upon summary conviction by virtue of this Act shall have paid the sum adjudged to be paid, together with the costs, under such conviction, or shall have received a remission thereof from the Crown, or from the lord-lieutenant in Ireland, or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment adjudged in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.' Sect. 113 was repealed by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 2.

(*j*) Sect. 115 provides for the trial of offences committed within the jurisdiction of the Admiralty. Sect. 116 provides for the form of an indictment for a subsequent offence. Sect. 117 states when offenders may be fined or required to find sureties (*ante*, Vol. i. p. 218). Sect. 118 was repealed by 55 & 56 Vict. c. 19. See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. p. 211. Sect. 119 relates to whipping. Sect. 120 relates to summary proceedings. Sect. 121 relating to the costs of prosecution for misdemeanors, is repealed as to England by 8 Edw. VII. c. 15, *post*, p. 2046.

Sect. 17, 'Section forty-five (*k*) of the Greenwich Hospital Act, 1865, shall be read and have effect as if this Act, instead of the Naval and Victualling Stores Act, 1864 (27 & 28 Vict. c. 91), were referred to in that section.'

By the War Department Stores Act, 1867 (*l*) (30 & 31 Vict. c. 128) sect. 3. 'In this Act the term "the Secretary of State for War" means such one of His Majesty's Principal Secretaries of State, as His Majesty is for the time being pleased to entrust with the Seals of the War Department . . . The term "stores" includes all goods and chattels, and any single store or article.'

By sect. 20, 'The Secretary of State for War may institute and prosecute any action, suit, or proceeding, civil or criminal, concerning military or ordnance stores, or other His Majesty's stores under the charge or control of the Secretary of State for War, or any stores sold or contracted to be delivered to or by the Secretary of State for War for the use or on account of His Majesty, or the price to be paid for the same, or any loss or injury of or to any such stores as aforesaid, and may defend any action, suit, or proceeding concerning any such stores, matter, or thing as aforesaid; and in every such action, suit, or proceeding the Secretary of State for War may be so described, without more; and any such action, suit, or proceeding shall not be affected by any change in the person for the time being holding the office of Secretary of State for War: Provided always as follows:

'(1) Nothing herein shall take away or abridge in or in relation to any such action, suit, or proceeding any legal right, privilege, or prerogative of the Crown; and in all such actions, suits, and proceedings, and in all matters and proceedings connected therewith, the Secretary of State for War may exercise and enjoy all such rights, privileges, and prerogatives as are for the time being exercised and enjoyed in any proceeding in any Court of Law or Equity by the Crown, as if the Crown were actually a party to such action, suit, or proceeding:

'(2) It shall be lawful for His Majesty, if and when it seems fit, to proceed by information in the Court of Exchequer (*ll*), or by any other Crown process, legal or equitable, in any case in which it would have been competent for His Majesty so to proceed if no provisions respecting procedure had been inserted in this Act.'

Indictment.—In a case upon 9 & 10 Will. III. c. 41, sect. 2 (rep.) an objection was taken to the indictment, in arrest of judgment, that no indictment lay because it was a new offence, and a particular penalty inflicted of forfeiture of the goods and £200; but the objection was

(*k*) By this section of 28 & 29 Vict. c. 89, 'The following mark may be applied in or on stores used, or intended to be used, for the purposes of Greenwich Hospital, to denote [His] Majesty's property in stores so marked, namely, an anchor surmounted with a naval crown, with two flags over the crown, and the letter G. on one side, and the letter H. on the other side; and stores used, or intended to be used, as aforesaid, shall be deemed naval stores within the meaning of the [Public Stores Act, 1875] and that Act shall apply thereto as if the mark in the present section described were described in the schedule to that Act; and that Act shall apply to all stores so marked before the commencement of this Act, becoming, by virtue of this Act, the property of [His] Majesty.'

(*l*) Part of sect. 3, sects. 4–19 and the schedule of this Act were repealed by sect. 18 of the Public Stores Act, 1875, *supra*.

(*ll*) Now in the King's Bench Division of the High Court (Revenue side).

overruled because the forfeiture accrued by the conviction on an indictment for the offence (*m*).

Though having in possession new stores, or stores not more than one-third worn, was punishable by transportation for fourteen years, (by 39 & 40 Geo. III. c. 89, s. 1,) and having in possession stores not new, or more than one-third worn, was, by the second section of that statute, subjected to a different punishment, yet counts for both these offences might be included in the same indictment (*n*). It is said to have been agreed that, although an indictment state that the prisoner, 'then or at any time before not being a contractor with, or authorised by the principal officers or commissioners of our said lord the King, of the navy, ordnance, &c., for the use of our said lord the King, to make any stores of war, &c.'; yet, that it was not incumbent on the prosecutors to prove this negative averment, but that the defendant must have shewn if the truth were so, that he was within the exception in the statute (*o*).

An indictment under 39 & 40 Geo. III. c. 89, s. 1 (rep.), alleged that the defendant unlawfully had in his custody certain naval stores, he 'not being a contractor with the principal officers or commissioners' of the navy, &c., and the Court of Queen's Bench held that the allegation of the defendant's not being a contractor could refer to no time but the time at which the defendant was in possession of the stores, and therefore the indictment was good (*p*).

(*m*) R. *v.* Harman, 2 Ld. Raym. 1104.
(*n*) R. *v.* Johnson, 3 M. & S. 539, Ellenborough, C.J.
(*o*) R. *v.* Willis, 1 Hawk. c. 89, s. 17.
(*p*) R. *v.* Silversides, 3 Q.B. 406. See R. *v.* Somerton, 7 B. & C. 463. R. *v.* Page, 2 Mood. 219. R. *v.* James [1902], 1 K.B. 540.

CANADIAN NOTES.

OF UNLAWFULLY RECEIVING OR HAVING POSSESSION OF PUBLIC STORES.

Purchasing Old Marine Stores from Person Under Sixteen.—See Code sec. 431.

Marks Specified to be Used on Public Stores.—See Code sec. 432. (Amended 6 & 7 Edw. VII. ch. 7.)

Unlawfully Applying Marks to Public Stores.—See Code sec. 433.

Obliterating Marks from Public Stores.—See Code sec. 434.

Unlawful Possession or Sale of Public Stores.—See Code sec. 435.

Search for Public Stores.—See Code sec. 437 and 636.

Meaning of "Public Stores."—See Code sec. 2(28).

Meaning of "Stores."—See Code sec. 2(34).

Being in Possession of Public Stores Without Being Able to Justify. —See Code sec. 436.

Searching for Stores Near His Majesty's Wharf or Docks.—See Code sec. 437.

Evidence of Offence Against secs. 433-437.—Code sec. 991.

Receiving Clothing, Furniture or Provisions from Soldiers or Deserters.—See Code sec. 438.

It is expressly provided by Code sec. 8, that nothing contained in the Criminal Code, shall affect any of the laws relating to the government of His Majesty's land or naval forces.

A summary conviction under the Army Act for "buying, exchanging, taking in pawn, detaining or receiving" from a soldier his war medal is to be construed under Code sec. 725 as charging a single offence only, and is not bad for uncertainty. R. v. Brine (1904), 8 Can. Cr. Cas. 54 (N.S.).

Receiving Necessaries from Seamen or Marines.—See Code sec. 439.

Receiving Seaman's Property Unless in Ignorance or on Sale by Authority.—See Code sec. 440.

Code sec. 335 contains definitions of the expressions "seaman," "seaman's property" and "admiralty," as used in this section.

Not Justifying Possession of Seaman's Property.—See Code sec. 441.

CHAPTER THE THIRTIETH.

OF RECEIVING GOODS STOLEN FROM SHIPS; AND OF RECEIVING GOODS STOLEN ON THE RIVER THAMES.

THE Larceny Act, 1861 (24 & 25 Vict. c. 96), contains provisions, as has been already seen (*a*) relating to persons found in possession of or selling shipwrecked goods (sects. 65 and 66). There are also provisions (*b*) making it felony to steal from ships in any haven, &c., or from any dock, &c., or from any ship in distress (sects. 63 and 64). Where the stealing of property amounts to a felony under the Larceny Act, 1861, or at common law, sect. 91 of the Larceny Act, 1861 (*c*) applies and the receiving is punishable under that section.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), contains provisions (sects. 538–542) as to the manner in which marine store dealers (*i.e.* persons dealing in anchors, cables, sails, old junk, or old iron, or other marine stores of any kind) must carry on their business. They must have their names, &c., painted up on their shop, they must keep proper books, must not purchase from persons under sixteen and must not cut up any cable, &c., exceeding five fathoms in length without a written permit which has been duly advertised. Penalties are imposed for offences under these sections.

This last mentioned Act also contains provisions (sects. 535 and 536) (*d*) as to the taking of wrecks to foreign ports, or interfering with wrecks and it also provides (sect. 537) summary procedure in the case of concealment of wreck.

By the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), sect. 26, 'Every person who within the metropolitan police district shall knowingly take in exchange from any seaman or other person, not being the owner or master of any vessel, anything belonging to any vessel lying in the river Thames or in any of the docks or creeks adjacent thereto, or any part of the cargo of any such vessel, or any stores or articles in charge of the owner or master of any such vessel, shall be deemed guilty of a misdemeanor' (*e*).

By sect. 27, 'Every person who shall unlawfully cut, damage, or destroy any of the ropes, cables, cordage, tackle, headfasts, or other the furniture of or belonging to any ship, boat, or vessel lying in the river Thames or in any of the docks or creeks adjacent thereto, with intent to steal or otherwise unlawfully obtain the same or any part thereof shall be deemed guilty of a misdemeanor' (*e*).

(*a*) *Ante*, p. 1355.
(*b*) *Ante*, p. 1355.
(*c*) *Ante*, p. 1465.
(*d*) *Ante*, p. 1357.
(*e*) By sect. 73, the penalty for every misdemeanor or other offence against this Act for which no special penalty is appointed is either a penalty of not more than £5, or imprisonment for not more than one month.

By sect. 28, 'It shall be lawful for any constable to take into custody every person who for the purpose of preventing the seizure or discovery of any materials, furniture, stores, or merchandize, belonging to or having been part of the cargo of any ship, boat, or vessel lying in the river Thames or the docks or creeks adjacent thereto, or of any other articles unlawfully obtained from any such ship or vessel, shall wilfully let fall or throw into the river, or in any other manner convey away from any ship, boat, or vessel, wharf, quay, or landing place, any such article, or who shall be accessory to any such offence, and also to seize and detain any boat in which such person shall be found or out of which any article shall be so let fall, thrown, or conveyed away; and every such person shall be deemed guilty of a misdemeanor' (*f*).

(*f*) By sect. 73, the penalty for every misdemeanor or other offence against this Act for which no special penalty is appointed is either a penalty of not more than £5, or imprisonment for not more than one month.

CANADIAN NOTES.

OF RECEIVING STOLEN GOODS FROM SHIPS, ETC.

Selling Vessel or Wreck Without Title.—See Code sec. 429.

The term "wreck" includes the cargo, stores, and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons.

Secreting, Receiving, Selling, Keeping or Boarding Wrecked Vessel.—See Code sec. 430.

CHAPTER THE THIRTY-FIRST.

OF CHEATS, FRAUDS, FALSE TOKENS, AND FALSE PRETENCES.

WHERE the possession of goods was obtained, in the first instance, without fraud, upon a contract or trust, a subsequent dishonest conversion of them, while the privity of contract continued undetermined, was at common law only a breach of trust or civil injury, and was not the subject of a criminal prosecution (*a*). But where the person who obtains the goods has recourse to fraudulent means in the first instance and thereby induces the owner not only to deliver the possession of the goods to him, but absolutely to *part with the property* in them, though such a taking is not larceny (*b*), yet if effected by means of a false pretence, it is a misdemeanor within sect. 88 of the Larceny Act, 1861 (*c*). There are also other statutes which relate to particular cheats and frauds therein specified.

SECT. I.—OF CHEATS AND FRAUDS PUNISHABLE AT COMMON LAW.

At common law many cheats and frauds affecting the public welfare and causing an actual prejudice are indictable (*d*).

Cheats levelled against the public justice of the kingdom are indictable at common law (*e*). Judicial acts done without authority, in the name of another, are cheats of this description. There is a precedent of an indictment against a married woman, for pretending to be a widow, and as such executing a bail bond to the sheriff for one arrested on a bailable writ, and it is observed, that perhaps this was considered as a fraud upon a public officer, in the course of justice (*f*). And upon an application to the Court of King's Bench to discharge a defendant who had been held to bail under a judge's order, made upon an affidavit of debt sworn before a magistrate at Paris, the Court desired counsel to argue the question, how far the making, or knowingly using such an affidavit, if false, was punishable (*g*). After argument, Lord Ellenborough, C.J., said that he had not the least doubt that any person making use of a false instrument, in order to pervert the course of justice,

(*a*) 3 Co. Inst. 107. 2 East, P. C. 693, 816. But see now 24 & 25 Vict. c. 96, *s.* 3. *ante*, p. 1245.

(*b*) *Ante*, pp. 1212 *et seq.* And see R. *v.* Pear, 2 East, P. C. 689 (n.); 1 Leach, 212.

(*c*) Set out, *post*, p. 1514.

(*d*) See R. *v.* Ward, 2 Ld. Raym. 1461; 2 Str. 747; 2 East, P. C. 860, which also refers to the repealed Acts 33 Hen. VIII. c. 1, and 30 Geo. II. c. 24.

(*e*) 2 East, P. C. 821. *Vide ante*, Vol. i. p. 160.

(*f*) 2 East, P. C. 821, citing R. *v.* Blackburn, Trem. P. C. 101; Cro. Circ. Comp. 78.

(*g*) The authorities referred to were 2 Hawk. c. 22, ss. 1, 38, and 39 (which cites Waterer *v.* Freeman, Hob. 205, 266. Worlay *v.* Harrison, 2 Dy. 249 *a*; 73 E. R. 551; R. *v.* Mawbey, 6 T. R. 619, 635. R. *v.* Crossley, 7 T. R. 315), and 2 East, P. C. 821, which cites the authorities mentioned, *ante*, note (*f*).

was guilty of an indictable offence (*h*). A person who, being committed to gaol under an attachment for contempt of court in a civil cause, counterfeited a pretended discharge, as from his creditor, to the sheriff and gaoler, under which he obtained his discharge from gaol, was held guilty of a cheat and misdemeanor at common law, in thus effecting an interruption to public justice; although, the attachment not being for non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge (*i*).

A corn merchant agreed to purchase a cargo of wheat to be shipped to the port of Bristol. It was agreed that any dispute arising out of the contract should be referred to two arbitrators, whose award should be binding. On arrival of the ship at Bristol the defendant was appointed by the vendors, and one B. by the purchaser, to take samples of the wheat as it came up from the hold. These samples were taken for the purpose of being used as evidence in case any arbitration should take place as to the quality of the wheat. The samples having been taken, the bags in which they were placed were sealed by the defendant and by B., and were then taken by the defendant to his house before being sent to London. The defendant afterwards tampered with these samples by pulling down a portion of the tops of the bags through the string on the side opposite the seal, cleaning the samples, and replacing the wheat so cleaned in the bags without breaking the seals. The samples so altered were then sent to London. No arbitrators were in fact appointed the reason assigned being that the samples, so altered as above, were far superior to other samples fairly taken by the parties, and it would have been useless to proceed to arbitration. Upon a case reserved it was held that this was an indictable misdemeanor at common law, and Coleridge, C.J., in the course of his judgment said, 'The first count of the indictment in substance charges the defendant with the misdemeanor of attempting, by the manufacture of false evidence, to mislead a judicial tribunal which might come into existence. If the act itself of the defendant was completed, I cannot doubt that to manufacture false evidence for the purpose of misleading a judicial tribunal is a misdemeanor. Here in point of fact no tribunal was misled, because the piece of evidence was not used, but I am of opinion that that fact makes no difference.' And Pollock, B. said: 'The real offence here is the doing of some act which has a tendency and is intended to pervert the administration of public justice. The question is whether the sending of these adulterated samples, which by previous arrangement were to be sent to the association in London to be used by the arbitrators is such an act as I have described. I think that it was' (*j*).

Those frauds which affect the Crown and the public at large are also

(*h*) O'Mealy *v.* Newell, 8 East, 364. He said that R. *v.* Mawbey (*ante*, note (*g*)), went the whole length of the proposition. *Vide ante*, Vol. i. p. 527.

(*i*) R. *v.* Fawcett, 2 East, P. C. 862, 952.

(*j*) R. *v.* Vreones [1891], 1 Q.B. 360; 60 L. J. M. C. 62. Pollock, B., referred to 2 East, P. C. 821. In another part of his judgment he said, 'If it had been charged as a cheat against a private individual, I should have felt bound to give effect to the argument of the defendant's counsel. In cases where a cheat or fraud against private individuals is charged, the two conditions—(1) that the act has been completed and (2) that there has been injury to the individual—are conditions precedent to the offence.' *Vide ante*, Vol. i. p. 530.

clearly the subject of indictment, though they may arise in the course of some particular transaction or contract with private individuals.

In R. *v.* Brailsford (*k*), two persons were indicted for conspiring to obtain by false representation a passport from the Foreign Office in the name of one of them with intent that it should be used by another person. The indictment contained a second count alleging the obtaining of the passport by false representations but without any allegation of conspiracy. At the trial evidence was given to shew that the defendants conspired to obtain, and did obtain, from the Foreign Office by false representations a passport in the name of one of them for his use in Russia, with the intent that it should be used in Russia by some other person, and that in fact it was so used with their knowledge and consent. The passport, some months after it had been issued, was found on the body of a man, who had been killed by the explosion of a bomb in his room in Russia. The jury convicted the defendants on the conspiracy count, but did not find a verdict on the second count, and the Court held that the conspiracy charged was an act tending to bring about a public mischief and was, therefore, indictable. And Lord Alverstone, C.J., said, 'It cannot, of course be maintained that every fraud and cheat constitutes an offence against the criminal law; but the distinction between acts which are merely improper or immoral, and those which tend to produce a public mischief have long been recognised . . . (*l*). It is, however, unnecessary to consider this point further because we are clearly of opinion that the act done—namely the obtaining of a passport by a false pretence—is an act of the kind which would render a conspiracy to carry it into effect unlawful.' They also held that it is for the Court and not for the jury to say whether a particular act tends to the public mischief. It is not an issue of fact upon which evidence can be given.

Amongst offences of this description is the selling of *unwholesome provisions* (*m*). And it is said that the giving of any person unwholesome victuals, not fit for man to eat, *lucri causa*, or from malice and deceit, is, in itself, an indictable offence (*n*).

Where an indictment charged the defendant that he knowingly, wilfully, deceitfully, and maliciously, did provide, furnish, and deliver to and for eight hundred French prisoners of war, whose names were unknown, confined in a certain hospital, large quantities of bread, to be eaten as food, such bread being made and baked in an unwholesome and insufficient manner, and being made of and containing dirt, filth, and other pernicious and unwholesome materials and ingredients, not fit to be eaten by man (*o*). The defendant having been convicted, it was objected, in arrest of judgment, that the offence as laid was not indictable; as it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty; and the judgment was respited to take the opinion of the judges upon the point; when they

(*k*) [1905] 2 K.B. 730, 745; 75 L. J. K.B. 64.

(*l*) R. *v.* Higgins, 2 East, 5. R. *v.* Wheatly, 2 Burr. 1125. Young *v.* R., 3 T. R. 98. R. *v.* De Berenger, 3 M. & S. 67. R. *v.* Dixon, 3 M. & S. 11. R. *v.* Treeve, 2 East, P. C. 821, were referred to.

(*m*) 4 Bl. Com. 162. R. *v.* Dixon, 3 M. & S. 11; 4 Camp. 12.

(*n*) 2 East, P. C. 822.

(*o*) There were eight other counts in the indictment charging the offence to have been done at different times, and in different prisons.

all held the conviction right (*p*). The defendant was a contractor with government for the supplying of provisions to some of the French prisoners then in this country. The indictment did not state this fact; but the judges held that it was not material to state it otherwise than as matter of aggravation, if such a case wanted any; as there could be no doubt of the offence being in itself the subject of indictment upon the principles already mentioned (*p*).

In R. *v.* Dixon (*q*), the indictment charged the defendant, a baker, with supplying to the Royal Military Asylum, as and for good wholesome loaves, divers loaves mixed with certain noxious ingredients, not fit for the food of man, which he well knew so to be at the time he so supplied them. It appeared that many of the loaves delivered by the defendant at the Asylum on a particular day were strongly impregnated with *alum*, and that there were found in them several pieces of alum in its crystalline form as large as horse-beans; the tendency of alum to injure the health was also proved (*r*). It was proved that, though the defendant permitted alum to be used to assist the operation of the yeast, and to make the loaves look white, yet, that very great care was employed in the use of it; that it was first dissolved, and then used in such small quantities, and so equally distributed, as not to be capable of occasioning injury; and that if, on any particular occasion, the loaves delivered at this asylum had alum put into them in a different manner, it was quite contrary to the directions and intentions and wholly without the knowledge or privity of the defendant. And it was contended that these facts completely negatived the averment in the indictment that the defendant at the time these loaves were delivered, well knew that they were not wholesome, and unfit for the food of man: and it was urged that the defendant could not be criminally responsible for the acts of his servants. But Lord Ellenborough, C.J., said, 'Whoever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable, if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm. If a baker will introduce such a substance into his bread, he must do it at his own hazard, and he must take especial care that the benefit he proposes to himself does not produce mischief to others. He is engaged in an illegal act, and he must abide the consequences. The 37 Geo. III. c. 98 (*r*) shews the judgment of the legislature with regard to alum, and a medical gentleman has given evidence as to its deleterious effects. If taken in very minute quantities it is innocuous. The same may be said of calomel, and even of arsenic. But would not a baker be answerable for selling bread having these substances mixed with it in a dangerous form, although he intended they should be so equally subdivided over the whole mass which he baked at one time that no harm could follow? If the defendant

(*p*) R. *v.* Treeve, 2 East, P. C. 821, 822. In referring to this case in R. *v.* Brailsford (*supra*), Lord Alverstone, C.J., said, 'A reference to the original record of the decisions of the judges, which is in the possession of the Lord Chief Justice, shews that the case did not depend upon the ground given at p. 822 of East.'

(*q*) 3 M. & S. 11. See R. *v.* Haynes, *post*, p. 1512.

(*r*) Reference was made to 37 Geo. III. c. 98, s. 21 (rep.), prohibiting, under penalties, the use of alum in making bread. The existing Bread Acts (3 Geo. IV. c. cvi. and 6 & 7 Will. IV. c. 37), contain a similar prohibition. See Core *v.* James, L. R. 7 Q. B. 135; 41 L. J. M. C. 19.

was cognisant of the manner in which his business was carried on, and knew that alum was at all used in the making of the loaves sent to the Military Asylum which are proved to have contained it to a very dangerous degree, he is guilty on this indictment.' The point was afterwards brought under the consideration of the Court of King's Bench, who concurred in the direction given at the trial; and Lord Ellenborough said, 'He who deals in a perilous article must be wary how he deals; otherwise if he observe not proper caution, he will be responsible' (*s*).

The Court of King's Bench held that the *mala praxis* of a physician was a great misdemeanor and offence at common law (whether it be for curiosity and experiment, or by neglect) because it breaks the trust which the party has placed in the physician, and tends directly to his destruction (*t*).

In some cases the rendering false accounts and other frauds practised by persons in official situations, have been deemed offences so affecting the public as to be indictable. Thus, where two persons were indicted for enabling persons to pass their accounts with the pay office in such a way as to enable them to defraud the government; and it was objected that it was only a private matter of account, and not indictable; the Court held otherwise, as it related to the public revenue (*u*). There are precedents of indictments against overseers of the poor for refusing to account (*v*), and for rendering false accounts (*w*); and of an indictment against a surveyor of highways for converting to his own use gravel dug at the expense of the parish, and for employing for his own private gain and emolument the labourers and teams of the parishioners, which he ought to have employed in repairing the highways (*x*). On an application for an information against the minister and churchwardens of a parish, who had spent the larger part of a sum of money, collected by a brief for certain sufferers by fire, at tavern entertainments, and then returned, upon the back of the brief, that the smaller sum only was collected, the Court of King's Bench, though they refused the information, yet referred the prosecutors to the ordinary remedy by indictment (*y*). A fraud committed by a parish officer, in procuring the marriage of a pauper, so as to throw the burden of maintaining such pauper on another parish, may also be an indictable offence (*z*). And there are precedents of indictments for misdemeanors in procuring sick and impotent persons standing in need of immediate relief, to be conveyed into parishes where

(*s*) The Court held that the indictment was sufficiently certain without shewing what the noxious materials were, or stating that the defendant intended to injure the children's health. Upon the last point, Lord Ellenborough, C.J., said that it was a universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from doing the act; and that in this case it was alleged that the defendant delivered the loaves for the use and supply of the children, which could only mean for the children to eat; for otherwise they would not be for their use and supply. See R. *v.* Bower, 1 Cowp. 323, and 2 Chit. Cr. L. 556.

(*t*) Dr. Groenvelt's case, 1 Ld. Raym. 213: 92 E. R. 1038: 3 Salk. 265. Cf. *ante*, Vol. i. p. 681, 'Homicide.'

(*u*) R. *v.* Bembridge, 22 St. Tr. 1, 6 East 136 (*cit.*). *Vide ante*, Vol. i. pp. 601, 612.

(*v*) R. *v.* Commings, 5 Mod. 179. 1 Bott. pl. 370.

(*w*) R. *v.* Martin, 2 Camp. 268. 3 Chit. Cr. L. 701. 2 Nol. (2nd ed.) 230, note (4).

(*x*) 3 Chit. Cr. L. 666 *et seq.*

(*y*) R. *v.* Minister, &c., of St. Botolph, 1 W. Bl. 443.

(*z*) R. *v.* Tarrant, 4 Burr. 2106. *Ante*, Vol. i. p. 606.

they had no settlements, and in which they shortly afterwards died, thereby causing great expense to the inhabitants of such parishes (*a*).

It is said to be a misdemeanor to fabricate and publish false news, likely to produce any public detriment (*b*).

Where an indictment charged that the defendant being an apprentice, and fraudulently intending to obtain money from the paymaster of a regiment, and to defraud the King, &c., procured himself to be enlisted as a soldier, without the consent of his master, by means whereof he fraudulently obtained from the paymaster divers sums of money well knowing himself to be, without the consent of his master, disqualified from serving as a soldier, to the great deceit, fraud, &c., of the King, &c., it appears to have been admitted that this was an offence at common law: but the conviction was quashed on the ground that the necessary proof of the indenture of apprenticeship had not been given (*c*).

An indictment against a man who falsely pretending that he had power to discharge soldiers, took money from a soldier to discharge him, has been held good (*d*).

It would seem that by the common law it is an indictable misdemeanor for a person to maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier (*e*).

False Weights and Measures.—It is indictable to cheat by means of *false weights or measures* (*f*), which are considered as instruments or tokens purposely calculated for deceit, and by which the public in general may be imposed upon without any imputation of folly or negligence. And this reasoning is applied to all cases where any species of false token is used which has the semblance of public authenticity (*g*): as where cloth was sold with the Alneager's seal counterfeited thereon (*h*); and where a general seal or mark of the trade on cloth of a certain description and quality was deceitfully counterfeited (*i*). And cheating by means of false dice, &c. (*j*), also is referred to the same principle (*k*). Cheating at games is also punishable under 8 & 9 Vict. c. 109, s. 17 (*l*).

If, therefore, a person selling corn measures it in a bushel short of the statute measure or measures it in a fair bushel, but puts something into the bushel to help to fill it up, it seems that he may be indicted for

(*a*) 3 Chit. Cr. L. 698 *et seq.*

(*b*) Odgers on Libel (4th ed.) 430. See Hale, Sum. 132. In R. *v.* Harris, 7 St. Tr. 929, Scroggs, C.J., seems to have thought it a misdemeanor to publish any news at all.

(*c*) R. *v.* Jones, 1 Leach, 174; 2 East, P. C. 822. The offence is now provided for by the Army Act, 1881 (44 & 45 Vict. c. 58).

(*d*) R. *v.* Serlestead, 1 Latch, 202.

(*e*) 1 Hawk. P. C. c. 55, s. 4, Of Maiming, &c. 1 Hale 412. Co. Litt. 127 *a*.

(*f*) The Weights and Measures Acts, 1878 1897, impose penalties on summary conviction for using false weights and measures, and where proceedings are taken before any Court of summary jurisdiction the Court may direct that instead of those proceedings being continued, proceedings shall be taken at common law. 52 & 53 Vict. c. 21, s. 33. See Roberts on Weights and Measures (3rd ed). R. *v.* Wheatly, 2 Burr. 1125, *post*, p. 1512.

(*g*) 2 East. P. C. 820.

(*h*) R. *v.* Edwards, Trem. P. C. 103.

(*i*) R. *v.* Worrell, Id. 106. See 3 Burn's Just., 'Linen Cloth.' 5 Burn's Just., 'Woollen Manufacture.' The forgery of a trade mark is punishable under the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), *post*, p. 1591. See also the Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23), sects. 13–16.

(*j*) Lesser's case, Cro. Jac. 497. Maddock's case, 2 Rolle R. 107. 2 Rolle Abr. 78.

(*k*) 2 East, P. C. 820.

(*l*) *Post*, p. 1589.

the cheat (*m*). And though knowingly exposing for sale and selling wrought gold under the sterling alloy, as and for gold of the true standard weight, was held not to be indictable, but a private imposition only, in a common person, where no false weight or measure was used (*n*); yet, if in such case the stamps or marks, required by statute on plate of a certain alloy, had been falsely used, it would seem that an indictment might have been sustained (*o*). The gold was not marked; and Aston, J., in giving his opinion, said that it was not selling by false measure, but only selling under the standard; and he cited a case in which it had been held that selling coals under measure was not an indictable offence, but that selling by false measure was (*p*). The result of the cases upon this subject appears to be that if a man sell by *false weights*, though only to one person, it is an indictable offence; but if without false weights he sells to many persons a *less quantity* than he pretends to do it is not indictable (*q*).

The first seven counts of an indictment charged the defendant with a fraud at common law. He was alleged to have contracted with the guardians of the poor to deliver for a certain term to the out-door poor of their parish, in such manner as the guardians should direct, quantities of bread made of the best household flour, in loaves, each loaf weighing $3\frac{1}{2}$ lbs., to be paid for at sevenpence a loaf; and was charged with having delivered loaves to different paupers of less weight, intending to deprive them of proper food and sustenance, and to endanger their healths and constitutions, and to defraud the guardians of the poor. Upon a case reserved after a verdict of guilty, it was held that the conviction was wrong; as delivering less than the quantity contracted for was a mere private fraud, no false weights or tokens having been used; and further that it did not appear to be indictable on the ground that the defendant delivered unwholesome provisions, nor was that offence charged in the indictment (*r*).

A count stated that L. was an artist in painting of great celebrity, and had painted a valuable picture, whereon he had painted his name to denote that the picture had been painted by him, and that the prisoner, well knowing the premises, and intending to cheat, did keep in his shop a certain painted copy of the said picture, on which copy was unlawfully painted and forged the name of the said L., with intent thereby to denote that the said copy was an original picture painted by the said L., and that the prisoner, well knowing the said picture to be such copy, and the name

(*m*) *Per Cur.* in R. *v.* Pinkney, 2 East, P. C. 820.

(*n*) R. *v.* Bower, 1 Cowp. 323. The sale of the gold was by a servant of the defendant; but the Court agreed that the master was responsible for the act of his servant done in the course of his employment, and within the scope of his authority. See R. *v.* Dixon, *ante*, p. 1504. That it would be indictable in a goldsmith so to sell gold (under the statute) see 2 East, P. C. 820, and 1 Cowp. 324.

(*o*) 2 East, P. C. 820 (n.). In 1 East, P. C. 194, it is said that offenders fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat.

(*p*) The case cited was R. *v.* Lewis (*post*, p. 1510). R. *v.* Wheatly, 2 Burr. 1125, was also cited.

(*q*) R. *v.* Young, 3 T. R. 98, 104, Buller, J. See R. *v.* Nicholson, 2 Burr. 1130 (*cit.*). R. *v.* Dunnage, 2 Burr. 1130, and R. *v.* Driffield, Say. 146.

(*r*) R. *v.* Eagleton, Dears. 376, 515: 24 L. J. M. C. 158, more fully stated *post*, p. 1585. The statement in the text is from the judgment of Parke, B. The indictment in 2 Chit. Cr. L. 559, for delivering short was weight considered and held bad.

of the said L. to be forged, fraudulently did offer and expose for sale the said copy with the said forged name upon it, and did offer, utter, sell, and dispose of the said copy as and for the genuine picture of the said L., with intent to cheat H. F. of his valuable securities, and that the prisoner did so fraudulently cheat the said H. F. of a cheque and three bills of exchange, with intent to defraud. On a case reserved after conviction, it was held that this count was bad. Cockburn, C.J., said, 'We have carefully examined the authorities, and the result is that we think if a person in the course of his trade, openly and publicly carried on, were to put a false mark upon an article so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at common law. As, for instance, if a man sold a gun with a mark of a particular manufacturer upon it, so as to make it appear like the genuine production of the manufacturer, that would be a false mark or token, and the party would be guilty of a cheat, and therefore liable to punishment if the indictment were fairly framed so as to meet the case; and therefore upon this count the prisoner would have been liable to have been convicted if that count had been properly framed; but we think that count is faulty in this respect, that, although it sets out the false token, it does not sufficiently shew that it was by means of such false token that the prisoner was enabled to pass off the picture and obtain the money. The conviction, therefore cannot be sustained' (*s*).

But though in the cases above mentioned an indictment may, and in most of them clearly is, maintainable as for a cheat or fraud at common law, on the ground that they consist of offences *which affect, or may affect the public*, being public in their nature, and calculated for the purposes of general fraud and deceit; they must be distinguishable from cases of cheats or frauds, effected in the course of *private transactions between individuals*. In a book of great authority, cheats, punishable at common law, are defined as 'deceitful practices in defrauding or endeavouring to defraud another of his known right by means of some artful device contrary to the plain rules of common honesty' (*t*). But this definition has been observed upon as not sufficiently distinct or accurate; and many of the authorities on which it seems to be based do not involve considerations either of public justice, public trade, or public policy, and have been said to be founded either in conspiracy or forgery, which are in themselves substantive offences. Such forgeries were usually, when successful, prosecuted as cheats (*u*) before the statutes by which forgeries have been, in many instances, made felony (*v*).

(*s*) R. *v.* Closs, Dears. & B. 460; 27 L. J. M. C. 54. Frauds of this kind are punishable on summary conviction under s. 7 of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68).

(*t*) 1 Hawk. c. 71, s. 1.

(*u*) In R. *v.* Hamilton [1901], 1 K.B. 740, concealing a fraud by means of a forgery (admittedly indictable) was held not to be a cheat or fraud punishable at common law within the meaning of 14 & 15 Vict. c. 100, s. 29, *vide, post*, p. 1514.

(*v*) 2 East, P. C. 817 *et seq.* The distinction between forgery and the general class of cheats was well settled in R. *v.* Ward, 2 Ld. Raym. 1461; 2 Str. 747; 2 East, P. C. 860. It was there shewn to be immaterial to the offence of forgery, properly so called, whether any person were prejudiced or not, provided any might have been prejudiced; but that to constitute a cheat, properly so called

Thus a case where the suppression of a will was held to be indictable as a cheat (*w*), is said to have been probably a case of conspiracy (*x*). And the same explanation is given (*y*) of a case where several persons were indicted for causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written (*z*): and of the case of a person who was convicted upon a charge of having run a foot race fraudulently, and with a view to cheat a third person, by a previous understanding with the running competitor to win (*a*).

In R. *v. Southerton* (*b*) Ellenborough, C.J., referring to R. *v.* Mackarty (*c*) said that even if it were not a case of conspiracy, yet, as the cheat was effected by means of bartering pretended port wine, which the indictment alleged was not wholesome, or fit to drink, the vending of such an article for drinking was clearly indictable, and within the principle already mentioned, of cheats or frauds, by which the public may be affected (*d*).

Where a cheat was effected by means of a forged instrument, the indictment charged that the defendant, intending to cheat J. S., did deceitfully take upon himself the style and character of a merchant, and did deceitfully affirm to J. S. that he was a merchant, and had received divers commissions from Spain; and, in order to induce J. S. to believe the same, and to give him credit, the defendant deceitfully produced to J. S. several paper writings, which he falsely affirmed to be letters from Spain, containing commissions for jewels, watches, and other goods, to the amount of £4000, by means whereof the defendant got into his hands two watches, the property of J. S.; whereas, in truth, the defendant was not a merchant; and the paper writings, containing such commissions, were false and counterfeit (*e*). But it is observed (*f*), that if this indictment were sustained as good at common law, the fraud being practised in a private transaction, and the false tokens mere private letters, having no semblance of public authenticity, the only ground on which the judgment can be maintained, without going the length of saying that 33 Hen. VIII. c. 1, was merely declaratory of the common law, is, that the cheat was effected by means of a forgery (in which all are said to be principals at common law) (*g*); and that the publication of such forged instruments, for the purpose of deceit, was in itself a substantive offence indictable at common law. And, where the defendant was indicted for

(both at common law and under 33 Hen. VIII. c. 1, and 30 Geo. II. c. 24), there must be a prejudice received.

(*w*) 1 Hawk. c. 71, s. 1, citing R. *v.* Breerton, Noy, 103; 74 E. R. 1069.

(*x*) 2 East, P. C. 823.

(*y*) Id. ibid.

(*z*) R. *v.* Skirret, 1 Sid. 312, cited in 1 Hawk. c. 71, s. 1; and R. *v.* Parris, 1 Sid. 431.

(*a*) R. *v.* Orbell, 6 Mod. 42, cited in note to 1 Hawk. c. 71, s. 1.

(*b*) R. *v.* Southerton, 6 East, 133, Ellenborough, C.J.

(*c*) R. *v.* Mackarty, 2 Ld. Raym. 1179; 3 Ld. Raym. 325, *ante*, Vol. i. p. 155.

(*d*) *Ante*, pp. 1501 *et seq.* The sale of corrupted wine, contagious or unwholesome flesh, &c., was prohibited by 51 Hen. III. s. 6, and the ordinance for bakers, c. 7, under severe penalties. These Acts were repealed in 1844 (7 & 8 Vict. c. 24). By 12 Car. II. c. 26, s. 11 (rep. 1863), any brewing or adulteration of wine was punished with a forfeiture. See 4 Bl. Com. 162.

(*e*) R. *v.* Govers, 2 Say. 206; 2 East, P. C. 824. It does not appear that the indictment concluded against the form of the statute, though the false tokens made use of came directly within 33 Hen. VIII. c. 1 (rep.).

(*f*) 2 East, P. C. 825.

(*g*) *Vide ante*, Vol. i. p. 120.

falsely and deceitfully obtaining £450, from one W., by a false token, viz. a promissory note, in the name of R., payable to J. E., &c., with a counterfeit endorsement thereon, the jury were directed that they must find the defendant guilty if it appeared to be a forged instrument, the instrument being a false token (*h*). But a forgery could not, it seems, be prosecuted at common law as a cheat, unless it were successful; as in a case where the defendant was convicted of forgery at common law of an acquittance, the Court said, that there was no reason why the offence should not be punished as a forgery, as well as if the thing fabricated had been a deed, but that it could not be prosecuted as a cheat at common law without an actual prejudice, which was an obtaining within 33 Hen. VIII. c. 1 (*i*).

These cases, therefore, when carefully examined, do not seem to be contrary to that which has been given as a more accurate definition of cheats and frauds, punishable at common law, namely, 'the fraudulent obtaining the property of another, by any deceitful and illegal practice or token (short of felony) which affects or may affect the public' (*j*). And there are many cases tending to shew that a cheat or fraud, effected by an unfair dealing and imposition on an individual, in a private transaction between the parties, cannot be the subject of an indictment at common law.

In several cases of impositions upon individuals in private transactions, which have been held not to be indictable, the cheat was effected by a mere false affirmation, or bare lie. Thus an indictment was quashed, upon motion, which charged the defendant with selling at market a sack of corn, which he falsely affirmed to be a Winchester bushel, whereas it was greatly deficient, and the Court said that this was no more than telling a lie (*k*). An indictment was quashed which charged the defendant with selling to a person eight hundredweight of gum at the price of £7 by the hundredweight, falsely pretending and affirming that the gum was gum seneca, and that it was worth £7 by the hundredweight, whereas in truth, the gum was not gum seneca, but a gum of an inferior kind, and was not worth more than £3 by the hundredweight (*l*). And a case was held not to be indictable where the defendant obtained money of another, by pretending that he was sent by a third person for it. Holt,

(*h*) R. *v.* Hales, 17 St. Tr. 161; 2 East, P. C. 825: a case of misdemeanor at common law, before the statute making the offence felony.

(*i*) R. *v.* Ward, 2 Str. 747. And see further the authorities collected upon the subject in 2 East, P. C. 817 (n.), 825.

(*j*) 2 East, P. C. 818. In R. *v.* Lewis 11 Cox, 404, Willes, J., is reported to have said, 'If a number of persons set up an auction for sale of articles of inferior value, having people present pretending to bid, and thereby induce "yokels" to buy, they are engaged in an offence against the law.' This is a conspiracy, *vide ante*, Vol. i. p. 169.

(*k*) R. *v.* Pinkney, 2 East, P. C. 818; 2 Burr. 1129 (*cit.*). But see *ante*, p. 1507; that the decision might have been different if the vendor had fraudulently measured the corn.

(*l*) R. *v.* Lewis, Say. 205. Indictments quashed upon motion may be considered as authorities; but no stress can be laid on the cases to be found in the books (particularly in Mod. Rep.), where the Court refused to quash indictments of this kind upon motion, because it was the practice of the Court, not to quash on motion indictments for offences founded in fraud or oppression, but leave the defendants to plead; 2 East, P. C. 818 (n.), citing 5 Mod. 13. 6 Mod. 42. 12 Mod. 499. Quashing on motion is now discretionary. R. *v.* Lynch [1903], 1 K.B. 744, and see Archb. Cr. Pl. (23rd ed.) 121.

C.J., said, 'Shall we indict one man for making a fool of another? Let him bring his action' (*m*). In another case the indictment set forth, that the defendant came to the shop of a mercer, and affirmed that she was a servant to the Countess of P., and was sent by her from St. James's to fetch silks for the Queen, endeavouring thereby to defraud the mercer, whereas, in fact, she was no servant of the Countess of P., nor was sent upon the Queen's account; and it was moved, in arrest of judgment, that this was not an indictable offence, there being no false token, nor any actual fraud committed, and the Court arrested the judgment, saying, that the case was no more than telling a lie (*n*).

And it appears that the same rule applies where the defendant uses an apparent token, which in reality is, upon the very face of it, of no more credit than his own assertion (*o*). An indictment at common law charged that the defendant deceitfully intending, by crafty means and devices, to obtain possession of certain lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order, for payment of money subscribed by him the defendant, &c., purporting to be a draft upon his banker for the amount, knowing that he had no authority to draw it, and that it would not be paid, but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid, by virtue of which he obtained possession of tickets, and defrauded the prosecutor of the value; and the defendant having been convicted, the Court of King's Bench arrested the judgment. Grose, J., said, 'That, in order to make this case something more than a bare naked lie, it had been said that the defendant used a false token, for that he gave a cheque on his banker; but that was only adding another lie'; and that 'if the Court should determine that this case was indictable, he did not know how to draw the line, for it might equally be said that every person who overdrew his banker used a false token, and might be indicted for it.' Lawrence, J., said, 'It is admitted that a mere false assertion, unaccompanied by a recommendation, is not indictable, and, I think, there is nothing in this case beyond the defendant's own false assertion' (*p*). So where the defendant, a brewer, was indicted for a cheat, in sending to the keeper of an ale-house so many vessels of ale *marked* as containing such a measure, and writing a letter to him, assuring him that they did contain that measure, when, in fact, they did not contain such measure, but so much less, &c.; the indictment was quashed upon motion, as containing no criminal charge (*q*). Foster, J., indeed doubted this case when it was cited, because it seemed

(*m*) R. *v.* Jones, 1 Salk. 379; 2 Ld. Raym. 1013. And see also R. *v.* Hannon, 6 Mod. 311; 2 Hawk. c. 71, s. 2; and R. *v.* Nehuff, Salk. 151, 91 E. R. 139, where the defendant borrowed £600 of a *feme covert*, and promised to send her fine cloth and gold dust as a pledge, and sent no gold dust, but some coarse cloth, worth little or nothing; and the Court said that it was not a matter criminal, and that it was the prosecutor's fault to repose such confidence in the defendant.

(*n*) R. *v.* Bryan, 2 Str. 866. In the case as cited in 2 East, P. C. 819, it is said that the defendant obtained the goods.

(*o*) 2 East, P. C. 819.

(*p*) R. *v.* Lara [1796], 6 T. R. 565; 2 Leach, 652. 2 East, P. C. 819. R. *v.* Hazelton, *post*, p. 1538. R. *v.* Gibbs, 1 East, 185, Kenyon, C.J.

(*q*) R. *v.* Wilders, cited by Lord Mansfield, and supplied by Denison, J., in R. *v.* Wheatly, 2 Burr. 1128.

to him that the vessels being *marked* as containing a greater quantity than they really did, were *false tokens* (*r*). But as it does not appear that cheating, by means of mere private or *privy* tokens, was punishable at common law, without the aid of 33 Hen. VIII, c. 1 (now rep.) (*s*), it has been well observed, upon this doubt, that possibly the Court, in deciding the case, thought that those marks, not having even the semblance of any public authority, but being merely the private marks of the dealer, did, in effect, resolve themselves into no more than the dealer's own affirmation that the vessels contained the quantity for which they were marked (*t*).

Where an indictment charged the defendant, for that he, keeping a common grist-mill, and being employed by one B. to grind three bushels of wheat, did, with force and arms, unlawfully take and detain forty-two pounds weight of wheat, judgment was given for the defendant upon a demurrer, there being no actual price laid, nor any charge of taking as for unreasonable toll, and it being a matter of a private nature, for which an action would lie (*u*).

The true boundary between frauds which are, and frauds which are not indictable at common law was considered to have been clearly established in R. *v.* Wheatly (*v*). The defendant, a brewer, was charged, by an indictment at common law, for that he, intending to deceive and defraud one W. of his money, falsely, fraudulently, and deceitfully sold and delivered to him sixteen gallons of amber, for and as eighteen gallons, of the same liquor, and received fifteen shillings as for eighteen gallons, knowing there were only sixteen gallons. And this was held clearly not to be an indictable offence, but only a civil injury, for which an action lay to recover damages. Lord Mansfield, C.J., said, 'It amounts only to an unfair dealing, and an imposition on this particular man, by which he could not have suffered but from his own carelessness, in not measuring the liquor when he received it, whereas fraud, to be the object of criminal prosecution, must be of that kind which, in its nature, is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy' (*w*).

And in R. *v.* Haynes (*x*) the doctrine of a transaction in the nature of an unfair dealing, and imposition upon any particular individual, not being an indictable offence at common law, was still further established. The indictment, in substance, charged the defendant, a miller, with receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome; and the defendant having been found guilty, it was assigned for error, amongst other things, that no indictable offence was charged against him. As to one of the grounds upon which it was contended that the offence charged was not indictable, namely, that the statement should have been, that the defendant delivered the barley 'to be eaten as for food,' and that it was 'not

(*r*) See 2 Burr. 1129.
(*s*) 2 East, P. C. 833, 834.
(*t*) 2 East, P. C. 820.
(*u*) R. *v.* Channell, 2 Str. 793; 2 East, P. C. 818. And see R. *v.* Haynes, *infra*.
(*v*) 2 Burr. 1125; 1 W. Bl. 273; 2 East, P. C. 818. And see *ante*, pp. 1502 *et seq.*
(*w*) See R. *v.* Lara, 6 T. R. 569, Kenyon, C.J.
(*x*) 4 M. & S. 214.

fit to be eaten by man' (*xx*); Ellenborough, C.J., said, that if the indictment had alleged that the defendant delivered the barley as an article for the food of man, it might possibly have been sustained, but that he could not say that its being musty and unwholesome, necessarily and *ex vi termini*, imported that it was for the food of man, and it was not stated that it was to be used for the sustentation of man, but only that it was a mixture of oat and barley meal. As to the other point, that this was not an indictable offence, because it respected a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit; he said that, if the case had been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this, his situation, had made it a colour for practising a fraud, this might have presented a different aspect, but, as it then stood, it seemed to be no more than the case of a common tradesman who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in R. *v.* Wheatly and the other cases, as not being indictable (*y*).

These cases seem sufficiently to support the definition above adopted (*z*), and to shew that the cheat or fraud must be effected by some deceitful and illegal practice or token, which affects, or may affect the public, in order to be indictable at common law. And it seems also to result from these cases that a cheat or fraud, in order to be punishable by the common law, must be one against which common prudence could not have guarded (*a*). Indeed it can hardly be supposed that a cheat will much affect the public which is open to the detection of any man of common prudence.

Indictment. — Where a cheat or fraud at common law, has been effected by false tokens, and the offence is so charged, it is necessary to specify and set forth in the indictment what the false tokens were; and it is not sufficient to allege generally that the cheat was effected by certain false tokens or false pretences (*b*). But it does not seem to be necessary to describe them more particularly than they were shewn or described to the party at the time, in consequence of which he was imposed upon; and it is also said not to be necessary to make any express allegation that the facts set forth shew a false token (*c*). An objection appears to have been made to a count for a cheat at common law, that it charged the false pretence to have been made to one person, and the deceit to have been practised on another (*d*).

(*xx*) See R. *v.* Treeve, *ante*, p. 1504.

(*y*) *Qu.*, therefore the case of R. *v.* Wood, 1 Sess. Cas. 217, where the defendant, being a miller, and indicted for changing corn delivered to him to be ground, and giving bad corn instead of it; a motion was made to quash the indictment because the transaction was only a private cheat, and not of a public nature; but it was answered that, being a cheat in the way of trade, it concerned the public; and the Court were unanimous not to quash it. And see the observations as to the authority of cases of this kind, in which the Court refused to quash the indictment, *ante*, p. 1510, note (*l*).

(*z*) *Ante*, p. 1510.

(*a*) 1 Hawk. c. 71, s. 1. R. *v.* Wheatly, 2 Burr. 1125, *ante*, p. 1512. By Fielding *arguendo* in the case of R. *v.* Young, 3 T. R. 99, assented to by Buller, J., id. 104; but see R. *v.* Young, 3 T. R. 98, *post*, p. 1518.

(*b*) 2 East, P. C. 837.

(*c*) 2 East, P. C. 838.

(*d*) R. *v.* Lara, 2 Leach, 647. But see R. *v.* Douglass, 1 Camp. 212, where the pretence was made to a servant, but the money of the mistress obtained.

Punishment. — The punishment of this offence at common law is by fine and (or) imprisonment (*e*). By the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), sect. 29, the Court may sentence any person convicted of 'any cheat or fraud punishable at common law,' to be imprisoned for any time now warranted by law, and to be kept to hard labour during the whole or any part of such term of imprisonment (*f*).

Sec. II.—False Pretences under the Larceny Act, 1861.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), sect. 88, 'Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . or to be imprisoned . . . (*g*). Provided, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts (*gg*): Provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences to allege that the party accused did the act with intent to defraud without alleging an intent to defraud any particular person, *and without alleging any ownership of the chattel, money, or valuable security;* and on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud' (*h*).

By sect. 89. 'Whosoever shall by any false pretence cause or procure any money to be paid, or any chattel, or valuable security, to be delivered to any other person, for the use or benefit or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security within the meaning of the last preceding section' (*i*).

(*e*) 1 Hawk. c. 71, s. 3. 2 East, P. C. 388. *Vide ante*, Vol. i. p. 249.

(*f*) In R. *v.* Hamilton [1901], 1 K.B. 740, it was held, that a prisoner convicted of forgery at common law could not be sentenced to hard labour under this section.

(*g*) The omitted words are repealed. For present terms of penal servitude and imprisonment see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*gg*) See R. *v.* King [1897], 1 Q.B. 214, 218.

(*h*) Framed from 7 & 8 Geo. IV. c. 29, s. 53 (E); 9 Geo. IV. c. 55, s. 46 (I); and 14 & 15 Vict. c. 100, s. 8. The former enactments had 'cheat or defraud'; but as 14 & 15 Vict. c. 100, s. 8, had 'defraud' only; and as to 'defraud means to cheat a person out of something,' per Pollock, C.B., in R. *v.* Ingham, Bell, 181, the word 'cheat' has been omitted; cf. *ante* p. 1413, note (*f*). The words in *italics* were introduced to get rid of R. *v.* Norton, 8 C. & P. 196; R. *v.* Martin, 8 A. & E. 481; and Sill *v.* R., 1 E. & B. 553. See R. *v.* Bullock, Dears. 653; and R. *v.* Godfrey, Dears. & B. 426.

(*i*) 'This section was new in 1861, and intended to meet all cases where any person by means of any false pretences induces another to part with property to any person other than the party making the pretence. It was introduced to get rid of the narrow meaning given to the word "obtain" in R. *v.* Garrett, Dears. 232; according to which it would have been necessary that the property should either have been actually obtained by the party himself or for his benefit. See also Liverpool Adelphi Loan Association *v.* Fairhurst, 9 Ex. 422. This section will include every case where a defendant by any false

By sect. 90 (*j*). 'Whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . (*k*).

A. *What is a Chattel or Valuable Security* (*l*) *within the Statute.*

As a dog is not the subject of larceny at common law, it seems that it is not a chattel within the meaning of the Act (*m*).

It is not necessary that the chattel should be in existence when the false pretence is made (*n*).

A railway ticket is a chattel within the section, and the fact that it has to be returned at the end of the journey does not affect the pretence. The prisoner was convicted of obtaining by false pretences from a servant of a railway company a railway ticket of the company, for a journey by one of their trains; the ticket was a voucher for the journey without further payment, but was to be given up to the company at the journey's end. Wightman, J., reserved the question whether the obtaining such a ticket was obtaining a chattel of the company, with intent to cheat and defraud the company of the same, within the meaning of 7 & 8 Geo. IV. c. 29, sect. 53 (rep.), and after consideration, Pollock, C.B., said that the judges were unanimously of opinion that it came within the statute, which makes it criminal to obtain a chattel by a false pretence. The ticket while in the hands of the party using it was an article of value entitling him to travel without further payment, and the fact that it was to be returned at the end of the journey did not affect the question (*o*).

pretence causes property to be delivered to *any other person* for the use either of the person making the pretence, *or of any other person*. It therefore is a very wide extension of the law as laid down in R. *v.* Garrett, and plainly includes every case where any one, with intent to defraud, causes any person by means of any false pretence to part with any property to any person whatsoever.' C. S. G.

(*j*) This section partially re-enacts 21 & 22 Vict. c. 47. It was framed to get rid of R. *v.* Danger, Dears. & B. 307, where the prisoner obtained a signature to a bill of exchange by false pretences. See R. *v.* Gordon, *post*, p. 1556.

(*k*) The omitted words are repealed. As to other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*l*) The term 'valuable security' is defined in sect. 1 of the Larceny Act, 1861, *ante*, p. 1267, and see the definition of 'document of title to lands,' *ante*, p. 1266.

(*m*) R. *v.* Robinson, Bell, 34; 28 L. J. M. C. 58.

(*n*) R. *v.* Martin, L. R. 1 C. C. R. 56, *post*, p. 1539.

(*o*) R. *v.* Boulton, 1 Den. 508: 19 L. J. M. C. 67. See R. *v.* Beecham, 5 Cox, 181, *ante*, p. 1188. R. *v.* Boulton was not argued. 'As the ticket was to be returned to the company at the end of the journey, it is clear the property in the ticket did not pass from the company. Now, in false pretences, the essence of the offence is that the property has passed from the owner. This decision, therefore, seems very questionable. Suppose a person wanting to ride from A. to B. were falsely to pretend that C. sent him to borrow a horse, and by means of that pretence he obtained the horse, and rode it from A. to B., but returned it to the owner, it could hardly be contended that he obtained the horse by false pretences. He obtained the ride by false pretences. So in this case what the prisoner obtained was the ride by the train—not the railway ticket, and it is plain that the real intent was to obtain the ride without paying for it.' C. S. G.

To constitute an obtaining of a chattel, &c., within sect. 88, there must, as in larceny, be an intention to deprive the owner wholly of his property, and merely to obtain the loan of a chattel by false pretences, with intent, &c., is not within the section. The prisoner, by false pretences obtained from a livery stable keeper a horse on hire for a third person, rode it himself during the time of hiring, and returned it to the stable afterwards. Upon a case reserved a conviction for obtaining the horse by false pretences was quashed (*p*).

Upon an indictment for obtaining an order for the payment of £2 10*s*., it appeared that there was a burial society, the rules of which had not been certified or enrolled, and the prisoners were the secretary and collector and also members of the society and interested in its funds, and B. was the president, and E. the treasurer of the society. In case of the death of a member it was the duty of the prisoners to view the body, report the death to the president, and apply to him for an order upon the treasurer for the amount to which the representatives of the deceased were entitled, and to receive the same upon such order for the benefit of the representatives. The prisoners falsely pretended to the president that a death had occurred, and thereby obtained from him an order on the treasurer to pay £2 10*s*. to the bearer. The prisoners took this order to the treasurer's daughter, and by means of it obtained £2 10s. from her on account of her father as such treasurer; upon a case reserved the conviction was upheld on the ground that the order was clearly a valuable security as interpreted by 7 & 8 Geo. IV. c. 29, sect. 5 (rep.) and came within the words 'order or other security whatsoever for money or for the payment of money' (*q*). Such an order would be a valuable security within the meaning of sect. 88 (*r*).

B. *What are False Pretences.*

To bring the case within the statute, there must be a false pretence that a fact exists or did exist. A promissory pretence to do some act is not within the statute (*s*).

By sect. 3 of the Summary Jurisdiction Act 1899 (*t*) which gives power to summarily convict of false pretences in certain cases the court is directed to 'state in effect that a false pretence means a false representation by words, writing, or conduct that some fact exists or existed and that a promise as to future conduct not intended to be kept is not by itself a false pretence.'

In an indictment framed on 30 Geo. II. c. 24 (rep.), the first count

(*p*) R. *v.* Kilham, L. R. 1 C. C. R. 261: 39 L. J. M. C. 109. Bovill, C.J., in delivering the judgment of the Court, said, 'But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us. In support of the conviction, R. *v.* Boulton (*supra*) was referred to. The reasons for this decision have been discussed *supra*, note (*o*). It may be distinguished from the present case in this respect, that the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use, for the only use for which it was capable of being applied.'

(*q*) R. *v.* Greenhalgh, Dears. 267. The Court also were clear that there was nothing in an objection that the society was not enrolled.

(*r*) For definition of 'valuable security' in the Larceny Act, *vide* s. 1, *ante*, pp. 1267 *et seq.*

(*s*) R. *v.* Giles, 34 L. J. M. C. 50: L. & C. 502.

(*t*) 62 & 63 Vict. c. 22.

charged that the four defendants, Y., R., M., and O., fraudulently intending to obtain the money of the King's subjects, by false colours and pretence, unlawfully and knowingly, &c., did falsely pretend to one T., that Y. had made a bet of five hundred guineas on each side, with a colonel that one L. would, on the next day, run on the high road from Gloucester to Bristol, ten miles within one hour; and that Y. and M. did go two hundred guineas each in the bet, and R. did go the other hundred guineas: and that, under colour and pretence of such bet, they obtained from T., as a part of such pretended bet, twenty guineas of the five hundred guineas; by which said false pretences the defendants unlawfully, &c., obtained from the said T. the said twenty guineas, with intent to cheat and defraud him thereof; whereas, in truth, no such bet had been made, &c., against the form of the statute, &c. A second count stated the bet to have been made between Y. and O. The defendants having been convicted, it was objected upon error that the false pretences alleged in the first and second counts were neither contrary to 33 Hen. VIII. c. 1 (rep.), or 30 Geo. II. c. 24 (rep.), or any other statute. And it was argued that the transaction itself was not the subject matter of a criminal prosecution, for that it did not affect the public; and that it was one against which common prudence might have guarded; for, as it was the representation of a *future* transaction, the party had an opportunity of inquiring into the truth of it, and that therefore it was his own fault if he were deceived: but the objection was overruled. Kenyon, C.J., said, 'Undoubtedly this indictment, being founded on the 30 Geo. II. c. 24, is different from a common law indictment. When it passed it was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or any occurrence that had not happened, to which persons of ordinary caution might give credit. The 33 Hen. VIII. c. 1, requires a false seal, or token, to be used in order to bring the person imposed upon into the confidence of the other; but that being found to be insufficient, the 30 Geo. II. c. 24, introduced another offence, describing it in *terms extremely general*. It seems difficult to draw the line, and to say to what cases this statute shall extend; and therefore we must see whether each particular case, as it arises, comes within it.' His Lordship then adverted to the facts of the case before the Court; and after saying that the defendants, morally speaking, had been guilty of an offence, proceeded thus: 'I admit that there are certain irregularities, which are not the subject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away. Now this offence is within the words of the Act; for the defendants have, by false pretences, fraudulently contrived to obtain money from the prosecutor; and I see no reason why it should not be held to be within the meaning of the statute.' Ashhurst, J., in giving his opinion, said, 'The 30 Geo. II c. 24, created an offence which did not exist before, and I think it includes the present. The legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind (*u*). The words of it are very

(*u*) See the observations of Denman, C.J., in R. *v.* Wickham, *post*, p. 1559.

general, "All persons who knowingly by false pretences shall obtain from any person money, goods, &c., with intent to cheat, or defraud, &c.," and we have no power to restrain their operation.' Buller, J., after observing upon 33 Hen. VIII. c. 1, said, 'The legislature thought that the former statute was too limited; and therefore the 30 Geo. II. c. 24, was passed; which enacts, "That all persons who shall obtain money from others, by false pretences, with intent to cheat or defraud such persons, shall be deemed offenders against the public peace." The statute therefore, clearly extends to cases which were not the subject of an indictment at common law. The ingredients of this offence are, the obtaining money by false pretences, and with an intent to defraud. Barely asking another for a sum of money is not sufficient; but some pretence must be used, and that pretence false: and the intent is necessary to constitute the crime. If the intent be made out, and the false pretence used in order to effect it, it brings the case within this statute' (*v*).

Upon an indictment for obtaining money by false pretences, it appeared that the prisoner had represented that he belonged to a club and was canvassing for members; that it was a very strong club; and that they had about £7,000 in the bank. No sum of £7,000, or indeed any sum of money whatever, belonging to the society, had ever been in any bank, and, upon a case reserved, it was held that this was a sufficient pretence within the statute, and Jervis, C.J., said, 'To support an indictment for false pretences there must be a knowingly false statement of a supposed bygone or existing fact, made with intent to defraud, and an obtaining of money by means of that false representation. Here the statement that the society had £7,000 in the bank was an untrue one, and, had it been true, it was a fact calculated to have influenced the mind of the party to whom it was made, and the jury have found by their verdict that it did so influence the mind of the prosecutrix' (*w*).

Where a count stated that the defendant pretended to C., a single woman, that he was an unmarried man, and having thereby obtained a promise of marriage from C., that she refused to marry the defendant, and that he falsely pretended, at the time of such refusal, that he was an unmarried man, and entitled to bring an action against her for the breach of promise of marriage, by means of which he obtained from her £100; whereas in truth he was not an unmarried man, and not entitled to maintain an action for the breach of promise of marriage against her. He had threatened her with an action at law for breach of promise of marriage; and believing that he could and would carry his threat into effect, and in order to induce him to refrain from doing so, she paid him a sum of money, under a written stipulation, that in consideration of such payment he would forego proceedings at law against the prosecutrix for breach of promise of marriage; that but for the prisoner's threat of bringing an action, she would not have paid the money; and that she was induced by such threat to pay the money; and that had she known he was a married man she would not have paid the money. The case was left to the jury to say whether the money was, in fact, obtained by

(*v*) R. *v.* Young, 3 T. R. 98; 1 Leach, 505; 2 East, P. C. 828.

(*w*) R. *v.* Welman, Dears. 188; 22 L. J. M. C. 118.

the false pretence that the defendant was single, and they found the prisoner guilty; and Denman, C.J., and Maule, J., were both clearly of opinion that there was evidence to go to the jury, that the money was obtained by the false pretence that the prisoner was a single man, and in a condition to intermarry with the prosecutrix. Maule, J. was further of opinion that there was also evidence of the money having been obtained by the false pretence of the defendant that he was entitled to maintain an action for breach of promise of marriage; and that such latter false pretence was a sufficient false pretence within the statute (*x*).

An indictment alleged that the prisoner pretended that a paper writing was a lease of a certain messuage for the term of nine years, whereas it was not a lease for the term of nine years *or for any other term*, nor was the same a lease of the said messuage or of any messuage. The lease appeared to be a valid lease for three years, but the figure 3 had been crossed by a pencil, and 9 substituted. It was urged that, as the lease was good for three years, the allegation negativing the pretences was bad in part, and therefore bad altogether; but the objection was overruled (*y*).

Upon an indictment for obtaining a sovereign by false pretences, it appeared that the defendant, an attorney, had appeared before the magistrates as attorney for the prosecutor, who kept a house for the sale of beer, and who was fined £2 by the magistrates. The defendant afterwards called on the wife of the prosecutor, and said he had been with a person to the magistrates, which person had been fined £2 for a similar offence, and he had prevailed on the magistrates to take £1 instead of £2; and if she could make it convenient to give him a sovereign, he would go and do the same for her. She gave him a sovereign. The defendant had never made any application to the magistrates respecting any person, or the fines, and the prosecutor had been obliged to pay his full fines of £2. It was submitted that this was not a false pretence within the statute; but a matter of bargain between an attorney and his client. But it was held to be a case clearly within the statute, as under the guise of an attorney the money was obtained (*z*).

Upon an indictment for falsely pretending that there was one J. Smith, an ironmonger at Newcastle, and that the said J. Smith was a person to whom the prisoner durst trust one thousand pounds, and that Smith went out twice a year to New Orleans to take different kinds of goods to his sons, and that the prisoner wanted some cotton warp cloths for the said J. Smith; the evidence proved that the pretences were made as alleged, and the jury found that the prosecutors believed the representations, and in consequence of such belief, thinking that the prisoner was a person with whom they might safely contract, as being connected with J. Smith, and employed by him to obtain goods, did mean to contract with the prisoner, and not with J. Smith, and did, in pursuance of such contract, deliver the goods to the prisoner for the prisoner himself and not for J. Smith; and it was contended, that this being so, the prisoner was entitled to be acquitted; but, upon a case reserved after a

(*x*) R. *v.* Copeland [1842], C. & M. 516.
(*y*) R. *v.* Gruby, 1 Cox, 249. Bullock, Comr., who consulted two of the judges.
(*z*) R. *v.* Asterly, 7 C. & P. 191, Park, J.

verdict of guilty, the conviction was held right. There was a false representation that the prisoner was connected with a person of opulence, and that was sufficient to sustain the conviction, it being a misrepresentation of an existing fact, upon the faith of which the property was obtained (*a*).

In the case of R. *v.* Young (*b*), Buller, J., cited the following as a case in point: the defendant, applied to B., telling him that he was entrusted by L. to take some horses from Ireland to London, and that he had been detained so long by contrary winds that his money was spent; by which representation B. was induced to advance some money to him: after which it turned out that the prisoner never had been employed by L., and that his whole story was a fiction. For this offence he was tried for a cheat on the statute (30 Geo. II.) and convicted (*c*). So where an indictment for false pretences charged that the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, and there was evidence that the defendant had taken premises and was doing a small business in coal, but he had no trucks of coal on demurrage at the station, this was held to be a false pretence within the present statute (*d*).

An indictment charged that the prisoner falsely pretended that he had got a carriage and pair, and expected it down to T. that day or the next, and that he had a large property abroad. The evidence was that the prisoner was at E., assuming to be a man of position and wealth, but was in a destitute condition, and could not pay his hotel and other bills. That three days after he came to T. and induced prosecutor to part with goods on the representation that he had just come from abroad, and had shipped a large quantity of wine to R. from England, and expected his carriage and pair to come down, and that he had taken a large house at T. and was going to furnish it. It was held, that the false pretences charged were sufficient in point of law, and that the evidence was sufficient to sustain a conviction (*e*).

Where an indictment alleged that the prisoner, being a common carrier, had received goods to carry and deliver at a certain place: and that afterwards intending to cheat the consignor of his money, he pretended to him that he had carried and delivered the goods to the consignee, and that the consignee had given to him (the said carrier) a receipt expressing the delivery of the goods: but that he had lost, or mislaid, the receipt; and then demanded sixteen shillings for the carriage of the goods, and by means of such false pretences (which were duly negatived) obtained the sum of sixteen shillings from the consignor; it was holden that the offence was sufficiently brought within the words and meaning of the statute (*f*). So where the defendant in the assumed character of a porter from an inn, delivered a parcel as from the country, with a printed ticket, with writing charging carriage and porterage, and received the money charged; and the parcel turned out to be a mock

(*a*) R. *v.* Archer [1855], Dears. 449; 6 Cox, 515.

(*b*) *Ante*, p. 1517, 1518.

(*c*) R. *v.* Villeneuve, *cor.* Moreton, C.J., of Chester, and Buller, J., Chester, 1778. 3 T. R. 104; 2 East, P. C. 830.

(*d*) R. *v.* Willot, 12 Cox, 68.

(*e*) R. *v.* Howarth, 11 Cox, 588.

(*f*) R. *v.* Airey, 2 East, P. C. 831; 2 East, 30.

parcel, worth nothing; and part of the false pretences charged in the indictment was taken from the porter's ticket; and it was objected that the defendant had not uttered these words; Lord Ellenborough, C.J., said, 'I take the defendant to have uttered every word contained in the ticket which he brought with the parcel' (*g*).

Where the prisoner borrowed half a sovereign of the prosecutor under the pretence that he wanted to buy some tea, but never returned any money to the prosecutor, and the pretence made use of was stated to be fictitious: Parke, J., told the grand jury, who asked his opinion on the case, that he thought this was not a larceny, and advised them to ignore a bill for larceny of the half sovereign (*h*).

The prisoner went to the shop of one A. and said he had come from P. for some hams and bacon, and produced a letter purporting to be signed by P. A. believing the note to be the genuine note of P., who occasionally dealt with him, delivered the hams to the prisoner. On these facts he was indicted and convicted of larceny but upon a case reserved the offence was held not to be larceny (*i*). The prisoner went to the prosecutor's shop in a village, and said that he wanted some carpeting for a family living in a large house in that village, who had had a daughter lately married. On this the prosecutor gave the prisoner about twenty yards of carpeting, which the prisoner sold for his own benefit. The only evidence on an indictment for obtaining the carpeting by false pretences charged was that of a lady living in the village, whose daughter was married about a year ago, who stated that she had not sent the prisoner for the carpet. Upon a case reserved it was held that the indictment stated a sufficient pretence, and that there was evidence to go to the jury in support of it (*j*).

The prisoner purchased goods and gave in payment for them a bill drawn on and accepted by himself on the day of the purchase, payable one month after date at the London and Westminster Bank, when he gave the bill he stated that it would be paid the next day at a bank in T., and that he had made arrangements that it should. The manager of that bank proved that the prisoner had not made arrangements for the payment of the bill, and had not been at the bank, and was not known there. Watson, B., said, 'If the representation made by the prisoner was false and the prosecutrix parted with her goods on the faith of its being true, the prisoner is guilty of obtaining money by false pretences' (*k*).

The prisoner obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and house agent, and that he wanted a clerk, and that the money was to

(*g*) R. *v.* Douglas, 7 C. & P. 785 (n.).

(*h*) R. *v.* Bromley, Hereford Spr. Ass. 1829. MSS. C. S. G. 'An indictment was afterwards preferred for obtaining the half sovereign by false pretences, and on the trial it appeared that the offence was true.' C. S. G. In R. *v.* Coleman (1 Leach 303 (n.); 2 East, P. C. 672, 673), the obtaining of half a guinea's worth of silver on pretence that she was short of change was held not to be larceny. It was in truth obtaining a loan by false pretences.

(*i*) R. *v.* Adams, 1 Den. 38. Therefore the offence was obtaining goods by false pretences. See R. *v.* Middleton, *ante*, p. 1241. From the judgment given by some of the judges in this case, it seems that they thought that R. *v.* Adams was not correctly decided.

(*j*) R. *v.* Burnsides, Bell. 282; 30 L. J. M. C. 42. See R. *v.* Franklin, 4 F. & F. 74.

(*k*) R. *v.* Hughes, 1 F. & F. 355.

be deposited as security for the prosecutor's honesty as such clerk. The jury having found that the prisoner was not carrying on that business at all, it was held, upon a case reserved, that the false pretence made was indictable (*l*).

The prisoner employed the prosecutor, a solicitor, to prepare a contract for building a house and workshop upon land near S. He afterwards asked him for the loan of £80, telling him that the builder had finished the house and workshop, and that he was short of money to pay for extras, and that he should have the lease in a day or two. Shortly afterwards the prisoner brought a lease from the governors of the Grammar School to the prisoner of certain land, with a plan in the margin, and left it with the prosecutor, and said, 'I have built a very capital house on the land, and some workshops, and it is a very nice piece of land. Can you lend me the £80 on it without putting me to the expense of a formal mortgage? They are worth near £300, and I hope you will save me the expense of a mortgage.' He also said he had to pay the builder for some extras. In consequence the prosecutor agreed to let him have the money on the deposit of the lease, and on his executing an agreement to execute a mortgage of the lease, and a bond for £80. The prisoner called the next day, and executed the agreement and bond; after which the prosecutor gave him the cheque for £80. The prosecutor was induced to give him the money on the representation that the house and workshops were worth £300, and built upon the land in the lease. He would not have given him the money unless he had signed the bond and agreement and deposited the lease; nor would he have given him the money on his bond, agreement, and deposit of the lease, unless for the false pretence that the house and workshops had been built on the land. It turned out that no house or workshop had been built on the land in the lease, but on an adjoining piece of land a house and workshop had been built and mortgaged by the prisoner for £250. The land in question could not be found by the description in the lease, and was of much less value without buildings. On an indictment for obtaining the cheque for £80 by false pretences, it was contended that the proximate cause of obtaining the cheque was the agreement, the bond, and equitable mortgage, and that the false pretence was only an antecedent inducement to enter into these contracts; but, upon a case reserved the conviction was approved (*m*) on the authority of R. *v.* Abbott (*n*).

Obtaining as a loan, from the drawer of a bill accepted by the prisoner, part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the amount, is within the statute, if the prisoner was not so prepared, and did not intend so to apply the money. The prisoner had accepted a bill, drawn on him by the prosecutor for £2,638, the amount he then owed to the prosecutor. The bill was put into circulation, and when it became due, the prosecutor asked him whether he was prepared to pay it. The prisoner answered that he was prepared with sufficient

(*l*) R. *v.* Crab, 11 Cox, 85.
(*m*) R. *v.* Burgon, Dears. & B. 11: 25 L. J. M. C. 105.
(*n*) *Post*, p. 1543.

funds all but £300, and that he expected to get the loan of that sum from a friend. The prosecutor expressed his willingness to advance the £300 himself, and ultimately did so; but the prisoner, instead of taking up the bill, applied the £300 to his own purposes, and suffered the bill to be dishonoured, and the prosecutor ultimately had to pay it. There was evidence that at the time the prisoner obtained the money he was not in possession of funds sufficient to make up the balance between the £2,638 and the £300, but was in insolvent circumstances. It was objected that the prisoner's statement, that he could take up the bill, formed a mere misstatement; at the worst a naked lie; and R. *v.* Wakeling (*o*) and R. *v.* Codrington (*p*) were cited. Secondly, that the statute did not extend to cases where the prosecutor had only lent, not parted with the property of the money. Patteson, J., 'The words of this Act are very large, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the £300 by a deliberate falsehood, averring that he had all the funds to take up the bill except £300, when in fact he knew that he had not, and meaning all the time to apply the £300 to his own purposes and not to take up the bill, the jury ought to convict the prisoner. In R. *v.* Codrington, it does not appear that the prisoner did distinctly allege that he had a good title to the estate that he was selling. Then as to the money being advanced by the prosecutor only as a loan, the terms of the Act embrace every mode of obtaining money by false pretences, by loan as well as by transfer' (*q*).

An indictment for false pretences alleged that the prisoner pretended to one Waters that he had received an order for the payment of £25 from one Cosser, for the payment of a quarter's salary then due to the prisoner in respect of his curacy. Waters proved that the prisoner came to him, and told him he had received an order that morning to go and receive his quarter's salary, £25, of Mr. Leighton; that he had been there, and finding Leighton ill in bed, he could not do it for him. He asked Waters if he could oblige him with the money, and shewed him a paper to this effect: 'Received of Mr. Leighton the sum of £25 for the Rev. W. M. Cosser's note.' It was in the prisoner's writing, and signed by him. Waters gave him £15, and the prisoner gave him a written receipt for that sum. He gave him the money on account of his knowing Mr. Cosser. The prisoner told him he had an order, but he did not see it; but he believed his word. On cross-examination Waters said, 'I had no doubt the paper he produced was genuine; I acted on that as much as on the other part of the transaction. It contributed to produce confidence, and it was in consequence of what I

(*o*) R. & R. 504, *post*, p. 1534.

(*p*) 1 C. & P. 661.

(*q*) R. *v.* Crossley, 2 M. & Rob. 17. 'But *qu.* the last point. The correct distinction between larceny and false pretences seems to be that in the former the property was not parted with, in the latter it was. See the cases, *ante*, pp. 1210 *et seq.* But if these cases shew that it would not be obtaining by false pretences, still if the jury found that the prisoner obtained the loan with intent to steal, that would be larceny, and he might be convicted of that upon this indictment.' C. S. G. On this note being cited in R. *v.* Burgon (*supra*), Crompton, J., said, 'Where a chattel is lent, the chattel does not pass; but money that is lent passes as much in case of a loan as on a sale. There was no expectation that the same money which was obtained would be returned.'

saw, and what he said, and what he gave me, that I was induced to let him have the money. Without the receipt I should not have let him have the money. He first told me he had received a letter from Mr. Cosser that morning. That was part of my inducement to let him have the money. He had the paper in his hand at the time, which he had taken to Mr. Leighton, and said the letter was wishing him to go to Mr. Leighton, and draw his quarter's salary.' It was objected that there was a variance between the pretence laid and that proved; that the proof was that the prisoner said he had received a letter and not an order; and that the receipt drawn for Mr. Leighton and the receipt given to Waters had been essential parts of the inducement to part with the money, and were not stated in the indictment as they ought to have been. The Court overruled the objections, and left the following points to the jury:—1. Did the prisoner make use of the pretence alleged in the indictment? 2. Did Waters part with his money in consequence of that pretence? 3. Was it false? 4. Did the prisoner obtain the money with intent to defraud? The jury found the prisoner guilty, and, upon a case reserved on the questions whether the ruling of the Court, and the direction to the jury in conformity therewith, were right, Jervis, C.J., after argument for the prisoner, delivered judgment. 'We are asked whether the ruling of the Court and the direction to the jury were right, and our answer is that they were right. Because it came out on cross-examination that the prisoner said that he had received a letter, therefore it seems to be contended that he did not say that he had received an order, and that there is a variance between the pretence laid and the pretence proved. I do not think that there is any variance. The objection was, that it was not proved that the prisoner pretended that he had received an order for money then due and payable; but what can be the meaning of saying that he had received an order for a quarter's salary, but that it was due and payable? Another objection is, that part of the inducement to the prosecutor to part with his money was the receipt, and that that inducement is not averred in the indictment; but the actual substantial pretence was that he had received the order; the order and not the receipt was the main inducement upon which the money was parted with. The pretence was correctly found by the jury. The ruling direction and verdict are right' (*r*).

A count alleged that the prisoner falsely pretended to O. that he had a letter of recommendation from G., and that he had engaged to make for P. nine new teeth for the sum of seven pounds, and that P. had refused to advance any money to him until the teeth were completed, and that he wanted thirty shillings to complete the teeth. The prisoner had stated to O. that he was a dentist in search of employment, and had produced a letter of recommendation purporting to be written by G., and O. gave him a letter to P., and afterwards the prisoner called on O., and said that P. had given him a job of seven pounds, but he could not accomplish it without some money to buy gold, and P. would not advance a single farthing until the job was done, and he therefore asked O. to

(*r*) R. *v.* Hewgill, Dears. 315.

lend him thirty shillings. O., not having change, advanced him two pounds. P., in consequence of O.'s letter, had agreed with the prisoner to make nine teeth, at five shillings each; he asked for money on account, and P. gave him thirty shillings. He never made the teeth. Coleridge, J., told the jury that if they believed the witnesses, it was clearly established that the prisoner had made a false assertion as to not having received any money from P. (*s*).

The indictment alleged that the prisoner unlawfully did falsely pretend that a certain printed paper then produced was a good and valid promissory note for the payment of five pounds. The prisoner offered to the prosecutor in payment of three pounds seventeen shillings and sixpence, for certain pigs agreed to be sold by him to the prisoner, a printed paper, commonly called a flash note, containing words and figures, arranged so as to have the appearance of a Bank of England note:—

'£5. Bank of Elegance. No. 230.

'I promise to pay on demand the sum of five pounds, if I do not sell articles cheaper than anybody else in the whole universe.

'January 1st, 1850. 'For Myself and Co.,

'Five. 'M. CARROLL,

'56, Allison Street, Birmingham.'

The prosecutor said to the prisoner, 'I think it is not a good one.' The prisoner said, 'It is a five pound Bank of England note, and will go anywhere.' Prosecutor then took the note, and gave the prisoner the change, £1 2*s*. 6*d*., and delivered up the pigs. The prosecutor said he could only read very badly, and being requested in court to read the note said he could not read it at all. Upon a case reserved upon the question whether the act of putting off the printed paper in question as a five pound Bank of England note in payment of goods amounted to a false pretence within the statute; it was contended, that it was not a false pretence, but only a misdescription of an article, which carried the refutation or correction of such misdescription on its face. Wilde, C.J., 'The misdescription was in a very material particular. It amounted to a total misstatement of the nature of the article itself. There can be no doubt that it was a false pretence' (*t*).

Upon an indictment for falsely pretending that a piece of paper was a £5 note, it appeared that the prisoner produced an Irish note

(*s*) R. *v.* Jones, 6 Cox, 467. Another count alleged that the prisoner pretended to J. B. that he was a dentist, and that he was willing to make a gold palate for J. B. for £2. if he, the prisoner, before making the said gold plate, should receive from J. B. thirteen shillings in cash down, and a false palate of J. B., to be allowed for at the sum of seven shilings. The prisoner had agreed to make J. B. a new palate for £2, of which £1 was to be paid down. J. B. gave him thirteen shillings and an old palate, for which the prisoner agreed to allow seven shillings. The prisoner never made the palate, and was apprehended twelve miles off. Coleridge, J., told the jury that if the agreement had been a *bona fide* agreement, although not performed, the prisoner could not be indicted for the breach of it. But the supposition put forward on the part of the prosecution was that the prisoner never intended to make the new palate at all. That was a question for the jury to determine. The prisoner was not defended.

(*t*) R. *v.* Coulson, 1 Den. 592: 19 L. J. M. C. 182. R. *v.* Wells, Dears. & B. 36 (*cit.*), Littledale, J.; R. *v.* Pindle, Dears. & B. 36 (*cit.*), Denman, C.J.

for one pound. 'One' was at each corner of the note, and 'one pound' clearly printed in the middle. He gave it to P., and said, 'I only want this £5 note changing.' She looked at the note, and thought it was a £5 note, and took it to her mother, who did not look particularly at the note and had no idea of its being a £1 note, and gave £4 19*s.* 10½*d.* to the prisoner for the note; both mother and daughter could read: it was objected that the prosecutrix by using common prudence had the means on the face of the note of detecting that it was not a £5 note, and therefore, that the case was not within the statute; but, on a case reserved, it was held that the conviction was right. In many cases a person giving change would not look at the note, but, being told it was a £5 note, and asked for change, would believe the statement of the party offering the note, and change it. Then if, giving faith to the false representation, the change is given, the money is obtained by false pretences (*u*).

Evidence of Falsity of Pretence.—An indictment charged the prisoner with obtaining money by falsely pretending that a five pound bank note was of the value of £5. It appeared in evidence that the note was the note of a bank which had been made bankrupt forty years before, and had not reopened, and the prisoner knew it. The bankruptcy proceedings were not produced, and there was no evidence as to what dividend, if any, had been paid: upon a case reserved it was held that the evidence was sufficient to justify the conviction of the prisoner (*v*).

The prisoner, on June 4, 1821, bought of the prosecutor a gelding, for the price of £12, and tendered in payment notes to that amount on the O. bank. On the prosecutor's objecting to accept these notes, the prisoner assured him they were good notes, and upon this assurance the prosecutor parted with the gelding. These notes had never been presented by the prosecutor at O., or at E.'s, in London, where they were made payable. A witness stated, that he recollected the bank at O. stopping payment upwards of seven years ago; but that he knew nothing but what he saw in the papers, and heard from people who had bills there. The notes appeared to have been exhibited under a commission of bankruptcy against the O. bank; the words importing the memorandum of exhibit, had been attempted to be obliterated; but the names of the commissioners remained on each of them. The jury found the prisoner guilty; and said, they were opinion, that when he bargained for, and obtained the horse, he well knew that the notes were of no value, and that it was his intention to cheat the prosecutor of his horse. But, upon a case reserved, the judges were unanimously of opinion that the evidence was defective, in not sufficiently proving that the notes were bad (*w*).

Where an indictment stated that the prisoner unlawfully pretended that a promissory note of C., S., and M., for the payment of £1 as bankers, was a good and available note, whereas it was not a good and available note, &c., and it appeared that the prisoner had been told that the bank from which the note issued had stopped payment; and the banking house was shut up, and C. and M. had become bankrupts, but S. had not become

(*u*) R. *v.* Jessop, Dears. & B. 440: 27 L. J. M. C. 76. It was also objected that the note was of the same species as a £5 note, differing only in quality and value; R. *v.* Bryan, Dears. & B. 265; but the Court held there was nothing in this point.

(*v*) R. *v.* Dowey, 37 L. J. M. C. 52.

(*w*) R. *v.* Flint, R. & R. 460.

bankrupt; it was objected that as one of the partners had not become bankrupt, the note remained an available note as it respected him; and *non constat* that if presented to him it would not have been paid. Gaselee, J., said, 'On this evidence the prisoner must be acquitted; because, as it appears that the note may ultimately be paid, I cannot say that the prisoner was guilty of a fraud in passing it away' (*x*). So where on an indictment for obtaining a bull by falsely pretending that a promissory note of V. and Co., was a good note, it appeared that the prisoner uttered the note to the prosecutor, in payment for his bull, and in answer to his inquiry whether the note was good, said it was a very good one: and, when asked where he lived, he gave a false address. The bank of V. and Co. had ceased business above twenty years ago, and one of their then clerks swore that the note uttered by the prisoner had been regularly cancelled and withdrawn from circulation, by the makers having drawn a large cross across the face of it; and the note was old and discoloured, of the date of 1816, and a large hole through the middle had taken away the middle part of the cross, leaving however, the ends of it quite distinct. The proceedings in bankruptcy against V. and Co. were not produced. Coleridge, J., held that there was no evidence to go to the jury that the prisoner knew the note to be cancelled and unavailable at the time he uttered it, so as to constitute a false pretence within the statute (*y*).

(*x*) R. *v.* Spencer, 3 C. & P. 420.

(*y*) R. *v.* Clark, Dick. Q. S. by Talfourd 315. The first count stated that the prisoner did deliver to one J. F. N. a certain paper writing, partly written and partly printed, purporting to be a promissory note, made by one O. V., for certain persons therein described, as using the names, style, and firm of Vincent, Bailey and Vincent, for the payment by the makers thereof to A. G., or bearer on demand of £5, at the Hon. B. D. &c., bankers, London, or on demand in Newbury, value received, as and for a good and available promissory note of the said makers thereof, and the said prisoner then and there unlawfully and falsely did pretend to the said J. F. N. that the said paper writing was a good and available promissory note of the said persons so using the names, style, and firm of the said V. B. and V.: by means of which said false pretence the said prisoner did then and there unlawfully obtain from the said J. F. N. a bull, the property of the said J. F. N., with intent then and there to cheat and defraud him, the said J. F. N., of the same: whereas in truth and in fact at the time the said prisoner so delivered the said paper writing, and made the said false pretence as aforesaid, the said paper writing was not a good and available promissory note of the said persons using the names, style, and firm of V. B. and V., but on the contrary thereof, at that time was and from thence hitherto hath been and still is a cancelled, bad, and unavailable promissory note of the said V. B. and V., and of no value, as he the said prisoner then and there well knew.' The second count was like the first, except in omitting the makers' names, and stating them to be 'certain persons therein more particularly described as makers thereof, for the payment of the makers thereof,' &c. The third count was for a cheat at common law, and charged the prisoner with uttering and delivering to the prosecutor a certain other paper writing (setting it out as in the first count), as and for a good and available promissory note, to the payment of which to the holder or holders thereof, the said persons so therein particularly described as the makers thereof were there and at that time liable, with intent then and there to cheat and defraud the said prosecutor; and did then and there and thereby cheat the said prosecutor to the amount of the said sum of £5; the prisoner then and there, well-knowing that the said last-mentioned paper writing was there, and at that time a bad, cancelled, and unavailable promissory note, to the payment of which to the holder or holders thereof, the said persons so therein particularly described as the makers thereof, were not there and at that time liable, against the peace, &c. The next case tried was R. *v.* Meshech Ferris, on a similar indictment. As the evidence closely resembled that in the last case, the counts for the false pretences were abandoned, and the opinion of the Court was taken whether the facts did not constitute a cheat at common law as laid in the last count; and the third count in R. *v.* Freeth,

The prisoner agreed to buy a pony, and produced three notes, one of them a £10 note on the R. bank, which the prisoner said was as good as gold. This note was dated in 1840, and purported to be payable on demand where it was issued, or at G. and Co., bankers, London. The cashier of the R. Bank proved that the note was a genuine note, but that the bank had stopped payment in 1844, and had not issued any notes since. The note had been presented at the bank of G. and Co., but no payment could be obtained. It was held that it was unnecessary to adduce any formal evidence of the bankruptcy, and that the evidence of the worthlessness of the note was sufficient to go to the jury. Besides, the note was more than six years old, and therefore no action could be maintained on it (*z*).

The prisoner was indicted for falsely pretending that a bank note was good and valid, he well knowing that the bank had long before stopped payment. The note was issued by Messrs. Williams of the Old Bank, N. in 1847, and was uttered by the prisoner who said it was good and received change for it. He also said that he had taken the note at A., and had afterwards heard that the bank had stopped. The bank stopped payment in 1851, and Messrs. Williams were made bankrupts the same year. R. *v.* Spencer (*a*) was cited, and it was said that in this case there was no solvent partner. Martin, B. said, 'The case which you cite is against you. How can the fact of one partner being solvent make any difference? The estate might pay twenty shillings in the pound. When I read the depositions I thought that there was no offence within the statute, and my Brother Bramwell, to whom I spoke on the subject, thought so too. The officer of the court informs me that a case of the same kind was tried some time ago at Shrewsbury, and that the judge ordered an acquittal. I think that decision was correct, and I hold that the prisoner must be acquitted' (*b*).

The prisoner was indicted for falsely pretending that a piece of paper was a bank note then current, good, and of the value of five pounds, whereas it was not a bank note then current, or good, or of the value of five pounds, or of any value whatever. The prisoner tendered to T. a paper purporting to be a five pound note of the N. Old Bank, and obtained five pounds in change. A witness proved that he remembered the N. Old Bank; that that bank no longer existed: he saw the doors of it shut; it paid a dividend of two shillings and

to which no objection was made at the trial or before the judges, was mentioned. Coleridge, J., was of opinion that the facts did not constitute an indictable cheat, and the prisoner was acquitted.

(*z*) R. *v.* Smith [1854], 6 Cox, 314, Talfourd, J., and Williams, J.

(*a*) *Ante*, p. 1527.

(*b*) R. *v.* Williams, 7 Cox, 351. 'No evidence was given, and the case went off on the opening. The facts are said to have been taken from the depositions, and no case was cited. It deserves consideration whether these cases have ever been dealt with on the proper ground. Assuming that the evidence shews that the prisoner was guilty of a fraud in passing the note, it would seem that the only proper question is, "was the note *at the time it was passed* an available note for the sum mentioned in it?" The representation of the prisoner is that it was; and the truth or falsehood of that representation depends on the state of facts at that time. Suppose a prisoner believes a note to be valueless, and passes it for full value, how can his guilt be turned into innocence by the possibility that years afterwards some dividend may be paid on the note? See the remarks of Pollock, C.B., Williams and Crowder, JJ., in R. *v.* Evans, *infra*.' C. S. G.

fourpence in the pound in 1852 or 1853; there was no bank at N. to which the note could be presented. The note had been tendered to a bank at M. after the prisoner passed it, but change could not be got for it. It was objected that the evidence was not sufficient to go to the jury in support of the allegation that the note was not good, or of the value of five pounds, or of any value whatever. The jury were directed that there was some evidence from which they might infer that the note was not of any value; but, on a case reserved, on the question whether there was sufficient evidence before the jury to sustain the said allegations in the indictment, it was held that the conviction was wrong. Pollock, C.B., said, 'Probably this case might have been left to the jury in such a way that the verdict of guilty might have warranted the sustaining the conviction. Had the prisoner represented the note to be of £5 value when she knew it was not of that value, and the jury had found the false pretence, and that the note was of less value than £5 to her knowledge, it would have been sufficient to justify a verdict of guilty. But as the case is stated, the only question for us is whether there was evidence that the note was of no value. There is no reasonable evidence that the note was not of any value; for although 2*s.* 4*d.* in the pound had been paid upon it, it might still be of some value' (*c*).

On an indictment for obtaining goods by false pretences it appeared that the prisoner enclosed the half of two bank notes to a tradesman and ordered certain goods to be sent by him to her. It appeared that two days before she so sent these halves of the notes, she had parted with the corresponding halves to another tradesman. The prisoner was convicted on an indictment that alleged that she falsely pretended to the prosecutor 'that she then had in her custody for the satisfaction of the (prosecutor) certain half notes, being the proper and corresponding half notes of the halves so sent as aforesaid, and the same would be sent in due course.' Upon a case reserved it was held that the conviction was proper (*d*).

False Accounts.—Upon an indictment for obtaining by false pretences from B. a sum of money, it appeared that B. was a member of 'Lodge of Odd Fellows at B.'; and his contribution was ninepence per fortnight. The prisoner was secretary of the lodge, and it was his duty to receive money from the members in lodge hours; but he had no authority to receive any out of the lodge; on the 17th of November, the prisoner

(*c*) R. *v.* Evans, Bell, 187: 29 L. J. M. C. 20. Williams, J., said, 'I wish to guard myself against being supposed to hold that a person might not be convicted on an indictment for obtaining money by false pretences by means of such a note as this, provided it were proved that the prisoner, knowing that the bank had stopped payment, and could not pay its notes in full, represented the note to be of full value, and the note of a solvent bank.' Crowder, J., said, 'If a person presents a note for £5 as a good note for that amount, knowing that the bank has stopped, it would amply support an indictment for obtaining money by false pretences.'

(*d*) R. *v.* Murphy, Ir. Rep. 10 C. L. 508; 13 Cox, 298 (Ir.). Morris, C.J., said, 'The request for the goods along with sending the two half notes was evidence from which the jury might infer that there was a sort of silent statement by the prisoner that she had the corresponding half notes ready for the satisfaction of the prosecutor.' This case seems to overrule R. *v.* Masterson, 2 Cox, 100 (Ir.), where the facts were similar, but the Court, Pennefather, B., and Perrin, J., held the indictment could not be supported. This case was not cited in R. *v.* Murphy.

gave B. out of the lodge a written notice that B. owed to the lodge for contributions, &c., the sum of 13*s.* 9*d.*, due on the 20th inst. The 20th of November was the next lodge night after the 14th. Prisoner said, 'I have brought you a summons for the money you owe the lodge.' B. opened the paper, and said, 'Do I owe that amount, thirteen shillings and ninepence?' Prisoner said, 'You do.' B. said, 'Very well,' and paid him fourteen shillings, and received threepence in change. It appeared by the books of the lodge in the prisoner's writing that two sums of ninepence and a subscription of eightpence were due from B. on Nov. 20. The prisoner accounted to the treasurer on Nov. 20, and paid him four pounds eleven shillings and one penny, but no sum of thirteen shillings and ninepence from B. Upon a case reserved, it was contended that there was no false pretence within the meaning of the statute; in all the cases the money had been obtained by a false representation of a fact, of which the party could not possibly have been cognisant, and the truth of which he had no means of ascertaining; but the judges were unanimously of opinion that this was a false pretence within the statute. And Alderson, B., said, 'If a man represents as an existing fact that which is not an existing fact, and so gets your money, that is a false pretence; for instance, that a certain church had been built, and that there was a debt still due for the building, when there was no debt due; that would be a false pretence; yet the matter might easily be inquired into and ascertained. Or take the common case. The prisoner says, "I am sent by Mrs. T. for a pair of shoes." Is not that a false pretence? yet inquiry can be made, and after the thing has happened usually is made, and the falsehood detected. Mrs. T. might live five miles off, or she might be a next-door neighbour; but false pretence or no cannot depend on mileage.' 'The old law about a false token was a much more stringent rule. Why should we not hold that a mere lie about an existing fact told for a fraudulent purpose should be a false pretence?' (*e*).

In R. *v.* Witchell (*ee*) the prisoner was indicted for obtaining money by false pretences. The prisoner was a shearman, in the service of the prosecutors, who were clothiers and employed to superintend the other shearmen, and to take an account of the persons employed, and of the amount of their wages and earnings; at the end of each week he was supplied with money to pay the different shearmen, by the clerk of the prosecutors, who advanced to him such sum as, according to a written account or note delivered to him by the prisoner, was necessary to pay them. The prisoner was not authorised to draw from the clerk for money generally on account, but merely for the sums actually earned

(*e*) R. *v.* Woolley [1850], 1 Den. 559; 19 L.J. M.C. 165; see also R. *v.* Jessop, *ante*, p. 1526. No notice was taken of the point about setting out the paper writing; but as to that point, see R. *v.* Coulson, 1 Den. 592, *ante*, p. 1525. In R. *v.* Taylor, 15 Cox, 265, 268, the prisoners were indicted for attempting to obtain a sum of money from L. by falsely pretending that that sum was due and owing to them by the prosecutrix. L. was a solicitor who held some money belonging to the prosecutrix, who in fact owed one of the prisoners some money, but not as much as alleged to L. It was held that the prisoners were guilty of a false pretence within the statute, although the creditor had obtained judgment against the prosecutrix for the larger sum.

(*ee*) 2 East, P. C. 830.

by the shearmen; and the clerk was not authorised to pay him any sums except what he carried in his account or note as the amount of what was due to the shearmen for the work they had done. The prisoner delivered to the prosecutor's clerk a note in writing in the following form, '9th September, 1796, Shearmen £44 11*s.* 0*d.*' which was the common form in which he made out his account of the amount of their week's wages. And in a book in his handwriting, which it was his business to keep (of the men employed, of the work they had done, and of their earnings), there were the names of several men who had not been employed who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed; so as to make out the sum stated in the note to be due to the shearmen. Upon this evidence the jury found the prisoner guilty; but sentence was respited in order to take the opinion of the judges, whether this case were within 30 Geo. II. c. 24 (rep.), the prisoner's counsel contending that no cases were within the statute but those where the original credit was obtained by means of the false pretence; and that it did not extend to cases where there was a previous confidence, as he said was the case here. The judges, after some difference of opinion, ultimately all agreed on the principle, that if the false pretence created the credit, the case was within the statute; and they considered that in this case the defendant would not have obtained the credit, but for the false account which he had delivered in, and, therefore, that he was properly convicted (*f*).

The first count charged the prisoner with falsely pretending that a certain account was correct, whereby he obtained an order for the payment of £14 1*s.* 2*d.* from the prosecutor with intent to cheat him of the same; the second count charged the prisoner with falsely pretending that a workman of the prosecutor was entitled to £1 4*s.* 3*d.*, for work done by him; whereby the prisoner obtained an order for the payment of £16 12*s.* 3*d.* from the prosecutor, with intent to cheat him of part of the proceeds thereof, to wit, six shillings and sixpence. It was the prisoner's duty as foreman of the prosecutor to keep an account of the work done by his master's men, and of the wages due to them, and on the Friday in each week to lay this account before his master; on which his master gave him a cheque on his banker for the total sum shewn to be due. In support of the first count it was proved that the prisoner one week produced an account amounting to £14 1*s.* 2*d.*, which included a false charge of seven shillings, which was not in fact due. The master confiding in the accuracy of the account gave him a cheque for £14 1*s.* 2*d.*, which he cashed, and applied seven shillings to his own use, but properly disposed of the remainder. The second count was supported by similar evidence, and had reference to a cheque for £16 12*s.* 3*d.*, out of which the prisoner applied to his own use six shillings and sixpence, falsely stated to be due to a workman; but properly disposed of the residue. It was objected that the first count was not proved, as the intent was not to cheat of the cheque,

(*f*) One of the judges observed that the prisoner was not to have any sum that he thought fit, on account; but only so much as was worked out. See R. *v.* Hunter, *post*, p. 1538.

but of a small portion of the proceeds: and that the second count charged no offence within the Act. But, on a case reserved, the judges held the first count proved; but gave no opinion as to the other count, as the objection was on the face of the record (*g*).

Upon an indictment for larceny it appeared that the prisoner was the servant of N., grocers, who were in the habit of purchasing large quantities of what was called 'kitchen stuff.' The course of business was for the sellers of the 'kitchen stuff' to take it to the prisoner on N.'s premises. It was his duty to weigh it, and if the chief clerk was in the counting-house to give the seller a ticket containing the weight, price, and name of the seller. The seller then took the ticket of the chief clerk, who paid him the price out of moneys furnished to him by N. for the purpose. In the absence of the chief clerk the prisoner had authority to pay the seller, and, on producing a ticket containing the above particulars, the chief clerk repaid the prisoner out of the moneys so furnished to him by N., without any inquiry as to whether any stuff had been really bought, or the quantity. One evening the prisoner went to the counting-house, and demanded two shillings and threepence of the chief clerk, which he said he had been paid for eighteen pounds of 'kitchen stuff.' He produced a ticket in the usual form containing the name of S. as the seller, and two shillings and threepence as the price, and received that sum from the clerk from the moneys so furnished to him, and applied it to his own use. There had been no such dealing as that alleged by the prisoner, nor any such payment by him. The prisoner was convicted, but, upon a case reserved, the judges were of opinion that as the clerk delivered the money to the prisoner with the intent of parting with it wholly to him, the latter was not liable to be indicted for larceny, but only for obtaining money by false pretences. The conviction for larceny, therefore, was wrong (*h*).

On an indictment for larceny it appeared that the prisoner was the clerk of the prosecutors, and it was part of his duty to pay dock and town dues, which might be due on goods exported by his masters. On ascertaining the amount required for that purpose on each day's export, it was his duty, before paying it, to apply for and obtain it from his master's cash-keeper, and having obtained it, to pay it over. On a certain day there was required to pay dock and town dues upon goods exported by his masters the sum of £1 3*s*., and no more was paid by the prisoner for such dues; but he fraudulently represented to the cash-keeper that £3 10*s*. 4*d*. was really due for such dues, and fraudulently obtained that sum from the cash-keeper by such representation, with intent to appropriate the difference to his own use, which he did. And, on a case reserved, it was held that the prisoner was guilty of obtaining money by false pretences, and not of larceny (*i*).

(*g*) R. *v.* Leonard [1848], 1 Den. 304. See also R. *v.* Christey, 1 Cox, 239.

(*h*) R. *v.* Barnes, 2 Den. 59: 20 L. J. M. C. 24.

(*i*) R. *v.* Thompson, L. & C. 233. In R. *v.* Cooke, L. R. 1 C. C. R. 295, 299, Bovill, C.J., said, 'The case of R. *v.* Thompson went entirely upon the question whether there was larceny in the obtaining of the money in the first instance. The point was not considered whether the subsequent misappropriation was larceny, nor was a question raised as to the Act relating to fraudulent bailees.' (24 & 25 Vict. c. 100, s. 3, *ante*, p. 1245.)

Upon an indictment for stealing a cheque for £50, it appeared that the prisoner was clerk to a savings bank; the course of business for drawing out money was this: the depositor gave a notice to the clerk of the amount required, and, if present on the next night of business, received a cheque for that amount from the manager in attendance, or, if absent, he allowed the clerk to receive the cheque and to get cash for it, to be kept by him till called for, and the depositor and clerk signed the books of account usual in a savings' bank. The prisoner, as clerk, falsely pretended to the manager in attendance, that G., a depositor, had given notice for £50, and produced the usual entries, signed by himself, and, as G. was not in attendance, received a cheque for £50, for which he obtained cash at the bank. G. had not given any notice or authority to draw out £50, or any sum, and the prisoner made the false pretence with the intention of obtaining the cheque, and appropriating it to his own use. According to the course of business the cheque was handed to the prisoner as agent of the depositor. Upon a case reserved, it was held that the offence was not larceny; for it must be taken that the prisoner received the cheque as the agent of the depositor, and not as the agent of his employers, the managers of the savings bank, and therefore he could not be charged with stealing the money of the bank (*j*).

The prisoner went into a shop and obtained cloth, stating that he had no money about him, and shewing a book which purported to be a pass-book between himself and the L. savings' bank, from which there appeared to be a balance of £34 2*s*. 10*d*. in his favour in the bank. The prisoner deposited the book, and at the same time gave a letter stating that he would pay for the goods within six weeks, or else forfeit a discount, which otherwise he was to obtain on the price. The entries in the book were proved to be false, and there was no balance due to the prisoner by the bank, but his account had been closed, and a letter of credit for £37, dated the day the account was closed, was found on the prisoner. It was urged that the false pretence alleged was a mere lie; that the indictment ought to have averred that by reason of the false pretence the prosecutrix had trusted the prisoner, or that the book had been deposited as a security; and, if these objections did not succeed, that the prisoner was entitled to be acquitted, if the jury believed that the prisoner did not intend to defraud the prosecutrix totally, but merely to obtain six weeks' credit. Richards, B., doubted the sufficiency of the indictment, but left the question of fraud to the jury, and they convicted. It was then further objected that the indictment did not state that the pass-book was false within the prisoner's knowledge. Richards, B., said, 'It is a startling thing to say that if a man goes into a shop and says, "I am a rich man and have money in the bank," and shews a book to corroborate his assertion, but does not give an order on the bank for payment, he is liable to be transported; but it is a different thing when a man says, "I have £500 in a bank, and if you give me goods I will give you an order on

(*j*) R. *v.* Essex [1857], Dears. & B. 371: 27 L. J. M. C. 20. The offence was clearly obtaining the cheque by false pretences from the manager, as he parted with the property in it.

the bank,'' and, by so doing, obtains the goods. Then it is clearly an offence within the statute' (*k*).

The overseer of the prisoner's parish asked him why he did not work to support his family, which received parish relief; the prisoner said he had no shoes: upon which the overseer gave him a pair; but the prisoner had at the time two good pairs. Upon a case reserved, the judges thought that this was not within the (rep.) 30 Geo. II. c. 24, and that the conviction was wrong; for it was rather a false excuse for not working, than a false pretence to obtain goods (*l*).

Abettors.—As obtaining property by false pretences is a misdemeanor, and all persons engaged in a misdemeanor are principals (*m*) and the acts done by one of such persons in furtherance of the common object, are in contemplation of law the acts of the others, though they may be absent: and if it appears that several persons are engaged in the common purpose of obtaining goods by false pretences, a false pretence made by one of them in furtherance of that purpose, is in contemplation of law a false pretence made by the others also, and will support an indictment, which alleges that the false pretence was made by such other persons, though they were absent at the time when such pretence was made (*n*).

Though a man cannot be guilty of forgery, merely by passing himself off for the person whose real signature appears to a written instrument, even if he does so for the purpose of fraud, and in concert with such real person, there being no false making, yet it was said that such personation was a false pretence within the 30 Geo. II. c. 24 (rep.) (*o*).

The first count charged that the defendant did unlawfully pretend that he was H. who had cured C. at the infirmary, and that he thereby obtained a sovereign from P. with intent to cheat him of the same. The second count charged the defendant with obtaining by similar pretences a sovereign from the said P., with intent to cheat him 'of the sum of five shillings, parcel of the value of the said last-mentioned piece of the current gold coin.' It appeared that the defendant made the pretence charged, and thereby induced the prosecutor to buy a bottle containing something which he said would cure the eye of the prosecutor's child, for five shillings; the prosecutor gave him a sovereign, and the defendant gave him fifteen shillings in exchange. It was objected, first, that the first count was not proved, as the defendant did not intend to defraud of a sovereign but of five shillings. Secondly, that the second count ought to have charged that the defendant obtained five shillings with intent to defraud P. of the same. Thirdly, that this was not an obtaining by false pretences within the Act, as the money was obtained by the sale of the stuff in the bottle. And it was held, first, that it could not be taken that the defendant intended to defraud P. of a sovereign; because he not only gave

(*k*) R. *v.* Molony, 2 Cox, 171 (Ir.). It is not stated what induced the prosecutrix to part with the cloth. Richards, B., after consideration, said, that certain grave questions on the indictment could be dealt with on a writ of error and declined to arrest judgment.

(*l*) R. *v.* Wakeling, R. & R. 504.

(*m*) *Ante*, Vol. i. p. 138.

(*n*) R. *v.* Kerrigan, L. & C. 383. R. *v.* Moland, 2 Mood. 276. See R. *v.* Clayton, 1 C. & K. 128.

(*o*) 2 East, P. C. 856. See R. *v.* Wickham, 10 A. & E. 34. R. *v.* Story, *post*, p. 1538.

silver coin to the amount of fifteen shillings to him, but it was all along a matter of bargain that he should do so. Secondly, that the allegations in the second count were proved. And lastly, that the only part of the pretence that was proved was that the defendant was H., and that the case must go to the jury (*p*).

False Pretence by Act or Conduct.—Both the present and the former enactments apply to pretences by act or conduct without words spoken. An indictment charged that the prisoner falsely pretended that he was an undergraduate of the University of Oxford and a commoner of M. College, and it appeared that the prisoner went to a bootmaker's, wearing a commoner's cap and gown, and ordered boots, which were not sent to him, and straps, which were sent to him; and he stated that he belonged to M. College. The prisoner, however, did not belong to that college. Bolland, B., 'If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the University, and if so, would have been a sufficient false pretence to satisfy the statute. It clearly is so by analogy to the cases in which offering in payment notes of a bank which has failed, knowing them to be so, has been held to be a false pretence without any words being used' (*q*).

A count under 30 Geo. II. c. 24 (rep.) charged, that the prisoner, intending to cheat B. of his moneys, did falsely, &c., utter, publish, offer, and tender to the said B. a false, forged, and counterfeit paper, as and for a true paper, and did falsely, knowingly, and designedly, pretend to the said B. that the said false, &c., paper was a true paper, and signed by one S., which paper was as follows:—

'Wolverhampton, 27 Feb., 1807.

'I promise to pay the bearer on demand the sum of ten shillings and sixpence.

'Wm. Sparrow.'

With intent the moneys, goods, &c., of the said B. to obtain, well knowing such paper to be forged; by means of which false pretences, he did obtain from the said B. a sum of money, to wit, nine shillings and tenpence, against the form of the statute, &c. The third count stated, that the prisoner, intending to cheat the said B. of his moneys, &c., did fraudulently utter, publish, offer, and tender to the said B., a false, forged, and counterfeit paper, as and for a true paper, and which he then and there did pretend and represent to the said B. to be a true paper, subscribed, &c. (and setting forth the paper), with intent to cheat the said B., and the moneys of the said B. fraudulently to obtain, well knowing the said paper to be forged, &c.; by means of which last-mentioned false pretences, he did fraudulently obtain from the said B. nine shillings and tenpence, of the money of the said B. It appeared

(*p*) R. *v.* Bloomfield, C. & M. 537, Cresswell, J. See R. *v.* Leonard, *ante*, p. 1532.

(*q*) R. *v.* Barnard, 7 C. & P. 784. And see R. *v.* Wickham, 10 A. & E. 34, where the defendant pretended that he was a captain in the East India service, and Coleridge, J., after citing this case, added, 'Suppose in the present case the defendant had not stated that he was an officer, but merely appeared in uniform.' 62 & 63 Vict. c. 22, s. 3 (*ante*, p. 1516), clearly recognises a false pretence by conduct.

by the evidence of B., that the prisoner came to his shop on a Saturday night, and asked for a loaf; that he served him with one for fivepence; that the prisoner then asked for some tobacco, and the witness served him with an ounce for threepence, upon which the prisoner threw down a note for ten shillings and sixpence. The witness said he had no change, but in copper, which the prisoner said would do; and the witness then gave him nine shillings and tenpence, in copper, which he took, together with the loaf and tobacco, and went away. The note was that which was set forth in the indictment, and was a forged note: and it was proved that the prisoner, in the course of the same evening and the next morning, put off several other notes of the same kind and amount, and all forged. S. was a person of good credit; and his notes under twenty shillings were generally circulated in that neighbourhood, as it was found impracticable to pay in cash, or larger notes, the wages of the numerous day-labourers engaged in the iron manufactories. But by 15 Geo. III. c. 51, sect. 1 (rep.) promissory notes, &c., negotiable for any sum less than twenty shillings, were declared absolutely void and of no effect; and the second section of that Act declared, that if any person should publish or utter such notes, &c., for a less sum than twenty shillings, or should negotiate the same, he should forfeit any sum not exceeding twenty pounds, nor less than five pounds; the third section gave directions as to the form of conviction. The counsel for the prisoner objected, first, that this was not a case within 30 Geo. II. c. 24 (rep.) the general expressions of that statute being confined to cases of false suggestions of fact, as in R. *v.* Young (*r*); to cases where the party falsely represents himself to be in a situation which he is not, as a servant of another, or as having his order or authority, or produces a false account of disbursements, on the face of which the party would be entitled to be reimbursed, as in R. *v.* Witchell (*s*); and to those cases where credit is acquired, and the moneys, &c., are obtained by the false pretence. And it was urged, that in this case the credit was given to the note, and to no representation or pretence of the prisoner himself; that the fraud consisted in the fabrication of the instrument, not in any representation made by the prisoner. But the learned judge who tried the prisoner thought that the uttering it as a genuine note was tantamount to a representation that it was so. An objection was also taken, as to this being a cheat at common law, upon the ground that as a note of this sort was void, and prohibited by law, it was no offence to forge it, or to obtain money upon it when forged, as the party taking it ought to be upon his guard. The case was, however, left to the jury, with a direction that the evidence, if true, sustained both or one of the latter counts of the indictment; and the jury found the prisoner guilty on both these counts; and, on a case reserved, the majority of the judges thought that the conviction was right, and that it was a false pretence, although the note, upon the face of it, would have been good for nothing in point of law, if it had not been false. Lawrence, J., was of a different opinion, and thought that the shopkeeper was not cheated if he parted with his goods for a piece of

(*r*) *Ante*, p. 1518. (*s*) *Ante*, p. 1530.

paper which he must be presumed in law to know was worth nothing if true (*t*).

The prisoner was in the service of a railway company and one of the rules of the company was, as the prisoner knew, that no servant should be entitled to claim payment of any wages due to him on leaving the company's service until he should have delivered up his uniform clothing. On leaving the service the prisoner gave up part of his uniform and was asked for his overcoat. The prisoner went away and soon afterwards returned with an overcoat, which in fact was not his as he knew. He gave up this overcoat and so obtained his wages. Upon a case reserved it was held that he was properly convicted of obtaining the money by false pretences (*u*).

The prisoner went to the post-office at A., and inquired of R., who transacted the business there for her husband, if there were any letters directed to 'John Story, post-office, A., to be left till called for.' R. finding amongst the letters one directed for 'John Storer, to be left till called for, A.,' and supposing it to be the letter for which the prisoner inquired, delivered it to him. The direction then upon the letter was a redirection of it from B., to which place it had been originally sent from A. The prisoner, on receiving it, objected to the payment of two shillings for the postage, saying, 'It was too much from M.'; but he paid the money, and went with the letter into the office passage, where he remained a sufficient time to have read it, after which he returned into the office with the money order in question, which had been enclosed in the letter, and offered it to R. R. told him, he must write his name on the back of the order before she could pay him the money, upon which he wrote his real name, John Story, and she paid him with a one pound note. He then told her, that if she would look again she would find another letter for him, from M., which she did, and he paid for it.

The terms of the letter clearly explained, that the order could not have been intended for the prisoner; and when he was first apprehended, he denied having received the money, or having ever seen R.: but he afterwards assigned a want of money as a reason for his conduct. R. had never asked the prisoner if he was the person for whom the letter and order were intended; nor did he say that he was so. It was contended, that as the order was given to the prisoner by R., herself, and the prisoner had merely presented it to her for payment, without making any untrue declaration or assertion, the case was not within the statute. The learned judge left it to the jury to find against the prisoner, if they were satisfied, that by his conduct he had fraudulently assumed a character which did not belong to him, although he had made no false assertions; and the jury found him guilty. And, on a case reserved, as well upon the objection made, as upon a doubt, whether the signature of the prisoner's name, under the circumstances, did not amount to a forgery of a receipt for money, in which the lesser offence was merged; all the judges were of opinion that this did not appear to be a forgery, the prisoner having signed his own name, which was not the same name as that of the person to whom the note was payable:

(*t*) R. *v.* Freeth, MS., and R. & R. 127. (*u*) R. *v.* Bull, 13 Cox, 608.

and upon the other objection, they held that the prisoner was properly convicted of obtaining the money by a false pretence, because by presenting the order for payment, and signing at the post-office, he represented himself to R. as the person named in the note (*v*).

A man who makes and gives a cheque for the amount of goods purchased in a ready money transaction, saying that he wishes to pay ready money, makes a representation that the cheque is a good and valid order for the amount inserted in it, and if such person has only a colourable account at the bank on which the cheque is drawn, without available assets to meet it, and has no authority to overdraw, and knows that the cheque will be dishonoured on presentation, and intends to defraud, he may be convicted of obtaining such goods by such false pretences (*w*).

Hewers and putters in a colliery have tokens with distinctive marks, which they place on the tubs of coal drawn up the pit, and which are then taken off and put into a box, and their wages calculated according to the number of tokens sent up by them. The putter fetches the empty tub to the hewer, and takes it, when full, to the station to be drawn up to the bank; before the tub is filled, he places his token on it to denote the sum he is entitled to for his labour in putting and removing the tub to the station, and the hewer puts his token on it also to denote the amount he is entitled to for hewing the coal and filling the tub. The prisoner, a hewer, removed the putter's token after the tub was brought to him, and substituted one of his own, and then put an additional token of his own for hewing and filling the tub. The tub was then drawn up and the two tokens thrown into the box. The contents of the box were then taken away by the tokenman, and the accounts of the different workmen made up according to the number of tokens found with their initials on. In that way the prisoner obtained money for hewing and filling two tubs of coal instead of one only. It was held that this amounted to an indictable false pretence under sect. 88 of the Larceny Act, 1861 (*x*).

The prisoner, who was the agent of an insurance company, received a year's premium from the prosecutor, but appropriated it to his own use, and informed the company that the policy had lapsed. The following year he demanded and obtained from the prosecutor payment of the annual premium. It was held that this amounted to a representation that the policy had not lapsed, and that the prisoner was therefore rightly convicted (*y*).

The tenant of a farm granted a bill of sale over all the stock thereon, and afterwards sold the stock without anything being said as to the ownership of it, or of the existence of the bill of sale. It was held upon

(*v*) R. *v.* Story, East. T. 1805, MS., and R. & R. 81.

(*w*) R. *v.* Hazelton, L. R. 2 C. C. R., 134; 44 L. J. M. C. 11. See R. *v.* Walne, 11 Cox, 647. R. *v.* Parker, 2 Mood. 1. R. *v.* Henderson, C. & M. 328; 2 Mood. 192. R. *v.* Jackson, Camp. 370. R. *v.* Lockett, 1 Leach, 94 L. T. R. 567 (n.); 2 East, P. C. 940. R. *v.* Cosnett, 20 Cox, 6.

(*x*) R. *v.* Hunter, 10 Cox, 642. The form of indictment in this case was disapproved in R. *v.* Sowerby [1894], 2 Q.B. 173 *post*, p. 1566.

(*y*) R. *v.* Powell, 54 L. J. M. C. 26, 15 Cox, 568, Lord Coleridge, C.J., Grove and Mathew, JJ. On the other hand Huddleston, B., and Manisty, J., thought that the first payment to the prisoner was a payment to the company, and therefore that the policy had not lapsed, and consequently that there was no false pretence in fact.

an indictment for false pretences that the onus lay upon the tenant of proving he had leave to sell the stock and not upon the prosecution and that the tenant by selling the stock represented himself to be the absolute owner thereof (*z*).

Continuing False Pretences. — The prisoner was indicted under sect. 88 of the Larceny Act, 1861, for obtaining by false pretences a spring van. The prisoner, by false pretences, had induced the prosecutor to enter into a contract to build and deliver a van for a certain sum of money. The prosecutor, on the faith of those pretences, built and delivered the van in pursuance of the original order, although the prisoner countermanded the order after the building and before the delivery. It was held, that to bring the case within the statute it is not necessary that the chattel should be in existence when the false pretence is made, but that the 'obtaining' is within the statute, if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence; that the question whether the pretence is or is not such a continuing one, is one of fact for the jury; and that here there was evidence from which the jury might infer that it was such a continuing one (*a*). Bovill, C.J. said: 'The first point taken in the argument was, that, in order to convict of obtaining a chattel by false pretences under this statute, the chattel must exist at the time when the pretence was made. That has been completely answered by my Brothers Blackburn and Willes during the argument. Take the case of a coat obtained by a false pretence, or of money, say £500. A man may not carry £500 about with him, and it may be that the bank notes obtained by the pretence are not printed when the pretence is made. Can anybody doubt that such a case would be an obtaining within the statute, the pretence and the delivery being connected together? So, as to obtaining a valuable security in the shape of a note or bill of exchange, which does not exist at the time when the prisoner asks for it, but is made afterwards. Again, take the case of minerals, of coal which is not dug at the time of making the pretence, and which, at common law, is not, till severed, the subject of larceny. A vast variety of similar cases might occur in which it would be an absurdity to say that the offence was not within the statute. In all cases, of course, the pretence must precede the delivery of the chattel. What, then, is the test as to the distance of time between them? the real test is, whether or not there is a direct connection between the making of the pretence and the delivery; or, in other words, whether the pretence is a continuing one, continuing during the interval between the time of making the pretence and the time of the delivery. It would be for the jury in all cases to say whether that was so in fact. In this case there is evidence from which the jury might draw the conclusion that the false pretence so continued. The decision in R. *v.* Gardner (*b*) was not quite as it is cited in the books. There the pretence was made in order to take the lodgings (*c*). The prisoner occupied them for one week, and after

(*z*) R. *v.* Sampson, 52 L. T. 772; 49 J. P. 807. See R. *v.* Stoddart, 25 T. L. R. 612; 2 Cr. App. R. 218.

(*a*) R. *v.* Martin, L. R. 1 C. C. R. 56; 36 L. J. M. C. 20.

(*b*) 25 L. J. M. C. 100; Dears. & B. 40.

(*c*) *Sed quære.*

he had become the lodger the false pretence was exhausted. The contract was for lodging only, and under that he became the lodger, having had no board at first, and no board being contemplated between one party and the other. There was no connection between the pretence and the obtaining of the board on that ground. In R. *v.* Bryan (*d*) the prisoner was indicted for obtaining board and lodging, and 6*d*. in money, but the point as to the board was not raised. The point was as to the loan of 6*d*. When the objection was taken that R. *v.* Gardner applied, the question was as to the money, and the only point was as to the 6*d*. (*e*). The obtaining of the 6*d*. in that case was quite as remote from the original contract for the board and lodging, as the obtaining the board was from the contract for the lodging in R. *v.* Gardner. Hill, J., there followed R. *v.* Gardner. Here, when the false pretences were made, the parties originally contemplated the making of the van and the delivery. The second point argued was, that what took place afterwards took the case out of the statute. It was for the jury to say whether the chattel was delivered in pursuance of the false pretence. The circumstance of the countermand might be of importance to the jury in deciding whether or not the chattel was delivered in pursuance of the pretence, but it was entirely for them.' Willes, J. said: 'It is quite clear that Hill, J., cannot have said, in R. *v.* Bryan, "You will return a verdict of not guilty, because, although the prisoner obtained money or goods from the prosecutor, he did it by means of a contract, and he obtained the contract only by means of the false pretences." He cannot have said that, after the case of R. *v.* Abbott (*f*) and R. *v.* Kenrick (*g*), and others, which decided that the intervention of a contract did not necessarily prevent a conviction for obtaining by false pretences.'

The prisoner obtained a cheque by false pretences. This cheque was informally drawn and payment was refused by the bank. The prisoner returned the cheque to the drawer, told him why it had not been cashed and received another cheque in its place. It was held upon a case reserved that the false pretence whereby the first cheque was obtained was a continuing one and that the second and valuable cheque was obtained thereby (*h*).

Quality, Value, Quantity.—The prisoner was convicted upon an indictment which charged that he obtained money from one W. by falsely pretending to W. that a certain albert chain, which the prisoner asked W. to buy of him, was of 15-carat gold, and that he was a draper, and that the chain was expressly made for him. The evidence as to the quality of the chain was that the prisoner said, 'It is 15-carat fine gold, and you will see it stamped on every link.' W. examined the chain, and gave £5 for it, but did so relying on the prisoner's statement. The chain was in fact marked as 15-carat, which was a hall mark used to denote that

(*d*) 2 F. & F. 567. Such a case as this and R. *v.* Gardner (*supra*) can now be dealt with as obtaining credit by means of fraud under sect. 13 of the Debtors Act, 1869 (32 & 33 Vict. c. 62). See R. *v.* Jones [1898], 1 Q.B. 119, *ante*, p. 1455, and R. *v.* Wyatt [1904], 1 K.B. 88, *ante*, p. 1455.

(*e*) *Sed quære.* See the report.

(*f*) 1 Den. 273: 2 C. & K. 630.

(*g*) 5 Q. B. 49, *post*, p. 1543.

(*h*) R. *v.* Greathead, 14 Cox, 108.

quality of gold in some towns in England. The chain was of a quality little better than 6-carat gold. The jury found specifically that the prisoner knew that he was falsely representing the value of the chain. Upon a case reserved it was held, that the conviction was right (*i*). Bovill, C.J., said: 'The cases have drawn nice distinctions between what is a matter of fact and what of opinion, between allegations of fact and exaggerated praise. It is difficult for the Court to decide, sitting here, what is statement of fact, and what opinion or praise. These are things for the jury to decide, who can consider not only whether the statement is of fact, but also, at the same time, whether there was an intention to defraud. R. *v.* Bryan (*j*) has been most pressed upon us. The statement there was, that spoons were equal to Elkington's A.; *prima facie*, that would be a matter of opinion. The Court there held that that was not sufficient. Many of the judges, however, expressed the opinion that a representation in some cases as to quality might be within the statute. Cockburn, C.J., says, 'It seems to me to make all the difference whether the man who is selling merely represents, as in this instance he did, the articles to be better in point of quality than they really are, or whether he represents them to be entirely different from what they really are." Pollock, C.B., says, "If a tradesman or merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply." These expressions shew that, in the opinion of those judges, a misrepresentation of quality might be enough, if known to be false. Coleridge, J., expressly concurs with Pollock, C.B., and Erle, J., grounds his decision on the misrepresentation in that case being of what was more a matter of opinion than of fact; and he says, "No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A." So, again, Crompton, J., says, "I think that the statute of false pretences ought not to be construed to extend to transactions where, in the course of a bargain for a specific chattel, the supposed misrepresentation consists in mere praise or exaggeration, or puffing of a specific article to be sold where the purchaser gets some value for his money; where the thing sold is of an entirely different description from what it is represented to be, and of no value whatever, as where a man passes off a chain of base metal for gold or silver, and the buyer really gets nothing for his money, the case is different.' Then my Brother Willes pronounced an opinion carefully expressed, which went the whole length of saying that a misrepresentation of quality is enough, if known to be false, and made with intent to defraud; and my Brother Bramwell concurs with him. Now, applying the observations in that case, I think the statement in the present case is not in form a matter of opinion or praise, but a distinct statement of a matter of fact accompanied by circumstances, viz. that the chain was of 15-carat gold, and that not true, and known not to be true, and made with intent to

(*i*) R. *v.* Ardley, L. R. 1 C. C. R.: 40 L. J. M. C. 85. (*j*) *Post*, p. 1547.

defraud. How does this case differ from that of a man who states a chain to be made of one thing when in fact it is made of another? The case is distinguishable from R. *v.* Bryan (*k*), because here there is a statement of a specific fact within the prisoner's knowledge, viz. of the amount of the gold. Therefore, whether we look at the whole of the circumstances, or at the statement of the quality only, the conviction must be affirmed.' And Willes, J. said: 'Erle, J., in R. *v.* Bryan (*k*), was of opinion that if the statement had been "is Elkington's A.," it would have supported the conviction; and so were several other of the judges.'

So where a jury found that the prisoner knew that what he had represented to be tea was not tea at all, but a mixture of articles unfit to drink, and that he designedly and falsely pretended that it was good tea with intent to defraud, it was held that the prisoner was rightly convicted (*l*).

Where upon an indictment containing counts for a conspiracy, and obtaining money by false pretences, 'the evidence was in effect that the prosecutor was told by both defendants that two horses had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horse-dealer, and that they were quiet and tractable, all these statements being absolutely false, and the defendants knowing that nothing but a full belief in their truth would have induced the prosecutor to make the purchase, as he repeatedly informed them that he wanted the horses for his daughters' use. The evidence was that the defendants, in order to induce the prosecutor to make the contract of purchase, made the false pretences aforesaid respecting the horses, and thereby induced him to buy them and part with the price' (*m*). The conspiracy was made out to the entire satisfaction of the jury, who convicted; and upon a motion for a new trial, it was contended that nothing was proved but a warranty, which was indeed false, and must, after verdict, be assumed to have been wilfully so; but that was not the ground of an indictment. Denman, C.J. said, 'A general question seems here to be raised, whether, if money be obtained through the medium of a contract between the defendant and the party defrauded, the charge of false pretences can be sustained. With some plausibility the thing obtained through the false pretence may be said to be the contract, and not the money which is paid in fulfilment of it, and which the party is probably by its terms liable to repay. This was the ground on which my Brother Littledale directed an acquittal in R. *v.* Codrington (*n*). But that decision was lately much doubted by the judges with reference to a case reserved by the Recorder of London (*o*). A person who falsely pretended that he was emigration commissioner thereby induced the prosecutor to enter into a contract with him, and to pay him under it a sum of money. An objection was taken that the verbal representation could not be received in evidence, as the bargain between them was

(*k*) Dears. & B. 265, *post*, p. 1547.

(*l*) R. *v.* Foster, 2 Q.B.D. 301: 46 L. J. M. C. 128.

(*m*) The preceding statement is taken from the judgment of the Court.

(*n*) 1 C. & P. 661, where the defendant purported to sell a reversionary interest which he had previously sold to another person, and entered into a covenant for title. See R. *v.* Meakin, 11 Cox, 270. It was once said that an indictment would not lie for a false pretence by a deceitful representation and warranty of the soundness of a horse. R. *v.* Pywell, 1 Stark. (N. P.) 402.

(*o*) R. *v.* Adamson, 2 Mood. 286: 1 C. & K. 192.

reduced to writing. But the Recorder admitted the evidence, and the judges unanimously approved of his decision. Hence it follows that the execution of a contract between the same parties does not secure from punishment the obtaining money under false pretences in conformity with that contract. Generally speaking, indeed, there would be little satisfaction in suing parties guilty of such a proceeding. But in the greater number of such cases, it is more probable that a contract should intervene in the transaction than otherwise. Though many breaches of contract may be of such a nature as to be the subject of an action, and not of any criminal proceeding, it is clear that the liability to an action cannot of itself furnish any answer to an indictment for a fraud. We think that, in this case, the two ingredients of the offence of obtaining money under false pretences were proved by the evidence. The pretences were false, and the money was obtained by their means' (*p*).

The indictment alleged that the prisoner, having in his possession divers pounds weight of cheese, of little value and of inferior quality, and also divers pieces of cheese called 'tasters,' of good flavour, taste, and quality, falsely pretended to the prosecutor that the said pieces of cheese called 'tasters' were part of the cheese the prisoner then offered for sale, and that the said cheese was of good and excellent quality, flavour, and taste, and that every pound weight was of the value of sixpence-halfpenny. The prisoner kept a cheese stall at Fareham Fair, and sold to the prosecutor a quantity of cheese, for the sum of £2 1*s.* 8*d.*, being at the rate of sixpence-halfpenny a pound. At the time the prisoner offered the cheese for sale he bored two of them with an iron scoop, and produced a piece of cheese, which is called a 'taster,' at the end of the scoop for the prosecutor to taste, and the prosecutor did so. The cheese, however, which he so tasted had not been extracted from the cheese, but was a 'taster' of another superior kind of cheese, which the prisoner had privily and fraudulently inserted in the top of the scoop. The prosecutor would not have bought the cheese unless he had believed that the 'taster' had been extracted from it. The cheese, which had been so bought, was delivered to the prosecutor, and he continued in the possession of it. No precise evidence was given of its value, but it was of a kind very inferior in value to the 'taster' (*q*). In another case (*r*) the circumstances were precisely similar, except that it was proved that the cheese was sold for fivepence a pound, and was worth between threepence and fourpence; and in a third case (*s*) the cheese was sold for fifty shillings a hundredweight, and its value was about threepence a pound. It was objected that the prosecutor was not induced to part with his money merely by

(*p*) R. *v.* Kenrick, 5 Q.B. 49. The counts for false pretences were bad, and the judgment passed on the count for conspiracy; and the point taken was that, unless the obtaining the money was indictable, the conspiracy was to do an innocent act, so that it was necessary to determine the question whether the defendants were guilty of obtaining money by false pretences.

(*q*) R. *v.* Abbott, 1 Den. 273. This and the two following cases were decided at the same time, on the authority of R. *v.* Kenrick, *supra*. See R. *v.* Goss, Bell, 208; 29 L. J. M. C. 86. R. *v.* Pratt, 8 Cox, 334.

(*r*) R. *v.* Dark, 1 Den. 276.

(*s*) R. *v.* Garlick, 1 Den. 276.

means of the false pretence, but principally because he got the cheese, the property in which vested in him by the sale: if this indictment could be sustained, an indictment would lie, in every case, of a fraudulent sale by sample, which did not correspond with the bulk; and if the principle were established, it would be impossible to stop short of holding that every man who induced another to buy by false representations of the quality of the thing sold, might be indicted for obtaining money by false pretences, even although property passed by the sale from the prisoner to the vendee nearly or quite equal to or even surpassing in value the price paid; but the jury having convicted, and the judges, on cases reserved, were unanimously of opinion that the convictions were right.

The prisoner was a coal dealer, and the prosecutrix asked him to sell her a load of coals which he then had. He declined, but said he would fetch and sell and deliver her one for sevenpence per hundredweight from a colliery, to which she assented, and he accordingly fetched and delivered to her a load actually to his knowledge weighing fourteen hundredweight, but he represented to her that the weight was eighteen hundredweight, and that it had been weighed at the colliery, and he produced a ticket, shewing such to be the weight, which ticket he stated he had made out himself when it was weighed. The prosecutrix thereupon paid him for eighteen hundredweight. The prisoner misrepresented the weight of the coals, wilfully and fraudulently, knowing them to be of the less weight, for the purpose of defrauding the buyer of the difference in price between the actual and represented weight; and he made the misrepresentation as to the weight of the coal, verbally and by the ticket, for the purpose of defrauding the buyer, and by such false pretences he intended to obtain, and did obtain, the excess: it was contended that this case was not within the statute, as it was a misrepresentation as to the quantity and value of goods agreed to be sold, and which were actually sold and delivered to the purchaser, and that the statute did not apply to misrepresentations made on sales; but, upon a case reserved, it was held that the case was within the Act. The misrepresentation was not a mere representation as to the quality of goods during a negotiation for the purchase of them, but the prisoner having sold and delivered the coals, when there came to be a question about the price, represented the quantity to be four hundredweight more than it really was. That representation as to the excess of four hundredweight was equivalent to a representation that he had sold four hundredweight of coals, when in fact there were no four hundredweight at all. And R. *v.* Reed (*t*) was expressly overruled (*u*).

(*t*) 7 C. & P. 848.

(*u*) R. *v.* Sherwood [1857], Dears. & B. 251. Pollock, C.B., put the following case, 'If, the bargaining and selling being entirely over, goods were to be transferred from the seller to the buyer, upon payment of the price, and the seller were to go and demand payment, and fraudulently name an amount different from that agreed on, and the false representation was for the purpose of obtaining money which was not in fact due for the goods, and the seller did thereby obtain it, he would be guilty of obtaining money by false pretences.' And this case is said to have been put by Jervis, C.J., 'Supposing a person employed a man on a contract to do ditching at one shilling a yard, and the man came at the end of the week and said, "I have done 5,000 yards," whereas he had only done 1,000, and thereby gets the money, he is guilty of obtaining it by false pretences.'

So where the prisoner, a coal dealer, called at the prosecutor's house with a load of coal in a cart, and the prosecutor bought the coal and paid seven shillings and sixpence for the load, on the representation of the prisoner that there were fifteen hundredweight, and the size of the cart and the appearance of the coal therein warranted the belief that there were fifteen hundredweight, but the coal was loaded in a particular manner so as to give it the appearance of greater quantity; upon a case reserved it was held that there was a false pretence within the statute (*v*).

On an indictment for pretending that a load of coal contained fourteen hundredweight, it appeared that the prisoners brought a load of coal to the prosecutor's door, and agreed to sell it at ninepence a hundredweight. They put the coal in the prosecutor's cellar and said it weighed fourteen hundredweight, and received the money for that weight. It only weighed ten hundredweight. Bramwell, B., held that this was an indictable false pretence (*w*).

On August 17, L. delivered to T. who had agreed to purchase soot at £1 18*s.* a ton, a cartload of soot, and at the same time presented to T. a ticket of the alleged weight (14 cwt. and two quarters). T. paid L. £1 7*s.* 6*d.* for that soot, believing there were fourteen cwt. and two quarters, as stated on the ticket. On August 20, both prisoners delivered to T. two loads of soot, and gave him two tickets for the alleged weight of the two loads. All three loads had been weighed, and the tickets obtained at a public machine some miles distant; and L. stated that the weights mentioned in the tickets for the two last loads were the weights of those two loads. T. then paid the prisoners for those loads according to the weight stated in the tickets, believing them to be correct. In consequence of suspicion all the soot was weighed, and found to be one ton two cwt. and two quarters less than the weight represented by the prisoners. The loads had been weighed at the machine, and the tickets represented their weight at that time, and the prisoners had afterwards removed three bags full of broken bricks, &c., which were in the carts when they were weighed. It was objected that the indictment ought to have set forth that the soot was weighed and the tickets given, and the contents of the tickets, and then alleged that the false pretence was the production of the tickets; and also that it was not a false pretence within the statute falsely to represent the weight of the soot. But, on a case reserved, it was held that the indictment was good, and that it was supported by the evidence, which clearly shewed a false pretence within the Act (*x*).

The prisoner went with a cart containing a number of blacking bottles, labelled 'Everett's Premier,' a name given to a blacking of

(*v*) R. *v.* Ragg [1860], Bell, 214; 29 L. J. M. C. 86.

(*w*) R. *v.* Ridgway [1862], 3 F. & F. 838. Bramwell, B., is reported to have said: 'If a man is selling an article, such as a load of coal, for a lump sum, and makes a false statement as to its weight or quality, for the purpose of inducing the intended purchaser to complete the bargain, that is not a false pretence within the statute. But if he is selling it by quantity, and says there is a larger quantity than there really is, and thereby gets paid for a quantity of coal above the quantity delivered, I am quite satisfied that he is indictable.' '*Sed quære* whether the former dictum is not erroneous.' C. S. G.

(*x*) R. *v.* Lee, L. & C. 418: 33 L. J. M. C. 129. R. *v.* Sherwood (*ante*, p. 1544) was approved and followed.

repute manufactured by E. The prisoner offered this blacking for sale to the prosecutor, taking out a bottle and brush and offering to prove its excellence; but the prosecutor was satisfied with his assertion, and after some bargaining, during which the prisoner offered to open any other bottle if the prosecutor doubted whether they contained as good blacking as that he had produced, the prosecutor bought six dozen bottles. The prisoner represented himself as the agent of E., and said that E. had sent him the blacking and allowed him to bottle it. The bottles had a label upon them imitating E.'s labels, with the only difference that the residence was stated at 'Queen's-court' instead of 'King's-court,' and they were not signed at the foot. The defence was that the blacking was sold 'on sale or return,' and the prosecutor was not cheated, as he might have returned it, if not satisfied with it. That the labels were not similar, and the prosecutor might have protected himself by ordinary caution. Erle, J., told the jury that the 'prisoner's offer to sell on sale or return might be intended to put the prosecutor off his guard; but the actual bargain was for cash, which was paid, and the sale completed. As to the difference between the labels, the jury would consider whether it was a small and colourable difference only, and intended to deceive. It was of little consequence whether the man's name was E. as he had stated, or not; for even if it were, and he went about the country, and offering blacking for sale as "Everett's Premier," representing it to be the well-known article of that name, knowing that it was not so, and intending to cheat the prosecutor by passing upon him a spurious article as the true one, his conduct was equally fraudulent' (*y*).

Where G. Borwick had been in the habit of selling some powders wrapped in printed papers, and the prisoner caused a number of papers to be printed as nearly as possible like those used by Borwick, and a number of the prisoner's powders were sold by him as Borwick's powder wrapped in these labels, the Court seem to have had no doubt that the prisoner might have been indicted for obtaining money by false pretences (*z*).

A false representation that a stamp on a watch was the hall-mark of the Goldsmiths' Company, and that the number 18, part thereof, indicated that the watch case was made of eighteen-carat gold, is an indictable offence, and is not the less so because accompanied by a representation that the watch was a gold one, and some gold was proved to have been contained in its composition (*a*).

Where a count stated that the prisoner pretended that eleven thimbles which he produced were silver, and of the value of five shillings or more, with intent, &c., but did not allege that any money was obtained, and it appeared that the prisoner went to a pawnbroker's shop, and laid down eleven thimbles on the counter, and said he wanted five shillings on them, and being asked whether they were silver, he said they were; but they were tested, and, being found not to be silver, no money was advanced on them. R. *v.* Tabram (*b*) was cited, and it was argued that

(*y*) R. *v.* Dundas, 6 Cox, 380, Erle, J.
(*z*) R. *v.* Smith [1853], Dears. & B. 566. 27 L. J. M. C. 225. See 50 & 51 Vict. c. 28; *post*, p. 1591.
(*a*) R. *v.* Sutor, 10 Cox, 577.
(*b*) Referred to by counsel *arguendo*, C. & M. 251.

this was not a pretence within the Act; but Mirehouse, C.S., told the jury that the pretence must in fact be false, and so false that a man exercising reasonable discretion might still be deceived by it. The jury convicted, and the case having been mentioned to some of the judges, they agreed that, in point of law, the evidence was amply sufficient to justify the verdict, and that the verdict was in point of law good (*c*).

Upon an indictment for obtaining ten shillings by falsely pretending that a chain was a silver chain, it appeared that the prisoner called at a pawnbroker's shop with a chain, on which he asked for an advance of ten shillings. The pawnbroker asked if the chain was silver; the prisoner replied that it was silver. The pawnbroker examined it, and tested it with an acid. The chain resembled in appearance greasy silver, and withstood the test as if it were silver. The pawnbroker then lent the prisoner ten shillings on the chain, which he took as a pledge. He paid this money relying on his own examination and test of the chain, and without placing any reliance on the statement of the prisoner. Twenty-six similar chains were found on the person of the prisoner when he was apprehended. An assayer proved that these chains and the chain pledged were not silver; they were all made of a composition worth about a farthing an ounce, and each chain was of much less value than ten shillings. The jury acquitted the prisoner of the offence charged, as the money had not been obtained by the prisoner's statement, but convicted him of an attempt to obtain it; and, upon a case reserved, the conviction was held right (*d*).

In R. *v.* Bryan (*e*) the indictment alleged that the prisoner pretended that certain spoons produced by him were of the best quality, that they were equal to Elkington's A. (meaning spoons made by Messrs. Elkington and stamped by them with the letter A), that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The prosecutors were pawnbrokers, and the false pretences were made by the prisoner for the purpose of procuring advances of money on the spoons, offered by the prisoner by way of pledge, and he thereby obtained the money by way of such advances. The spoons were of inferior quality to that represented by the prisoner, and the prosecutor said that, had they known the real quality, they would not have advanced money on the goods at any price. It was the declaration of the prisoner as to the quality of the spoons, and nothing else, which induced them to make the advances. The money advanced exceeded the value of the spoons (*f*). The jury found the prisoner

(*c*) R. *v.* Ball, [1842], C. & M. 249. This case, which overrules R. *v.* Tabram, was approved and acted upon in R. *v.* Roebuck, *infra*. It seems that the fact that the false pretence might be detected by inspection will not prevent the case from being within the statute. See R. *v.* Coulson, *ante*, p. 1525. R. *v.* Jessop, *ante*, p. 1526.

(*d*) R. *v.* Roebuck [1855], Dears. & B. 24: 25 L. J. M. C. 101. In R. *v.* Matthews, tried before Parke, B., in 1841, and cited Dears. & B. 39, the prisoner was convicted of obtaining a watch by falsely pretending that certain articles were made of gold, and were of the value of £25, whereas they were not made of gold. See R. *v.* Stevens, 1 Cox, 83.

(*e*) Dears. & B. 265: 26 L. J. M. C. 84.

(*f*) 'It is difficult to conceive a more unsatisfactory statement of a case than this. It neither states whether the spoons were of the same materials as represented, nor the difference in value; so that it is perfectly consistent with this statement that the

guilty of fraudulently representing that the goods had as much silver on them as Elkington's A., and that the foundations were of the best material, knowing that to be untrue, and that in consequence of that he obtained the money; and, upon a case reserved, Campbell, C.J., said: 'I am of opinion that this conviction cannot be supported. It seems to me to proceed upon a mere misrepresentation, during the bargaining for the purchase of a commodity, of the quality of that commodity.' . . . 'And bearing in mind that the article was of the species that it was represented to be to the purchaser, because these were spoons with silver upon them, although not of the same quality as was represented, the pawnbroker received these spoons, and they were valuable, though the quality was not equal to what had been represented. Now it seems to me it never could have been the intention of the Legislature to make it an indictable offence for the seller to exaggerate the quality of that which he was selling, any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were.' Cockburn, C.J. said: 'It seems to me to make all the difference whether the man who is selling merely represents, as in this instance it appears he did, the articles to be better in point of quality than they really are, or whether he represents them to be entirely different from what they really are.' . . . 'Here, if the prisoner had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be a different thing; but the representation here made was only a vaunting or exaggerating of the value of the article in which he was dealing, by representing it to be in quality equal to a particular manufacture' (*g*). Willes, J.,

spoons were of the same materials as represented, and very nearly equal in value.' C. S. G.

(*g*) Pollock, C.B., Coleridge, Cresswell, Erle, Crompton, Crowder, JJ., Watson and Channell, BB., agreed that the case was not within the statute; but Pollock, C.B., said that there might be many cases of buying and selling to which the statute would apply. 'If a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different, even in quality, from what it was, the statute would apply. So, if a mart were opened, or a shop in a public street, with a view of defrauding the public, and puffing away articles calculated to catch the eye, but which really possessed no value, there the statute would apply.' Coleridge, J., also thought that the statute might apply to cases of buying and selling. He said: 'It would be a dangerous thing to say that there could be no fraudulent misrepresentation within the statute, in the course of an ordinary transaction of buying and selling. I think it may as often occur in the course of a real transaction of buying and selling as in any other way; but in order to determine whether a fraudulent misrepresentation is or is not within the statute, I think you must look, among other things, to the extent to which it goes, and the subject matter to which it is applied. It seems to me to be a safe rule to say, where it applies simply to the quality, and is only in the nature of an exaggeration on the one hand or a depreciation on the other, which too frequently takes place, even in tolerably honest transactions, this is not the subject of a criminal proceeding.' Erle, J., said: 'It seems to me that not only are contracts for sale not intended to be excluded from the statute, but, on the contrary, the statute was precisely intended to make falsehoods, in respect of contracts for sale, indictable. The statute recites that there had been a failure of justice by reason of cheats not amounting to larceny, and it therefore makes the obtaining of goods by false pretences an indictable misdemeanor. Now what were the cheats which were not amounting to larceny, in respect of the prosecution of which there had been a failure of justice? I think that these cheats were the cases either where a person, intending to defraud another of his goods by a false pretence in purchase, obtained from him a transfer of the property in the goods, he intending

differed in opinion from the other judges and was for affirming the conviction. He said: 'As at present advised, I incline to think the true meaning of the statute is that it shall extend to people who make these bargains by fraud, and so by the fraud get possession of the chattels or property of others' (*h*).

not to give the value of them, or where by a false pretence in a sale, a man put off on another a counterfeit article, which he knew was not truly the article intended, and so got money paid for the specific thing shewn, that being apparently what the buyer intended, but being in reality a totally different thing; the property was, under these circumstances, held to have passed, and the matter was held to amount to cheat; at the same time, where a party meant to part with the possession only, and a fraudulent person obtained the article *animo furandi*, and took it off, although the possession was so passed to him, still it was held to be no transfer of the property in law, but the property remained in the owner notwithstanding.' Crompton, J., thought that, 'where the thing sold is of an entirely different description from what it is represented to be, and of no value whatever, as where a man passes off a chain of base metal for gold or silver, and the buyer really gets nothing for his money,' the statute applied.

(*h*) See R. *v.* Levine, 10 Cox, 374. Mr. Greaves, Q.C., made the following note on R. *v.* Bryan: 'As it seems to me that the clause in question (7 & 8 Geo. IV. c. 29, s. 53) has never been sufficiently considered, it may be well to devote some remarks to it. It recites that "a failure of justice frequently arises from the subtle distinction between larceny and fraud." Now a reference to the numerous cases, *ante*, pp. 1212 *et seq.*, will plainly shew that the subtle distinction alluded to is this: that if the owner of property, or his servant, is induced by fraudulent pretences to part with the possession only of his property, still retaining the right of property, the case is larceny; but if he is induced by such means to part with the right of property as well as the possession, the case is not larceny; and it is plain that the primary object of the clause was to provide for those cases which would have been larceny if the property as well as the possession had not been parted with; and that this is the true construction of the clause is put beyond a doubt by the proviso that if the prisoner "obtained the property in any such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor." To put a single instance of this class: A man goes to a shop, and fraudulently goes through the purchase of an article, and gets it from the shopman by some false pretence or other, with intent to defraud the owner; if the shopman had no authority to part with the property without payment of the price, the offence is larceny; but if he had such authority, it is only a fraud. Well may this be termed a "subtle distinction," especially as the distinction turns on a fact—the authority—of which, in most cases, the prisoner must be ignorant. Now such being the object of the clause, one simple test for determining whether a case is within it immediately presents itself. Assume that the pretences are proved as laid, and that the party from whom the chattel or money was obtained did not part with the property in it; then if the prisoner would be guilty of larceny, the case is clearly within the clause; for under that supposition not only may he be convicted, but he must be convicted; for the words are, "he shall not by reason thereof be entitled to be acquitted of such misdemeanor." It is, therefore, very confidently submitted that wherever on an indictment for false pretences the pretences are proved, and the offence would have been larceny if the property in the chattel or money had not been parted with, the case is within the statute. And this clearly shews that the decision in the principal case is wrong; for no one can doubt that, if the money had been obtained from a shopman, who had no authority to make advances, except on real and valuable pledges, the offence would have been larceny.' See R. *v.* Jackson, 1 Mood. 119, *ante*, p. 1216.

'The words of the clause are, "If any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud," &c. Now these words are perfectly general and unqualified, and it is obvious that they are amply wide enough to include every case where property is obtained by means of a fraudulent contract; and a reference to the first Act on the subject, from which they are taken, seems not only to shew that it does include such contracts, but that its principal object was to punish those who by such contracts defrauded tradesmen. 30 Geo. II, c. 24, s. 1, recites that "evil-disposed persons have, by various subtle stratagems, threats, and devices, fraudulently obtained divers sums of money, goods, wares, and merchandises, to the great injury of industrious families, and to the manifest prejudice of trade and credit," and then contains the first enactment against obtaining "money, goods, wares, or merchandises" by false pretences; and there can be no doubt

Remoteness.—The prisoner was convicted of attempting to obtain goods (viz. prizes) by false pretences. It appeared that amongst the names sent in on entry forms for two handicap races at an athletic meeting was that of one Sims. A correct account of Sims' previous performances was given on the forms, together with a statement that he had never won a race. Sims knew nothing of these entries having been made, nor were they written by the prisoner. Sims, being only a moderate runner, received a long start in each race. Sims was not at the race meeting, but was personated by the prisoner, who, being a fine runner, won both contests easily. After the races the prisoner

that the similar enacting part of 7 & 8 Geo. IV. c. 29, s. 53, and the new clause, ought to receive an equally comprehensive meaning. It must also be observed that it would seem to be erroneous to speak of a fraudulent contract as a contract; fraud vitiates everything; and, though the ceremony of the contract may have been gone through, there is really no contract at all, where the prisoner has done everything with intent to defraud. And where a prosecution is instituted by the injured person, there is no ground for asserting that the prosecutor has affirmed the contract. Whether there be fraud or not is a question for the jury; and where they have expressly found that the contract was made with the intent to cheat the owner of his property, as they have in every case which has been reserved, it appears to be quite a mistake to speak of a contract in the manner in which it has sometimes been spoken of in these cases.

'In order to bring a case within the statute, the following things are alone requisite: 1. A false pretence. 2. An obtaining of property by it. 3. An intent to defraud. And the correct way to determine whether any particular case falls within it is, not to consider each of these things separately, but to look at them all together; for no case is within the statute unless all of them co-exist in it. And one error in some cases seems to have been to consider the pretence apart from the finding of the jury that it was made with intent to defraud. One man may extol an article innocently, and another fraudulently, in similar terms, but the latter is alone within the statute, which does not apply to every false pretence, but only to such false pretences as are made with intent to defraud.

'As to the distinction between a representation that articles are better in point of quality, and a representation that they are entirely different from what they really are, there is nothing in the statute which warrants any such distinction; what the statute requires is that there shall be a false pretence. Then is a representation as to quality a pretence? Possibly where such a representation is made on the mere inspection of an article it may be rather a matter of opinion than a pretence; but where it is made with a full knowledge of the quality of the article, it is not opinion (for opinion must cease when knowledge exists), but an affirmation of a known fact; in other words a pretence. If a man who knew the precise composition of Elkington's A. swore that a spoon, which he himself had manufactured, was of the same quality as Elkington's A., he would clearly be guilty of perjury, if it was made of the materials of which the spoons in this case were composed. If then a man possessing such knowledge made such a representation as to a spoon made by himself, can it be doubted that he made a false pretence? The judges, indeed, do not seem to say that such a representation is not a false pretence? but only that it is not a false pretence within the meaning of the Act. But as the words "*any* person" include every person who comes within the other requisites of the clause; so the words "any false pretence" include every false pretence which is made with intent to defraud. The Legislature has declared the false pretences to be such as are made with intent to defraud; and to hold that any false pretence made with that intent is not within the Act, is to assume the office of legislation rather than that of judge.

'As to the remark that, if extolling goods be within the statute, so must depreciating them be so also: the answer is that if a person were to induce an owner to part with his property by falsely representing it as of inferior value, the case would be clearly within the statute, if the representation was made with intent to defraud. Suppose a veterinary surgeon represented that a valuable race-horse had a fatal disease when he well knew that it had not, and by that means obtained it at the price of a useless horse, with intent to defraud the owner; the case would clearly be within the statute.

'As to the danger to the honest tradesman, there is no fear that a jury, generally containing several tradesmen, will be too ready to find an intent to defraud in cases of this kind, unless there be plain and palpable evidence of fraud, and where that exists it is the interest of every one that the offender should be convicted.'

stated, in reply to the handicapper, that he really was Sims, that the performances given in the entries were his own, and that he had never won a race. All these statements were untrue. The prisoner did not apply for the prizes. Upon a case reserved it was held that there was evidence for the jury of an attempt to obtain the prizes by false pretences, and that the attempt was not too remote from the pretence, and the conviction was affirmed (*i*).

In a case tried at the summer assizes at Nottingham, in 1879, before Lindley, J., a professional runner, by representing himself as an amateur, and assuming a false name, competed in a race exclusively for amateurs, was allowed a start, and won the race. He was convicted of attempting to obtain the prize by false pretences (*j*). It would seem that in all such cases the question of remoteness is for the jury (*k*).

Promissory Pretences.—A promissory pretence to do an act is not within the statute (*l*).

A pretence that the party would do an act which he did not mean to do (as a pretence that he would pay for goods on delivery) is not a false pretence within the Act (*m*).

The prosecutor having lost a mare and gelding, went in search of them to L.; where the prisoner, on being introduced to the prosecutor, said he knew where they were, and would tell him if he would give him a sovereign; the prosecutor hesitated to give him a sovereign, but the prisoner refusing to give the information unless the sovereign was delivered into his hands, the prosecutor reluctantly put two half sovereigns into his right hand, which the prisoner immediately put into his pocket. The prosecutor then required the prisoner to give him the information he had promised, which he refused to do or to return the money, saying he had no information to give him. The jury having found the prisoner guilty, upon a case reserved upon the question whether this was a false pretence within 7 & 8 Geo. IV. c. 29, s. 53 (rep.), the conviction was quashed on the ground that the indictment should have stated that the prisoner pretended he knew where the horses were (*n*).

An indictment alleged that F. had deserted his wife, and that the prisoner falsely pretended to the wife that she, the prisoner, then had the power to bring back F. to his wife, and that the prisoner then had power to bring back F. to his wife over hedges and ditches, and that a certain stuff which the prisoner then had in her possession was sufficient for the purpose of bringing back F. to his wife; by means whereof the prisoner

(*i*) R. *v.* Button [1900], 2 Q.B. 597; 69 L. J. Q.B. 901; where R. *v.* Larner, 14 Cox, 497 was disapproved and R. *v.* Dickenson (*infra*) followed.

(*j*) R. *v.* Dickenson, Roscoe Cr. Ev. (13th ed.) 408. 'Times' Newsp. July 25, 1879.

(*k*) See R. *v.* Martin, *ante*, p. 1539.

(*l*) *Vide*, *ante*, p. 1516.

(*m*) R. *v.* Goodhall, MS. Bayley, J., and R. & R. 461, decided under 30 Geo. II. c. 24. See R. *v.* Burrows, 11 Cox, 258. The Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), which enables Courts of Summary Jurisdiction to deal with false pretences, provides (sect. 3), that 'Where a Court of Summary Jurisdiction proposes to deal summarily in pursuance of this Act with a charge of obtaining by false pretences . . . the Court shall . . . state in effect that a false pretence means a false representation by words, writing, or conduct that some fact exists or existed, and that *a promise as to future conduct not intended to be kept is not by itself a false pretence*. . . .'

(*n*) R. *v.* Douglas, 1 Mood. 462. See also R. *v.* Lee, L. & C. 309. R. *v.* Giles, L. & C. 502, *post*, p. 1553. R. *v.* Henshaw, L. & C. 444, *post*, p. 1566, note (*l*).

unlawfully obtained from the wife a dress and two sixpences. The wife proved that her husband had left her, and that she had had a conversation with a woman, in consequence of which she went with her to the prisoner's house, and 'I asked the prisoner to tell me a few words by the cards to fetch my husband back. She said her price was five shillings. She asked me if I had anything on that I could leave. I said I had a petticoat on, but that was old, and she said that would be of no use. I had two frocks on. She told me to leave the under one. I left it with her, She said her price was so high, she could not do anything without the money; the stuff she had to work upon would cost her five shillings, or nearly that. She said she could bring my husband back over hedges and ditches. She said that about bringing my husband back after she got the frock. She said that she would bring my husband back before I gave her the money. She said if I brought her four shillings I should have the frock again. I went to the prisoner's house again on the following Monday. She asked me if I had heard anything of my husband. I replied I had not. She asked me if I had any more money. I said I had not. She said she had worked very hard for me all the time during the week. I parted with the money and the dress on the faith of what passed between us on the first occasion.' Upon a case reserved, it was urged that the false pretence charged amounted merely to a promise that the prisoner would do the act. It might mean by moral influence, physical strength, or supernatural power. Secondly, there was no sufficient evidence to go to the jury. The false pretence was made after the property had been obtained. Lastly, there was no evidence that the prisoner knew that she had not the power to do what she promised. Erle, C.J. said, 'The first question is whether the indictment is good. I take it that the pretence that the prisoner had the power to bring back her husband to the prosecutrix is the material part of the indictment. Now, the pretence of power, whether moral, physical, or supernatural, made with intent to obtain money, is within the mischief of the law, and sufficient to constitute an offence within the language of the statute. The second point is, whether there was any evidence to support the indictment. I take the law to be that there must be a false pretence of a present or past fact, and that a promissory pretence to do some act is not within the statute. Then the question is, was there evidence of a false pretence of an existing fact that the prisoner had the power to bring the husband back when the money was obtained? It was contended that the prosecution ought not to succeed, because the evidence was that the prisoner said that she *would* bring the prosecutrix's husband back, and that thereupon the money was parted with by the prosecutrix, and that after the prisoner had got the property she said she *could* bring the husband back, and that there was therefore a promissory pretence only. It is clear that an indictable pretence must precede the obtaining of the money, so that it can be alleged that the money was obtained by means of the pretence. The exact words of that part of the evidence favour the argument of the prisoner's counsel; but I have come to the conclusion that we ought not to sustain the objection, because the whole tenor of the evidence is to be regarded, and it may be upon the evidence that the prisoner tended to convey to the mind of the prosecutrix that she had not only the will but the power to bring her

husband back. The whole of the evidence was to be regarded by the jury, and they were to consider whether the prisoner intended to pretend to the prosecutrix, and to induce her to believe, that she, at that time, had the power to bring her husband back, and that she did actually so pretend. Upon the whole evidence, I think there was enough for the jury from which they had a right to infer that she intended to induce the prosecutrix to believe that she had power, at the time when the money was parted with, to bring her husband back. It was next contended that the prisoner might have believed that she did possess such power; but upon the facts, I think there was evidence to go to the jury that the prisoner was a fraudulent imposter. I think, therefore, that the conviction ought to be affirmed' (*o*).

The prisoner falsely told the prosecutrix that she kept a shop at N., and she promised the prosecutrix that she should go home with her until she found a situation, and then borrowed half a sovereign. She was convicted upon an indictment which charged her with obtaining this money by the false pretences that she kept a shop and that the prosecutrix might go and live with her at the said shop until she got a situation. The jury found that the prosecutrix parted with the money under the belief that the prisoner kept a shop at N. and that she (the prosecutrix) should have the money when she went home with her. Upon a case reserved it was held the indictment was good and supported by the evidence (*p*).

A count alleged that the prisoner pretended to one S., the shopman of A., that he was then intending to open a shop for the sale of cheese and bacon, and that he was then a provision dealer, and that he was possessed of the sum of £1 7*s*. 1½*d*., and that he was desirous of purchasing a cheese of the said A., in good faith, and for the purpose of selling it again in the trade of a provision dealer, and that he had the means of paying the said A. the price of the said cheese, and that if S. would sell and deliver the cheese to him, he was ready to purchase the said cheese, and pay S. the said sum of £1 7*s*. 1½*d*. It was urged, in arrest of judgment, that the pretences were so mixed up together, that, if one was bad, the count was also bad, and that some of the pretences merely related to the future, and were therefore insufficient; but it was held that the pretences that the prisoner was a provision dealer, and had the means of paying, were pretences of existing facts, and whether a false pretence were as to the status of the prisoner at the time, or as to any collateral fact supposed to be then existing, it would equally support an indictment under the statute (*q*).

So where upon an indictment for false pretences it appeared that the prisoner told the prosecutrix that he had been to B.; and bought skins,

(*o*) R. *v.* Giles, L. & C. 502; 34 L. J. M. C. 50. See R. *v.* Stephenson [1904], 68 J. P. 524. In R. *v.* Lawrence, 36 L. T. 404, the prisoner was convicted of attempting to obtain money—upon the false pretences that he had power to communicate with the spirits of deceased and other persons, although such persons were not present in the place where he then was, and also that he had power to produce and cause to be present such spirits as aforesaid in a materialised or other form; and also that divers musical instruments by the sole means of such spirits so caused to be present, produced musical and other sounds, and it was held that the indictment alleged a good and valid false pretence.

(*p*) R. *v.* Fry, Dears. & B. 449: 27 L. J. M. C. 68.

(*q*) R. *v.* Bates, 3 Cox, 201, Platt, B.

and had paid ten shillings upon them to make them safe. He said he was to give seven pounds for the skins, and would bring them and sell them to the prosecutrix, and asked her for four pounds ten shillings in part payment of them; the prosecutrix believed his story, and let him have the money; the representation that he had bought the skins induced her to let him have the money; but she added, 'I expected to make a profit by the skins, and I lent the prisoner the money, because I thought he would bring me the skins, and I would not have lent him the money if I had not believed that he was going to bring me the skins. If he had only told me that he had bought the skins, unless I had thought that he would sell them to me, I would not have let him have the money; nor should I have lent him the money, if I had not thought that he had already bought the skins of B.' The jury found the prisoner guilty of obtaining the money 'upon the false pretences that he had bought the skins from B. and would bring them to the prosecutrix, and sell them to her;' and, upon a case reserved, it was held that this case was governed by R. *v.* Fry (*r*), in which it was decided that when a misrepresentation of a matter of fact is accompanied by a promise, the promise does not prevent the case from coming within the statute (*s*); and here there was a pretence of an existing fact combined with a promise for future conduct the pretence here being that the prisoner *had bought* the skins, and *would bring* them to the prosecutrix (*t*).

An indictment charged that C. did falsely pretend that he was a dealer in potatoes in a large way of business, and in a position to do a good trade, and able to pay for goods supplied to him, by means of which, &c. The evidence was that the prisoner had written the following letter:—

'SIR,—Please send me one truck of Regents and one truck of Rocks as samples, at your prices named in your letter. Let them be good quality, and then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice.

'Yours truly,

'WILLIAM COOPER.

'P.S.—I may say if you use me well, I shall be a good customer. An answer will oblige, saying when they are put on.'

It was held that there was evidence on which the jury were justified in convicting (*u*).

On an indictment for obtaining money by false pretences it appeared that the prisoner, who had a wife living, had represented

(*r*) *Ante*, p. 1553.

(*s*) Per Pollock, C. B.

(*t*) R. *v.* West, Dears. & B. 575; 24 L. J. M. C. 227.

(*u*) R. *v.* Cooper, 2 Q.B.D. 510; 46 L. J. M. C. 219. It is a question for the jury whether the words used fairly conveyed a representation of an existing fact. So where the defendant inserted the following advertisement in a newspaper, 'Barnardo, £2, £1, 10s., for most words from Barnardo. Proceeds to go to Dr. Barnardo's home for Destitute Children. Alphabetical lists with 1*s.* 3*d.* to Rev. A. Brient, Trowbridge, Wilts, by March 5. Result 8th,' it was held that the jury could rightly find that this amounted to a representation that a minister of religion of the name of Brient had instituted a *bonâ fide* competition. R. *v.* Randell, 16 Cox, 335. In R. *v.* King [1897], 1 Q.B. 214, it was held that the person receiving a letter containing the alleged false pretences may be asked what opinion he formed on reading it.

himself to the prosecutrix as a single man, and, pretending that he was about to marry her, induced her to hand over to him £8 out of her wages, representing that he would go to Liverpool, and with the money furnish a house for them to live in, and that, having done so, he would return and marry her. Having obtained the money he went away, and never returned. The prosecutrix stated that she had been induced to part with her money on the representations of the prisoner that he was a single man, that he would furnish the house with the money, and would then marry her. On a case reserved, it was held that though a false promise cannot be the subject of an indictment for obtaining money by false pretences, yet here there was the pretence that the prisoner was a single man, which was false, and was essential, for without it he would not have obtained the money. Then this false fact, by which the money was obtained, would support the indictment, although it was united with two false promises, which alone would not have supported the conviction (*v*).

A count stated that the prisoner unlawfully pretended to H.G.H. that he intended to marry her on the 8th of February, and that he had purchased a suit of clothes for the wedding, for which he wanted the sum of £4 to pay for the same; whereas the prisoner did not intend to marry H.G.H., nor did he ever purchase a suit of clothes for the said wedding. The prisoner had paid his addresses to H.G.H., and the banns had been published with his sanction. After the first publication the prisoner met H.G.H. at a draper's shop, by appointment, in order that he might there buy a suit of clothes for the wedding. He accordingly bought a suit of clothes for £4, and asked her for £4 to enable him to pay for them, and she gave him £4 for that purpose. The jury found the prisoner guilty; but Rolfe, B., doubted whether the pretence stated was one on which a conviction could take place; and, upon a case reserved, the judges held the conviction wrong (*w*).

The prisoner who owed his landlord some rent, met the prosecutor and said to him, 'I am going to pay (or I have got to pay) my rent to the squire on the 1st March, but as that is Sunday, I am going to pay it the next day. Will you advance £10 for your father-in-law on the rent of the flax field?' (about which they were in treaty). The prosecutor said, 'I don't wish to be mixed up with my father-in-law's affairs.' The prisoner then said, 'Will you lend me £10 till Tuesday or Wednesday, and I will give you a note of hand for it to make it all business-like?' The prosecutor then lent him £10, and the prisoner gave him a formal promissory note for that sum. The prisoner did not say he required the sum of £10 to make up his rent, but the prosecutor believed that was what he wanted it for. The prisoner at the time he obtained the money meant to leave the next day for New Zealand, and did leave accordingly, and without paying his rent. The jury found that the prisoner's statement that he was going to pay his rent on the Monday was a false pretence, and that the money was advanced on the credit of that pretence. But, on a case reserved, it was held that there was no false pretence of any

(*v*) R. *v.* Jennison [1862], L. & C. 157; 31 L. J. M. C. 146.

(*w*) R. *v.* Johnston, 2 Mood. 254, Rolfe, B. See also R. *v.* Woodman, 14 Cox, 179, Mellor, J.

existing fact. The pretence alleged was that he had got to pay his rent, while in fact he had no intention of paying it, but meant to appropriate the money to his own purposes. That was not a false pretence of an existing fact (*x*).

The prisoner was convicted on an indictment charging that:—by the false pretence to the prosecutors that 'he was prepared to pay' them £100, he did then unlawfully and fraudulently induce them to make a certain valuable security, to wit, a promissory note for £100, with intent thereby to defraud them. It was held that the indictment was good, as it must be taken by necessary inference to allege a false pretence by the prisoner of an existing fact: viz. that he was prepared to pay the prosecutors £100, and had the money ready for them on their signing the promissory note; and, secondly, that the indictment shewed an offence within sect. 90 of the Larceny Act, 1861, of fraudulently causing a person to make a valuable security, although the promissory note in question might not be of value until it had been delivered into the hands of the prisoner (*y*).

The prisoner represented that he was collecting information for a directory which W. was getting up, and by means of this pretence he obtained 1s. from the prosecutor. It was held that he was rightly convicted, since there was a misrepresentation of an existing fact, namely, that W. was getting up a new directory (*z*).

Obtaining by the False Pretence.—It is for the jury to determine whether the money, etc., was 'obtained' by means of the false pretence. In R. *v.* Garrett (*a*), Maule, J., said the word 'obtains' means the same as the word 'get' in its sense of acquire; and Parke, B., said the word 'obtain' seems to mean not so much a defrauding or depriving another of his property as the obtaining of some benefit to the party. Where proof of actual obtaining fails the accused may in some cases be convicted of attempting to obtain, etc., on an indictment for the full offence (*b*).

It must be shewn that the prisoner obtained the goods by means of some of the false pretences laid in the indictment (*c*). The indictment stated that the prisoner did falsely pretend that he was a gentleman's servant, that he had lived in B., and that he had bought twenty horses in B. fair, and that he thereby obtained a filly from the prosecutor. The pretences were proved to have been made by the prisoner as stated in the indictment, but it was also proved that the prosecutor sold the filly to the prisoner for £11, and that the prisoner said he had twenty other horses at the Cross Keys at Brecon, and that if the prosecutor would take the horse that the prisoner had got to the Cross Keys, he would come down there in about half an hour, and pay the prosecutor for the filly. The prosecutor thereupon delivered the filly to the prisoner, and took the prisoner's horse to the Cross Keys, where he ascertained the prisoner's statement to be false. In his cross-examination the prosecutor said that he delivered

(*x*) R. *v.* Lee [1863], L. & C. 309.
(*y*) R. *v.* Gordon, 23 Q.B.D. 354. 58 L. J. M. C. 117. Cf. R. *v.* Dal Ram [1901], 3 West Aust. Rep. 111. And see the Moneylenders Act, 1901, s. 4, *post*, 1591.
(*z*) R. *v.* Speed, 15 Cox, 24.
(*a*) Dears. 232; 23 L. J. M. C. 20.
(*b*) See 14 & 15 Vict. c. 100, s. 9.
(*c*) See R. *v.* Partridge, 6 Cox, 182. R. *v.* Cosnett, 65 J. P. 472.

the filly to the prisoner because he believed that the prisoner would call at the Cross Keys and pay him, and not because he believed him to be a gentleman's servant, or that he lived at Brecon, or had purchased twenty horses. Coleridge, J., told the jury, 'The question for you to consider is, whether the prosecutor parted with his filly by reason of his having believed any false pretence made use of by the prisoner. It is sufficient for the prosecutor to prove that any one of the false pretences charged in the indictment was false, and that he parted with his filly by reason of such false pretence, the prisoner intending to defraud him thereby. However, in this case, the prosecutor himself says that he parted with his filly because the prisoner promised to pay him, and not on account of any of the false pretences charged. If you think that was so, you will acquit the prisoner' (*d*).

On an indictment against the registrar of the court of record for the borough of Northampton for obtaining money by a false return of the amount of fees received by him, it appeared that he sent the return from Northampton, and swore an affidavit there of its truth, and upon these was obtained the treasury minute, which authorised the payment to the prisoner of the sum he had obtained. This minute was the most formal act that was done in the matter, and it was an authority and direction to the paymaster to pay the amount awarded. It was objected that the return and affidavit did not amount to a false pretence, on which money was obtained. The 6 & 7 Vict. c. 96, placed the commissioners in a quasi-judicial position, and their minute, which was the authority on which the money was obtained, was a judicial act; that minute was obtained by false testimony, but the money was not obtained by a false pretence. Coleridge, J., said: 'The return and minute are mere procedure and matter of regulation—the means by which the prisoner obtained the money. It will be for the jury to say whether the minute was not obtained by a belief in the truth of the return. If so, then the money was so obtained' (*e*).

In R. *v.* Lince (*f*), Bovill, C.J., said: 'The second point reserved was, whether a charge of obtaining goods by false pretences can be sustained when the prosecutor admits that another circumstance influenced his mind in parting with his goods, as well as the alleged false pretence. It has been long settled that it is immaterial that the prosecutor was influenced by other circumstances than the false pretence charged. If that were not so, an indictment for false pretences could scarcely ever be maintained, as a tradesman is generally more or less influenced by the profit he expects to make upon the transaction.'

The prisoner was a carrier, and dealt with a brewer. He went to the brewer and said, 'I want a cask of ale. I will call on my way back.' He came again and said, 'Is my beer ready?' The brewer said, 'Yes.' The prisoner took it up saying, 'It is for W.,' which it was not. It was objected that the prisoner did not obtain the ale by means of the false pretence, as the order was originally given for himself, and he did not

(*d*) R. *v.* Dale, 7 C. & P. 352. See R. *v.* Hunt, 8 Cox, 495.

(*e*) R. *v.* Cooke, 1 F. & F. 64.

(*f*) 12 Cox, 451. See R. *v.* Hewgill, *ante*, p. 1524. R. *v.* English, 12 Cox, 171. Cockburn, J., and R. *v.* Finch, 72 J. P. Rep. 102.

say anything of W. until he had got possession of the ale; Wightman, J., held that the objection was fatal (*g*).

Upon an indictment for false pretences it appeared that the prisoner was employed to cut chaff for the prosecutor, and was to be paid 2*d.* per fan for as much as he cut. He demanded 10*s.* 6*d.*, and stated he had cut sixty-three fans, but the prosecutor had seen him remove eighteen fans of cut chaff, and add them to the heap which he pretended he had cut, thus making the sixty-three fans for which he charged. Upon the representation that he had cut sixty-three fans, and notwithstanding his knowledge of the prisoner having added eighteen fans, the prosecutor paid him the 10*s.* 6*d.*; and it was held, on a case reserved, that the prisoner had not obtained the money by means of the false pretence; for the prosecutor knew it was false, and therefore it was not the false pretence that induced him to part with his money (*h*).

Upon an indictment for obtaining a sovereign, it appeared that the prosecutor and a magistrate went and saw the defendant in consequence of a letter, which had been previously received, stating that the writer was able to give information of something to the prosecutor's advantage, and that the prisoner said J. L. was his partner, and was the brother of Sir P. L., neither of which was the fact. The prosecutor paid him a sovereign, upon which he gave him a paper containing some information, which turned out to be useless. The defendant refused to return the money. For the defence an endeavour was made to shew that the prosecutor and the magistrate went together to the defendant, well knowing who he was, for the purpose of making evidence to support a case against him. Patteson, J., said: 'If I understand the defence set up, it is nothing more nor less than this, that a conspiracy existed between the prosecutor and the magistrate to entrap the defendant into the commission of the offence. You will judge for yourselves whether it be so or not. But still, if the defendant did obtain the money by false pretences, and knew them to be false at the time, it does not signify whether they intended to entrap him or not' (*i*).

The criminality of the pretence is not in law measured by the extent to which it was calculated to deceive a person of ordinary intelligence or caution. On its being said in argument that an opinion had always prevailed that the fraud, to constitute an indictable offence, must be such an artful device as would impose upon a man of ordinary caution. Denman, C.J., said, 'I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person, and defraud him; how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?' R. *v.* Jones (*j*) was then cited, where the defendant being indicted for having obtained money by pretending to be sent for £20 for the use

(*g*) R. *v.* Brooks, 1 F. & F. 502. R. *v.* Steels, 11 Cox, 5.

(*h*) R. *v.* Mills, Dears. & B. 205; 26 L. J. M. C. 59. R. *v.* Ady, *infra*, was cited, and Coleridge, J., observed, 'In R. *v.* Ady it is said that the prosecutor believed the false statement.' The prisoner might, in a case like this, be convicted of attempting to obtain the money by false pretences, or be only indicted for attempting to obtain. See R. *v.* Roebuck, Dears. & B. 24, *ante*, p. 1547. R. *v.* Hensler, 11 Cox, 570.

(*i*) R. *v.* Ady, 7 C. & P. 140.

(*j*) 2 Ld. Raym. 1013. This is a case on common law cheating, *ante*, pp. 1501 *et seq.*

of J.S., Holt, C.J., said, 'It is no crime unless he came with false tokens. Shall we indict a man for making a fool of another? Let him bring his action.' Upon which Denman, C.J., added, 'Why is it the prosecutor's folly more than the defendant's fraud? This point is sometimes put as if a lie were something laudable. There are indeed cases, where the pretence is so very foolish that it is difficult to say that an imposition is practised; but still who is to give the measure?' (*k*).

The prisoner went to B., and said his (the prisoner's) master wanted £2 or £3 to pay for some wheat; B. said he had no small money, he had a £10 note, and he would let him have that, which he did, and he said the reason he did so was, that he had no small change, and in consequence of what the prisoner said. Taunton, J., expressing doubts whether the £10 was obtained by the false pretence, it was submitted that if the pretence had not been used the prisoner would not have obtained the note; the note therefore was obtained by means of the pretence, which was all the indictment alleged. Taunton, J., 'The prisoner asks for one thing and obtains another; he did not obtain the £10 note by means of the pretence, but through the imprudence of the prosecutor. I think that that is not sufficient' (*l*).

The prisoner, having invented an improved miners' lamp, entered into partnership with A. and B. by a deed, for the purposes of manufacturing and selling such lamps. By the deed the capital of the partnership was to consist of £300, to be advanced by A. and B. in equal shares. After the execution of the deed A. and B. advanced the prisoner money to pay the expenses of exhibiting the lamp, and obtaining the patent for it; at length they refused to advance any more money unless he agreed to go out as an agent to sell the lamps on commission; and a verbal agreement was made between the three that the prisoner should travel about the country to obtain orders for the lamps, on the terms that A. and B. should pay him a commission of 15 per cent. on all orders received by him, besides his travelling expenses, such commission to be paid to him as soon as he received the orders, and to be payable out of the capital funds of the partnership before dividing any profits. On the occasion in question the prisoner stated to A. and B. that he had got an order from a colliery company for one hundred lamps, to be made in a month, and paid for in a month

(*k*) R. *v.* Wickham, 10 A. & E. 34. 'It is submitted that the jury are the proper persons to give the measure, and that it is for them to say whether or not the pretences used were the means of obtaining the property. Any rule founded upon the pretence being such as would impose upon persons of ordinary caution, would leave all such as were all unfortunately gifted with a less degree of caution at the mercy of the fraudulent and designing. And as in robbery it would be absurd to lay down any rule which defined the force necessary to constitute a robbery with reference to the ordinary strength of mankind; so in false pretences it would be equally absurd to establish a rule with reference to the ordinary capacity of mankind. On the other hand, as in robbery, the correct rule clearly is that any force sufficient to overcome the bodily resistance of the party robbed constitutes the offence, whether that party be a powerful man or a feeble woman; so it is submitted that any pretence sufficient to overcome and impose upon the mind of the party to whom it is made, ought to be considered to constitute an offence within this statute; and that whether it were of such a character or not, ought to be left to the determination of the jury with reference to all the facts of the particular case.' C. S. G. See R. *v.* Woolley, *ante*, p. 1530. R. *v.* Young, 3 T. R. 98: 2 East, P. C. 828; *ante*, p. 1518.

(*l*) R. *v.* Smith, Hereford Spr. Ass. 1832. MSS. C. S. G.

after delivery. In the faith that this statement was true, A. and B. gave the prisoner £12 10*s.*, the commission which would be due to him under the said agreement on the sale of one hundred lamps. No such order had, in fact, been given. It was objected that the money obtained was money in which he was interested under the deed of partnership; and that the intent to defraud was negatived by the fact that the money came out of the partnership funds. And, upon a case reserved on these questions, it was held that this was not an obtaining of money by false pretences within the statute. The prisoner was charged with obtaining money by making charges against the partnership funds, for which there was no foundation. But as, before there could be any division of profits, those expenses would have to be paid out of the capital fund, those charges would be matter of account between the parties. If there was a real foundation for these charges, they would come into the account, and be deducted from the profits of the partnership. The act of the prisoner was no more than a misrepresentation, which would be overhauled when the accounts were gone into (*m*).

Obtaining *credit* in account from a banker by drawing a bill on a person, on whom the party has no right to draw, and which has no chance of being paid, was not within 7 & 8 Geo. IV. c 29, sect. 53 (rep.), though the banker paid money in consequence thereof to an extent that he would not otherwise have done. The prisoner had kept an account with certain bankers for more than three years. They had told him that they could not allow him to overdraw beyond £200, but on November 29, 1828, his account was £400 overdrawn, of which he was given notice, and he was told that he must get the bank some money. On that day he met R., one of the partners, and told him that he had been obliged to give a cheque to J. for £70. R. said, 'We certainly shall not pay it, unless you give us some money first.' He said, 'Sir, I can give you a good bill on F.' R. said, 'Very well.' About two hours afterwards the prisoner sent a letter to the bank containing a bill of exchange for £200, in his own handwriting, purporting to be drawn on F. After this, cheques drawn by the prisoner were brought in and paid there on that day, and amongst others that in favour of J. for £70. J. banked with the prosecutors, and they placed the amount to his credit, which R. swore he would not have done unless he had met the prisoner and received the bill. Several other cheques were afterwards paid, or placed to the credit of parties, on whose behalf they were sent in. The bill was not accepted, and searches were made

(*m*) R. *v.* Evans [1862], L. & C. 252. 'This decision may be supported on the ground that the prisoner obtained money in which he had a joint interest. But the grounds on which the decision was rested are open to the gravest doubt. It might just as well be said that a clerk, who obtains money by presenting a false account, was not guilty of the offence, because there might be an accounting afterwards.' C. S. G. Pollock, C.B., on delivering the judgment, said, 'I may add that in my opinion, the statute against obtaining money by false pretences was never intended to meddle with the real business of commerce. It was not to control commercial proceedings, unless where there was really and truly a piece of swindling; nor to apply to frauds committed in the course of a commercial transaction. In my opinion—and I am giving this as my opinion only, and not that of the Court—it would be very mischievous to make every knavish transaction the subject of an indictment.'

in vain for a person of the description of F., and the bill was not paid. The prisoner endeavoured to prove that at the time when he drew the bill he had reason to expect that it would have been accepted, but the jury disbelieved the defence. Upon a case reserved, it was objected that no chattel, money, or valuable security was obtained by the prisoner by means of the false pretences; that he only obtained such credit with the bankers as to induce them to honour his cheques. The judges held that the prisoner could not be said to have obtained any specific sum on the bill; all that was obtained by him was credit in account; somebody else received the money; and therefore the conviction was wrong (*n*).

The prisoner agreed with B. in writing 'to go captain and take charge of a vessel, and to work her by the thirds, as is customary.' The meaning of 'working by the thirds' was that the prisoner was to have two-thirds of the net profits of the vessel. The prisoner had repairs done to the vessel to the amount of £1 2*s*. 2*d*.; but presented a receipt for £1 19*s*. 10*d*.; and that amount was allowed to the prisoner in the settlement of the vessel's accounts. Maule, J. said: 'How can it be said that the prisoner obtained any *money* by this false pretence? I have no doubt about the pretence or the falsity of it; but my difficulty is that he obtained no *money* by it, but only *credit* on account. It is only a non-payment of the 17*s*. 8*d*. It is like Wavell's case (*o*), and there must be an acquittal' (*p*).

Where the prosecutor, by certain false representations made to him by the prisoner as to his business, customers, and profits, was induced to enter into partnership with the prisoner, and to advance £500 as part of the capital of the concern, and the jury were directed that, if they believed the account given by the prosecutor, they would find the prisoner guilty, and the question was reserved whether the conviction could be supported, the Court held that the only point of law reserved was whether, in every possible and conceivable view of the evidence by the jury, they were bound to return a verdict of guilty (*q*); and the Court held that they were not; for many other questions ought to have been submitted to the jury (*r*).

(*n*) R. *v.* Wavell, 1 Mood. 224. This would seem to come within sect. 13 (1) of the Debtors Act, 1869, *ante* p. 1455.

(*o*) *Supra*.

(*p*) R. *v.* Crosby, 1 Cox, 10.

(*q*) Per Williams, J.

(*r*) R. *v.* Watson, Dears. & B. 348; 27 L. J. M. C. 18. As the only question turned on the direction to the jury, it is quite useless to set out the facts. Cockburn, C.J., said, 'I am far from saying that where a party is induced by false pretences to enter into a partnership, and to advance money, the allegations being altogether fraudulent and false, or colourable merely, he might not have ground for maintaining an indictment for obtaining money by false pretences, or from saying that he might not rescind a contract obtained by fraud. But I am clearly of opinion that if he does enter into the contract of partnership, and does not rescind it, and advances money as part of the capital of the concern, he has not parted with his money within the meaning of the statute; because, being a partner, he is still interested in that money.' Erle, J., thought on the evidence there had been a real partnership assented to by the prosecutor for some time, and was not aware of any case in which it was held that money advanced to a concern by a partner can be treated as money obtained by another partner by false pretences; but he agreed that there might be a case of partnership obtained by fraud, and money advanced, where the whole thing was a pretence, and the party always intended to obtain and appropriate the money, where an indictment for false pretences might lie. See R. *v.* Williamson, 11 Cox, 328, Byles, J., as to an indictment being maintained for false representations on sale of a business.

A begging letter containing false representations for the purpose of inducing the party to whom it is addressed to send the writer money, is a false pretence within the statute; and if money be obtained by such a letter, it is obtaining money by false pretences within the statute, although the money be given as a voluntary charitable gift. The prisoner wrote a letter to the prosecutor in a fictitious name containing false statements. The prosecutor, believing the statements in the letter to be true, sent a post-office order for £3 to the address mentioned in the letter, and this was received by an accomplice of the prisoner, and the proceeds divided between them. The prisoner knew that each of the statements in the letter was false, and wrote the letter with intent to cheat the prosecutor of his money, and used the fictitious name for that purpose. Upon a case reserved the conviction was held right on the grounds that a begging letter containing a false tale was a false pretence within the statute; that the offence created by sect. 4 of the Vagrancy Act, 1824 (5 Geo. IV. c. 83), was a different offence, viz. 'going about as a collector of alms, &c': and that that enactment would not prevent the party from being proceeded against under the then existing statutes, which had already made the offence a misdemeanor (*s*).

C. *The Intent to Defraud.*

By sect. 88 of the Larceny Act, 1861, it is not necessary to prove an intent to defraud any particular person. It is sufficient to prove that the party accused did the act charged with an intent to defraud (*t*).

The prosecutor owed the prisoner's master a sum of money, of which he could not procure payment, and the prisoner, in order to secure to his master the means of paying himself, had gone to the prosecutor's wife in his absence, and told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away, and thereupon she delivered the two sacks of malt to the prisoner, who carried them to his master. The pretence was false, and the prisoner knew it to be so at the time he used it. Coleridge, J., told the jury: 'Although *primâ facie* everyone must be taken to have intended the natural consequence of his own act, yet if, in this case, you are satisfied that the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, it will be your duty to find him not guilty. It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud the prosecutor' (*u*).

An indictment charged that the prisoner, being a member of a building society, obtained from the society £30 by falsely pretending that he had completed two houses, which he had to erect before he was entitled to the money. The prisoner, by the rules, would have forfeited the houses, if they were not completed by the time he made the pretence,

(*s*) R. *v.* Jones, 1 Den. 551; 19 L. J. M. C. 162. *Vide ante*, Vol. i. p. 6.

(*t*) *Ante*, p. 1514. An indictment for false pretences which omits the words 'with intent to defraud' is bad and cannot be amended under 14 & 15 Vict. c. 100, s. 1 (*post*, p. 1972). R. *v.* James, 12 Cox, 127, Lush, J.

(*u*) R. *v.* Williams, 7 C. & P. 354, Coleridge, J.

and the certificate of a surveyor was necessary to be, and was in fact, obtained before the money could be received. Willes, J., on the suggestion of the prosecution, allowed the prosecution to be abandoned, on the ground that the pretence might have been made in order to avoid the forfeiture (*v*).

On an indictment charging the prisoner with obtaining goods by certain false pretences, the jury found that the prisoner did obtain the goods by means of the false pretences, but that he intended to pay for them when it should be in his power to do so, and a verdict of guilty was entered. Upon a case reserved, it was held that the prisoner was properly convicted (*w*).

But where a jury found a verdict 'Guilty of obtaining food and money under false pretences, but whether there was any intent to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy,' it was argued, upon a case reserved, that the verdict was separable, the latter portion of it being merely the jury's reasons for their recommendation, and that if it was not separable it only meant that the prisoner intended to pay at some future time, but the Court held that the verdict was not separable and that as the latter part of it negatived the necessary intent to defraud, the conviction must be quashed (*x*).

On an indictment for obtaining money on the pretence of being a captain in the Guards, it appeared that the money was obtained on the representation by the defendant that he could embark it in the manufacture of bricks, and that the profit would be very great, and that the prosecutor should receive a large share of the profit, and the money was invested in the purchase of the brick-field, and the making of the bricks, but the prosecution was commenced before the speculation was fully carried out. It was urged that the pretence might have been made for a perfectly honest purpose; the speculation might have succeeded, and the prosecutor might have received the return on his capital. R. *v.* Williams (*y*) was cited. Pollock, C.B., said: 'I do not fully admit the doctrine that the obtaining money under false pretences is not a crime, if the prisoner does not intend ultimately to cheat the person advancing it. It is forgery on the part of one who accepts a bill in the name of another, even although he may intend to provide funds to meet it when it becomes due. In R. *v.* Williams the prisoner believed, however erroneously, that he had some sort of right to do as he did, and this was probably the ground on which the jury acquitted him' (*z*).

The difficulty as to venue disclosed in R. *v.* Buttery (*a*) removed by 7 Geo. IV. c. 64, sect. 12 where a felony or misdemeanor is committed on the boundary of two or more counties, or within the distance of 500 yards of the boundary, or is begun in one county and completed in

(*v*) R. *v.* Stone, 1 F. & F. 311.

(*w*) R. *v.* Naylor, L. R. 1 C. C. R. 4; 35 L. J. M. C. 61.

(*x*) R. *v.* Gray, 17 Cox, 299. Cf. R. *v.* Petch, 2 Cr. App. R. 71: 25 T. L. R. 401.

(*y*) *Ante*, p. 1562.

(*z*) R. *v.* Hamilton, 1 Cox, 244. Maule, J., was present.

(*a*) 3 B. & C. 703 (cit.); 4 B. & Ald. 179 (cit.). The case is fully discussed in R. *v.* Ellis [1899], 1 Q.B. 230, at 236, by Wills, J., at p. 241, by Wright, J. As to the distinction between jurisdiction and venue, *vide ante*, Vol. i. pp. 19, 54.

another, the venue may be laid in either county, in the same manner as if it had been wholly committed therein.

In R. *v.* Jones (*b*) the prisoner was indicted at the Middlesex Sessions for obtaining by false pretences a post-office order of C., and in other counts for obtaining a five-pound bank note, and two pieces of paper, to wit, two halves of a five-pound note, of the said C. The prosecutor resided at S. in Middlesex, having a house also at Bath, and the prisoner lived at V.-road in Middlesex, and the prisoner wrote a letter at his residence in an assumed name to 'C., Bath.' This letter was posted at Gravesend by an accomplice of the prisoner, and reached the prosecutor at S., having been forwarded to him from Bath, and he obtained a post-office order, enclosed it in an envelope, posted it to G. in Kent, where it was received by the accomplice of the prisoner under his directions, who got the money for the order, and gave half of it to the prisoner, at his residence in the V.-road. The prisoner wrote and posted a second letter from Bath. This letter was written in the fictitious name of J. H. C., and directed to 'C., S., Middlesex.' This letter made false representations, and asked for pecuniary assistance, not as a loan but as a gift; and some letters enclosed in it were requested to be returned to the writer at Chippenham. 'Address Mr. J. H. C., Chippenham.' This letter was received at S. by the prosecutor, who, believing its contents to be true, enclosed one half of a five-pound note in a letter addressed as desired, and forwarded it by post from S. to Chippenham, in Wilts, where it was received by the prisoner, who thereupon requested the prosecutor by letter to forward the second half of the note by post to his residence in Middlesex, and which the prosecutor, who was still at S., accordingly did, and the prisoner received it there. It was objected, 1st, that the prisoner was only triable for obtaining the post-office order in Kent, where it was received. 2nd, that one half of the note having been received in Wiltshire, and the other half in Middlesex, the bank note was not received in Middlesex; and that with respect to the charge of obtaining two pieces of paper, to wit, two halves of a Bank of England note, the same constituted no offence, because the halves were of themselves and as distinct from each other valueless. The objections were overruled, and the prisoner convicted; and, upon a case reserved, the judges were unanimously of opinion that the conviction was right, even independently of 7 Geo. IV. c. 64, sect. 12 (*ante*, Vol. I. p. 20); Alderson, B., observed that when the prosecutor put the letter containing the post-office order into the post-office at S. in Middlesex, the postmaster became the agent of the prisoner, and the latter must thus be taken to have received it in Middlesex (*c*).

Upon an indictment tried at the sessions for the county of the borough of Carmarthen, which is a separate jurisdiction from the county of Carmarthen, it appeared that the false pretence, with which the prisoner was charged, was contained in a letter written by him in the county of Carmarthen, and received by the prosecutor in the borough of Carmarthen.

(*b*) 1 Den. 551, *ante*, p. 1562; followed in R. *v.* Stoddart, 25 T. L. R. 612; 2 Cr. App. R. 217.

(*c*) No notice was taken of the objection as to the half notes being valueless, but R. *v.* Mead, 4 C. & P. 535, *ante*, p. 1269, shews that there was nothing in this objection.

The money obtained by such false pretence was posted in a registered letter in the borough of Carmarthen, and received by the prisoner in the county of Carmarthen; and, upon a case reserved, it was held that the sessions for the borough had jurisdiction to try the prisoner. The offence consisted of making the false pretence, and obtaining the money by means of the false pretence, and that offence was committed by the prisoner partly in one county and partly in another (*d*).

The prisoner was indicted in Northamptonshire for pretending to the commissioners of the treasury that the fees received by him as the registrar of the court of record for the borough of Northampton amounted to a certain sum only, by means whereof he did then and there obtain a certain sum of money. The prisoner's return of the amount of fees was received in a letter, dated in Northampton, and he had sworn an affidavit there of its truth. The treasury minute upon it, which authorised the payment to the prisoner of the sum he had obtained, was proved; it directed the paymaster to pay the amount, which was paid in Westminster. It was objected that no part of the offence had taken place in Northamptonshire; but Coleridge, J., held that as the letter was written and the affidavit sworn in Northamptonshire, the jury might infer that they were posted there, and that was sufficient (*e*).

Where the prisoner was indicted at N. for false pretences, and it appeared that he had written and posted a letter at N., addressed to F. at a place in France, containing a false pretence by means of which he induced F. to transmit to him in N. a draft which he received and cashed in N., it was held that he could rightly be convicted there; and Coleridge, C.J., said: 'Of the two necessary ingredients of the offence both take place in N. It may be that one important part of the offence taking place in N. would be sufficient, but here both ingredients take place in N.' (*f*).

The prisoner was indicted for obtaining sheep by false pretences, and the venue was laid in Essex. The sheep were obtained in Middlesex, and remained in the prisoner's possession till he conveyed them into Essex, and it was held, on a case reserved, that he had been indicted and tried in the wrong county (*g*).

D. *Indictment. Trial. Evidence.*

Indictments for obtaining money or other property by false pretences are subject to the provisions of the Vexatious Indictments Act, 1859 (*h*).

The indictment, whether it is for obtaining or attempting to obtain money, &c., by false pretences, must state the person to whom the

(*d*) R. *v.* Leech, Dears. 642; 25 L. J. M. C. 77. R. *v.* Allington, 9 T. L. R. 199.

(*e*) R. *v.* Cooke, 1 F. & F. 64.

(*f*) R. *v.* Holmes, 12 Q.B.D. 23; 53 L. J. M. C. 37. See R. *v.* Peters, 16 Q.B.D. 636, *ante*, p. 1461.

(*g*) R. *v.* Stanbury, L. & C. 128; 31 L. J. M. C. 88. See R. *v.* Dawson, 16 Cox, 556. R. *v.* Ellis [1899], 1 Q.B. 230, *ante*, Vol. i. p. 54. R. *v.* Stoddart, 25 T. L. R. 612; 2 Cr. App. R. 217.

(*h*) *Post*, p. 1927. This does not apply to the attempt, R. *v.* Burton, 13 Cox, 71. Counts can be added if the facts appear upon the depositions, R. *v.* Clark, 59 J. P. 248, Collins, J. See also R. *v.* Crabbe, 59 J. P. 247. R. *v.* Harris, 64 J. P. 360. R. *v.* Rogers, 66 J. P. 825. R. *v.* Coyne, 69 J. P. 151. R. *v.* Kopelewitch, 69 J. P. 216, and *post*, pp. 1928 *et seq.*

false pretence was made, and the person from whom the money, &c., was obtained or attempted to be obtained (*i*), but it need not state any ownership of the money, &c. (*j*)

The false pretences must be set out (*k*) in order that the Court may see what they are, and whether they come within the statute (*l*). But it does not appear to be necessary to describe false tokens more particularly than they were shewn or described to the party at the time; or to make any express allegation that the facts set forth shew a false token or false pretence (*m*). An indictment under 10 Geo. II, c. 24 (rep.), alleged, in substance, that the defendant unlawfully, knowingly, and designedly pretended certain things, 'by means of which said *false pretences*' he obtained the money, in the subsequent part of the indictment, all the pretences were averred to be false, but it was nowhere alleged that he did *falsely* pretend. On a writ of error the indictment was held sufficient, and the judges seem also to have been of opinion that the indictment would have been good if it had only alleged that the defendant obtained the money by such and such pretences (stating them); and then averred that those pretences were false (*n*). But a special averment that the pretences, or some of them, are false, cannot be dispensed with, and its omission seems to be fatal. In R. *v.* Perrott (*o*), the Court considered the case by analogy to the necessary averments in an indictment for perjury framed under 23 Geo. II, c. 11 (*p*), and were decidedly of opinion that where a party was charged with obtaining money, &c., by false pretences, and the matter charged as the pretence contained more than one proposition, the indictment ought to announce the precise charge by distinct averments, and state in what particular such pretences are false. Ellenborough, C.J., said, 'To state

(*i*) R. *v.* Sowerby [1894], 2 Q.B. 173; 63 L.J. M.C. 136. The form of indictment in R. *v.* Hunter, 10 Cox, 642, was disapproved, and that in R. *v.* Douglass, 1 Camp. 212, approved. But an indictment which set out that the defendant by causing to be inserted in a newspaper an advertisement (which was set out) did 'falsely pretend to the subjects of Her Majesty the Queen that,' &c., by means of which said false pretence he did unlawfully obtain from R. C. a certain valuable security, was held to be good in R. *v.* Silverlock [1894], 2 Q.B. 766; 64 L. J. M. C. 233.

(*j*) *Ante*, p. 1514.

(*k*) R. *v.* Mason, 2 T.R. 581. See R. *v.* Jarman, 14 Cox, 111.

(*l*) R. *v.* Fuller, 2 East, P. C. 837. A count alleged that Henshaw and Clark did falsely pretend to H. Pond, who lived at one Madame Temple's, and acted as her representative, that Clark had come down from London to the residence of Henshaw, and that H. Pond was to give him 10*s.*, and that the said Madame Temple was going to allow Clark 10*s.* a week for the benefit of his health. By means, &c., the prisoners did attempt, &c. Madame Temple had a shop in London and another at Brighton, and the prisoners went to the shop at Brighton, and saw H. Pond, who kept the accounts of Madame Temple there, and who proved that Henshaw in the hearing of Clark said that Clark had come down from London, and had been in Brompton Hospital with a bad leg, and had seen Madame Temple in London, who said that she (Pond) was to give Clark 10*s.* a week while he was in Brighton for the benefit of his health. She refused to do so. And, upon a case reserved, it was held that the indictment did not sufficiently allege any pretence of an existing fact. R. *v.* Henshaw, L. & C. 444, 33 L. J. M. C. 132. The Court seem to have thought that, if the indictment had alleged that Pond was to give the money on account of Madame Temple, it would have been good. In these sort of cases there ought to be an averment that the prisoner was authorised by the party to ask for and to receive the money.

(*m*) 2 East, P. C. 837, 838. R. *v.* Terrey, Cro. Car. 564; 79 E. R. 1085.

(*n*) R. *v.* Airey, 2 East, P. C. 831; 2 East, 30, *ante*, p. 1520.

(*o*) 2 M. & S. 379. See R. *v.* Kelleher, 14 Cox, 48 (I.); 2 L.R. Ir. 11.

(*p*) Now repealed, *vide ante*, Vol. i tit. 'Perjury,' pp. 455 *et seq.*

merely the whole of the false pretence is to state a matter generally combined of some truth as well as falsehood. It hardly ever happens that it is unaccompanied with some truth. Suppose the offence, instead of being comprised within five or six separate matters of pretence, as here, had branched out into twenty or thirty, of which some might be true, and used only as the vehicle of the falsity; are we to understand from this form of charge that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and, in furtherance of that convenience, it is part of the duty of those who administer justice to require that the charge should be specific, in order to give notice to the party of what he is come prepared to defend; and, to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached for falsehood. The Legislature have expounded their understanding of the matter in the case of perjury; and I am at a loss to discover, why, in reason, in justice, and in mercy to the party, the charge in this case should not be as distinctly ascertained by proper averments that specifically draw his attention to it, as in the case of perjury' (*q*). It appears from this case that it is not necessary that the whole of what is stated in order to obtain the property should be false; it is sufficient if part is false; provided that part has a material effect in inducing the party defrauded to give up his property (*r*).

In R. *v.* Oates (*s*) one count alleged that the prisoner falsely pretended that he, having executed for S. and R. a certain quantity of work, there was then due and payable to him from S. and R. for and on account of the said quantity of work a certain sum of money, (to wit) the sum of six shillings, being parcel of a larger sum, (to wit) the sum of 16*s.* 7*d.* claimed by him for the said quantity of work. In other counts it was alleged that the prisoner falsely pretended that there was due and owing to him from S. and R. the whole amount of a certain sum of money, (to wit) the sum of nineteen shillings (different sums were inserted in the several accounts), for and on account of a certain quantity of work executed by him for S. and R.; whereas the whole amount was not due and owing; and, upon a case reserved after a verdict of guilty, it was held that the indictment was bad. Considering each of these allegations as an allegation merely that so much was 'due and owing,' it might involve many questions both of law and fact. It might involve the price to be paid, the value of the work, the credit to be given, and the terms of payment. An indictment for false pretences must disclose a false pretence of an existing fact. Here there was merely a fraudulent claim in respect of a *quantum meruit* of the prisoner's work and labour, and the indictment would be supported by evidence that the prisoner made a false estimate of the value of his work. The false pretence consisted of nothing more than what might be matter of opinion, and this indictment might be supported by evidence of a mere wrongful overcharge, or a misrepresentation of a matter of law.

(*q*) R. *v.* Perrott, 2 M. & S. 379, 386; 15 R. R. 280.

(*r*) And see R. *v.* Hill, *post*, p. 1578.

(*s*) Dears. 459; L.J. M.C. 123.

The false statement that money is due and owing does not necessarily involve a false pretence of an existing fact (*t*).

In R. *v.* Young (*u*), an objection was taken that the pretence was not stated with sufficient *certainty*, inasmuch as a wager therein mentioned was stated only to have been made 'with a colonel in the army, then at Bath,' without setting forth the colonel's name (*v*). But the objection was overruled; and Lord Kenyon, C.J., said, that the charge was sufficiently certain to enable the defendants to know what they were called upon to answer for; and that perhaps the colonel's name with whom the wager was stated to have been made was not mentioned; in which case he could not have been described with greater accuracy. And further, that if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence.

It is sufficient to state the effect of the pretence correctly (*w*), and the very words used need not be stated. The indictment alleged the prisoner did falsely pretend that he was the servant of one G., and that he was sent by the said G. to look at two heifers, the property of the prosecutor, for the said G., and that he was sent by the said G. to buy the said heifers of the prosecutor for the said G. and that the said G. would buy the said heifers for the sum of £23 10*s*., and that the said G. would pay the prosecutor the said sum of £23 10*s*. for the said heifers, and that the said G. would be over on the next Thursday, and would pay the prosecutor for the said heifers on that day. The evidence was, that the prisoner said he came from G., &c., and that either G. or himself would

(*t*) Mr. Greaves considered this decision to be wrong. He says: 'In an indictment for this offence the pretence may either be laid in the terms actually used, or in what are substantially the same; and consequently it is uncertain, on the face of the indictment, which course is adopted. The first fallacy that runs through the judgment is the assumption that the indictment does not state the pretence that was actually used; no one can doubt that if a person, having done a certain quantity of work, writes a letter, and says that a pound is due and owing for that work, knowing that 5*s*. alone is due, with intent to defraud his employer, that is an offence within the Act, and an indictment using the very terms of the letter would clearly be good: and that was substantially this case; for the prisoner obtained the money by altering the sum in an account into a larger one, and presenting the account so altered to his employers. Another fallacy was the considering the pretence apart from its being false and made with intent to defraud. The case was clearly put on its right ground by Maule, J. (who seems to have left the Court before judgment was given): "The allegation in the indictment being in effect that the prisoner made a statement that a debt was due and owing to him, knowing that statement to be false, and for the purpose of effecting a fraud, it excludes the idea of a disputed account, or that what is due and owing is a conclusion of law, and amounts to a false statement that a debt was existing." Lastly, another fallacy was that the allegation was treated like an allegation in a count for work and labour, instead of being the statement of a false pretence. If a man alters an account which shews 5*s*. to be due to him, and makes it £1 5*s*., and then presents it, and obtains the money, is not this a pretence that the latter sum is due and owing to him? and how can an indictment more correctly state the pretence than that he pretended the sum was due and owing to him? The Court then doubted the validity of the indictment in R. *v.* Woolley, 1 Den. 559, *ante*, p. 1530, on the same grounds as they decided this case.'

(*u*) 3 T. R. 98. Mentioned on another point, *ante*, p. 1518.

(*v*) See the abstract of the indictment, *ante*, p. 1517.

(*w*) The prisoner was indicted for obtaining money by false pretences from D. by the false pretences made to D., that she (the prisoner) had made funeral arrangements with a certain undertaker and had paid him 5*s*. by way of deposit, for the burial of a certain child called G. S. The evidence was that the false pretences made to D. related to another child, not G. S., but W. D. Kennedy, J., held that he had power to amend the count by substituting W. D. for G. S. R. *v.* Byers, 71 J. P. 205. See 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972.

be over the following Thursday; and it was submitted that the indictment was supported; first, it was sufficient to state the effect of the pretence correctly, and that the allegation that the prisoner was sent by G. was supported by proving that he said 'he came from G.' Secondly, that the alternative that the prisoner would himself come was a mere naked lie, on which no indictment could be supported, and, therefore, it was unnecessary to state it in the indictment; and Littledale, J., held that the evidence was sufficient to support the indictment; and the prisoner was convicted (*x*).

The second count of an indictment alleged that the defendant, intending to cheat W. on, &c., at, &c., unlawfully, knowingly, and designedly did falsely pretend to the said W. that he, the defendant, then was a captain in Her Majesty's Dragoon Guards; by means of which said false pretence the defendant did then obtain from the said W. a certain valuable security, to wit, an order for the payment of the sum of £500 of lawful money, of the value of £500, the property of the said W., with intent to cheat and defraud him of the same; whereas in truth and in fact the defendant was not at the time of making such false pretence a captain in Her said Majesty's said regiment (*y*); and it was objected upon error after judgment, 1st, that the count was bad for not shewing that the alleged false pretence was made with intent to obtain the security; but the Court of Queen's Bench held that the count was not bad for omitting such allegation. 2ndly, that the count ought to have shewn how the false pretence was calculated to effect the obtaining of the order; but the Court held that this was matter to be shewn by the evidence, and need not be shewn by the indictment. 3rdly, that it ought to have been shown that in fact the particular pretence did induce the party defrauded to part with the order; but the Court held that it could not be necessary to state that there was no pretence besides that charged. Had the defendant shewn that there was any other which caused the giving of the order, he must have been acquitted. 4thly, that the falsehood of the pretence was not properly made to appear. The pretence was that the defendant 'then,' that is to say, on the day and year aforesaid, was a captain; the subsequent allegation is that he was not so 'at the time of making the false pretence.' Now he might have been a captain at the early part of the day, and ceased to be so before he made the supposed false pretence; but the Court held that the averment was sufficient. And, lastly, that the count ought to have alleged that the security was unsatisfied; but the Court held that after verdict the indictment was sufficient, under 7 Geo. 4, c. 64, s. 21 (*z*), as it followed the words of 7 & 8 Geo. 4, c. 29, s. 53 (rep.) (*a*).

Where an indictment alleged that the prisoner pretended that a certain paper produced by him was a good and valid promissory note for the payment of five pounds; but did not set out the instrument, which was a Bank of Elegance note; upon a case reserved it was contended that the instrument should have been set out in the indictment.

(*x*) R. *v.* John Scott, Hereford Spr. Ass. 1832, MSS. C. S. G., cited in R. *v.* Parker, 2 Mood. 1.

(*y*) The indictment added that the prisoner knew he was not a captain.

(*z*) *Post*, p. 1936.

(*a*) Hamilton *v.* R., 9 Q.B. 271; 16 L. J. M. C. 9.

There was no averment even of the purport of the paper. Wilde, C.J., 'We are of opinion that the objections are insufficient. With regard to the record, it can only be necessary to set out the instrument where the Court could derive assistance from seeing a copy of it on the record; as where the case turns on the nature and character of the instrument as distinguished from its quality of good or bad. The cases seem to shew that this is the true criterion.' Alderson, B., 'It is not necessary to set out instruments of any kind in an indictment, except where it is material for the Court to see that the thing described is described rightly. But here the charge is a false pretence. It is needless to set out instruments which are not in any way affected by the terms applied to them in the indictment' (*b*).

A count stated that A. agreed with W. and B., in consideration that A. would receive divers iron rails, chairs, &c., from S. the agent of a railway company, and convey them from St. Mary's to K., that W. and B. would pay A. a certain sum for the carriage of the said rails, &c. That it was the duty of S. whenever he delivered any such rails, &c., to A. to give to A. certain tickets signed by S., and containing the amount of rails, &c., delivered, and the place to which they were to be conveyed. That when A. received such tickets he, after the carriage of the said rails, &c., gave such tickets to J. Brunt, as the agent of W. and B. in that behalf; and that it then became the duty of W. and B. to pay A. for the said carriage of the said goods in the said tickets mentioned. That the prisoners A. and J. well knowing the premises, falsely pretended to C., as such agent as aforesaid, that A. had received certain iron rails and chairs from S., and that S. had given to A. certain tickets as aforesaid signed by S., containing the amount of the said goods so delivered by S to A., and the place to which the said goods were to be conveyed, and that A. had conveyed *the same* from St. Mary's to K. By means of which said false pretences the prisoners obtained from W. and J. 'a certain large sum of money, to wit, the sum of £90.' It was urged in arrest of judgment that the count made the agreement material, and that only A. was entitled to receive the money; but it was held that two persons might receive the money. Secondly, that the words 'the same' referred to tickets; but it was held that the fair construction was that 'the same' referred to goods. Thirdly, that the pretence must be made to the same person from whom the money was obtained, and that that must appear by the indictment; but it was held that there was nothing in the Act which made it necessary that the pretence should be made to the same person as the money was obtained from; and when it was said that 'by means of the said false pretences' the money was obtained, that was a question of evidence: and if there were any means to shew that the pretence to A. operated on the mind of B., it might be shewn in evidence. Fourthly, that the tickets, being written documents, ought to have been set out; but it was held that the tickets need not be set out *in hæc verba* (*c*).

(*b*) R. *v.* Coulson, 1 Den. 592; 19 L. J. M. C. 182.

(*c*) R. *v.* Brown, 2 Cox, 348, Patteson, J., after consulting Coleridge, J. The third ruling in this case was recognised by Williams, J., in R. *v.* Butcher, Bell, 6; 28 L. J. M. C. 14. See R. *v.* Wakley, 2 Cox, 484.

The first count alleged that the prisoner did unlawfully pretend to F. E. that the wife of the said prisoner was then dead: by means whereof he obtained from F. E. £3 15*s*. of the moneys of the said F. E. with intent to defraud F. E. The second count was similar except that it added the words 'and others' after the name of F. E. The third count stated that there was a friendly society, and that the prisoner was a free member of it, and that when the wife of a free member died he was by the rules of the society entitled to receive £5 from the society's stock; and that F. E. was one of the stewards of the society, and that the prisoner produced to F. E. a paper, which purported to be a certificate of the funeral of the prisoner's wife, and falsely pretended to F. E. that the paper contained a true account of the death and burial 'of the said wife of' the prisoner; and that the prisoner *further* falsely pretended to F. E. that 'the said wife of the said' prisoner was then dead, and that he as such free member was entitled to receive from the steward of the said society the sum of £5 by virtue of their rules in consequence of the death 'of his said wife.' By means of which *said last-mentioned* false pretence the prisoner obtained from F. E. £3 15*s*. of the moneys of F. E. and others, with intent to cheat the said F. E. and others of the same. It appeared that F. E. was one of the stewards of the society, and that the moneys of the society were kept in a box, of which F. E., another steward, and the landlord of the inn where the box was kept, had each keys. The prisoner was a free member of the society, the rules of which had not been enrolled. A printed book containing the rules was produced; and it was proved that a printed book of the same kind had been delivered to the prisoner, who had been a member of the society for more than a year, and had paid his subscriptions. Upon this evidence Rolfe, B., held that the book produced was admissible in evidence against the prisoner (*d*). By one of the rules every free member was entitled to be paid £5 out of the funds of the society on the death of his wife; and the prisoner had stated to the clerk of the society that his wife was dead, and had been told by the clerk that he must produce a certificate of her burial. Afterwards at a meeting of the stewards he produced the document mentioned in the third count, and said to the clerk, in the presence of F. E. and the other steward, that his wife was dead; the document was read by the clerk, and thereon F. E. took £5 out of the box and gave it to the prisoner. F. E. stated that he was induced to part with the money by the certificate, and that he should not have given it to the prisoner without the certificate. It was proved that the prisoner's wife was alive, and that the certificate was fabricated by the prisoner. It was submitted that neither the first nor the second count was proved, as it was not the statement of the wife's death that induced F. E. to part with the money, but the certificate; but Rolfe, B., held that the pretence was that the wife was dead, and that the certificate was only evidence of it. It was then urged that there was a variance, as the pretence was laid to have been made to F. E., and the evidence was that it was made to the clerk. Rolfe, B.: 'The pretence is made in F. E.'s presence to

(*d*) See Brown *v.* Langley, 4 M. & G. 466.

all there; that is sufficient. I am inclined to think, however, that it would have been good if it had been stated to have been made to all.' It was next urged that the money was not obtained from F. E. Rolfe, B. said: 'It is paid by the hands of F. E., and he is for this purpose the agent of the others.' It was then urged that the first count was not proved; it was answered that the money was actually in F. E.'s hand, and that as against a wrong-doer was sufficient to support that count: and Rolfe, B., held that was so. A general verdict of guilty having been found, it was moved, in arrest of judgment, that the last count mentioned 'the said wife' of the prisoner, and that that count did not state that the prisoner had a wife; but Rolfe, B. thought the last count as to this was sufficient, as it referred to the wife mentioned in the other counts. It was then urged that there were several pretences charged in the last count, and then the count alleged that by means of the said last-mentioned false pretence the money was obtained. The last pretence was that the prisoner was entitled to receive £5 in consequence of the death of his wife. Rolfe, B. said: 'That is perfectly correct. The count states several things; and then concludes with a statement of that pretence, which is in truth the pretence whereby the money was obtained. That count is clearly good' (*e*).

An indictment charged that the defendant having in his custody and possession a certain parcel, to be by him delivered to I. upon the delivery of which he was authorised and directed to receive and take the sum of six shillings and sixpence and no more, for the carriage and porterage of the same; yet that defendant produced and delivered to H., then being servant to I., the said parcel, together with a certain false and counterfeit ticket, made to denote that the sum of nine shillings and tenpence was charged for the carriage and porterage of the said parcel, and unlawfully, knowingly, and designedly, did falsely pretend to the said H. that the said false and counterfeit ticket was a just and true ticket, and that the said sum of nine shillings and tenpence had been charged, and was due and payable, for the carriage and porterage of the said parcel; and that defendant was authorised and directed to receive and take the said sum of nine shillings and tenpence for the carriage and porterage of the said parcel; by means of which said false pretences, defendant did unlawfully, knowingly, and designedly obtain of and from the said H. the sum of three shillings and fourpence in moneys, of the moneys of the said I., with intent to cheat and defraud her of the same; whereas in truth and in fact, &c. The delivering the parcel mentioned in the indictment, and receiving nine shillings and tenpence, instead of that which he ought to have received, namely, six shillings and sixpence, was sufficiently brought home to the defendant. But it appeared that the parcel was a *basket* of fish: upon which it was contended on behalf of the prisoner, in the first place, that the indictment was not upon the 30 Geo. II. c. 24, (rep.), but upon a public local Act, 39 Geo. III. c. 58 (*f*), by which it was enacted, that if any porter, or other person employed in the porterage or delivery

(*e*) R. *v.* Dent, 1 C. & K. 249. See Hamilton *v.* R. (*ante*, p. 1569), that the first and second counts were good, although they did not shew how the pretence could operate to obtain the money, upon which ground they were objected to, but no opinion pronounced by Rolfe, B.

(*f*) Now repealed.

of the 'boxes, *baskets*, packages, *parcels*, trusses, game, or other things,' mentioned in the Act, shall demand or receive, in respect of such porterage or delivery, any greater sum or sums than the rates or prices thereinbefore fixed, such persons shall for every such offence forfeit not exceeding twenty nor less than five shillings: and that, being upon such Act, the *basket* in question was not properly described as a *parcel:* that parcel was not a generic name, and that the indictment should have described the thing according to the fact (*g*). Lord Ellenborough, C.J., was of opinion that if the indictment had been upon the 30 Geo. III., this would have been a fatal variance; but that, as the indictment was upon the 30 Geo. II. c. 24, a basket answered the general description of a parcel well enough. It was further objected, that as the offence certainly came within 39 Geo. III. c. 58 (rep.), the defendant ought to have been prosecuted on that statute; but Lord Ellenborough said, that the remedy given by that statute was cumulative, and did not take away the remedies which before existed either at common law, or by other Acts of Parliament (*h*).

Where an indictment alleged that the prisoner 'unlawfully, knowingly, and designedly did *feloniously* pretend,' Law, Recoredr, thought that the indictment was bad, and after consulting Bosanquet and Taunton, JJ., stated they were of the same opinion, and the prisoner was therefore acquitted (*i*).

Where the first count of an indictment charged that the prisoner did falsely pretend to L. that he was sent by P. for an order to go to B.'s for a pair of high shoes; by means of which false pretence he unlawfully obtained from the said B. one pair of shoes of the goods and chattels of the said B. with intent to cheat the said L. of the price and value of the said shoes, to wit, of the sum of nine shillings of the moneys of the said L., and the second count charged that the prisoner did falsely pretend to the said L. that P. had said that the said L. was to give him an order to go to B.'s for a pair of high shoes; by means of which false pretence he unlawfully obtained from the said B., in the name of the said L. one pair of shoes, of the goods and chattels of the said B. with intent to cheat the said L. of the same; the prisoner having pleaded guilty, judgment was arrested, on the ground that neither count charged an offence within 7 & 8 Geo. IV. c. 29, s. 53 (rep.), (*j*).

Knowledge that Pretence False.—The indictment should allege and the evidence shew that the defendant knew that the pretence was false (*jj*). Where in R. *v.* Henderson (*k*) an indictment alleged that P. was possessed of a mare, and H. of a horse, and that H. and B. 'unlawfully and fraudulently did falsely pretend to P. that B. was then and there possessed of a certain sum of money, to wit, the sum of £12,' and that if P. would exchange the said mare for the said horse, B. was willing to purchase the said horse of

(*g*) See as to this objection, R. *v.* Cook, 1 Leach, 105; 2 East, P. C. 616.

(*h*) R. *v.* Douglass, 1 Camp. 212.

(*i*) R. *v.* Walker, 6 C. & P. 657. 'In R. *v.* Carradice, R. & R. 205, *ante*, p. 1353, where an indictment for taking fish alleged them to have been 'feloniously' taken, the judges thought that did not vitiate the indictment.' C. S. G.

(*j*) R. *v.* Tully, 9 C. & P. 227, Gurney, B., after consulting Patteson, J. In R. *v.* Brown, 2 Cox, 348, Patteson, J., said, 'Tully's case was a peculiar one, and I am not quite sure that that case could be supported if carried into a Court of error.'

(*jj*) R. *v.* Dunleavey, 1 Cr. App. R. 240.

(*k*) R. *v.* Henderson, 2 Mood. 192; C. & M. 328. This case was only argued for the prisoners. See R. *v.* Bowen, *post*, p. 1574.

P., and then and there to pay P. the sum of £12; whereas B. was not then possessed of the said sum of £12: and, on a case reserved, it was held that the indictment was bad, because it did not allege that the prisoners knew that B. had not got the money.

In R. *v.* Phillpotts (*l*) the indictment alleged that the prisoner 'unlawfully did falsely pretend to C. S. that a paper writing (which was set out) was a good £5 Ledbury bank note. There were other similar counts, but it was not alleged in any of them that the prisoner *knew* that the paper writing was not a £5 note. It was objected, on the authority of R. *v.* Henderson (*m*), that this indictment was bad, as it did not allege that the prisoner knew that the paper was not what he alleged it to be; and Wightman, J., after taking time to consider, held that the indictment was bad. The jury might find the prisoner guilty on this indictment, although it was not proved that he knew that the instrument was not such as he stated it to be; and as the prosecutor was deceived by the instrument, so might the prisoner have been; and the defect was not aided by the statement of the intent.

In R. *v.* Bowen (*n*) where an indictment alleged that the defendant 'unlawfully did falsely pretend to H. H., that he the defendant had caused a writ of right to be issued at the suit of M. W., &c.,' 'By means of which false pretences the defendant did unlawfully obtain from H. H. £1' with intent, &c., and the defendant was found guilty, the Court of Queen's Bench held that, as the indictment used the words of the statute, it was sufficient, after verdict, under 7 Geo. IV. c. 64, s. 21; and Denman, C.J., observed that R. *v.* Henderson (*m*) was not fully argued.

Several defendants may be charged jointly in the same indictment, if they were all acting in concert together, and taking part in the same transaction (*o*). And it is no objection in arrest of judgment, that the indictment contains several charges of the same nature in the different counts. Kenyon, C.J., said: 'This objection would be well founded if the legal judgment on each count was different; it would be like a misjoinder in civil actions. But, in this case, the judgment on all the counts is precisely the same; a misdemeanor is charged in each. Most probably the charges were meant to meet the same facts; but, if it were not so, I think they may be joined in the same indictment' (*p*).

Where the indictment alleged that the prisoner 'did unlawfully attempt

(*l*) 1 C. & K. 112.

(*m*) *Ante*, p. 1573.

(*n*) 13 Q.B. 790: 19 L.J. M.C. 65. He also said that no reference was made to 30 Geo. II. c. 24, s. 1, which contained the words 'knowingly and designedly.' In R. *v.* Gruby, 1 Cox, 249, it was held that an indictment alleging that the prisoner 'unlawfully did falsely pretend' that a document was a lease for nine years, was sufficient (after plea), without any allegation of knowledge that the pretence was false. R. *v.* Henderson was there distinguished as not having the word 'unlawfully' in the indictment; but this was a mistake, as that word is in 2 Mood. 192.

(*o*) R. *v.* Martin, 8 A. & E. 481. R. *v.* Moland, 2 Mood. 276, *ante*, p. 1534. See 24. & 25 Vict. c. 96, s. 98, and *ante*, Vol. i. p. 138.

(*p*) R. *v.* Young, *ante*, pp. 1517, 1518. In R. *v.* Bassett, 1 Cox, 51, Maule, J., is reported to have stated that several counts, charging separate offences by obtaining money under distinct false pretences from different persons, could not be included in the same indictment. But as the prosecutor was put to his election, and the previous case was not cited, and as that very learned judge well knew that the general rule in misdemeanors is that any number of misdemeanors may be included in the same indictment, probably the case is incorrectly reported. See also R. *v.* Hempstead, MS. Bayley, J., and R. & R. 344.

and endeavour, fraudulently, falsely, and unlawfully to obtain from the "A. C. I. Company" a large sum of money, to wit, the sum of £22 10*s*., with intent thereby then and there to cheat and defraud the said "A. C. I. Company;"' after a verdict of guilty, upon a case reserved, judgment was arrested on the grounds that the nature of the attempt was not sufficiently specified, and the money was not laid to be the property of any one (*q*).

Proof of False Pretences.—Upon an indictment for obtaining money by false pretences, the pretences which, as we have seen, must be distinctly set out (*r*), must at the trial be proved as laid, where the indictment stated that the defendant pretended that he had paid a sum of money into the Bank of England, and it appeared upon the evidence that he did not say that he paid the money, but that he said generally that the money had been paid into the bank, Ellenborough, C.J., held this to be a fatal variance; and said that an assertion that money had been paid into the bank was very different from an assertion that it had been paid into the bank by a particular individual (*s*).

One count alleged that the prisoner pretended to J. Holden, the treasurer of the company of Free Fishers and Dredgers of Whitstable, that he was the agent of two persons commonly called the 'Jim Butchers,' and that he was sent by them to the pay-table of the said company to receive certain moneys payable to them, and that he was authorised to receive such moneys for them. Another count alleged that the prisoner pretended to W. B. that he was authorised to send him to the pay-table of the said company to get the money of the 'Jim Butchers.' A third count alleged that the prisoner pretended to W. B. that he was the agent of the 'Jim Butchers,' and that he was sent by them to receive moneys payable to them, and was authorised to receive such moneys. Each count alleged that by means of the pretences the prisoner obtained £2 3*s*., and the two first counts stated the money to belong to the company, and the third to W. B. The members of the said company were employed in working on the oyster grounds of the company, and were paid for their work by the treasurer; amongst the freemen of the company were two persons who went by the name of the 'Two Jim Butchers,' and the money due to them was commonly called the 'Two Jim Butchers' money.' One Friday evening W. B., a little boy, went to the pay-table of the company, and said, 'I want the "Two Jim Butchers' money;"' whereon J. H., the treasurer, paid the boy £2 3*s*., the sum that was due to them. W. B. proved that the prisoner came to him and another boy, and said, 'Which of you wants to earn a penny?' and on his saying, 'I do,' the prisoner said, 'Go to the pay-table and fetch the "Two Jim Butchers' money;" the boy accordingly went, and asked for the 'Two Jim Butchers' money;' received £2 3*s*., and took it to the prisoner, and received from him a penny. The boy said he went and received the money because the prisoner had promised

(*q*) R. *v.* Marsh, 1 Den. 505; 19 L.J. M.C. 127. 'The proper course is to allege the false pretences, and to deny their truth in the same manner as in an indictment for obtaining property by false pretences, and then to allege that by means of the false pretences the prisoner attempted to obtain the property.' C. S. G.

(*r*) *Ante*, p. 1566.

(*s*) R. *v.* Plestow, 1 Camp. 494.

him a penny. The treasurer said that he parted with the money because the boy said he wanted the 'Two Jim Butchers' money,' and that he should not have parted with it without that. And, upon a case reserved, it was held that the false pretence was not correctly stated in any of the counts. The prisoner was, no doubt, guilty of obtaining money by false pretences; but it was also clear that the pretence by which the money was obtained was that the boy had authority to receive it, and that is not one of the pretences laid in the indictment. The prisoner, no doubt, was as much responsible for what the boy said as if he, the prisoner, had gone to the pay-table, and made the false representation himself; but the representation of the boy was that he, the boy, had authority to receive money; there was no such representation alleged in the indictment, and that was the representation on which the treasurer parted with the money (*t*).

An indictment alleged that the prisoner pretended that 'he had served a certain order of affiliation on one B.:' the evidence was that he had said 'he had been with the order to Bretby to serve B., and left it with the landlady at the C. Arms there, where B. lodged;' and it was held that the allegation in the indictment meant a personal service of the order, and consequently that there was a variance in the proof (*u*).

A count stated that the prosecutrix had written and sent divers letters to the prisoner, and that he pretended that a parcel contained the said letters, and each and every of them, whereas the parcel did not contain the said letters, but only one of them. On cross-examination it appeared that the prosecutrix had destroyed some of the letters; it was objected that the pretence that the parcel contained all the letters was not proved; but the Court held the allegation distributive (*v*).

The prisoner was indicted for obtaining from B. 5*s*. 6*d*. by falsely pretending that he was an agent for a loan society. He went to B., and told him that he was an agent for a loan society, and could get £10 for him, and that the charge would be 5*s*. 6*d*.; B. told him to go to his wife for it, which he did, and said he came for 5*s*. 6*d*., as the man from the loan-office was waiting for the money; and she gave him 5*s*. 6*d*. of her husband's money; it was objected that the proof was that the money was not obtained from the prosecutor as alleged, but from his wife; but, on a case reserved, the conviction was affirmed (*w*).

Where a count alleged that the prisoner promised H. G. H. to marry her, and that he and H. G. H. had taken a messuage for their

(*t*) R. *v.* Butcher, Bell, 6; 28 L. J. M. C. 14. During the argument, Cockburn, C.J., said, 'I am inclined to agree in thinking the conduct of the defendant amounted to a false representation; but it was a false representation to this effect; it was as if he had gone to the pay-table himself, taking the boy with him, and said, "This boy is authorised to receive the Jim Butchers' money."' See R. *v.* Boyd, 5 Cox, 502, as to a representation made by an agent of a prisoner.

(*u*) R. *v.* Bailey, 6 Cox, 29, Greaves, Q.C., after consulting Platt, B. It was also held that this variance was not amendable under 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972.

(*v*) R. *v.* Colucci, 3 F. & F. 104, Martin, B., and Keating, J. It is not stated when the letters were destroyed, or in what way that fact had any bearing on the indictment, which, as reported, only stated that the prosecutrix had sent 'divers letters,' which allegation did not include every letter, and then the pretence referred to the 'said letters.'

(*w*) R. *v.* Moseley, L. & C. 92; 31 L. J. M. C. 24. Any variance of this kind might be amended under 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972.

residence after their marriage, and that the prisoner pretended that he intended to go to N. to purchase furniture for the said house, &c.; and it appeared that the house was not hired until after the prisoner got the money, and that the pretences were made whilst they were in treaty for the house; it was held, on a case reserved, that the prisoner ought not to have been convicted on this count (*x*).

The prisoner was indicted for obtaining hop-poles from C. by pretending that he was authorised by F. The prisoner, hearing that F. wanted hop-poles, went to him, and agreed to sell him a number at so much per hundred to be delivered at a station. He then went to C., who had hop-poles, and said he was commissioned by F. to buy them, and promised that F. would send a cheque for the price. A cheque was sent; but it did not appear by whom. C. sent the poles to the station, and F. got them. Then the prisoner got the money from him. It was urged that the prisoner never got the poles. He pretended to sell goods he had not. C. ratified the contract between F. and the prisoner, and if the prisoner was indictable at all, it was for obtaining money from F., not goods from C.; and Wightman, J., so held, and directed an acquittal (*y*).

The indictment alleged that the prisoner falsely pretended that he was the servant of Hardman of S. (the said Hardman being well known to the prosecutor), and that he was sent by the said Hardman to buy a horse for him; by means, &c. The prisoner said his master was Hardman. The prosecutor knew no person of the name of Hardman, but he had known very well one Harding of Benwell Lodge. The prosecutor said to his father, 'I am going to sell a horse to Harding of B.;' upon which the father said, 'He does not live there now.' 'No,' said the prisoner, 'he lives now at S.' And the prisoner ultimately got the mare. Upon a case reserved it was held that the indictment was not supported by the evidence; for the indictment alleged that the prisoner pretended he was the servant of Hardman, while the evidence shewed that the prosecutor considered him the servant of Harding. But if the indictment had alleged that the prisoner pretended that he was the servant of Harding, it would have been supported. The prosecutor confounded Hardman with Harding, and then the prisoner availed himself of what was passing in the prosecutor's mind, and linked Hardman into Harding. It was further held that the proviso in sect. 88 of the Larceny Act, 1861 (*ante*, p. 1514), did not prevent the prisoner from being acquitted; for that proviso does not authorise the proof of a larceny under any state of facts that may be alleged in the indictment, but provides that the prisoner shall not be acquitted of the misdemeanor by reason of its being merged in the felony, shewing that the pretences alleged must still be proved (*z*).

But it is not necessary to prove the whole of the pretence charged: proof of part of such pretence, and that the money was obtained by such part, is sufficient. An indictment on 30 Geo. II. (rep.) charged

(*x*) R. *v.* Johnston, 2 Mood. 254.
(*y*) R. *v.* Martin, 1 F. & F. 501.
(*z*) R. *v.* Bulmer, L. & C. 476; 32 L. J. M. C. 171. *Quære*, whether the indictment might not have been amended by substituting the name of Harding for Hardman under 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972.

the prisoner with obtaining money under colour of obtaining a pension for a discharged seaman, by falsely pretending that the prisoner had received an answer by letter, in reply to an application he had made on the seaman's behalf, that two guineas must be sent to the under-clerks as fees, *which they always expected, and that nothing could be done without it*. There was no evidence that the prisoner used that part of the pretence in italics, but there was evidence that he used the residue, and by means thereof obtained the money; and on point saved, the Court held it not necessary that the whole of the pretence charged should have been proved, and that the conviction was right (*a*).

But the rule that it is sufficient to prove any part of the pretences laid, if the property were obtained thereby, must be confined to those cases where such part is a separate and independent pretence; for if false pretences are so connected together upon the record that one cannot be separated from the other, and the statement of one of those pretences is insufficient in point of law, no judgment can be given upon the other pretence. The indictment stated that the prisoner 'did falsely pretend to W. Walker that he was a captain in the service of the East India Company, and that a certain promissory note, which he then and there produced and delivered to the said W. Walker, purporting to be made for the payment of the sum of £21, was a good and valuable security for the sum of £21;' whereas the defendant was not a captain in the service of the East India Company, and whereas the said promissory note was not a good and valuable security for the sum of £21, or for any other sum of money whatsoever.' Upon error, Lord Denman, C.J., said (*b*), 'The indictment here omits to say in what respect the note was not valuable. It may have been for want of a stamp, or from other causes. We do not mean to throw any doubt on the late decisions, and there is much of the argument for the defendant below in which we do not concur. But the pretences stated in this indictment must be taken together, and the falsification as to that part which relates to the note, is not sufficient. The judgment must therefore be reversed.' Patteson, J., 'I do not know that I should have gone the whole length of reversing this judgment if the note had appeared to be that of another person; but consistently with this indictment, the note may have been the defendant's own, and then the pretences are so connected together that we cannot separate them' (*c*).

On an indictment for false pretences it appeared that the prisoner had obtained the goods by a false letter, which had been lost before the trial; and Tindal, C.J., allowed parol evidence of its contents to be given (*d*).

(*a*) R. *v.* Hill, MS. Bayley, J., and R. & R. 190. In R. *v.* Ady, 7 C. & P. 140, Patteson, J., said, 'It is not necessary that all the pretences should be false. If you believe that any one of them was false, and that the mind of the prosecutor was operated upon by it, then you will find the defendant guilty.' See per Coleridge, J., in R. *v.* Dale, *ante*, p. 1557. R. *v.* Lince, 12 Cox, 451.

(*b*) Lord Denman, C.J., observed, on an argument on the part of the Crown, that the crimes as charged being made up of two false pretences it must be presumed that the judge would tell the jury that one of them was so laid as not to call for an answer: 'Can we presume on a writ of error? On a special verdict it might have been stated that the jury convicted as to one pretence, but negatived the other.'

(*c*) R. *v.* Wickham, 10 A. & E. 34; 8 L. J. M. C. 87. Littledale and Coleridge, JJ., concurred.

(*d*) R. *v.* Chadwick, 6 C. & P. 181.

The indictment charged the prisoner with falsely pretending that he had obtained a certain appointment worth £600 a year, and that for £200 he would give J. Heron one-third of the fees. According to the evidence of the prosecutor and his witnesses, the prisoner obtained the money by means of the pretences stated in the indictment, which were false. The prisoner had also urged the prosecutor to become his partner, and engaged that if the prosecutor accepted his proposal of a partnership, and advanced him the £200 as a bonus, the prosecutor should have a third share of the fees and of the other business, which the prisoner would have. After the pretences stated in the indictment had been made, and before the prosecutor parted with his money, a partnership deed was, at the prisoner's instance, prepared by the prisoner's solicitor, and executed by the prosecutor and prisoner. The prisoner had, however, previously promised that on drawing up the deed of partnership between them he would shew the prosecutor the letters appointing the prisoner. The consideration of the partnership was stated in the deed to be £200, and no mention was made of the appointment in respect thereof. It was objected that as the deed did not contain the pretences stated in the indictment, but on the contrary represented the £200 to be given in consideration of a general partnership, and as the prosecutor had made use of the deed as part of his case, the parol evidence of the false pretences ought to be rejected. The Recorder overruled the objection, and told the jury that if they believed the evidence of the prosecutor, and were satisfied that the prosecutor in fact parted with his money on the pretences laid in the indictment, and that the preparation of the partnership deed, and the execution of it, were a part of the prisoner's scheme to effect the fraud, the prisoner might properly be convicted; and, upon a case reserved after conviction, upon the question whether, under the circumstances, upon the production of the deed as part of the prosecutor's case, the parol evidence ought to have been excluded, the judges held the conviction right (*e*).

An indictment alleged that the prisoner pretended that he was a captain in the Dragoon Guards, and it was held that evidence was admissible that he had represented to the prosecutor that he had been in India and in active service in Cabul; for the falsehood of the pretence alleged, and the intent to defraud, must be proved; and his having told other falsehoods was evidence of an attempt to deceive. A number of statements might have been made, all contributing to create a general impression that he was what he assumed to be, but there might be one particular representation which was more influential than all the rest, and which eventually enabled the prisoner to obtain his object; and this pretence of his having been in India was essentially connected with the pretence alleged, since it was probably used as a means of confirming the impression that he was in the Dragoon Guards. It was also held, that it might be proved that the prisoner had, after he had obtained the money, represented himself to be in the Dragoon Guards to another person, for this evidence tended to confirm the prosecutor's evidence. It was also held, that it might be proved that, for three

(*e*) R. *v.* Adamson, 2 Mood. 286; 1 C. & K. 192.

years previously to the offence, the prisoner had gone by another name, and followed a different profession, for that was one mode of proving that the prisoner was not in the Dragoon Guards; but it was merely presumption, and might be rebutted. The prisoner had assumed the name of Captain H., and represented himself to be in the Dragoon Guards before he was acquainted with the prosecutor, and had repeatedly appeared in the undress uniform of a cavalry regiment, and it was some time after his introduction to the prosecutor that he obtained the money; it was urged that the false pretence must be immediately connected with the object of obtaining the money, and here the pretence was made before the prisoner knew the prosecutor. It clearly, therefore, was not made for the purpose alleged in the indictment. But it was held that every time a man reiterates a false pretence he makes one within the Act. He does not exhaust his liability by the commission of a single fraud. If he assumes a false character for one object, his maintaining it for the accomplishment of another does not divest the second of its criminality. But it is for the jury to determine whether the character was maintained for the purpose of defrauding the prosecutor (*f*).

Where an indictment alleged a pretence to have been made to J. B. and others, and the pretence was made to J. B. in the absence of his partners, but with intent to defraud the firm, it was held that the evidence supported the indictment (*g*).

Where the prisoners were charged with pretending that a certain vessel was in P. Roads, and that one of them was the master and the other of them was the mate of the said vessel, and that they wanted the sum of £3 to pay for the pilotage of the vessel, and it was proved that no vessel answering the description of the prisoners' supposed ship had arrived or had been heard of down to the trial, and after the prisoners were in custody one of them said that the vessel was expected at S., and subsequently that there was no vessel at all; Wightman, J., seems to have held that the fact that there was no vessel at all, or with which they were connected, negatived the pretence that they were the master and mate of the supposed vessel (*h*).

One count alleged a pretence to have been made to M., and the money obtained from him; another count alleged the pretence to have been made to I., and the money obtained from him. The prisoners had been members of a lodge of Odd Fellows, by the rules of which, on the death of a member, his family became entitled to a sum of money. The lodge was a branch lodge of the Odd Fellows at W., and on the death of any one of its members a certificate in a printed form was presented to the secretary at W. The prisoners went to I., the secretary at W., and presented a certificate in the printed form and filled up in writing, purporting to certify the death of a member of the branch lodge. At this time the branch lodge had been dissolved, and a new lodge formed; but I. was not aware of this fact, and did not doubt the genuineness of the certificate; and the prisoners told him they were members of the branch lodge, and that the man named in the certificate

(*f*) R. *v.* Hamilton, 1 Cox, 244, Pollock, C.B., and Maule, J.

(*g*) R. *v.* Kealey, 2 Den. 68; 20 L. J. M. C. 57.

(*h*) R. *v.* Baroisse, 5 Cox, 559.

had died of fever, and the money was wanted to provide for his funeral immediately, and in consequence of this representation the secretary accompanied the prisoners to M., the treasurer, who, upon the facts stated, being equally ignorant of the dissolution, paid the prisoners £16, the amount to which the family of a member was entitled under the circumstances mentioned in the certificate. The certificate was altogether false. It was objected that neither count was proved, for the pretence was to I., and the money obtained from M.; Erle, J., 'M. is the treasurer, who disposes of the money of the society on receiving certificates from I., who is the responsible party. The prisoners go to I., and I. goes to the mechanical instrument, the treasurer, and the latter produces the money. I think that it is correctly stated that I. paid the money, and that it was obtained from him. The second count, therefore, is correct' (*i*).

In R. *v.* Taylor (*j*), where the defendant was convicted on an indictment which alleged that he made certain false pretences to M. and obtained from M. certain sums of money, and it appeared that the defendant was an officer of a society, and that where members applied for sick pay it was his duty to visit them and satisfy himself as to the genuineness of the application, and then to hand a list of members entitled to sick pay to the secretary, who thereupon gave the defendant an order upon M., the treasurer, who paid the amount thereof to the defendant, and in the cases in question the defendant fraudulently inserted in his list handed to the secretary the name of a member as being entitled to sick pay when in fact he was not so entitled and so obtained an order on and payment from M., it was held upon a case reserved that there was evidence on which the jury might convict of a false pretence made to M.

The prisoner was charged with obtaining money by falsely pretending that he was of age, and it was held that a plea of infancy to an action brought against him was not admissible to prove that he was under age, as the plea might have been pleaded without his knowledge; but that evidence that, when he was applied to for the payment of a debt, he had said he was a minor and should plead his infancy, ought to be left to the jury (*k*).

Evidence of other Obtainings.—On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, which in fact was composed of crystals, evidence was admitted that two days before the transaction in question, the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be gold, but which was not so, and had endeavoured to obtain from other pawnbrokers advances upon a ring which was not produced at the trial, which he represented to be a diamond ring, but which, in the opinion of the witness, was not so. Upon a case reserved it was held that the evidence was properly admitted. Lord Coleridge, C.J.,

(*i*) R. *v.* Rouse, 4 Cox, 7, Erle, J. As the certificate was produced, and the pretences told to Mills in the presence of the prisoners, it would seem that the first count was proved.

(*j*) 65 J. P. 457.

(*k*) R. *v.* Walker, 1 Cox, 99. The Common Sergeant, after consulting Rolfe, B. See R. *v.* Simmonds, 4 Cox, 277

in delivering the judgment of the court, said: 'It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had a guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible. It tends to shew that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake' (*l*). So where on an indictment for obtaining goods by false pretences there is evidence that, on dates subsequent to the offence charged, the prisoner obtained goods from other persons by similar false pretences, such evidence is admissible if it points directly to one and the same system of fraud and a connected scheme of dishonesty. The prisoner was indicted for obtaining eggs by falsely pretending that he was carrying on the business of a dairyman. Evidence was called that the prisoner had obtained eggs from two other persons, in one case a week, in the other two months after he had obtained the eggs the subject of the indictment. In all the cases the persons had parted with their eggs after seeing advertisements, inserted by the prisoner in newspapers, which induced them to believe they were dealing with a responsible firm. Upon a case reserved it was held that the transactions were connected together by the advertisements, and that evidence of them was admissible as shewing one and the same system of fraud (*m*).

The prisoner was tried upon an indictment which charged him with obtaining money from R. by means of false pretences (worthless cheques). Upon this indictment he was acquitted. He was then tried upon another indictment (*n*), which charged him in three counts with obtaining other sums from other persons by means of other worthless cheques, all the cheques being drawn on the same bank. One of these obtainings was after, the other two were before that alleged in the first indictment. Upon this indictment R. was called and repeated the evidence he had given upon the first indictment as to the alleged false pretences made to him and the money thereby obtained from him. Upon a case reserved it was held that R.'s evidence was admissible, and that the fact that the prisoner had been acquitted upon the charge founded upon that evidence did not render it inadmissible (*o*).

The prisoner was convicted upon an indictment containing four counts for obtaining money by false pretences from four persons and upon a fifth count, for inserting, with intent to defraud the Queen's

(*l*) R. *v.* Francis, L. R. 2 C. C. R. 128; 43 L. J. M. C. 97. In R. *v.* Holt, Bell, 280; 30 L. J. M. C. 11, evidence of a previous obtaining from another by the same false pretence was held inadmissible; but in R. *v.* Francis, Blackburn, J., said of this case, 'There the alleged false pretence was an assertion of authority to receive the money, and the question was authority or no authority. The evidence was wholly irrelevant.' See also per Alverstone, C.J., in R. *v.* Smith, 20 Cox, 804; 69 J. P. 51.

(*m*) R. *v.* Rhodes [1899], 1 Q.B. 77; 68 L. J. Q. B. 83. See also R. *v.* Smith (*supra*), and R. *v.* Wyatt, *ante*, p. 1455.

(*n*) It does not appear why the charges were not all contained in one indictment.

(*o*) R. *v.* Ollis [1900], 1 Q.B. 758; 69 L. J. Q.B. 918; Lord Russell, C.J., Mathew, Grantham, Wright, Darling and Channell, JJ., Bruce, J., and Ridley, J., dissenting. Lord Russell of Killowen, C.J., said the evidence was admissible as shewing a course of conduct on the part of the accused, and a belief on his part that the cheques would not be met, and Wright, J., that it was admissible as tending to shew that the accused's conduct was not inadvertent or accidental, but was part of a systematic fraud. See also *post*, pp. 2101, 2108, 'Evidence.'

subjects, an advertisement in a newspaper, containing the false statements mentioned in the previous counts, and obtaining money thereby. It was proved at the trial that the prisoner had inserted an advertisement containing false statements offering employment, and adding 'trial paper and instructions, 1*s*.' On his arrest six envelopes were found in his possession, each containing an answer to his advertisement and twelve stamps. Two hundred and eighty-one other letters were produced by a post-office clerk. These letters had been addressed to the prisoner, but had been stopped at the post-office by the post-office authorities, and none of them had ever been in the possession or custody of the prisoner, and no proof was given that they were written by the persons from whom they purported to come. These letters had been opened at the post-office before the trial, and each contained twelve stamps. Upon a case reserved, it was held by a majority of the Court the letters were, under the circumstances, admissible in evidence (*p*).

Where facts amount to Felony.—Where the prisoner, a servant of W., applied to B.'s wife for payment of a debt of seventeen shillings due to W., she refused, unless she had W.'s receipt, and the prisoner went away and returned with the following document, upon which she paid the money:—

'Received from Mr. B., due to Mr. W., 17*s*. 0*d*., Settelled.'

Six judges thought the document was a forged receipt; but five judges thought it did not purport to be the receipt of W., and therefore was no forgery, as if it was to be taken as the receipt of the prisoner, it was no forgery; and that the offence of the prisoner was the obtaining money under false pretences (*q*). Wherever an instrument is of such an ambiguous character, it is prudent to indict for obtaining money by false pretences, because then the prisoner may either be convicted on that indictment, or an indictment for felony may be preferred by the direction of the Court (*r*).

Attempt.—Upon an indictment for any offence mentioned in this chapter, the jury, under 14 & 15 Vict. c. 100, sect. 9, may convict of an attempt to commit that offence, and thereupon the prisoner may be punished in the same manner as if he had been convicted on an indictment for such attempt (*s*).

The eighth count of an indictment alleged that the prisoner falsely pretended to the relieving officer of a parish that he had delivered to a pauper of the parish two loaves of bread, and that each of them weighed 3½ lbs.; by means of which false pretences he unlawfully attempted to obtain the sum of one shilling from the guardians of the parish; the ninth and tenth counts were similar (*t*). The prisoner had entered into a contract with the guardians of Y. to supply the out-door poor with loaves of bread of 3½ lbs. each, at sevenpence per loaf, until the 25th day of March, 1854, and the guardians agreed to pay the prisoner at the price aforesaid for the loaves so supplied within

(*p*) R. *v.* Cooper, 1 Q.B.D. 19; 45 L. J. M. C. 15. Cf. *Re* Pinter, 17 Cox, 497.

(*q*) R. *v.* Inder, 1 Den. 325, and see *ante*, p. 1558, note (*h*).

(*r*) Under 14 & 15 Vict. c. 100, s. 12, *post*, p. 1965. As to former law, see Fost. 373 R. *v.* Evans, 5 C. & P. 553; R. *v.* Anderson, 2 M. & Rob. 469.

(*s*) *Vide ante*, p. 1558, note (*h*). See the section, *post*, p. 1966.

(*t*) They are set out at length, 1 Dears. 384.

two calendar months from the said 25th day of March. The contract also provided for the guardians retaining money due to meet deficiencies in its performance by the prisoner. On paupers applying for out-door relief, the relieving-officer gave the applicant a ticket, and the pauper, on presenting the ticket to the prisoner, was entitled to receive a loaf. A number of tickets had been delivered to paupers, who had obtained loaves from the prisoner in the usual course, and many of these loaves were deficient in weight. The prisoner had, in the usual course, returned the tickets to the relieving-officer, with a note in writing of the number of tickets returned, and they were entered to the credit of the prisoner's account in the books of the guardians; but the prisoner was apprehended before any money was paid to him. Upon a case reserved, Parke, B., delivered the following judgment: 'It was contended that the counts for attempting to obtain money by false pretences could not be supported, because the offence of obtaining money under false pretences was committed only when the money was obtained wholly without consideration, and that the offence was analogous to larceny, of which the prisoner might be convicted if the offence should appear on the trial to be larceny. There are many cases, no doubt, in which the distinction is very subtle between the misdemeanor of obtaining money by false pretences and larceny; but it does not follow that all the cases of obtaining money by false pretences are of that description. But it was strongly contended that the statute applied to no cases where there was some bargain or consideration for giving the money, and so some cause for the giving other than the false pretence, as where goods were sold under a false representation of the quality or value, and the purchaser had the commodity; otherwise the range of indictable offences would be greatly extended, and breaches of contract made the ground of criminal proceedings' (*u*). 'But this is not the case of the sale of goods by a false pretence of their weight; it is an attempt to obtain money by a false and fraudulent representation of an antecedent fact, viz. that a greater number of pounds of bread had been delivered than had actually been delivered, and that representation made with a view of obtaining as many sums of twopence as the number of loaves falsely pretended to have been furnished amount to. In this respect the case exactly resembles that of R. *v.* Witchell (*v*), where the prisoner obtained money by the false pretence that certain workmen, whom it was his duty to pay, had earned more than they really had, and there since are cases of similar convictions where the prisoner falsely stated the quantity of work which he had done, according to which he was to be paid; we therefore think that the indictment would be maintainable if the money had been obtained. A second objection was, that the prisoner was not to obtain the price of the number of pounds falsely stated to have been delivered in cash, but only to have *credit in account*. The statement in the case is that the prisoner was to return the tickets, and upon such return, with a written statement of the amount of loaves in the following week, would be credited in the relieving-officer's book

(*u*) R. *v.* Kenrick, *ante*, p. 1543, and R. *v.* Abbott, *ante*, p. 1543, were then mentioned, but no opinion intimated as to them.

(*v*) 2 East P.C. 830: *vide ante*, p. 1536.

for the amount, and the money would be paid at the time stipulated in the contract, that is, in two calendar months from the 25th March following. No further step would be necessary for the prisoner to receive payment. The prisoner did obtain credit in account from the relieving-officer in effect for the number of pounds falsely represented to have been delivered. Further, the contract stipulates that if the prisoner should fail in his performance of it, the guardians might deduct the damages and costs sustained thereby from the sum payable to him for loaves supplied. On the part of the prisoner it was contended, first, that the attempt to obtain credit in account for a sum of money by delivering up the tickets as vouchers, was not in itself an attempt to obtain money within the meaning of the statute; for that credit in account was not equivalent to money, and no doubt the credit in the relieving-officer's book was not equivalent to money, and the prisoner could not have been convicted of the offence of actually obtaining money by false pretences; secondly, it was contended that the credit in account would not necessarily lead to an ultimate payment, for there might be deductions for breaches of contract, which would prevent any payments in cash by the guardians. We have had great doubt on this part of the case, but do not think that this objection should prevail. We think that the contingency of the whole sum due to him being subject to deduction in a future event, does not the less make the obtaining credit an attempt to obtain money, if it would be so without that contingency; but our doubt has been whether the obtaining that credit, though undoubtedly a necessary step towards obtaining the money, can be deemed an *attempt* to do so. The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; and if, in this case, after the credit with the relieving-officer for the fraudulent over-charge, any further step on the part of the prisoner had been necessary to obtain payment, as the making out a further account or producing the vouchers to the board, we should have thought that the obtaining credit in account with the relieving-officer would not have been sufficiently proximate to the obtaining the money. But, on the statement in the case, no other act on the part of the prisoner would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered an attempt. The receipt of the money appears to have been prevented by the discovery of the fraud by the relieving-officer; and it is very much the same case as if, supposing rendering an account to the guardians at their office, with the vouchers annexed, were a preliminary necessary step to receiving the money, the prisoner had gone to the office, rendered the account and vouchers, and then been discovered, and the money consequently refused' (*w*).

(*w*) R. *v.* Eagleton, Dears. 376, 515; 24 L.J. M.C. 168. See also *ante*, p. 1507. 'The act of the relieving-officer in making the entries was the act of an innocent agent, and precisely the same as if it had been done by the prisoner, and that gets rid of all the doubt, for which there really was no ground whatever. If the prisoner

On an indictment for attempting to obtain money by false pretences it appeared that the prisoner was a collier, and in order to ascertain the amount of wages to which each collier was entitled, each collier, on going to work, was supplied with a certain number of tallies marked with a number corresponding with that marked against his name in his employer's books. In each tub of coal got by a collier he placed one of his tallies, so shewing the amount of work for which each man was entitled to be paid. These tallies were counted, and the number booked to the credit of the collier. The prisoner placed three tallies in the tub, containing other tallies, which was just about to be sent back to the pit; by which means the tallies would in due course have been placed on the tally board; but they were immediately removed from the tub by a person who saw them put in it. But it was held that the facts constituted the offence charged; the placing of the tally in the tub by the prisoner being an act done for the purpose of obtaining money which was not due to him, and with intent that the person whose duty it was to do so should place the tallies on the board, whereby he would have obtained credit for work which he had not done (*x*).

Upon an indictment for attempting to obtain money by false pretences, it appeared that Messrs. D. of New York, the correspondents of the U. Bank in London, issued a circular letter of credit to the prisoner for £210, No. 41, and he having obtained different sums not amounting to £210 in England, went to St. Petersburg, and, having altered the circular by adding the figure 5 to 210, and so converted the circular into one for £5210, exhibited it to Messrs. W. of that place, one of the firms mentioned in the circular, and obtained from that house a sum of £1200, on drafts for those amounts on the U. Bank, drawn by the prisoner. The U. Bank having been advised of the circular No. 41 by Messrs. D. as a circular for £210 only, and so discovering the fraud, refused to pay the £1200, and the prisoner, being afterwards found in England, was apprehended, and convicted, but, upon a case reserved, it was held that the conviction could not be supported. The question was whether, supposing the U. Bank had honoured the prisoner's draft upon them, he could have been convicted of obtaining any chattel, money, or valuable security. This would not have been an obtaining within the meaning of the statute, which contemplates the money being obtained according to the wish and for the advantage, or at all events to gain some object of the party who makes the false pretence. Here it was not to gain any object, and it was not according to his wish. He would derive no benefit from the draft being honoured. He had obtained his full object at St. Petersburg, and had the money in his pocket. As to the finding of the jury,

had put one innocent agent in motion, and any number of other innocent agents had been thereby put in motion, every act done would have been just the same as if done by the prisoner. As to the point upon the deductions the simple answer was, the prisoner made the attempt, and, whether he succeeded or not, he was guilty of that attempt.' C. S. G. See sect. 13 (1) of the Debtors Act, 1869 (32 & 33 Vict. c. 62) *ante*, p. 1455.

(*x*) R. *v.* Rigby, 7 Cox, 507. Martin, B., and Byles, J. This decision is in accord with R. *v.* Eagleton, Dears. 376, *supra*, and R. *v.* Holloway, 1 Den. 370, *ante*, p. 1186.

they merely meant to say that the prisoner foresaw that the draft would be presented to the U. Bank, not that he wished it (*y*).

SECT. III.—OF CHEATS AND FRAUDS PUNISHABLE BY OTHER STATUTES.

Besides the enactments already mentioned very many statutes provide for the punishment of acts which are in the nature of cheats or frauds, but also bear analogy to perjury and forgery (*z*). Of these a few only can be here dealt with.

Fraudulent Conveyances.—The 13 Eliz. c. 5, intituled, 'An Act against Fraudulent Deeds, Gifts, Grants, Alienations, &c.,' recites, 'that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been and are devised and contrived of malice, fraud, covin, collusion, or guile; to the end, purpose, and intent to delay, hinder, or defraud creditors, and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs;' and then enacts (sect. 1), that 'all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution . . . had or made to or for any intent or purpose before declared and expressed, shall be . . . deemed and taken only as against that person, his heirs, executors, assigns, &c., whose actions, suits, &c., by such guileful covinous or fraudulent devices and practices, as aforesaid, shall or might be in any ways disturbed, delayed, or defrauded, 'to be clearly and utterly void, frustrate, and of none effect. . . .' By sect. 2 (*a*) all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, or being privy and knowing of the same, or any of them, which . . . shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had, or made, *bonâ fide* and upon good consideration; or shall alien or assign any the lands, tenements, goods, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof, shall incur the penalty and forfeiture of one year's

(*y*) R. *v.* Garrett, Dears. 232. None of the Court doubted that 'if a man employ a conscious or unconscious agent in this country, he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction.' Per Lord Campbell, C.J. See as to this point, R. *v.* Brisac, 4 East, 163, and *ante*, vol. i. p. 53. 'It is not a little singular that it seems never to have occurred to anyone that, supposing all the facts in this case to have happened in England, the prisoner would clearly have been guilty of obtaining by false pretences the money he received from Messrs. Wilson, and that makes an end of this case. Suppose a person drew a cheque on a bank in which he had no funds, and by it obtained from A. a sum of money, and the cheque afterwards passed through several persons' hands, each of whom gave the amount for it, nothing can be clearer than that the offence would be obtaining the money from A. only.' C.S.G. See *ante*, p. 1514 note (*i*).

(*z*) For complete list of statutes relating to frauds see Chronological Index to Statutes (published annually), *tit.* 'Fraud.' See also *post*, 'Forgery.'

(*a*) In the Second Revised edition of the Statutes; s. 3 in the common printed editions.

value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits of or out of the same, and the whole value of the said goods and chattels, and also so much money as are or shall be contained in any such covinous and feigned bond;' one moiety to the Crown, the other to the party grieved, to be recovered in any court of record, by action, &c.: 'and also being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprise' (*b*).

27 Eliz. c. 4 recites that subjects and corporations, 'after conveyances and purchases of lands, tenements, leases, estates, and hereditaments, for money, or other good considerations, may have, incur and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses heretofore made or hereafter to be made of, in or out of lands, tenements, or hereditaments so purchased or to be purchased; which said gifts, grants, charges, estates, uses, and conveyances were, or hereafter shall be meant, or intended by the parties that so make the same, to be fraudulent and covinous of purpose and intent to deceive such as have purchased, or shall purchase, the same; or else by the secret intent of the parties, the same be to their own proper use, and at their free disposition, coloured nevertheless by a feigned countenance and shew of words and sentences, as though the same were made *bonâ fide* for good causes and upon just and lawful considerations.' Section 1 (*c*) then enacts, 'that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses of, in or out of any lands, tenements, or other hereditaments whatsoever, had or made for the intent and purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same, or any part thereof, shall be deemed and taken' (only as against that person, bodies politic, &c., their heirs, successors, executors, &c., and persons lawfully claiming under them, which so purchase for money or other good consideration, the same lands, &c.), 'to be utterly void.' And sect. 2 (*d*) enacts, 'that all and every the parties to such feigned, covinous, and fraudulent gifts, grants, leases, charges or conveyances before expressed, or being privy and knowing of the same or any of them, which shall wittingly and willingly put in ure, avow, maintain, justify or defend the same or any of them as true, simple, and done, had or made *bonâ fide* or upon good consideration, to the disturbance or hindrance of the said purchaser or purchasers, lessees or grantees, or of or to the disturbance or hindrance of their heirs, successors, executors, administrators or assigns, or such as have or shall lawfully claim any thing by, from, or under them or any of them, shall incur

(*b*) See 2 Chitty's Statutes, *sub tit.* 'Conveyancing and Law of Property' p. 11, for the cases decided on this statute.

(*c*) In the Revised Statutes; s. 2 in the common printed editions.

Voluntary conveyances if made *bonâ fide* and without any fraudulent intent are not to be void. See 56 & 57 Vict. c. 21, s. 2.

(*d*) In the Revised Statutes; s. 3 in the common printed editions.

the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, so purchased or charged;' (the one moiety to the Crown, and the other moiety to the party grieved, to be recovered in any of the Queen's courts of record, by action, &c.) 'and also, being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprise' (*e*).

An indictment on 13 Eliz. c. 5, s. 3, alleged that the prisoners devised and prepared a certain feigned, covinous, and fraudulent conveyance of certain lands, and unlawfully, fraudulently, &c., did execute the said conveyance. It was argued in arrest of judgment that the section did not create an indictable offence; and that, if it did, an indictment could not be preferred until after a recovery of damages in a civil action; and that this indictment was bad for not stating in what respect the conveyance was fraudulent; but Maule, J., held that the Act created an indictable offence, and that an indictment might be preferred before an action was brought, and that it was not necessary to shew in what respect the conveyance was fraudulent (*f*).

Fortune Telling.—The Witchcraft Act, 1735 (9 Geo. II. c. 5), s. 4 (*g*), for the more effectual preventing and punishing of *any pretences* to such arts or powers of witchcraft, sorcery, enchantment, or conjuration, whereby ignorant persons are frequently deluded and defrauded, enacts, that 'if any person shall pretend to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertake to tell fortunes, or pretend from his or her skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels, supposed to have been stolen or lost, may be found, every person so offending, being thereof lawfully convicted on indictment or information in England, or on indictment or libel in Scotland, shall, for every such offence, suffer imprisonment by the space of one whole year without bail or mainprise . . . and also shall (if the Court by which such judgment shall be given shall think fit) be obliged to give sureties for his or her good behaviour, in such sum and for such time as the said Court shall judge proper according to the circumstances of the offence, and in such case shall be further imprisoned until such sureties be given.'

Gaming.—By sect. 17 of the Gaming Act, 1845 (8 & 9 Vict. c. 109), 'Every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other

(*e*) See 2 Chitty's Statutes, *sub tit.* 'Conveyancing and Law of Property,' p. 15, for the cases decided on this statute: to which may be added Doe dem. Tunstil *v.* Bottriell, 6 B. & Ad. 131; and Kerrison *v.* Dorrien, 9 Bing. 76.

(*f*) R. *v.* Smith, 6 Cox, 31.

(*g*) The Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 4, makes punishable as a rogue and vagabond every person professing to tell fortunes 'to deceive or impose upon' any persons. In order to support a conviction there must be an intent to deceive. Penny *v.* Hanson, 18 Q.B.D. 478. See R. *v.* Entwistle [1899], 1 Q.B. 846; Monck *v.* Hilton, 2 Ex. D. 268. In R. *v.* Stephenson, 68 J. P. 524, the indictment contained a count under the Witchcraft Act, 1735.

person by a false pretence, with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly.'

This section comprises several distinct branches :—

I. Any fraud or unlawful device or ill-practice in playing at or with cards, dice, tables, or other games ; and under this clause the offence consists in the fraud, unlawful device, or ill-practice, and it seems perfectly immaterial whether the game be or be not lawful.

II. Any fraud or unlawful device or ill-practice in bearing a part in the stakes, wagers, or adventures on the sides or hands of them that do play ; and here, too, the offence consists in the fraud, and not in the nature of the game.

III. Any fraud or unlawful device or ill-practice in betting on the sides or hands of them that do play ; and here, also, the same remark applies.

IV. Any fraud or unlawful device or ill-practice in wagering on the event of any game, sport, pastime, or exercise ; and here, also, the same remark applies. On the whole, therefore, the gist of every offence created by this section appears to be the fraud, unlawful device, or ill-practice.

Tossing with coins for wagers is a pastime within the meaning of the section (*h*).

An indictment alleged that the prisoner by fraud, unlawful device, and ill-practice in playing at and with cards, unlawfully did win from one B. to a certain person unknown a certain sum of money, with intent to cheat the said B. of the same, and it was moved, in arrest of judgment, that the indictment was bad for not alleging the ownership of the money won ; but upon a case reserved, it was held that the indictment was sufficient, as it described the offence in the words of the statute (*i*). Some of the judges considered the offence might be committed, although no money was actually paid ; as the word ' win ' might be construed in the sense of obtaining a title to a sum of money by becoming the winner of a stake ; but such a construction is plainly inconsistent with the latter part of the clause, for how can a person, who merely obtains a title to a thing, ' be deemed guilty of obtaining such money or valuable thing from some such other person ? ' If, however, a case were to occur where every other ingredient of the offence were proved except the payment of the money, the party might be convicted (under 14 & 15 Vict. c. 100, s. 9) of an attempt to commit the offence.

Where, on an indictment under sect. 17, it appeared that the prisoners began to play at skittles in the prosecutor's presence ; and B., one of them, appeared to be very drunk, and played so badly that he lost every game ; and the others then persuaded the prosecutor to play with B., and stake large sums upon the game, for he was sure of winning ; and the prosecutor accordingly did play with B. several games for large sums, every one of which he lost ; and the prisoners, having got all the prosecutor's money, ran away ; it was contended that there must be fraud in the act of playing, and here the fraud was before the game

(*h*) R. *v.* O'Connor, 15 Cox, 3, Lush, J. M.C. 9.
(*i*) R. *v.* Moss, Dears. & B. 104 ; 26 L.J.

commenced; and the Recorder held that the fraud relied on must be a fraud put in practice during the game itself (*j*).

Where the three prisoners being at a public-house with the prosecutor, one of them, in concert with the others, placed a pen-case on the table and left the room, and whilst he was absent one of the others took the pen out of the case, and put a pin in its place, and the two prisoners induced the prosecutor to bet with the third prisoner when he returned that there was no pen in the case, and the prosecutor staked fifty shillings, and on the pen-case being turned up another pen fell into the prosecutor's hand, and the prisoners took the money; it seems to have been considered clear that this case did not come within sect. 17 (*k*).

Money Lenders.—By the Money Lenders Act, 1900 (63 & 64 Vict. c. 51), s. 4: If any money lender (*l*), or any manager, agent, or clerk of a money lender, or of any person, being a director, manager, or other officer of any corporation carrying on the business of money lender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money, or to agree to the terms on which money is to be borrowed, he shall be guilty of a misdemeanor, and shall be liable, on indictment, to imprisonment, with or without hard labour for a term not exceeding two years or to a fine not exceeding £500 or to both (*m*).

Merchandise Marks.—By the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, (1) 'Every person who (A) forges any trade mark (*n*); or (B) falsely applies to goods, any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive (*o*); (C) makes any die, block, machine, or other instrument for the purpose

(*j*) R. *v.* Bailey, 4 Cox, 390. The prisoners were convicted of a conspiracy to cheat. It was also contended that the game of skittles was not within the first clause of the section; that the words 'other game' must be confined to the same sort of game as those previously specified, which were all games of chance; and that the game of skittles was more reasonably included within the latter branch of the clause: but no opinion was expressed on this point. See also R. *v.* Darley, 1 Stark. (N. P.) 359. R. *v.* Rogier, 1 B. & C. 272.

(*k*) R. *v.* Hudson, Bell, 263: 29 L.J. M.C. 145. The prisoners were convicted of a conspiracy to cheat.

(*l*) The expression 'money lender' is defined in sect. 6.

(*m*) A money lender who carries on business without registration is liable to penalties on summary conviction (sect. 2).

(*n*) By sect. 4, 'A person shall be deemed to forge a trade mark who either (a) without the assent of the proprietor of the trade mark makes that trade mark, or a mark so nearly resembling that trade mark as to be calculated to deceive; or (b) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise; and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark. Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.'

(*o*) By sect. 5 (1), 'A person shall be deemed to apply a trade mark or mark or trade description to goods who—(a) applies it to the goods themselves; or (b) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or (c) places, encloses, or annexes, any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or (d) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description. (2) The expression 'covering' includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression 'label' includes any band or ticket. A

of forging, or of being used for forging, a trade mark; or (D) applies (*p*) any false trade description to goods; or (E) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark, or (F) causes any of the things above in this section mentioned to be done, shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act (*q*).

'(2) Every person who sells, or exposes for, or has in his possession for sale or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description (*r*) is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive (*s*) is falsely applied, as the case may be, shall, unless he proves—(A) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and (B) that on demand, made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (C) that otherwise he had acted innocently (*t*), be guilty of an offence against this Act.

'(3) Every person guilty of an offence against this Act shall be liable

trade mark, or mark, or trade description shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods or to any covering, label, reel, or other thing. (3) A person shall be deemed to 'falsely apply' to goods a trade mark or mark who, without the assent of the proprietor of a trade mark, applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods, the burden of proving the assent of the proprietor shall lie on the defendant. See Payton *v.* Snelling [1901], A. C. 308: 70 L.J. Ch. 644.

(*p*) See Budd *v.* Lucas [1891], 1 Q.B. 408. 50 L.J. M.C. 95. North Eastern Breweries, Ltd. *v.* Gibson, 20 Cox, 706.

(*q*) It is not necessary that there should be any fraud in the sense of an intention to supply a worthless or inferior article, but it is sufficient that an article is intended to be supplied of a different description from that which the customer intends to purchase, and believes that he is purchasing. Starey *v.* Chilworth Gunpowder Co. 24 Q.B.D. 90: 59 L.J. M.C. 13; Thwaites *v.* M'Evilly [1904], 1 Ir. R. 310.

(*r*) See sect. 3 *post*. A false invoice is within this sub-section, but a false oral description is not, Coppen *v.* Moore (No. 1) [1898], 2 Q.B. 300: 67 L.J. Q.B. 689. A master is liable for the acts of his servants done in contravention of this section if the servants acted within the general scope of their employment, although contrary to the master's orders, unless he can shew that he acted in good faith and had done all that it was reasonably possible for him to do to prevent the commission of the offence, Coppen *v.* Moore (No. 2) [1898], 2 Q.B. 306: 67 L.J. Q.B. 689. As to what amounts to a false trade description see Bischop *v.* Toler, 65 L. J. M. C. 1. Hooper *v.* Riddle, 70 J. P. 417. Langley *v.* Bombay Tea Company [1900], 2 Q.B. 460: 69 L.J. Q.B. 752. Star Tea Company *v.* Whitworth, 20 Cox, 658. Cameron *v.* Wiggins [1901], 1 K.B. 1: 70 L.J. Q.B. 15. R. *v.* Lipton, 32 L. R. Ir. 115 Kirschenboim *v.* Salmon [1898], 2 Q.B. 19: 67 L.J. Q.B. 601. Davenport *v.* Apollinaris Company, Ltd., 20 Cox, 302. Wood *v.* Burgess, 24 Q. B. D. 162: 59 L.J. M.C. 11.

(*s*) On an indictment under this section, it is not necessary to leave to the jury the question whether the purchaser was misled, the offence being putting on the market goods falsely described. R. *v.* Butcher [1908], 72 J.P. 454: 99 L.T. 622.

(*t*) The mere absence of an intent to defraud does not necessarily shew that the prisoner 'acted innocently.' Wood *v.* Burgess, 24 Q.B.D. 162: 59 L. J. M. C. 11, 16 Cox, 729. A piece of china which was to be sold by auction was catalogued as 'Dresden,' but the auctioneer said that his attention had been drawn to that lot and he sold it for what it was worth, and crossed out the word 'Dresden.' The Court held that the defendant (the auctioneer) might prove he acted innocently, although at the time of the sale he had reason to suspect the genuineness of the trade description. Christie *v.* Cooper [1900], 2 Q.B. 522; 69 L. J. Q. B. 708. See R. *v.* Phillips, C. C. A., July 23, 1909.

(i) on conviction on indictment (*u*) to imprisonment with or without hard labour for a term not exceeding two years; or to fine, or to both imprisonment and fine; and (ii) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding £20, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding £50 (*v*); and (iii) in any case to forfeit to [His] Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed' (*w*). . . .

'(6) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted . . . in manner provided by the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section before a Court of summary jurisdiction shall, on appearing before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and, if he requires, be so tried accordingly (*vide ante*, Vol. I. p. 17).

By sect. 3, '(1) For the purposes of this Act—The expression "trade mark" means a trade mark registered in the register of trade marks kept under the Patents, Designs and Trade Marks Act, 1883 (*x*), and includes any trade mark, which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of sect. 103 of the Patents, Designs, and Trade Marks Act, 1883 (*x*) are, under order in council for the time being applicable: The expression "trade description" (*y*) means any description, statement, or other indication, direct or indirect, (a) as to the number, quantity, measure, gauge, or weight of any goods; or (b) as to the place or country in which any goods were made or produced; or (c) as to the mode of manufacturing or producing any goods; or (d) as to the material of which any goods are composed; or (e) as to any goods being the subject of an existing patent, privilege, or copyright, and the use of any figure, word, or mark, which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act: The expression "false trade description" means a trade description which is false in a material (*z*) respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act: The expression "goods"

(*u*) By s. 13 the Vexatious Indictments Act (22 & 23 Vict. c. 17, *post*, p. 1927) is applied to offences under this Act.

(*v*) Sect. 2 (5), gives an appeal to Quarter Sessions against a summary conviction.

(*w*) The Court can order any forfeited articles to be destroyed or otherwise disposed of as it may think fit (sect. 2 (4)).

(*x*) See now the Trade Marks Act, 1905 (5 Edw. VII. c. 15), and the Patents & Designs Act, 1907 (7 Edw. VII. c. 29), s. 91.

(*y*) The Customs entry relating to imported goods is to be deemed a trade description applied to the goods, Merchandise Marks Act, 1891 (54 Vict. c. 15) s. 1. In the case of imported goods, evidence of the port of shipment shall be *primâ facie* evidence of the place or country in which the goods were made or produced (sect. 10, 1887 Act).

(*z*) See Fowler *v.* Cripps [1906], 1 K.B. 16; 75 L. J. K. B. 72.

means anything which is the subject of trade, manufacture, or merchandize. The expressions "person" "manufacturer, dealer or trader" and "proprietor" include any body of persons corporate or unincorporate. The expression "name" includes any abbreviation of a name.'

'(2) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandize of some person other than the person whose manufacture or merchandize they really are.'

'(3) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression "false name or initials" means as applied to any goods, any name or initials of a person which—(a) are not a trade mark, or part of a trade mark, and (b) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials, and (c) are either those of a fictitious person, or of some person not *bonâ fide* carrying on business in connection with such goods.'

By sect. 6, 'Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—(a) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and, (b) that he took reasonable precautions against committing the offence charged; and, (c) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and, (d) that he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied,—he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor unless he has given due notice to him that he will rely on the above defence.'

By sect. 7, 'Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall, *primâ facie*, be deemed to be a description of that country

within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for or having in possession for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly, and for the purposes of this section the expression "watch" means all that portion of a watch which is not the watch case.'

By sect. 9, 'In any indictment, pleading, proceeding, or document, in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.'

By sect. 11, 'Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission, without the United Kingdom, of any Act, which, if committed within the United Kingdom, would under this Act be a misdemeanor, shall be guilty of that misdemeanor as a principal and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom in which he may be, as if the misdemeanor had been there committed.'

[By sect. 14, 'On any prosecution under this Act the Court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively'] (*a*).

By sect. 15, 'No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens' (*aa*).

By sect. 18, 'Where at the passing of this Act (*b*) a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade descriptions when so applied: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.'

By sect. 19, '(1) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him

'(2) Nothing in this Act shall entitle any person to refuse to make

(*a*) Repealed as to England by 8 Edw. VII. c. 15, *post*, p. 2047.

(*aa*) By 54 Vict. c. 15, s. 2, the Board of Trade may, in certain cases, make regulations as to prosecutions. And see also 57 & 58 Vict. c. 19, s. 1, and 3 Edw. VII. c. 31, s. 1 (8), as to prosecutions by the board of agriculture and fisheries.

(*b*) August, 23rd, 1887. See *R. v.* Butcher, [1908], 99 L.T. 622; 72 J.P. 454.

a complete discovery, or to answer any question or interrogatory in any action; but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.'

'(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom who *bonâ fide* acts in obedience to the instructions of such master, and on demand made by or on behalf of the prosecutor has given full information as to his master.'

Sale and Transfer of Real or Personal Property.—By the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 24, 'Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser, *or mortgagee* (*c*), or the solicitor or agent of any such seller or mortgagor, who shall after the passing of this Act conceal any settlement, deed, will, or other instrument material to the title, or any incumbrance from the purchaser, *or mortgagee* (*c*), or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty shall be liable, at the discretion of the Court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of [His] Majesty's Attorney-General, or in case that office be vacant, of [His] Majesty's Solicitor-General; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the Attorney-General or the Solicitor-General (as the case may be) shall direct.' By the Law of Property Amendment Act 1860 (23 & 24 Vict. c. 38), s. 8, 'Section 24 of the above Act (*c*) shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in the said section.'

By the Declaration of Title Act, 1862 (25 & 26 Vict. c. 67) (*d*), s. 44, 'If in the course of any proceeding before the court under this Act any

(*c*) Added by 23 & 24 Vict. c. 28, s. 8, *infra*.

(*d*) After the passing of this Act, applications for the registration of an estate under the Land Registry Act, 1862 (25 & 26 Vict. c. 53) were not to be entertained. See sects. 105, 138, 139, of the Act of 1862.

person, acting either as principal or agent, shall, knowingly and with intent to deceive, make or assist or join in or be privy to the making of any material false statement or representation, or suppress, conceal, or assist or join in or be privy to the suppressing, withholding, or concealing from the Court any material document, fact, or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned for a term not exceeding *three* years, and either with or without hard labour, or to be fined such sum as the Court by which he is convicted shall award; the order or declaration of title obtained by means of such fraud or falsehood shall be null and void for or against all persons other than a purchaser for valuable consideration without notice.'

By sect. 45, 'If in the course of any proceeding before the Court under this Act any person shall fraudulently forge or alter, or assist in forging or altering, any certificate or other document relating to such land, or to the title thereof, or shall fraudulently offer, utter, dispose of, or put off any such certificate or other document, knowing the same to be forged or altered, such person shall be guilty of felony, and upon conviction shall be liable, at the discretion of the Court by which he is convicted, to be kept in penal servitude for life. . . .' (*e*).

By the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 99, 'If in the course of any proceedings before the registrar or the Court, in pursuance of this Act any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person or to substantiate a false claim, suppresses, attempts to suppress, or is privy to the suppression of any document or of any fact, the person so suppressing, attempting to suppress, or privy to suppression, shall be guilty of a misdemeanor, and upon conviction on indictment shall be liable to be imprisoned for a term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the Court before which he is tried may award.'

By sect. 100, 'If any person fraudulently procures, attempts to fraudulently procure, or is privy to the fraudulent procurement of, any entry on the register, or of any erasure from the register, or alteration of the register, such person shall be guilty of a misdemeanor, and upon conviction on indictment be liable to imprisonment for any term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the Court before which he is tried may award, and any entry, erasure, or alteration so made by fraud, shall be void as between all parties or privies to such fraud.'

This Act is amended and extended by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65) (*f*), which is to be read as one Act with the Act of 1875.

(*e*) For any term not less than three years, or to be imprisoned for a term not exceeding two years, with or without hard labour: 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*f*) *Vide ante*, p. 1596, note (*d*).

CANADIAN NOTES.

OF CHEATS, FRAUDS, FALSE TOKENS, AND FALSE PRETENCES.

Sec. 1.—Of Cheats, Frauds, etc.

Obtaining Passage by False Ticket.—Code sec. 412.

Official Destroying Security and Making False Entry in Books.—Code sec. 413.

An indictment charging bank official with having made in a monthly report, etc., "a wilful, false and deceptive statement" of and concerning the charges of the bank, with intent to deceive, sufficiently charges the offence, under the Bank Act, of having made "a wilfully, false or deceptive statement in any return or report" with such intent. R. v. Weir (No. 1) (1899), 3 Can. Cr. Cas. 102, R.J.Q. 8 Q.B. 521.

In a prosecution under sec. 153 of the Bank Act against a local bank manager for signing a false statement in the Government returns, it must be made to appear that the accused knew that he was signing a statement which misrepresented the bank's affairs, and the signing of such statement is not a presumption *juris et de jure* of wilful intent or guilty knowledge. R. v. Browne, 14 Can. Cr. Cas. 247.

False Prospectus by Directors, etc.—See Code sec. 414.

Fraudulent Official Statements.—Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed. R. v. Gillespie (No. 2) (1898), 2 Can. Cr. Cas. 309.

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

Judicial notice will be taken of the statutory law of a province, other than the one in which the charge is laid, whereby the "president" of a company must necessarily be one of the "directors," and on proof of the manner of incorporation a description of the accused as the "president" of the company seems to be sufficient. R. v. Gillespie (No. 2) (1898), 1 Can. Cr. Cas. 551 (Que.).

Official Destroying, Altering or Mutilating Book.—See Code sec. 415.

False Returns by Revenue Officer.—See Code sec. 416.

Fraudulent Transfer of Property with Intent to Defraud Creditors.—See Code sec. 417.

See notes to Book 10, Chap. 26, *supra.*

In a case where the nature of the proceedings and the evidence clearly shewed that criminal process issued against S. was used only for the purpose of getting S. to Montreal to enable his creditors there to put pressure on him, in order to get their claims paid or secured, a transfer made by S.'s father of all his property for the benefit of the Montreal creditors was set aside as founded on an abuse of the criminal process of the Court. Shorey v. Jones (1888), 15 Can. S.C.R. 398, affirming the decision of the Supreme Court of Nova Scotia, 20 N.S. Rep. 378.

In Nova Scotia it was held that the disposition of the property under this section must be such as would, if not interfered with, deprive the creditors of any benefit whatever therefrom. R. v. Shaw (1895), 31 N.S.R. 534.

In a proceeding of a penal nature involving deprivation of liberty, and brought under a provincial statute for an alleged concealment of property in fraud of creditors, the rules and principles of the criminal law as to the evidence and its effect are applicable, and there must be clear and conclusive evidence to justify a conviction. A finding that an insolvent has secreted a part of his property with the intent of defrauding his creditors is not supported by evidence merely of a discrepancy between two financial statements made by him a few months apart, and the failure of the insolvent to account for the deficit in his arrears other than as being the result of an extravagant expenditure of capital in living expenses. Bryce v. Wilks (1902), 5 Can. Cr. Cas. 445 (Que.).

The depositions of a judgment debtor upon his examination as to means may be proved in evidence against him upon a criminal charge of disposal of property in fraud of creditors, unless at the time of the examination he objected to answer on the ground that his answer might tend to criminate him. If the examination were before a duly authorized authority, the admissions then made in answer to questions not objected to, may be afterwards used against the accused although such questions were not properly within the scope of the examination. The King v. Van Meter, 11 Can. Cr. Cas. 207.

Destroying or Falsifying Account Books with Intent to Defraud Creditors.—See Code sec. 418.

Concealment of Document of Title by Vendor of Property with Intent to Defraud.—See Code sec. 419.

No Prosecution Without Consent of Attorney-General.—See Code sec. 597.

Fraudulent Registration of Titles.—See Code sec. 420.

Sale of Property with Knowledge of Former Unregistered Sale Thereof.—See Code sec. 421.

Sale of Property Where no Title Possessed by Vendor.—See Code sec. 422.

Wrongful Taking of Property in Execution.—See Code sec. 423.

Holder of Lease of Gold or Silver Mine, Defrauding Owner Thereof. See Code sec. 424.

(Amended 8 & 9 Edw. VII. ch. 9.)

Indictment for.—Code sec. 866.

Indictment (Amendment of).—Code sec. 893.

Search Warrant.—Code sec. 637.

Warehousman, etc., Delivering Receipt for Goods Without Receiving Them.—See Code secs. 425, 428.

Fraudulent Disposal of Merchandise as to Which Money has Been Advanced or Security Given by Consignee.—See Code secs. 426, 428.

Fraudulent Statements in Receipts under Bank Act.—See Code sec. 427, 428.

Receipts given by any person in charge of logs or timber in transit from timber limits or other lands to their place of destination are covered by the term "warehouse receipt" used under the Bank Act.

Innocent Partners.—See Code sec. 428.

Sec. 2.—False Pretences.

Definition, Exaggeration, Question of Fact.—See Code sec. 404.

The false pretence need not be made in words or writing; it may be made "otherwise" and it will suffice if it is signified by the conduct and acts of the accused. R. v. Létang (1899), 2 Can. Cr. Cas. 505. As put by Bishop (on Crimes, vol. 2, par. 430): "The pretence need not be in words, but it may be sufficiently gathered from the acts and conduct of the party."

A false pretence need not be in words or in writing but may be in the conduct and acts of the accused. R. v. Létang (1899), 2 Can. Cr. Cas. 505. In that case a debtor had made a judicial abandonment for the benefit of his creditors whereby his property became vested in another and knowing that he was no longer entitled to receive the rent, he presented himself afterwards as the landlord to a tenant of the property and received the rent as he had formerly been accustomed to do. It was held that he was properly found guilty of a false pretence by his acts and conduct.

A person who is present when a false representation is made by another person acting in conjunction with him, and who knows it to be false, and gets part of a sum of money obtained by such false

pretence, is guilty of obtaining such sum of money by false pretences. R. v. Cadden (1899), 5 Can. Cr. Cas. 45 (N.W.T.).

But giving of a post-dated cheque without any representation other than the document itself may contain, implies no more than a promise to have sufficient funds in the bank on the date thereof and is not, in itself, a false representation of a fact past or present. And where given in respect of a voidable gambling contract intent to defraud could not be found because the complainant was legally entitled to withdraw from the voidance contract even after the event upon which the bet was placed. The King v. Richard, 11 Can. Cr. Cas. 279.

If a person offers in exchange for goods the promissory note of another, he is to be taken to affirm, although he says nothing, that the note has not to his knowledge been paid either wholly or to such an extent as to almost destroy its value. R. v. Davies (1859), 18 U.C.Q.B. 180.

Where an attorney who had been struck off the rolls obtained money out of Court under such circumstances as amounted to a false pretence practised on the Court, his object being to obtain the fund that he might retain his costs out of it, it was held that it was none the less a false pretence by reason of the fact that the accused had intended to pay and did in fact pay over the balance to the person properly entitled. R. v. Parkinson, 41 U.C.Q.B. 545.

When the prosecutor does not intend to part with the right of property in the goods or money taken by the defendant, and in some cases does not intend to part with the possession of them until they are paid for, and the defendant fraudulently gets possession of them contrary to the intention of the owner, intending all the time not to pay for them, then the jury may find the party guilty of theft. But where the owner voluntarily parts with the possession and property in the goods, and intends to vest them in the defendant, because he relies on the defendant's promise to pay the money, or bring other property or money in place of those vested in him, then the defendant cannot be convicted of theft. R. v. Bertles (1863), 13 U.C.C.P. 607; R. v. Haines (1877), 42 U.C.Q.B. 208; R. v. Middleton (1873), L.R. 2 C.C.R. 338.

Where a person is induced by a false representation to part with the possession of goods but does not part with his right of property therein (*ex gr.* in a contract of hire of a chattel), there can be no conviction for obtaining the goods under false pretences. R. v. Nowe (1904), 8 Can. Cr. Cas. 441, 36 N.S.R. 531.

To prove a charge of obtaining goods by false pretences where there is a lapse of time between the making of the pretence and the delivery of the goods, there must be a direct connection between them

constituting the former a continuing pretence up to the time of delivery. R. v. Harty (1898), 2 Can. Cr. Cas. 103.

If the money is parted with from a desire to secure the conviction of the prisoner there is no obtaining by false pretences. R. v. Mills (1857), Dears. & B. 205, 26 L.J.M.C. 79; R. v. Gemmell, 26 U.C.Q.B. 315. The false pretence must have been the inducing cause to the defrauded party to part with his property *Ibid.*

Where payment is obtained from a debtor by one who falsely represents that he is an agent of the creditor and the creditor is thereby defrauded, the creditor may ratify the payment and adopt the agency and thereby make the payment equivalent to one to an authorized agent, as regards civil liability even though the person receiving the money has by his false representation committed an indictable offence. Scott v. Bank of New Brunswick, 23 Can. S.C.R. 277.

The doctrines of commercial agency do not apply to prevent the operation of the criminal law. So where one Clark, a policyholder of a fire insurance company, conspired with Howse, their local agent to defraud the company and handed to Howse for transmission to the company an unfounded proof of claim for pretended losses by fire, and obtained the money through Howse from the company, it was held that the knowledge of Howse of the falsity of the pretence could not be imputed as the knowledge of the company so as to affect the criminality of Clark. R. v. Clark (1892), 2 B.C.R. 191.

On an indictment for obtaining money by false pretences it appeared that the prosecutor took out a $2 bill saying he would get it changed. Prisoner offered to change it upon which the prosecutor handed it to him, and the prisoner kept it without giving the change. It was held that if the prisoner replied to the prosecutor that he then had the change to give him for the bill, and if on that representation he obtained it for the alleged purpose of changing it, whether at the time he obtained it he really had the change mentioned, or whether his representation in that respect was false and was used as a pretence to get the bill, then he would be guilty; but if he did not make such representation, or if having so made it, he did not obtain the bill on such representation, and having in fact the change to give, although wrongfully withholding the change and retaining the bill, in either of these instances the prisoner would not be guilty of obtaining the money by false pretences. If the inducement to the prosecutor to part with his money was on a mere promise to get change, or to change it, the case would fail. R. v. Gemmell (1867), 26 U.C.Q.B. 312.

Prisoner having agreed to lend prosecutor $5,000, gave him certain drafts, representing that they were good and would be paid, whereas they turned out worthless and merely fictitious. On the strength of prisoner's representations prosecutor gave prisoner a note

for $1,200, which note prosecutor retired before maturity. It was held that an indictment for obtaining $1,200 by false pretences was not supported by proof of the above facts, there not having been a renewal of the false pretence when the money was paid. Though remotely the payment arose from the false pretence, yet, immediately and directly, it was made because prosecutor desired to retire the note. R. v. Brady (1866), 26 U.C.Q.B. 13.

To prove that the board of a corporation had acted on the faith of the false representation made, it is not necessary to examine one or more of the directors, if the fact can be proved by other competent witnesses. R. v. Boyd (1896), 4 Can. Cr. Cas. 219 (Que.).

False representations amounting to mere promise or professions of intention, though they induce the defrauded party to part with his property are not false pretences under sec. 404 of the Code as they are not representations of a matter of fact either present or past. The King v. Nowe, 8 Can. Cr. Cas. 441, 36 N.S.R. 531.

A representation by the person obtaining goods that he would pay for them the following week is not a representation of fact, either past or present, and any belief by the prosecutor that such a promise was a false pretence within the meaning of the Criminal Code is unreasonable. Mott v. Milne (1898), 31 N.S.R. 372.

The word "owner" following the signature of the accused in a letter written by him inviting negotiations for the charter of a vessel in his possession and managed by him, does not in itself constitute a representation by the accused that he is the "registered owner." R. v. Harty (1898), 2 Can. Cr. Cas. 103.

The prisoner represented to the prosecutor that a lot of land on which he wishes to borrow money had a brick house upon it, and thus procured a loan, when in fact the land was vacant. It was held that he was properly convicted of obtaining the money under false pretences. R. v. Huppel (1861), 21 U.C.Q.B. 281; R. v. Burgon (1856), 1 Dears. & B.C.C. 11, 7 Cox C.C. 131; R. v. Eagleton (1855), 6 Cox C.C. 559.

Obtaining Property by False Pretences.—See Code sec. 405.

It is not necessary that the indictment should allege an intent to defraud a particular person. Cr. Code 885(*c*). And before the Code an indictment for obtaining money by false pretences by means of fraudulent post office orders was upheld upon a general allegation of "intent to defraud." R. v. Dessauer (1861), 21 U.C.Q.B. 231.

The intent to defraud is necessary to constitute the offence, and yet the statutory form of indictment contains no allegation of such intent.

Section 863 of the Code made an indictment which charges any false pretence, etc., valid, although it does not set out in detail in

what the false pretence consisted. This, it is submitted, does not mean that the false pretence need not be set out at all. While Meredith, C.J., in his judgment in R. v. Patterson (1895), 2 Can. Cr. Cas. 339, speaks of the "addition of the words unnecessarily setting out in what the false pretences consisted," and expresses the view that the indictment would have been fully authorized if laid without alleging in what the false pretence consisted," it will be observed that Rose, J., limits his opinion to the case of an indictment in which the false pretence is not set out in detail.

It is submitted, however, that the form 64 cannot override the express requirement of sec. 852, which demands that every count of an indictment shall be in "words sufficient to give the accused notice of the offence with which he is charged" (sub-sec. 3). Section 853 is in its terms confined to the setting forth of details of the circumstances of the alleged offence, and it is submitted that to state what the false pretence was, is a matter rather of describing the offence than of detailing the circumstances. Moreover, the false pretence, and not the mere fact of obtaining the property, would seem to be the gist of a charge of obtaining goods by a false pretence.

It seems probable also that sec. 863 applies only where the false pretences, etc., is charged against the accused, and if the charge were for knowingly "receiving" goods obtained by false pretences, it would be necessary to look at the law as it was before the Code to find whether or not the false pretence should be particularized. Canada Criminal Code (Tremeear) 334.

In The Queen v. Broad (1864), 14 U.C.C.P. 168, it was held by the Court of Common Pleas of Upper Canada that an indictment was valid where a prosecutor had been bound by recognizance to prosecute and give evidence upon a certain trial, notwithstanding that there was a variance between the specific perjury charged in the information and the specific charge of perjury contained in the indictment, and although the statute then in force, 24 Vict. (Can.) ch. 10, sec. 10, forbade an indictment for certain offences named, including perjury, unless a recognizance had been given "to prosecute or give evidence against the person accused of such offence," or unless the accused had been committed or bound over to "answer to an indictment to be preferred against him for such offence," etc. John Wilson, J., in delivering the judgment of the Court, said: "If the indictment set forth the substantial charge contained in the information, so that the defendant had reasonable notice of what he had to answer, we should incline to think this a compliance with the statute, and would refuse to quash the indictment."

Evidence is admissible of facts which are subsequent to the false representation, to prove the insolvency of the defendants a very short

time after the false representation had been made, as an evidence of their knowledge of its falsity when they made it. R. v. Boyd (1896), 4 Can. Cr. Cas. 219 (Que.).

Upon a charge of obtaining goods under false pretences, evidence of other similar acts committed by the accused is not admissible in corroboration of the fact that he committed the act charged, but upon due proof of the act charged such evidence may be given in proof of criminal intent or of guilty knowledge. R. v. Komiensky (No. 2), 7 Can. Cr. Cas. 27, 12 Que. K.B. 463.

On an indictment for the offence of having obtained money by false pretences, the defendants cannot be convicted of the full offence when the evidence proved only that by the discount of their promissory note they had only obtained a credit in account, such credit in account being a thing not capable of being stolen, but they might, if the evidence should establish an attempt to obtain the money, be convicted of such attempt. R. v. Boyd (1896), 4 Can. Cr. Cas. 219 (Que.).

On an indictment for obtaining money under false pretences, the accused may be convicted of an attempt to commit the offence. Code sec. 949; R. v. Goff (1860), 9 U.C.C.P. 438.

Where a basis of a charge of extradition is an alleged falsification of a written document, either the document itself must be produced or a foundation must be laid for secondary evidence of its contents; and a commitment for extradition is invalid as not disclosing a *primâ facie* case unless this has been done. Re Harsha (No. 1) (1906), 10 Can. Cr. Cas. 433; Re Johnston (1907), 12 Can. Cr. Cas. 559.

Execution of Valuable Security Obtained by Fraud.—Code sec. 406.

A lien note is a "valuable security" within the meaning of sec. 406 of the Code. The King v. Wagner (1901), 6 Can. Cr. Cas. 113, 5 Terr. L.R. 119.

Where two parties enter into a voidable betting or gaming contract, each putting up his own cheque post-dated the day on which the result of the bet would be ascertained, the fact that the loser's cheque was dishonoured because he had no account at the bank will not support a charge that he obtained the execution of the winner's cheque delivered to the stakeholder for a like amount by false pretences with intent to defraud. The giving of a post-dated cheque implies no more than a promise to have sufficient funds in the bank on the date thereof and is not, in itself, a false representation of a fact past or present. Intent to defraud could not be found because the complainant was legally entitled to withdraw from the voidable contract even after the event upon which the bet was placed. R. v. Richard (1906), 11 Can. Cr. Cas. 279 (Que.).

The document need not be a valuable security at the time of the signature obtained by the false pretence, and the decisions in R. v. Brady, 26 U.C.Q.B. 13, and R. v. Rymal, 17 O.R. 227, no longer apply. R. v. Burke (1893), 24 O.R. 64.

Falsely Pretending to Enclose Money in Letter.—Code sec. 407.

Indictment not Necessary to Allege Intent in.—Code sec. 846.

Sec. 3.—Of Other Frauds, etc.

Conspiracy to Defraud.—See Code sec. 444.

It is not necessary to prove that the defendants actually met together and concerted the proceeding; it is sufficient if the jury are satisfied from the defendants' conduct either together or severally, that they were acting in concert. R. v. Fellowes (1859), 19 U.C.R. 48, 58; Farquhar v. Robertson, 13 P.R. (Ont.) 156.

The jury may group the detached acts of the parties severally, and view them as indicating a concerted purpose on the part of all as proof of the alleged conspiracy. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

When the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design. *Ibid.*

A conspiracy to defraud is indictable, although the conspirators have been unsuccessful in carrying out the fraud. R. v. Frawley (1894), 1 Can. Cr. Cas. 253 (Ont.).

A conspiracy to defraud is indictable, although the object was to commit a civil wrong, and although if carried out the act agreed upon would not constitute a crime. R. v. Defries (1894), 1 Can. Cr. Cas. 207 (Ont.).

Any overt act of conspiracy is to be viewed as a renewal or continuation of the original agreement made by all of the conspirators, and, if done in another jurisdiction than that in which the original concerted purpose was formed, jurisdiction will then attach to authorize the trial of the charge in such other jurisdiction. R. v. Connolly (1894), 1 Can. Cr. Cas. 468.

The bare consulting of those who merely deliberate in regard to the proposed conspiracy, although they may not agree on a plan of action, is of itself an overt act. *Ibid.*

And it has recently been held in Ontario, in a case under the Code, that one conspirator may be indicted and convicted without joining the others, although they are living and within the jurisdiction. R. v. Frawley (1894), 1 Can. Cr. Cas. 253 (Ont.).

The doctrines of commercial agency do not apply to prevent the operation of the criminal law. So where one Clark, a policyholder of

a fire insurance company, conspired with Howse, their local agent, to defraud the company and handed to Howse for transmission to the company an unfounded proof of claim for pretended losses for fire, and obtained the money through Howse from the company, it was held that the knowledge of Howse of the falsity of the pretence could not be imputed as the knowledge of the company so as to affect the criminality of Clark. R. v. Clark (1892), 2 B.C.R. 191.

Upon a charge of conspiracy to defraud the Canadian Pacific Railway Co. by bribing clerks in the company's employ to illegally and fraudulently disclose information of the secret audits of trains to be made and to furnish such information to conductors to enable them to be prepared for the audits when made and at other times to be free to retain fares and to allow passengers to ride free or for a reduced fare, the Court properly rejected evidence of conductors to the effect that if they knew the date of a proposed secret audit they would communicate it to the conductor whose train was to be audited for a purpose other than that of defrauding the company. The King v. Carlin (No. 2) (1903), 6 Can. Cr. Cas. 507 (Que.).

An indictment for conspiracy to defraud may properly charge that the conspiracy was with persons unknown, if neither the Crown nor the private prosecutor had definite information of the identity of the alleged co-conspirators. Where at the trial of such an indictment the name of one of the alleged co-conspirators is for the first time disclosed in the testimony of a Crown witness, that information may then be added to the statement or particulars of the indictment. R. v. Johnston (1902), 6 Can. Cr. Cas. 232.

It is a conspiracy to defraud a railway company for an employee of the audit office of the railway to agree with train conductors to sell to them secret information as to the time of special audits of passenger tickets on their trains, which information it was the duty of the accused as such employee to keep secret. The system of special audits on trains being designed to prevent the railway company being defrauded by irregularities not only on the train audited but on others, and being dependent for its effectiveness on the secrecy as to the time when it will take place, the disclosure of same for reward is evidence of an attempt to cause the company a financial loss, although such disclosure tended to prevent any loss on the occasion when such audits took place. *Ibid.*

In an indictment charging a conspiracy to defraud it is not necessary to set out overt acts done in pursuance of the illegal agreement or conspiracy, nor is it necessary to name the person defrauded or intended to be defrauded. Before the acts of alleged conspirators can be given in evidence there ought to be some preliminary proof to shew an acting together, but it is not necessary that a conspiracy should first be proved. R. v. Hutchinson (1904), 8 Can. Cr. Cas. 486.

The offence of conspiracy to defraud under Code sec. 444 does not include a conspiracy to defeat a candidate's chances of election by the employment of unlawful devices. So a charge of conspiracy the particulars of which severally allege that the accused conspired to defraud a candidate at an election to the Saskatchewan Legislature, the electors of the division and the public, by illegally obtaining the return of the opposing candidate, does not disclose an offence under sec. 573 of the Code, for the acts alleged as the object of the conspiracy do not constitute an indictable offence either by statute or at common law. R. v. Sinclair (1906), 12 Can. Cr. Cas. 20 (Sask.).

Particulars of Charge May be Ordered.—Code sec. 859.

Copy of Particulars for Accused.—Code sec. 860.

In a case of conspiracy to do that which is not a crime or to do a wrong which is not well known as being the subject of a criminal conspiracy, the facts should be set out in the indictment that it may appear whether or not the conspiracy charged is an indictable offence. An indictment for conspiracy to cure another of a sickness endangering life, "by unlawful and improper means" and thereby causing his death is bad and should be quashed because it does not specify the unlawful and improper means nor indicate the specific crime or wrong intended to be relied upon. R. v. Goodfellow (1906), 10 Can. Cr. Cas. 425, 11 O.L.R. 359.

Particulars furnished under sec. 859 of the Code have not the effect of amending or extending the scope of the original indictment or charge, and the inclusion of a separate and distinct offence as a particular under a charge of conspiracy will not authorize a conviction which would otherwise not be within the scope of the indictment. R. v. Sinclair (1906), 12 Can. Cr. Cas. 20 (Sask.).

Extradition.—Conspiracy to defraud is in itself not an extraditable offence between Canada and the United States, but extradition will lie as for a separate crime in respect of an overt act of a conspiracy which constitutes one of the crimes mentioned in the extradition arrangement. And the extraditable offence of larceny or participation in larceny is charged sufficiently in an information laid on instituting extradition proceedings therefor, if, following a charge of conspiracy to defraud between the accused and another person and an embezzlement and theft by such other person in pursuance thereof, the information alleges that the accused "did participate in the said offence of embezzlement and theft." United States v. Gaynor; Re Gaynor and Greene (No. 3), 9 Can. Cr. Cas. 205 (P.C.).

Cheating at Games, etc.—See Code sec. 442.

Where the loser in a card game was informed shortly after its termination that he had been cheated and thereupon, in a *bonâ fide* belief (whether mistaken or not) that such was the case, assaulted the

winner and by force took from him a part of the money won in the game, such assault and re-taking does not constitute theft or robbery. But under such circumstances the accused may properly be convicted of common assault. R. v. Ford (1907), 12 Can. Cr. Cas. 555, 13 B.C.R. 109.

Pretending to Practise Witchcraft.—Code sec. 443.

Fortune Telling.—It was held by the Ontario Court of Appeal in R. v. Marcott (1901), 4 Can. Cr. Cas. 437, that, to uphold a conviction under sec. 443 of the Code, there must be evidence upon which it may be reasonably found that the accused was asserting or representing, with the intention that the assertion or representation should be believed, that he had the power to tell fortunes, with the intent, in so asserting or representing, of deluding and defrauding others.

Where on a prosecution for undertaking to tell fortunes, it appears that the prediction of the future for which payment was made was expressly stipulated to be only a delineation made pursuant to rules laid down in published works on palmistry, etc., an acquittal should be directed, as the contract negatives any intention to deceive. The King v. Chilcott (1902), 6 Can. Cr. Cas. 27.

The word "undertakes," as used in this section of the Code, implies an assertion of the power to perform, and a person undertaking to tell fortunes impliedly asserts his power to tell fortunes and in doing so is asserting the possession of a power which he does not possess and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others the offence aimed at by the enactment is complete. Per Armour, C.J.O., in R. v. Marcott (1901), 4 Can. Cr. Cas. 437.

The mere undertaking to tell fortunes is an offence. A conviction obtained upon the evidence of a person who was a decoy, but not a dupe or a victim, was affirmed. R. v. Milford (1890), 20 Ont. R. 306.

Forgery of Trade Marks.

Definition of Offence.—See Code sec. 486.

Where a colonial legislature re-enacts in substantially the same terms a British Act not originally applying to the colony, the adopted enactment is to be construed in the colony in the same way as the original enactment. The two are to be treated as being in part *materia.* Trimble v. Hill, 5 App. Cas. 342; R. v. Authier (1897), 1 Can. Cr. Cas. 68.

Where a trade mark is complained of as being forged and as infringing the rights of a proprietor of a duly registered trade mark, any resemblance of a nature to mislead an incautious or unwary purchaser, or calculated to lead persons to believe that the goods marked are the manufacture of some person other than the actual manufac-

turer, is sufficient to bring the person using such trade mark under the purview of this section.

In such cases it is not necessary that the resemblance should be such as to deceive persons who might see the two marks placed side by side, or who might examine them critically. R. v. Authier (1897), 1 Can. Cr. Cas. 68 (Que.). The trial Judge may examine the label for himself and form a conclusion as to the resemblance without expert evidence as to its tendency to deceive. In Re Marks & Tellefsen's Application, 63 L.T. 234; R. v. Authier (1897), 1 Can. Cr. Cas. 69.

Application of Trade Marks.—See Code sec. 487.

On a charge of falsely applying a trade mark the onus of proving that the assent of the proprietor of the trade mark has not been given is upon the prosecution, for sec. 488(2) applies only to cases of "forgery" of a trade mark and not to cases of "falsely applying," to shift the onus to the defendant of proving such assent. R. v. Howarth (1898), 1 Can. Cr. Cas. 243 (Ont.).

Meaning of "False Trade Description."—Code sec. 335(1).

(Sub-sec. 2 amended 7 & 8 Edw. VII. ch. 18.)

Application of Part VII.—Code sec. 341(2).

The use of the words "quadruple plate" in an advertisement of sale of silver-platedware may constitute a false trade description, the application of which is an offence under this section. R. v. T. Eaton Co. (1899), 3 Can. Cr. Cas. 421.

The question of what resemblance to an already registered trade mark will be a bar to registration under the Trade Marks and Industrial Designs Act (Can.), is not the same as that which arises in an action for the infringement of a trade mark; and it does not follow that, because the person objecting to the registration of a trade mark could not get an injunction against the applicant, the latter is entitled to put his trade mark on the register. Re Melchers and De Kuyper (1898), 6 Can. Exch. Ct. Rep. 82, 100; Re Speer 55 L.T. 880; Re Australian Wine Importers, 41 Ch. Div. 278.

The Minister of Agriculture may refuse to register a trade mark. . . (*b*) if the trade mark proposed for registration is identical with or resembles a trade mark already registered; (*c*) if it appears that the trade mark is calculated to deceive or mislead the public. Trade Mark Act (Can.)

Under that statute it has been held that "if the trade mark proposed to be registered so resembles one already on the register that the owner of the latter is liable to be injured by the former being passed off as his, then a case is presented in which the proposed trade mark is calculated to deceive or mislead the public. Whenever the resemblance between two trade marks is such that one person's goods are sold as those of another the result is that the latter is injured and

some one of the public is misled." Re Melchers and De Kuyper (1898), 6 Can. Exch. Rep. 82, 95.

Forging Trade Marks.—See Code sec. 488.

Upon a prosecution for falsely applying an imitation of a trade mark with intent to defraud, under Code sec. 488(*b*), it is open to the accused to attack the validity of the registered trade mark. If upon the evidence it appears that the registered trade mark merely denotes the component parts of the goods, the registration is invalid. R. v. Cruttenden (1905), 10 Can. Cr. Cas. 223.

A merely descriptive word or name, that is, a word or name which merely denotes the goods or articles or some quality attributed to them, is not capable of registration as a trade mark. Provident Chemical Works v. Canada Chemical Manufacturing Co., 4 O.L.R. 545; Partlo v. Todd, 17 Can. S.C.R. 196.

On a charge of falsely applying a trade mark the onus of proving that the assent of the proprietor of the trade mark has not been given is upon the prosecution, for sec. 488 applies only to cases of "forgery" of a trade mark and not to cases of "falsely applying," to shift the onus to the defendant of proving such assent. R. v. Howarth (1898), 1 Can. Cr. Cas. 243 (Ont.).

Selling Goods Falsely Marked.—See Code sec. 489.

Defacing Trade Marks and Using Trade Marks of Others by Trafficking in Bottles, etc.—Code sec. 490.

A soda water manufacturer who fills for the purpose of sale bottles having the name of another manufacturer permanently placed thereon is guilty of an indictable offence under sec. 490 unless the manufacturer whose name appears on the bottles has given a written consent to such filling. It is not essential to the offence that the name on the bottles should be registered as a trade mark. R. v. Irvine, 9 Can. Cr. Cas. 407.

This section is designed to protect manufacturers and bottlers whose business is now injured by the action of unscrupulous persons, who procure bottles from second-hand dealers, junk stores, etc., and fill them with inferior soda water, ginger ale, etc., and by merely covering up the manufacturer's name on the bottle, and covering up his trade mark, sell the inferior ginger ale, etc.; and although it is impossible to shew that there is any fraudulent representation or deception practised on the public in the first instance (as the name and trade mark are covered up), still the use of the bottles in this way eventually injures the manufacturer, as the new cover sometimes slips off and his reputation becomes injured in some cases thereby. Commons Sessional Debates (1900), page 5290.

On the consideration of this section in the Senate the Hon. Mr. Power said: "The necessity for this provision has arisen from the practice of persons who make up certain kinds of mineral and other

waters using the siphons and bottles bearing the trade mark of the person who has manufactured that which was in the bottle first, and it is really a sort of forgery. If one wishes to use a bottle which has contained ——'s ale, he can wipe the label off, but this is intended to meet the cases of bottles and siphons which have the original maker's name stamped on the bottle or siphon, and one can readily understand how fraud is perpetrated by selling an inferior article with one of these trade marks on it." Senate Debates (1900), page 710.

It will be observed that under this enactment the trade mark other than a name of a person is protected only when it has been "duly registered," *i.e.*, registered in Canada under the Canadian Trade Mark Act or otherwise protected in respect of its British registration by the Imperial Trade Marks Act. (See Code sec. 335(*s*).)

Sub-paragraph (*b*) and sub-section (2) are limited to bottles and siphons and do not include casks, kegs and cases, and packages of that class, as does sub-paragraph (*a*). The offences under sub-paragraph (*b*) consist either in

(1) trading or trafficking in the bottles and siphons, or

(2) filing the bottles and siphons for the purpose of sale or traffic.

Prosecution, Commencement of.—Code sec. 1140(*a*).

Penalty for Offence in Relation to Trade Marks Where None Specified.—See Code sec. 491.

The offences specified in secs. 492, 493, of falsely representing goods as having been manufactured for the Government, and of unlawfully importing goods liable to forfeiture under the trade mark law would appear to be examples of Code offences for which a corporation must be proceeded against under the Summary Conviction Clauses. But for the offence declared by sec. 489 of selling goods to which a false trade description has been applied, provision is made by sec. 491 for punishment; (*a*) upon indictment, by imprisonment or fine or both; (*b*) upon summary conviction by imprisonment or fine; and it was held that under that section a justice has no summary jurisdiction against a corporation, and that the intention to be inferred from such an alternative provision is that where the accused is a corporation the only authorized procedure is that of indictment. R. v. Eaton (1898), 2 Can. Cr. Cas. 252.

Limitation.—It would seem that under secs. 1140(*a*) and 1142, the prosecution, if by indictment, must be commenced within three years; and, if by summary proceedings, within six months except in localities where a one-year term is substituted under the latter section.

Falsely Representing that Goods are Manufactured for His Majesty.—See Code sec. 492.

Unlawful Importation of Goods Liable to Forfeiture.—See Code sec. 493.

See also the Customs Act as to importations of goods purporting to be marked with trade mark of a dealer in the United Kingdom or Canada.

Making Instruments for Forging Trade Marks.—See Code sec. 494.

Servant not Liable Where Acting Under Instructions of Master.—See Code sec. 495.

CHAPTER THE THIRTY-SECOND.

OF FORGERY.

Common Law.—Forgery is a misdemeanor at common law (*a*): but many kinds of forgery are specifically punished by statute and made felonies, or in some cases misdemeanors only (*b*). The earlier statutes, which for the most part made the forgeries to which they related capital felonies, were consolidated in 1830 (*c*). The principal Act now regulating forgery is the Forgery Act, 1861 (24 & 25 Vict. c. 98).

At the outset it is proposed briefly to state the doctrine of forgery at common law, together with such principles and decided points as (though some of them may have arisen in prosecutions upon particular statutes) appear to be of general application.

Forgery at common law has been defined as 'the fraudulent making or alteration of a writing to the prejudice of another man's right' (*d*); or, more recently, as 'a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit' (*e*); the word 'making' in this last definition being considered as including every alteration of, or addition to, a true instrument (*f*). It has also been very clearly defined as the fraudulent making of an instrument which purports to be that which it is not (*g*).

Uttering, or Publication.—The offence of forgery may be complete, without any publication or uttering of the forged instrument. For the very making with a fraudulent intention, and without lawful authority, of any instrument which, at common law or by statute, is the subject of forgery, is of itself a sufficient completion of the offence before publication; and though the publication of the instrument is the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence (*h*). Thus, where the note, which the prisoner was charged with having forged, was never published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction, on the ground of the note never having been published, there being circumstances sufficient to warrant the

(*a*) 4 Bl. Com. 248.

(*b*) See Chronological Index to Statutes (published annually) *tit.* 'Forgery.'

(*c*) 11 Geo. IV. and 11 Will. IV. c. 66, repealed, except sect. 21, in 1861 (24 & 25 Vict. c. 95).

(*d*) 4 Bl. Com. 247. This definition was approved in R. *v.* Riley [1896] 1 Q.B. 309. 18 Cox, 291.

(*e*) 2 East, P.C. 852. R. *v.* Parkes, 2 Leach, at 785; 2 East, P. C. 965.

(*f*) Id. ibid. As to the word *forge*, it is said in 3 Co. Inst. 169, 'To forge is metaphorically taken from the smith, who beateth upon his anvil, and forgeth what fashion or shape he will: the offence is called *crimen falsi*, and the offender *falsarius*; and the Latin word to forge is *falsare* or *fabricare*.'

(*g*) R. *v.* Ritson, L. R. 1 C. C. R. 200: 39 L. J. M. C. 10, Blackburn, J.

(*h*) 2 East, P. C. 855.

jury in finding a fraudulent intention (*i*). Most of the statutes in force as to forgery make the uttering or offering of the forged instrument, with knowledge of the fact, a substantive offence.

Sect. I. The Making or Alteration of a Written Instrument necessary to constitute Forgery.

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery; and this even though the instrument is afterwards executed by another person ignorant of the deceit. And the fraudulent application of a true signature to a false instrument, for which it was not intended, or *vice versâ*, will also be forgery (*j*). Thus it is forgery in a man who is ordered to draw a will for a sick person, to insert legacies in it out of his own head (*k*). So if a man inserts in an indictment the names of persons against whom, in truth, it was not found (*l*). So if, finding another name at the bottom of a letter, at a considerable distance from the other writing, he causes the letter to be cut off, and a general release to be written above the name, and then takes off the seal and fixes it under the release (*m*). And it seems to have been considered that if a man makes a copy of a receipt, adds to such copy material words, not in the original, and then offers it in evidence on a suggestion of the original being lost, he may be prosecuted for forgery (*n*). The fraudulent alteration of a material part of a deed is forgery; *e.g.* making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D into an S; or making a bond for £500, expressed in figures, seem to have been made for £5,000 (*o*). And though it seems to have been thought that

(*i*) R. *v.* Elliot, 1 Leach, 175; 2 East, P. C. 951; 2 B & P. (N. R.) 93, note (*a*). And see also R. *v.* Crocker, R. & R. 97; 2 Leach, 987, where it appears to have been held by Le Blanc, J., that though the note there in question had been kept in the prisoner's possession, and never attempted to be uttered by him; yet it was a question for the jury, under all the circumstances of the case, whether the note had been made innocently, or with an intent to defraud.

(*j*) 2 East, P. C. 855.

(*k*) Noy. 101. Moore (K.B.), 759. 3 Co. Inst. 170. 1 Hawk. c. 70, s. 2. Bac. Ab. 'Forgery' (A.). See R. *v.* Collins, 2 M. & Rob. 461, *post*, p. 1605.

(*l*) R. *v.* Marsh, 3 Mod. 66. 1 Hawk. c. 70, s. 2. See *post*, p. 1683, as to forging proceedings, &c., of Courts of Justice.

(*m*) 3 Co. Inst. 171. 1 Hawk. c. 70, s. 2. Bac. Abr. 'Forgery' (A.). E. Maurice was convicted at the O. B. Sessions, October, 1772, for forging a promissory note for £103 10*s*. Maurice, who was a lodger, paid the prosecutrix some money for rent and by taking two pieces of paper, lapping them over each other, and making them just stick together with some gum water, he so ordered it that the body of the receipt should fall on the uppermost piece, and the name on the lowermost, so that when the paper came to be separated, the body of the receipt which was taken off left room for the body of the note to be written in its stead, and the name at the bottom appeared in its true place. R. *v.* Evan Maurice, Ann. Reg. for 1772, p. 134. He received a free pardon, Ann. Reg. p. 145, but on what ground it does not appear.

(*n*) Upfold *v.* Leit, 5 Esp. 100, Ellenborough, C.J. The words inserted were 'in full of all demands.' In R. *v.* Milton, 10 Cox, 364, Chambers, Common Serjeant, held that it was for the jury to say whether the addition of words to a receipt, after it had been given, altered the effect of the receipt.

(*o*) Blake *v.* Allen, Moore (K.B.), 619. 1 Hawk. c. 70, s. 2. So in R. *v.* Elsworth, 2 East, P. C. 986, where a cipher being added after the figure 8, the bill, which was for £8, became a bill for £80. But if a man alter a bond given to himself for £100 into a bond for 100 marks, this is not forgery, because he thereby avoids the bond, and prejudices

a deed so altered is more properly to be called a false than a forged deed, not being forged in the name of another, nor his seal nor hand counterfeited (*p*); yet, according to the better opinion, such an alteration amounts to forgery; on the ground that the fraud is the same as if there were an entire making of a new deed in another's name; and also on the ground that a man's hand and seal are falsely made use of to testify his assent to an instrument, which, after such an alteration, is no more his deed than a stranger's (*q*). Altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment, would come within the same rule (*r*). So altering a bill payable at three months, into a bill payable at twelve months, is forgery (*s*). And upon the principle that the false making of any part of a genuine note, which may give it a greater currency, is forgery; where a note of country bankers was made payable at their house in the country, or at their bankers in London, and the London banker had failed, it was held forgery to alter the name of such London banker to the name of another London banker, with whom the country bankers had made their notes payable subsequent to the failure. The judges considered that the act done by the prisoner was a false making, in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a solvent instead of an insolvent house (*t*). And upon the general principle that the alteration of a true instrument makes it, when altered, a forgery of the whole instrument, where the indictment charged the prisoner with 'making, forging, and counterfeiting' a bill of exchange, and with uttering it, knowing it to be forged, and the evidence was of an alteration of the bill of exchange from £10 to £50 in the part of it in which the sum is expressed in figures, and also in the part in which it is expressed in letters, it was held that the prisoner was properly convicted; though 7 Geo. II. c. 22 (rep.), on which the indictment proceeded, contained the word *alter* as well as the word *forge*; 'if any person shall falsely make, alter, forge, or counterfeit,' &c.; from which it was contended that to *alter* a bill of exchange was made a distinct offence (*u*). Making a special endorsement a general one has been held to be altering an endorsement (*v*).

The prisoner was station master at a railway station, and one B. collected and distributed parcels that were sent from and arrived at the station. For each service he was entitled to payment, which the

no one except himself. But if he had increased the sum, or had diminished it to avoid any collateral prejudice to himself, as to be free from any covenant, arbitrament, or like thing, or to prejudice another, this is forgery. Moore, (K.B). 619.

(*p*) 3 Co. Inst. 169.

(*q*) 1 Hawk. c. 70, s. 2. Bac. Abr. 'Forgery' (A.) in the notes.

(*r*) Master *v.* Miller, 4 T. R. 320; 2 East, P. C. 853.

(*s*) R. *v.* Atkinson, 7 C. & P. 669, Park, J.

(*t*) R. *v.* Treble, 2 Taunt, 328; 2 Leach, 1040; R. & R. 164. The alteration was effected by pasting a slip of paper bearing the words Ramsbottom and Co. over the words Bloxham and Co., in the same manner as the prosecutors had themselves altered their re-issuable notes after the failure of their first London bankers, Bloxham and Co.

(*u*) R. *v.* Teague, 2 East, P. C. 979; R. & R. 33. The judges held that the point was governed by R. *v.* Dawson, 1 Str. 19; 2 East, P. C. 978, where the prisoner having altered the figure of 2 in a bank note to 5 (£220 to £520) ten of the judges agreed that it was forging and counterfeiting a bank note; and that 3 Co. Inst. 171, 172, was not law in this respect. R. *v.* Post, R. & R. 101.

(*v*) R. *v* Birkett, R. & R. 251.

prisoner ought to have made to him. The prisoner was furnished with printed forms on which he had to account to the railway company for the expenses incurred for delivering and for collecting parcels. The left-hand column of these forms had to be filled in by the prisoner with expenses of 'delivery' and the right-hand column with expenses of 'collecting.' The prisoner told B. that the company had determined not to pay him anything for delivery. B. assented. This statement was untrue, and the prisoner continued to charge the company with payments purporting to be made to B. for delivery. In order to furnish a voucher to the company for these alleged payments the prisoner continued to fill up the sheets as before. The prisoner paid A., B.'s servant, £13, the amount of the right-hand (collecting) column only, and then wrote on the right-hand side of the dividing line, 'Recd. pro W. B.,' and procured A. to sign the receipt, and when A. had signed it, the prisoner, unknown to A. or B., put a receipt stamp under A.'s name, and on it put £39 in figures, that sum being the aggregate of the said sum of £13 which appeared in the right-hand (collecting) column, and of the sum of £26 which the prisoner had entered in the left-hand (delivery) column. The jury found that the document thus added to meant differently to what it meant before; and, upon a case reserved, it was held that this was forgery (*w*).

So if a person gives another a blank acceptance, and at the time limits the amount either by writing upon it or otherwise, and if in the filling up of the acceptance that amount be exceeded, with intent to defraud either the acceptor or any other person, that is forgery (*x*).

Filling in, without any authority, the body of a blank cheque to which a signature is attached, is forgery (*y*).

On an indictment for forging a cheque it appeared that the prisoner was clerk to Messrs. S. and C., and had been in the habit of getting blank cheques signed by the firm, and filling in the amount himself to meet the demands on the firm. He brought the cheque in question to one of the partners and asked him to sign it, saying that S. had told him to pay certain rent due from S. to G., but that the amount was not ascertained. The prisoner filled up the cheque for £100. At the bottom was written, 'Pay in notes'; but neither this, nor the date, nor the amount was filled in when it was signed by the partner, who gave the prisoner no authority to receive cash for the cheque or to appropriate it otherwise than for the rent. The prisoner received the amount, and the notes were traced to parties to whom the prisoner had paid them on account of gaming debts of his own. The rent due to G. was much more than £100. Neither S. nor G. was called. Erle, J., said: 'I think the prisoner must be acquitted. It is clear that he had authority to fill up the cheque in some way or another, and that authority was derived from S., and there is no evidence to shew that his directions were not to get a blank cheque filled up for £100, and appropriate it as it has been.

(*w*) R. *v.* Griffiths, Dears. & B. 548: 27 L. J. M. C. 205. It is not stated for what the prisoner was indicted, but it is presumed that it was for forging a receipt for money.

(*x*) R. *v.* Hart, 1 Mood. 486.

(*y*) R. *v.* Wright, 1 Lew. 135, Bayley, J. Flower *v.* Shaw, 2 C. & K. 703, Wilde, C.J.

Moreover, it should have been shewn that G. did not authorise him to receive the money.' But Erle, J., added: 'If a cheque is given to a person with a certain authority, the agent is confined strictly within the limits of that authority, and if he choose to alter it the crime of forgery is committed. If the blank cheque was delivered to him with a limited authority to complete it, and he filled it up with an amount different from the one he was directed to insert, or if after the authority was at an end he filled it up with any amount whatever, that would clearly be forgery.' Patteson, J. said: 'I quite agree with my learned brother that if the prisoner filled up the cheque with a different amount, and for different purposes than those which his authority warranted, the crime of forgery would be made out' (*z*).

The indictment charged the prisoner with forging a warrant and order for the payment of money. The prisoner was clerk to M. A bill for £156 9*s.* 9*d.* falling due on the 8th of December, M. on that day signed a blank cheque, and gave it to the prisoner, directing him to fill the cheque up with the correct amount due on the bill (which was to be ascertained by reference to the bill-book), and the expenses (which would amount to about ten shillings), and after receiving the amount at the bank, to pay it over to W., in order that the bill might be taken up. Instead of doing so the prisoner filled up the cheque with the amount of £250, which sum he immediately received at the bank, and without paying any part of the money over to W., retained the whole of it in his possession, in satisfaction of a claim for salary, which he alleged to be due to him, and in support of which he gave some evidence, but which his master entirely denied to be due. On the day after the receipt of the money on the cheque, he sent in an account of his claim, giving his master credit for the sum received on the cheque. It was objected that as the signature to the cheque was the genuine signature of M., and as the prisoner was entrusted to fill it up for a specified sum, the filling it up for a different sum, though it was a breach of trust, was not a forgery; but Coltman, J., held that it was a forgery. It was further urged that there was no proof of an intention to defraud M., but only to obtain from him a sum of money which the prisoner might honestly believe to be due to him. With reference to this point Coltman, J., told the jury that, if they were satisfied that the prisoner was authorised only to fill up the cheque for the amount of the bill and expenses, and to pay the proceeds to W., and that he filled it up for a larger sum, and applied the money, when received, to his own purposes, that was evidence of an intention to defraud M. The jury convicted, and upon a case reserved, Coltman, J., said 'that he had felt some doubt whether the question of the reality of the prisoner's claim ought not to have been left to the jury. But he and all the judges agreed that whether he had a claim or not there was no shadow of authority thereby given to draw a cheque for a larger sum than his master had expressly authorised; and the drawing a cheque to a larger amount fraudulently was forgery, on the authority of R. *v.* Hart' (*supra*) (*a*).

(*z*) R. *v.* Bateman [1845], 1 Cox, 186.

(*a*) R. *v.* Wilson [1847], 1 Den. 284: 17 L. J. M. C. 82. In R. *v.* Bradford, 2 F. & F. 859, Erle, C.J., is reported to have ruled differently, but the case is probably misreported.

On an indictment for forgery it appeared that the prisoner had the management of the prosecutors' business, and they had an account with Messrs. G., to which it was his duty to pay all sums not necessary for the current expenses of the concern; and on that account the prisoner was authorised to draw when the cash in hand was not sufficient to meet those expenses. In doing this the prisoner, with the sanction of the prosecutors, did not always draw in favour of a particular creditor for the exact amount due to him, but drew in his own favour such sum as he required, or was supposed to require, for his disbursements, and paid the creditors out of it. He was indicted for having forged a cheque, which he had drawn for £11 10*s.*, and entered in the prosecutors' books as having been paid to the E. C. R. Co.,; but which he had paid to his landlord for his own rent. Williams, J., held that the prisoner must be acquitted. There was a distinction between cases where there was an authority to fill up a bill to a limited amount, as in R. *v.* Hart (*b*), and where there was a general authority to draw. There was no doubt in this case a discretion vested in the prisoner to draw cheques, and so create a balance in his hands to meet the demands made on the firm; the prisoner, therefore, did not necessarily exceed his authority in drawing for this amount, and the criminal act was rather the subsequent appropriation of it (*c*).

But where the instrument is imperfect as a bill, when the name of another is written upon it, it is not a forgery of the acceptance. Upon an indictment for forging and uttering a forged acceptance of a bill of exchange, an accomplice proved that the prisoner produced a blank stamp from his pocket, and wrote the names 'Stiff and Sims' across it, and then gave it to the witness, who two days after in the absence of the prisoner drew the bill for £1000 on the stamp, Patteson, J., doubted whether the charge of forgery could be supported; because at the time when the names 'Stiff and Sims' were written on the stamp by the prisoner, it was a blank paper (*d*). And where the prisoner was indicted for forging an acceptance of a bill of exchange, and it appeared that at the time when the prisoner caused a lad to write the name of 'J. C.' across the bill, as the acceptor thereof (which the lad innocently did), a blank was left in the bill for the drawer's name; Parke, B., held that the indictment was not supported, as the instrument, to which the forged acceptance was affixed, was not, at the time of such supposed forgery, a bill of exchange, there being no drawer's name. He also referred to the terms of 11 Geo. IV. and 1 Will. IV. c. 66, s. 4 (rep.), which do not make it forgery merely to counterfeit an acceptance, but an acceptance of a bill of exchange (*e*).

Expunging by means of lemon juice (laid in the indictment to be a certain liquor unknown to the jury), an endorsement on a bank note was held to be a *rasing* of the endorsement within 8 & 9 Will. III, c. 20,

(*b*) *Ante*, p. 1602.

(*c*) R. *v.* Richardson [1861], 8 Cox, 448.

(*d*) R. *v.* Cooke, 8 C. & P. 582. The judge did not think the point material, because the prisoner had uttered the bill after it was completed, and, as he wrote the names on it, he must have known the acceptance to be a forgery.

(*e*) R. *v.* Butterwick, 2 M. & Rob. 196. The bill when produced had upon it the names 'Elstob and Butterwick,' as the drawers. 'There seems to have been no count for uttering in this case.' C. S. G.

s. 36 (rep.), which related to the altering or rasing any endorsement on any bank bill, &c. (*f*).

Where the prisoner procured a deed to be forged, as from one J. M. and his son, conveying a certain estate for life to M. K.; and, after the death of one of the supposed grantors, procured the forged deed to be altered by enlarging the grantee's estate to a fee; and was convicted of forging and uttering it in the state to which it was so altered; this was held by all the judges to be no less a forgery after than before such alteration (*g*).

It seems that a man cannot be guilty of forgery by a bare *non-feasance;* as if, in drawing a will, he should omit a legacy which he was directed to insert: but it appears to have been held that if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causes a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, the person making such an omission is guilty of forgery (*h*).

Upon an indictment for forging a lease and release, it appeared that H. was a freeman of D., entitled to the freehold property described in the deeds, and could neither read nor write. The prisoner went to his lodgings, and said he had come to ask him for his vote, and had brought him a requisition to sign for the purpose of bringing another candidate forward. The prisoner laid the two deeds on the table, and asked H. to sign them; he said he could not write, but would put his mark, and did accordingly put his mark at the foot of the two deeds; nothing was said in the presence of H. about delivering the deeds: but there was contradictory evidence as to there being seals on the deeds at the time H. made his mark. For the prosecution, 2 Russ. C. & M. 319, 2 Deac. C. L. 1402, were cited. Rolfe, B., said he could by no means subscribe to the authority of the cases cited by Russell and Deacon, and expressed a clear opinion, and so charged the jury, that if they thought the seals had been affixed previously to the mark of H. being obtained, and that they were on the deeds when he put his mark, the prisoner was entitled to be acquitted, though liable to an indictment for a very gross fraud; that if a different doctrine were laid down, the consequence would be that any party might be indicted for forgery who prevails on a man to execute a deed by misrepresenting its legal effect. On the other hand, he was clearly of opinion that the prisoner was guilty of the crime imputed to him if he obtained H.'s mark to the parchments and afterwards affixed the seals (*i*).

So where upon an indictment for forging a receipt for £12 it appeared that the prisoner, an attorney, had been employed by one C. to settle

(*f*) R. *v.* Bigg, 3 P. Wms. 419; 2 East, P. C. 855, 882.

(*g*) R. *v.* Kinder, 2 East, P. C. 855.

(*h*) Moore (K.B.), 760, Noy, 101. 1 Hawk. c. 70, s. 6. Bac. Abr. 'Forgery.' 2 East, P. C. 856. 3 Co. Inst. 170.

(*i*) R. *v.* Collins, 2 M. & Rob. 461, Rolfe, B. In R. *v.* Skirret, 1 Sid. 312, the defendants were indicted for reading a release to an illiterate person in other words than it was written, whereby he sealed it, &c.; and, though several objections were taken and overruled on a motion to quash, no objection was taken on the ground that this was not an indictable offence. This appears not to have been an indictment for forgery, at least in the usual form. 24 & 25 Vict. c. 96, s. 90, *ante*, p. 1515, covers some cases of this class.

an action against him at the suit of a building club, and a meeting took place, at which A., the treasurer, and G., the steward of the club, attended, and the club agreed to take £9 in satisfaction of their demand. The prisoner then produced a piece of paper, on which was a stamp, and a receipt was written on it and handed to A., who read it aloud, and returned it to the prisoner, and shortly afterwards it was returned to A., and he and G. signed it, the prisoner paying the £9. The receipt was produced afterwards, purporting to be for £12, and the figures written on an erasure. Rolfe, B., told the jury that he was clearly of opinion that, if they thought the alteration of the document was made before A. and G. signed it, such conduct on the part of the prisoner, however fraudulent, would not constitute the crime of forgery (*j*).

It was held forgery for a person to make a feoffment of certain lands to I. S., and afterwards to make a deed of feoffment of the same lands to I. D., of a date prior to that of the feoffment to I. S.; for therein he falsified the date in order to defraud his own feoffee, by making a second conveyance, which at the time he had no power to make (*k*). His crime would have been the same if, by his conveyance, he had passed only an equitable interest for good consideration, and had afterwards by such a subsequent ante-dated conveyance endeavoured to avoid it (*l*).

A., by deed bearing date the 7th of May, 1868, conveyed on that day certain lands to B. in fee. Subsequently, on the 26th April, 1869, C. produced a deed, bearing date the 12th March, 1868, purporting to be a demise of the same land for a long term of years, as from the 25th March, 1868, from A. to C. This deed had, in fact, been executed by A. and C., but at a date after the 7th of May, 1868, and had been fraudulently ante-dated by them. It was held, upon a case reserved, that A. and C. were guilty of forgery (*m*).

Where Brown gave Brittain a cheque for £7 on the Bank of London, which, having been presented and paid, was by them returned, cancelled in the usual way, to Brown, who altered it in the handwriting, and then took it back to the bank, declaring that it was a forgery, and wrote a statement to the effect that the cheque was forged by Brittain; Cockburn, C.J., is reported to have held that there was no forgery by Brown; the real offence committed by Brown, as regards the cheque, was obtaining money on credit by means of a false pretence that it was forged, whereas it was genuine (*n*).

If a bill of exchange, payable to A. B. or order, gets into the hands of another person of the same name as the payee, and such person, knowing that he is not the real payee, in whose favour it was drawn, endorses it, for the purpose of fraudulently possessing himself of the money, he is guilty of forgery (*o*).

The uttering of a note, as the note of another person, has been held

(*j*) R. *v.* Chadwick, 2 M. & Rob. 545. Rolfe, B.

(*k*) 3 Co. Inst. 169. Pult. 46 b. 1 Hawk. c. 70, s. 2. Bac. Abr. 'Forgery,' (A.) J.B. 27 Hen. VII. f. 3, pl. 21.

(*l*) 1 Hawk. c. 70, s. 2. Bac. Abr. 'Forgery,' (A.) in the notes. Moore (K.B.) 655.

(*m*) R. *v.* Ritson, L. R. 1 C. C. R. 200; 39 L. J. M. C. 10.

(*n*) Brittain *v.* Bank of London, 3 F. & F. 465. The case is very unsatisfactorily reported. It does not shew in what the alteration consisted, &c.

(*o*) Mead *v.* Young, 4 T. R. 28; 2 R. R. 314.

to be forgery, though such note was made in the same name as that of the prisoner.

The point arose in the following case: two prisoners, named P. and Thomas Brown, were indicted for forging a promissory note, purporting to be drawn by Thomas Brown for Self and Co. (*p*).

There was a second count for uttering the same, knowing it to be forged. The prisoner Brown uttered the note to one H., pretending that it was the note of his brother, who, he said, had just married a lady with a fortune of £15,000, and had deposited it in the hands of Down and Co. (where the note was made payable). H. asked if it was on the money lodged with Down and Co.'s: Brown said that it was, and added that his brother and he always paid in that manner on demand, for they wanted no credit. P. and Brown were connected together; and when P. was arrested, more than forty of these five-guinea notes, in blank, were found upon him, dated R., Salop; and a few of the same sort of notes were also found concealed under a board in a shop where Brown was arrested, and which it was probable he had thrust there. The note in question was proved to be filled up in the handwriting of P.; and the name of Thomas Brown was also in the handwriting of P. In P.'s pocket-book was found a receipt under a cover, addressed to Thomas Brown, at the prison to which Brown had been committed, for £21, for four five-guinea bills. Down and Co. had no such customers as Thomas Brown, of R., in Shropshire; and there was no evidence that the prisoner Brown had any residence or connection at that place. The jury found both prisoners guilty; and stated that they thought P. signed the note in question with Brown's assent, and that Brown uttered it under a representation that it was his brother's, knowing that it was not so, with intent to defraud H. It was objected: first, that the name *Thomas Brown* was the real name of one of the prisoners; secondly, that if P. were not guilty of forgery, Brown could not be guilty of uttering the note knowing it to be forged. The twelve judges held the conviction wrong as to P., on a ground irrelevant to the subject now under consideration; but all of them held the conviction right as to Brown; and Grose, J., afterwards delivered their opinion. He observed, 'as to the first objection, that the definition of forgery was, "the false making a note, or other instrument, with intent to defraud; which might be done either by using the name of one who did not exist, or of one who did exist, without his consent."' That this was of the former description; being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist: and that the circumstance of its being made in the same name as his own could not make any difference; being uttered as the note of another, and not his own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, *as the signer of the note*, applied, there could be no consent given to sign the name. It was signed by the authority of *a* Thomas Brown, but not of *the* Thomas Brown for whose note it purported to be given. For the person in whose name the note was made, was, according to the

(*p*) The words, 'I promise to pay the bearer on demand,' and also the words, 'the sum of five guineas, for value received. For Self and Co.,' were *printed* in the note.

description of him in the note, then a resident at R., in Salop; and it imported that he was a correspondent of Down and Co., and had money in their hands; and he was also represented to be the brother of the prisoner; but no such person of that name and description appeared to exist. And all this was proved and found to be done for the purpose of fraud. Thirdly, that the indictment did not charge that Brown uttered the note knowing it to have been forged *by P.*, but only knowing it to have been *forged:* and therefore, let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it (*q*).

J. H. was indicted for forging an endorsement of a bill of exchange in the name of B. M., with intent to defraud W. M. and E. B., &c.; and the indictment contained a count for uttering a forged endorsement in the name of B. M., with the like intention. The bill of exchange in question purported to be drawn by J. C. for S. & Co., Bath, on Messrs. B. & Co. of St. Helen's, London, in favour of B. M. The prisoner came to the shop of B. and M. to buy a watch, and offered them the bill in question, with the endorsement then written on it; they hesitated about taking it, upon which he told them it was a good bill, that his name was B. M., that he had endorsed it, and that B. and Co., by whom the bill purported to be accepted, were agents to the Bath Bank. The shopkeepers were not satisfied, and sent their servant to St. Helen's to inquire about the acceptance; but upon his returning and saying that he had seen a person at St. Helen's, who said the acceptance was good, they let the prisoner have the watch, and gave him the difference of the bill. The prisoner had procured the plate to be engraved some time before, containing the form of the bill in question, and had printed several hundred copies; he had always been known by the name of J. H.; and no such person as S. and Co. could be found in Bath, though there were such names put on the door of a house, whence the person who had been there had run away. The names of B. and Co. were on a counting-house door in St. Helen's, where a man of the name of B., who said he was a clerk, had lived; but was since taken up and lodged in prison. There was such a man as B. M., and the endorsement was in fact in his handwriting. The jury found a verdict of guilty, and found specially that there was such a person existing as B. M., and that the endorsement was in his handwriting; that the prisoner was not that person, but had passed himself upon the prosecutors as such at the time he tendered the bill in payment; and, on a case reserved, the judges were all of opinion that it did not amount to forgery, for there was no false endorsement, the jury having found that the endorsement was truly made by a real person whose name it purported to be (*r*).

And it was afterwards held by a majority of the judges that to adopt a false description and addition, where a false name was not assumed, and where there was no person answering the description or addition, was not forgery. The bill of exchange upon which the indictment proceeded was addressed to T. B., baize manufacturer, at R., and was drawn by the prisoner in his own name. The prisoner uttered

(*q*) R. *v.* Parkes, 2 Leach, 775; 2 East, P. C. 963.

(*r*) R. *v.* Hevey, 1 Leach 229; 2 East, P. C. 856.

this bill, with an acceptance thereon in the handwriting of T. B., whom the prisoner had known for many years, but who never had carried on the business of a baize manufacturer at R., nor ever resided there. The bill was accepted by B., payable at No. 40, C. Street, Holborn; and the person who lived at that house, and who knew B., and was well acquainted with his handwriting, stated that he was surprised at B.'s accepting the bill, payable at his house, as he did not reside there, and had no authority from the witness to make any bills payable at that house. The learned judge left it to the jury, in the first place, to consider whether there was any such person as T. B.; and, if there was, whether the acceptance was his, and that if there was no such person, or the acceptance was not his, and the prisoner, at the time he offered the bill to the prosecutors, knew either that there was no such person, or if there was that he had not accepted it, they should find him guilty. He also gave them other directions, but the jury found that there was no such person as T. B., and the prisoner was convicted. A case was reserved for the opinion of the judges, on the point whether, assuming that the acceptance was the handwriting of B., the prisoner, by the giving on the face of the bill a false description of B., and uttering the bill after it was accepted by B., with this false description, with intent to defraud, brought himself within any of the counts of the indictment which charged a forgery of the bill, and an uttering and publishing the forged bill, and also a forging of the acceptance, and the uttering and publishing such forged acceptance. And a majority of the judges held the conviction wrong (*s*).

A bill was addressed to W. and Co., bankers, Birchin Lane, London; and it appeared that possibly the figure 3, on the lower left-hand corner of the bill, might have been inserted originally as part of the address, but the evidence left that matter in doubt. The prisoner was asked at the time when he was drawing the bill whether the acceptors were W., B., and Co., and his answers imported that they were. W., B., and Co. lived at No. 20, Birchin Lane; and it was proved not to have been their acceptance. There were no known bankers in London using the style of W. and Co. except W., B., and Co.; but at No. 3, Birchin Lane, the name 'W. and Co.' was on the door; and some bills addressed to Messrs. W. and Co., bankers, Swansea, had been accepted, payable at No. 3, and had been paid there. There was no evidence as to the person who lived at No. 3; but another bill of the same tenor as that in question, drawn by the prisoner, had been accepted there. Upon these facts it was held that the prisoner was improperly convicted of uttering a forged acceptance, knowing it to be forged (*t*).

The first count charged the prisoner with forging a bill of exchange, the second with uttering the same bill, the third with forging an acceptance of a bill of exchange, and the fourth with uttering the acceptance. There were other counts not material. The instrument in question was drawn on Mr. William Wilkinson, Halifax.

The prisoner had in his employ one William Wilkinson, a mechanic, at sixteen shillings a week, and without any other property. This man

(*s*) R. *v.* Webb, R. & R. 405; 3 B. & B. 228.

(*t*) R. *v.* Watts, R. & R. 436.

proved the acceptance to be in his handwriting, so far as the mere name; he stated that he wrote that on a stamped paper, blank, except some printed parts of a bill, among which was the place of date; that he wrote it at the prisoner's house. He himself had never lived at Halifax, nor received authority from any one there to accept a bill for him. It was admitted that, at the time the acceptance was thus written, the prisoner intended to make the drawing to be on a William Wilkinson, of Halifax, and that there were persons of that name resident there, from none of whom any authority had been received. When uttered by the prisoner, the bill was drawn and accepted, and over the acceptance were the words, 'payable at S., P., and Co., bankers, London.' The jury having convicted, upon a case reserved, it was held that the putting an address to the acceptor's name, while the bill was in the course of completion, with intent to make the name of the acceptor appear to be that of a different existing person, was forgery (*u*).

On an indictment for forgery it appeared that the prisoner had in his service G. B. as foreman, and he got him to write his acceptance on a bill drawn by himself at three months for £32 11*s.* 8*d.*, and directed to 'G. B.,' without any address. He then, without, as far as appeared, G. B.'s knowledge or consent, filled in the address, 'Rottingdean.' The prisoner took this bill to a discount company, and said he (*quære* B. or the prisoner) was 'good for the amount.' There was a G. H. B. at Rottingdean, but he was a youth of seventeen, and knew nothing of the prisoner, and there was no other G. B. there. G. B., the foreman, had lived near Brighton, and had accepted bills for a person who lived at Rottingdean, but he denied that he had led the prisoner to suppose that these bills were addressed to him at Rottingdean. He had written this acceptance in the prisoner's shop, and he did not observe that there was an address upon it, nor did he believe that there was; but he admitted that he never read the bill. R. *v.* Blenkinsop (*v*) was cited for the Crown; Willes, J., however, pointed out that in that case there was evidence that the prisoner intended to make the drawing to be on a different person, and here there was no evidence of that, and directed an acquittal (*w*). The prisoner was then tried for another forgery. He had gone to one W., a bill discounter, and stated that he had business transactions with 'B., seedsman, Rottingdean,' and asked him whether, if he could get an acceptance of this B., he would discount it; and, after making inquiries, Woods said he would, and then discounted a bill, which, like the other, had been accepted by the prisoner's foreman who lived then at Maidstone, and had never lived at Rottingdean, and was no further a seedsman than having been foreman for years in that business. In this case the acceptance had been written by G. B. on a blank stamp, which the prisoner afterwards filled up, and put the address 'Rottingdean,' without, so far as appeared, B.'s knowledge or consent. There was no G. B. at Rottingdean. The false

(*u*) R. *v.* Blenkinsop [1847], 1 Den. 276: 17 L. J. M. C. 62; 2 C. & K. 531. 'Suppose any one in the street were to sign the name "Thomas Coutts," that being his real name, and afterwards the word banker was added, would not that be forgery?' Per Alderson, B., ib.

(*v*) *Supra.*

(*w*) R. *v.* Epps, 4 F. & F. 81,

address was not added to the acceptance but to the address. R. *v.* Blenkinsop (*v*) was cited for the prisoner to shew that the address must be that of a different *existing* person. Willes, J., said that could not have been the ground of the decision, as it was clear law that there may be a forgery in the name of a non-existing person, and it was too plain for argument that if a person added an address to a bill, so as to make it appear that the acceptance, though really written by a person of the same name, was that of a different person, whether such person existed or not, he was guilty of forgery. Here the bill was so altered as to make it appear that the acceptor was a seedsman, whereas he was a servant. It was then urged that the indictment was for forging the acceptance, not the bill, and that the acceptance was not altered. Willes, J., held that that did not matter, for in point of law there was no acceptance until the bill was drawn. It was, therefore, really the effect of the acceptance that was altered, and that was a forgery. It was then urged that the body of the bill, including the prisoner's address, was all in the prisoner's handwriting, and therefore it could not be forgery to alter what purported to be his own handwriting; and R. *v.* Webb, R. & R. 406, was cited; but Willes, J., said that that made no difference, and that the question for the jury was whether the bill was passed off to W. as that of a seedsman and customer, instead of what it really was, that of a mere servant; and he told the jury that 'forgery consists in drawing an instrument in such a manner as to represent fraudulently that it is a true and genuine document, as it appears on the face of it, when in fact there is no such genuine document really in existence, as it appears on the face of it to be. Consequently, if the prisoner passed off this acceptance as that of one B. of Rottingdean, thereby meaning one B., a seedsman, then find him guilty' (*x*).

The prisoner was indicted for forging, &c., a bill of exchange drawn by Richard M. on W. R. N. in favour of the Rev. J. N., and purporting to be accepted by W. R. N. The indictment also charged the forgery and uttering of the acceptance. The bill bore the prisoner's endorsement, and when he produced it to the prosecutor he asked who the parties to the bill were, and the prisoner said one was his brother, who was his tenant in Ireland, and the other was Mr. M., a clerk at Nine Elms station. It was proved that no clerk of the name of M. had been employed in that department between September, 1847, and November, 1851. On the part of the prisoner it was proved that Robert (*y*) M. was now a barrister's clerk, but in 1843 he had been a clerk at the Nine Elms station, and the prisoner must have known, in 1850, that he had left the station. In 1850 the prisoner asked M. if he would permit his name, as usual, to appear on the prisoner's bills, M. having previously given him permission to use his name and the prisoner at the same time produced some bills with M.'s name on them, and at last M. consented that his name should be used as drawer. The prisoner had married M.'s sister. It was also proved that W. R. N., whose name appeared as the acceptor, was the prisoner's brother, and went to America in 1850, and the handwriting was not his, but like the prisoner's. Williams, J., told the jury that if a representation

(*x*) R. *v.* Epps, 4 F. & F. 83.

(*y*) *Quære*, a mistake for Richard?

were made that an individual was worth £1,000, in order to obtain advances, and it should turn out that he was not worth ten shillings, it could not be maintained that the person so represented was fictitious, as he was really in existence; but, in the present case, it was for the jury to say whether the prisoner had tendered the bill with a knowledge that there was no such person at the Nine Elms station, and if they were of that opinion, and that the prisoner tendered the bill as that of a person who did not in fact exist, then the charge of forgery was sustained. Again, did the jury believe that the prisoner had forged the name of his brother? (z).

The prisoner was indicted for forging two promissory notes purporting to be drawn by P. M. and A. W. The prisoner being indebted to B. and Co., their agent pressed him for payment; he had previously ascertained that Mrs. W., the prisoner's mother-in-law, was a solvent person, but he did not know her Christian name; in the prisoner's presence he drew the body of two notes which the prisoner signed. The prisoner said he would go to his mother-in-law, and get her to sign them; and he took away the notes and returned in an hour, and handed the notes to the agent, saying, 'Here are the notes; they will be paid before they arrive at maturity.' The agent took the notes, believing they had been executed by the mother-in-law. It was proved that her name was Catherine, and that she had neither signed nor authorised any one to sign the notes; but they had been signed by her daughter Anne, the prisoner's wife, in her usual handwriting. The jury were told that if the prisoner got his wife to sign the notes in the name 'A. W.,' he at the time intending to pass them as the notes of his mother-in-law, and that he afterwards passed them to the agent for Messrs. B. and Co. as the notes of his mother-in-law, the indictment was supported. The jury found that he got his wife to affix the signature 'A. W.,' he at the time intending to pass them to the agent as the genuine notes of his mother-in-law. On a case reserved, it was urged that this was not forgery, as it was the signature by the prisoner's wife in her maiden name. There was no false making of the notes. It was answered that this was a false signature, and intended as such, and that W. was not the name of the prisoner's wife. Lefroy, C.J., said: 'It is well settled that the making of a written instrument, with a view to defraud, may be either by the false making of the signature of a non-existing person, or of an existing person without permission. Now here it was not to represent a fictitious person, but an existing person who was known, namely, the mother-in-law of the prisoner, that the prisoner put this signature to these notes. He professed to get her name, and he brings to the prosecutor what purports to be her signature, and an execution of the notes by her. It is true that the signature is "A. W.," not "C. W.,' but we are of opinion that the prisoner cannot avoid the consequences of his fraudulent act by a variation in the signature, which would not put a party on an inquiry as to its regularity and authenticity. He brought

(z) R. *v.* Nisbett [1853], 6 Cox, 320. The following written questions were given to the jury: 'Do you believe that the prisoner forged the acceptor's name with intent to defraud? Did he utter the bill knowing it to be forged? Did he forge the name of the drawer with a felonious intent? Did he forge the name of the drawer as a fictitious person?' The jury answered all the questions in the affirmative; but if they had only so answered the last the case would have been reserved.

these notes to the prosecutor as the instruments which he had promised to procure, namely, the notes of his mother-in-law; and whether he put this signature to them himself, or got a person to do it by his directions, he is equally guilty. We are, therefore, of opinion that the case was left to the jury, as it should have been, and that the conviction should be confirmed' (*a*).

The cases in which a party committing forgery has used a name different from his own, consist either of those in which the name used has been of a real existing person, or those in which the name used has been of a person non-existing and fictitious (*b*).

It is said to be clearly settled that in the case of forgery committed in the name of a person really existing, it matters not whether the offender pass himself off upon the parties at the time for such person, and receive credit from them as such, the credit in such case not being given to the impostor personally without any relation to another, but to that other person whom he represents himself to be (*c*).

E. D., an illiterate woman, was indicted for forging a promissory note, with intent to defraud H. She applied to H., calling herself M. W., and desired him to advance her money to pay the fees for the probate of her husband's will, which was in the hands of a proctor. She returned soon after with the probate of the will of J. W., therein described to be a seaman; and H. then required her to produce a certificate to shew that she was the M. W. named in the will. A few days afterwards she brought a certificate, and pressed H. to lend her money on the credit of the wages due to J. W., when he let her have three guineas and a half, and wrote the body of the promissory note in question, to which she subscribed her mark, after which his clerk attested it. She was then asked what name he was to put to her mark, to which she answered, 'You know my name; you may write M. W.,' which he did. It was proved that her name was E. D., and that the whole account was a fabrication. The jury were directed to find the prisoner guilty, if they believed that she subscribed the note in a false name, either by a mark intended by her to express such false name (*d*), or by words at length, with intent to defraud H., and the jury accordingly found her guilty; and, on a case reserved on the question whether as the note, though made by the prisoner in an assumed name and character, was her own note, made and offered as her own, and not as the note of another, in contradistinction to herself, the offence amounted to forgery, nine of the judges were of opinion that the prisoner was properly convicted (*e*).

This case appears to have proceeded upon the ground of the prisoner

(*a*) R. *v.* Mahony [1854], 6 Cox, 487 (I). Jackson, J., said, 'It is very common with the humbler classes in the south to call married women by their original name, when the Christian name, and not Mrs., is used. Except for this, there does not seem to be a doubt that the signature was a forgery.' Monahan, C.J., said, 'It is plain that the "A" was written in such a way as to render it difficult to say whether it was "A" or "C."'

(*b*) As to the meaning of a 'fictitious or non-existing person,' see Bank of England *v.* Vagliano [1891], A. C. 107. Clutton *v.* Attenborough [1897], A. C. 90. MacBeth *v.* North and South Wales Bank [1908], 1 K.B. 13; 77 L. J. K.B. 19.

(*c*) 2 East, P. C. 962.

(*d*) There is no doubt forgery may be committed by using a mark by way of signature, see R. *v.* Fitzgerald, *post*. p. 1631.

(*e*) R. *v.* Dunn, 1 Leach, 57; 2 East, P. C. 962, 976.

having assumed the character of executrix to W., a real person actually entitled to wages. Amongst the principles there laid down, it appears to have been held, that if a note be given in the name of another person who is either really existing, or represented so to be, and in that light it obtain a superior credit, or induce a trust which would not have been given to the party himself, it is then a false instrument, and punishable as forgery; and that the law would be the same, though the note or security were thus falsely subscribed in the presence of him who lent his money upon it, if the impostor and the party whose name is made use of were both strangers to him; for then he could not know that such impostor was not really the person whose name he assumed, and, therefore, the other would be equally deceived (*f*). This case occurred before any decision had established the principle, which will be presently noticed, of the use of a mere fictitious name being of itself sufficient to constitute a forgery (*g*). And it is observed that after the authorities by which it was settled that such a case was within the Acts respecting forgery, it would have been quite sufficient to have shewn that the prisoner, with a fraudulent intent, signed a promissory note in the name of M. W., and it would have been unnecessary to resort to the additional circumstance of the fraudulent object being to obtain credit in respect of money actually due to the deceased J. W., of whom M. was falsely alleged to be the representative (*h*).

Upon an indictment for uttering a forged acceptance it appeared that the prisoner called at the warehouse of the prosecutor at H., and bought some wool of his clerk, to whom he tendered in payment a bill of exchange, bearing the acceptance of 'J. C.,' and directed to 'Mr. J. C., Leeds.' The prisoner said the bill was as good as cash; whereupon the clerk said that he knew a respectable Leeds merchant of the name of C. attended H. market, and he asked the prisoner if this was the same person; to which the prisoner replied, 'Yes, it is.' The clerk then took the bill in payment, and delivered the wool to the prisoner. A few weeks afterwards, and before the bill became due, the prisoner called again, and bought more wool of the same clerk, for which he tendered in payment three other bills, all of them accepted by 'J.C.,' and addressed to 'Mr. J. C., Leeds.' One of these was the bill mentioned in the indictment. The prisoner stated that the bills were as good as cash, and that the acceptor was the same as on the former bill. The clerk took the bills in payment. The only persons at Leeds named C., who attended the H. market, were the partners in a firm of D. and J. C.,' none of whom had accepted any of these bills, or authorised the acceptance. On behalf of the prisoner another J. C. was called, and stated that he was an occasional assistant in a stable-yard at Leeds, and had no other means of subsistence; that he had for several years been in the habit of accepting bills for the accommodation of the prisoner, and had accepted the bills in question, as usual, at the prisoner's request; that he had never been a merchant, and never attended the H. market; that he accepted the bills in question on the days of their respective

(*f*) 2 East, P. C. 961.
(*g*) See *post*, p. 1618.
(*h*) 6 Evans, Coll. Stat. Pt. V. Cl. xii. p. 579.

dates. The three bills above mentioned all of them bore date after the first and before the second transaction. For the Crown it was urged that, as there is in respect of forgery no difference between the forgery of the name of an existing person and the use of a name that is purely fictitious, the question for the jury was whether, at the time the prisoner got C. to accept the bill in question, he did so with intent to use it as the acceptance of any other person, real or imaginary. Cresswell, J., after consulting Coleridge, J., told the jury that 'the facts charged might amount to forgery in two or three points of view. The prisoner asks C. to draw bills for his accommodation; C. does so, not knowing how they are to be used. This is no forgery on the part of C. But if a man signs or procures another to sign the name of another person to a bill without his authority, it is forgery. It is also forgery if the name so signed be that of an imaginary person. Where a person employs an innocent agent to do an act, he himself is responsible. C. is innocent as regards this charge. If, when the prisoner got C. to sign the bill, he meant to pass it as the bill of D. and J. C., or of an imaginary J. C., and uttered it with the purpose of fraud, he is guilty. The facts as to the uttering of the first bill are material. Did the prisoner know who was meant by the inquiry of the clerk as to attending H. market? If he did, "Yes, it is," must have meant that it was the bill of D. and J. C., and is evidence of the purpose of the original concoction. If he did not know D. and J. C., it might be that he meant a non-existing person. But before you can find the prisoner guilty you must go further. You must be satisfied that he got J. C. to put his name to the bill for the purpose, on the part of the prisoner, of putting off the bill either as that of D. and J. C., or of a non-existing person. The clerk's question might first put it into his head; if so, the first bill was not a forgery. After the credit on the first bill he again goes to J. C. What passes in his mind when the three other bills were drawn is a different question from what passed in his mind when the first was drawn. Do you find that he got the second bill accepted with intention to pass it as the bill of some J. C., real or imaginary, other than the J. C. who accepted it? In either of these events the prisoner is guilty of forgery' (*i*).

Writing the acceptance of an existing person to a bill of exchange without authority, or the name of a firm or person non-existing in acceptance of a bill, with intent to defraud, is forgery; and if a person write an acceptance in his own name to represent a fictitious firm, with intent to defraud, it is a forged acceptance; for, if an acceptance represent a fictitious firm, it is the same as if it represented a fictitious person (*j*).

The prisoner, J. P., was indicted for forging an endorsement on a bank post bill. Messrs. J. P. and Son carried on business near P., and consigned certain pieces of shirting to Messrs. B., of M., to be forwarded to Messrs. A., in America. Messrs. C., of London, were the correspondents both of Messrs. B. and A., and received from Messrs. A. a remittance, with a list of parties among whom it was to be divided, in which J. P. and S., of M., were included. Messrs. C. forwarded a letter addressed

(*i*) R. *v.* Mitchell, 1 Den. 282.
(*j*) R. *v.* Rogers, 8 C. & P. 629, Bosanquet, Coleridge, and Coltman, JJ.

on the outside to Messrs. J. P. and Son, but in the inside to Messrs. John P. and Son, promising to remit the amount received by the *Helena*.

This letter arrived in M.; but was put among the dead letters, as the parties were not to be found there. A postman met the prisoner, and told him of the existence of the letter. The prisoner got the letter and wrote to Messrs. C. asking for the money and signed 'for self and partner J. P,' and, not receiving an answer, he wrote another letter asking for an answer by return of post, and then Messrs. C. forwarded a bank post bill for £133 15*s.* 6*d.* in a letter addressed to J. P. and Son, M. The prisoner obtained this letter from the post-office, and went to a bank at M., and produced the bank post bill, which was made payable to J. P. and Son, and endorsed it 'Jas. P. and Son,' but when he handed it to the clerk, he said, 'This is a mistake; our firm is J. P. and Co., Spinners, Otham.' It was objected that this was not the forgery of an endorsement. 'This endorsement could not deceive the party to whom the bill was passed, as the name in the body is J. P. and Son, and that on the back Jas. P. and Son, and therefore it cannot be taken as the forgery of the name in the body of the bill.' Wightman, J.: 'It seems to me that I must take all the evidence together, and from that the bill appears to have been intended for John P. and Son, and that the prisoner, having obtained it by representing himself to be *John* P., afterwards endorsed it "Jas. P.," which is not the designation of the person for whom it was intended. It is true that J. P. and Son may mean any one, John or James; but I think it will be a question for the jury whether he did not intend to defraud John P. and Son when he added the words "and Son," which is not his firm.' After consulting Cresswell, J., who concurred, Wightman, J., told the jury: 'The endorsement being Jas. P. and Son, the charge against the prisoner is, that the name is forged, and that it is an endorsement of a non-existing firm; and, undoubtedly, if the name of a non-existing firm, or other fictitious person, be applied, with an intention to defraud, it will be forgery. With reference to the indictment, the objection, which is a technical one, does not apply here; because the indictment is in general terms, and charges him with forging an endorsement to a certain instrument, styled, &c., without saying that it was intended to represent any particular person, or the said J. P. and Son mentioned in the note. The question is, whether he intended by that endorsement to defraud any of the parties named in the indictment. The words in the letter are, "Messrs. John P. and Son:" that is not the name of the prisoner, nor the name of the firm under which he trades. It also names that they had received so much money from the proceeds of the *Helena*. If you are satisfied that at the time he received this letter he knew it was not for him, but for those persons to whom he had formerly delivered the letter directed "John P. and Son," or for some other person than himself, but that he nevertheless adopts the letter containing the money, and adopts that equivocal mode, writing J. P., and not James P., and received the bill knowing at that time it did not belong to him, but to certain other persons, and put the name of Jas. P. and Son upon it, there being no such firm in existence, and

if in doing so he intended to defraud any of the parties mentioned in the indictment, you must find him guilty' (*k*).

In a case where the prisoner was convicted and executed for forging a bill of exchange, the facts were, that he had pretended to be the Hon. A. A. H., brother of the Earl of H., and in that name induced a young woman to marry him, and imposed upon several persons in the neighbourhood; and that, during such residence, he drew the bill in question upon a gentleman to whom he was known by that name, and who probably would have paid the bill, if the deception had not in the mean time been discovered. It is observed, as a material ingredient in this case, that the prisoner assumed the name and character of a really existing person (*l*).

It is laid down, as a clear proposition of law, that the making of any false instrument which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing or fictitious person, is as much a forgery as if it had been made in the name of one who was known to exist, and to whom credit was due (*m*).

Where the prisoner was indicted on 2 Geo. II. c. 25 (rep.), for uttering a forged deed, purporting to be a power of attorney, from E. T., administratrix of her father R. T., deceased, to F. P., empowering the said P. to receive all money due to her, &c., the facts were clearly proved, and the prisoner was convicted. But a doubt was entertained whether, as R. T. had died childless, and as there was no such person as E. T., the case amounted to forgery; and the point was referred to the consideration of the twelve judges. Eleven of them were very clearly of opinion that the case was within the letter and meaning of the Act (*n*).

A person endorsing a fictitious name on a bill of exchange, to give it currency, will be guilty of forgery; and in a case which was stated to the judges, they were all of opinion that a bill of exchange drawn in fictitious names, when there are no such persons existing as the bill imports, was a forged bill within 2 Geo. II. c. 25 (*o*).

It has been held that a forged order on a banker, for the payment of money, purporting to be made by one who kept cash with him, was within 7 Geo. II. c. 22 (rep.), though made in a fictitious name (*p*), or in the name of one who had no authority to draw on him (*q*).

It is immaterial whether any additional credit be gained by using the false name.

E. T. was tried for forging an endorsement on a bill of exchange, for fifty pounds, in the name of J. W. The bill of exchange was drawn payable to the order of Messrs. R. and M., by whom it was endorsed generally, and it afterwards became the property of one W. W., out of

(*k*) R. *v.* Parke, 1 Cox, 4.

(*l*) R. *v.* Hadfield, Carlisle, 1803. Evans Coll. Stat. Pt. V. Cl. xii. p. 580.

(*m*) 2 East, P. C. 957.

(*n*) R. *v.* Lewis, Fost. 116. It is stated that the doubt arose from the passage in 3 Co. Inst. 169, where Coke, speaking of forgery, says, 'this is properly taken when the act is done *in the name of another person*.' But it was thought that Coke's description of the offence, on which the doubt was grounded, was apparently too narrow.

(*o*) R. *v.* Wilks, 2 East, P. C. 957. See R. *v.* Bolland, Id. 958, 1 Leach, 83.

(*p*) As to the meaning of this phrase, see Bank of England *v.* Vagliano, *ante*, p. 1613, note (*b*).

(*q*) R. *v.* Lockett, 1 Leach, 94; 2 East, P. C. 940. R. *v.* Abraham, 2 East, P. C. 941.

whose pocket it had been picked or lost. The prisoner took the bill to a bank where the clerk told the prisoner that it was the rule of their house never to take a discount-bill unless the person offering such bill endorsed it; but that if he would endorse the bill in question, it should be discounted. The prisoner immediately endorsed it by the name of 'J. W.,' and the banker's clerk, after deducting the discount, gave him the cash for it. The prisoner's name was not J. W. The judges, on a case reserved, were unanimously of opinion that this was a forgery within the statute on which the indictment was framed; for, although the fictitious signature was not necessary for the prisoner's obtaining the money, and his intent in writing a false name was probably only to conceal the hands through which the bill had passed, yet it was a fraud both on the owner of the bill and on the person who discounted it; as the one lost the chance of tracing his property, and the other lost the benefit of a real endorser, if by accident the prior endorsements should have failed (*r*).

A receipt, endorsed on a bill of exchange in a fictitious name, has been held a forgery, although it does not purport to be the name of any particular person. The prisoner T. was indicted for that he, having in his possession a bill of exchange for £20, drawn on one J. C., feloniously did make, forge, and counterfeit a receipt and acquittance for the said sum of twenty pounds, as followeth, 'Recd., W. W.,' with intent to defraud the said J. C. A second count stated an uttering with the like intent; and the third and fourth counts were for forging and uttering it with intent to defraud J. B. and H. S. The bill was endorsed in blank, and delivered to S., out of whose possession the prisoner obtained it by some undue means (which did not appear), and presented it for payment when it wanted two or three days of becoming due; he offered to give a trifle to adjust the difference, and accordingly gave the drawee, C., a shilling for the discount; C. then desired him to write a receipt on the back of the bill, which he did, by writing the receipt in question, in the fictitious name of W. It was submitted that this was not a receipt for money within the meaning of the statute, for that it was essential to the commission of forgery that the act should be done in the name of another; but that, in the present case, for anything that had appeared to the contrary, there never was such a person existing as the 'W. W.' whose name was supposed to have been forged. It was also submitted that the name 'W. W.' could not have been used with an intention to defraud, because no receipt at all was necessary, nor was the prisoner compellable to give a receipt, and he might as well have procured payment of the bill by writing the receipt in the name of 'J. T.,' as in the name of 'W. W.'; the possession of the bill being a sufficient discharge to the drawee. That, therefore, as the discharge to the drawee was not any way strengthened by the receipt the prisoner had given, the use of the fictitious name, which was not necessary to the accomplishment of any fraud, was of no effect. And it was further urged, that the prisoner gained no additional credit by the name he

(*r*) R. *v.* Taft, 1 Leach, 1722; East, P. C. 959. The judges also referred to R. *v.* Lockett, *supra*, as having decided that the forging a name either of a real or of a fictitious person, with intent to defraud, was forgery.

assumed; and that what he had written was a mere memorandum, and did not operate as an acquittance against any person but the man himself who received the money, and who would be equally estopped by it as if he had written his own name. But the objections were overruled upon the ground that, as this was a false receipt, the case was clearly within the statute on which the indictment proceeded. And, after observing that the prisoner knew he had obtained the bill fraudulently; that the better to elude inquiry after him it was necessary to conceal his name; and that his object was to defraud the real owner of the bill of its value: the Court held that if he intended to defraud anybody by the fictitious signature it was sufficient to constitute forgery. The jury having found the prisoner guilty, upon a case reserved eleven of the judges were of opinion that, though the prisoner did not gain any additional credit by signing the name 'W. W.' to the receipt, as the bill was not by the endorsement made payable to the person whose name was used, yet still it was a forgery; for it was done with intent to defraud the true owner of the bill, and to prevent the person receiving the money from being so readily traced (*s*).

It is now an accepted principle (*t*) that, 'if a person give a note or other security, as his own note or security, and the credit thereupon be personal to himself, without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery; for, in such a case, it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view' (*u*).

On an indictment for forging and uttering an order for £32, it appeared that the prisoner purchased a pony and cart from the prosecutor, and in payment for the same he drew a cheque for £32 in the presence of the prosecutor, and signed the cheque in the name of William Martin, his real name being Robert Martin, as the prosecutor knew. The prisoner gave the cheque to the prosecutor as his own cheque drawn in his own name, and the prosecutor put it in his pocket without looking at it. At the time he drew the cheque the prisoner knew that the cheque would be, as in fact it was, dishonoured. Upon a case reserved it was held that this did not amount to forgery (*u*).

In R. *v.* Sheppard (*v*), where the credit was without doubt given personally to the prisoner, the security tendered being considered as his alone, the judges agreed unanimously that the offence amounted to forgery. The prisoner was indicted for uttering an order for payment of money, knowing it to be forged, with intent to defraud. The order was a cheque on a bank in favour of J. A. or bearer, signed H. T., Green Street. The prisoner bought goods from the prosecutor and paid for them with the cheque, and gave his name as H. T., Junior, Noah's Row,

(*s*) R. *v.* Taylor, 1 Leach, 214; 2 East, P. C. 960. Buller, J., doubted.

(*t*) Laid down in R. *v.* Dunn, 2 East, P. C. 961. *Ante*, p. 1613.

(*u*) R. *v.* Martin, 5 Q.B.D. 34; 49 L. J. M. C. 11.

(*v*) 1 Leach 226. In 2 East, P. C. 967, it is stated that the prisoner was indicted for forging the order: in 1 Leach, 226, that he was indicted for uttering the order. Probably there were counts for forging, and for uttering the order, knowing it to be so forged.

Hampton Court. The prosecutor further stated that he gave credit to the prisoner, and not to the draft. No person of the name of H. T. kept cash at the bank, or lived in Green Street; nor could such a place as Noah's Row, or such a person as H. T., jun., be found at Hampton Court. The jury found the prisoner guilty, and, on a case reserved on the question whether, as the prosecutor gave credit to the prisoner, and not to the draft, it could amount to the crime of forgery, the twelve judges were unanimously of opinion that the conviction was right; for it was a false instrument, not drawn by any such person as it purported to be, and the using a fictitious name was only for the purpose of deceiving (*w*).

But in R. *v.* Aickles (*x*), not easily to be distinguished in principle from R. *v.* Sheppard, the judges were much divided in opinion.

A. was indicted for forging a promissory note, with intent to defraud. A second count charged him with uttering such note, knowing it to be forged. The promissory note purported to be drawn by J. M., Argyle Street, in favour of H. B. The note in question was, on the 9th of January, 1787, tendered by H. B. to G.'s shopman, in payment for some linens that were shewn by him to B. Upon being asked who J. M. was, B. described him as a gentleman of fortune, with whom he was concerned in a coal-mine, and as living at Argyle Street. The shopman declined to leave the goods with him; but promised to send them, if, upon inquiry, the note was good. He immediately went to Argyle Street, and inquired for Mr. M.; the prisoner appeared, and said his name was J. M., and that the note was drawn by him, and should be paid when due. The prisoner had taken the house, Argyle Street, in the name of J. M., and the person who let the house had inquired concerning him, by this description, at the British Coffee-house, and received a favourable account of his character. He had always passed by the name of A., and had been tried several times at the Old Bailey, and was known by that name since the year 1780, until the present time. Grose, J., entertained some doubt, and directed the jury that they could only convict the prisoner in case they believed that this note was drawn by him in consequence of a concerted scheme between him and B. to defraud G., that the prisoner had never gone by the name of J. M. before, and had assumed it for the purpose of this fraud. And he said that, if they were satisfied on these points, they might find the facts. Thereupon the jury found specially that the prisoner intended to defraud G., and assumed the name of M. for the purpose of this fraud; that he had never gone by that name before; and that they disbelieved a witness on the part of the prisoner, who had deposed that two years before he was inquired for and known by that name at the British Coffee-house. On this a verdict of guilty was taken by consent, subject to the opinion of the judges on the case. The opinion of the judges was pronounced upon this case by Ashhurst, J., to the effect that it did not amount to forgery. But the judgment appears to have been given under a misconception that the judges had so decided; when, in fact, the case had been adjourned for

(*w*) In 2 East, P. C. 967, it is said that R. *v.* Taylor (*ante*, p. 1619), and R. *v.* Dunn (*ante*, p. 1613), were relied on.

(*x*) 1 Leach, 438; 2 East, P. C. 968.

further consideration (*y*). It afterwards underwent further discussion, when many of the judges seemed to entertain an opinion that it was forgery; but several thought otherwise; and they never came to any final resolution on the matter (*z*).

The following reasons are given as those upon which Gould, J., and the other judges who coincided with him, thought that the case amounted to forgery. There was an apparent design for fraud in general; and the jury was satisfied that the prisoner had assumed the name of M., which was not his name, nor had ever been used by him before, but always A., with intent to defraud G. He, therefore, made the note in the name of another, as if his own, and clearly with an intent to defraud. Whether there existed a person of that name or not was immaterial; the felony consisted in the intent to defraud under the falsity. One might assume a feigned name, and make a draft in it, and yet innocently; as if he concealed himself to avoid arrest, and had appointed his friend on whom he drew to pay his bills; or, giving notes, took care to pay them when due. But the prisoner, having no such intention, but, on the contrary, to defraud the party, by making the note under such disguised name, by which, after he left the place of concealment, he could not be traced, the case amounted to forgery. There was no ground, he thought, to distinguish this from the common case where the draft is made in the name of a person who does not exist. It was in reality a deeper fraud, because the entity of such drawer would at once be disavowed at the place of his supposed residence; whereas, in the present case of a note, there would be no circumstance to find out the maker when he quitted the place where he made the note.

The judges, who inclined against the conviction, went on the doubt whether, to constitute forgery, it was not necessary that the instrument should be made as the act of another (*a*), according to the definition of Coke, whether that other existed or not. Whereas, here the note was made as the prisoner's own, and avowed by him to be so. The credit was given to the person, and not to the name; and the person, and not the name, was the material thing to be considered (*b*).

This point is discussed at some length in East's Pleas of the Crown (*c*) and an endeavour is made to ascertain the grounds upon which the judges who inclined against the conviction, might possibly have proceeded. But it is suggested that it is very difficult to distinguish the case from that of Sheppard: and that much of the difficulty in these cases arises from mistaking matters of fact for matters of law, and confounding the two together (*d*). Another learned writer observes that it may be difficult to admit that the case involved any real ground of doubt when the specific fraudulent intention was expressly found, and the taking the house was only a part of the machinery of the fraud: and, with respect to the suggestion in East, that the difficulty may have arisen from mistaking matters of fact for matters of law, he further observes that this seems to be the true view of the case; for, if the use of the assumed name is intended to

(*y*) 2 East, P. C. 969; 1 Leach, 440.
(*z*) 1 Leach, 438; 2 East, P. C. 968.
(*a*) See R. *v.* Lewis, *ante*, p. 1617, note (*n*).
(*b*) 2 East, P. C. 970.
(*c*) Ibid.
(*d*) Ibid.

commit a fraud in the particular instance, there is no reason for not treating it as forgery, although that may only be part of a more general system of fraud, which such assumption is intended to carry into effect (*e*).

The prisoner, S. Whiley, bespoke some goods of the prosecutor, which he directed to be sent to him, writing his direction in the prosecutor's book, 'Samuel Milward, No. 12, Kensington Place, Bath.' He called on the prosecutor, and the bill, amounting to £49 10*s*., was given to him. He gave the prosecutor a bill of exchange; and saying that he would give the prosecutor a draft on his banker in London for £60. The prosecutor looked at the bill of exchange, which was endorsed with the name 'Samuel Milward,' and, upon the prisoner saying it was a good one, gave him the balance of ten guineas. The bill of exchange having been dishonoured, the prosecutor went immediately to the prisoner's house, in Bath, but he found it shut up, and saw nothing more of the prisoner till he was in custody. A clerk from the bankers proved that they knew no such person as Samuel Milward. The prisoner's real name was Samuel Whiley: he was baptised as the son of persons of that name, was married by that name, had gone by the same name until the day after his first application to the prosecutor, when he ordered a brass plate to be engraved with the name of 'Milward,' which was fixed on the door of his house on the following day. The prisoner stated, in his defence, that he had understood that he was christened by the name of Milward; and that, being under difficulties, and afraid of arrests, he had omitted the name of Whiley. In answer to questions put by Thomson, B., the prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary; but that if the prisoner had come to him under the name of S. Whiley he should have given him equal credit for the goods, and have taken the draft from him, and paid him the balance as he had done when he came under the name of Milward. Thomson, B., left it to the jury to say whether the prisoner had assumed the name of 'Milward' in the purchase of the goods, and given the draft, with intent to defraud the prosecutor. And the jury saying that they were satisfied of the fact, found the prisoner guilty: and, upon a case reserved, the judges were of opinion that the question of fraud being so left to the jury, and found by them, the conviction was right (*f*).

The prisoner in R. *v.* Francis (*g*) took lodgings at the house of W., and gave an order in the name of J. C., drawn on P. and Co., to pay W. or order £15 for a bank note of £15, which she advanced to him upon his applying to her for change. The order was returned. The prisoner, first reading over the order, said that he saw he had made a mistake, and had forgotten to put the word 'junior,' which word he then added, and said that W. would find it would be right. Shortly afterwards the prisoner left the

(*e*) 6 Evans, Coll. Stat. Part v. Cl. xii. p. 580; and R. *v.* Hadfield is cited. See *ante*, p. 1617.

(*f*) R. *v.* Whiley, MS. and R. & R. 90. Cf. R. *v.* Marshall, R. & R. 75.

(*g*) MS. and R. & R. 209. Sir J. Mansfield, C.J., Macdonald, C.B., Grose and Lawrence, JJ., were absent.

house, saying he should return to tea; but he never did return. The order, with the addition, was presented at P. and Co.'s the next morning, and payment refused, the drawer not being known at that house, and no person of that name keeping cash there. The prisoner's real name was John Francis, though he occasionally had gone by other assumed names. The case was left by the learned judge to the jury, with a direction that they should consider whether the prisoner had assumed the name of J. C., junior, with a fraudulent purpose; and they found a verdict of guilty: but upon some doubts occurring whether the facts in evidence went to establish a forgery, or only a fraud, the case was referred to the consideration of the twelve judges, who held the conviction right; and were of opinion that if the name were assumed for the purpose of the fraud, and avoiding detection, it was as much a forgery as if the name assumed were that of any other person of known credit; though the case would have been different if the party had habitually used and become known by another name than his own. But it seems (*h*) that it must satisfactorily appear that the fictitious name was assumed for the purpose of fraud in the particular instance of the forgery in question, and that it will not be sufficient to shew that the fictitious name had been assumed for general purposes of concealment and fraud: as in a subsequent case, in which the prisoner was charged with forging an acceptance upon a bill of exchange in the name of S., the majority of the judges, being of opinion that it did not sufficiently appear upon the evidence that the prisoner had not gone by the name of S. before the time of accepting the bill in that name, or that he had assumed the name for that purpose, held that a conviction for such forgery was wrong.

But forging in a false name assumed for concealment, with a view to a fraud, of which the forgery is part, is sufficient to constitute the offence. And if there be proof of the prisoner's real name, it is for him to prove that he used the assumed name before the time he had the fraud in view, even in the absence of proof as to what name he had used for several years before the fraud in question (*i*).

On an indictment for forging an acceptance of a bill for £20, it appeared that the prisoner opened an account with the prosecutor for lace goods; he represented that he was in partnership with W, who was his brother-in-law. The account was a monthly account, and the first and second were paid; but afterwards the prisoner got in arrear, and wanted the prosecutor to draw upon the firm, which at last he consented to do. The bill in question was drawn, and the prisoner accepted it in the name of W. and Co. W. proved that he had never been in partnership with the prisoner, and had never given him any authority to use his name. It was held that it was a question for the jury whether the prisoner assumed the name of W. and Co. with a view of defrauding the parties with whom he dealt, by issuing false bills of exchange, of which this was one. It would not be sufficient that he assumed the name for the purpose of fraud generally; but the jury must find that he contemplated issuing this particular bill, and there

(*h*) R. *v.* Bontien, R. & R. 260.

(*i*) R. *v.* Peacock, R. & R. 278.

was no sufficient evidence to warrant them in coming to such a conclusion (*j*).

The prisoner was indicted for forging and uttering a cheque. He had asked R. to endorse the cheque for him; which he refused, but he wrote a letter to the Craven Bank, which he gave to the prisoner, speaking to the identity of the prisoner. The prisoner took this letter and the cheque endorsed 'R.' to the bank, and there saw the clerk, who objected that the endorsement was not very like R.'s, and the prisoner produced his letter, and said that he saw him sign his name at the back of the cheque. There was no proof that the cheque was not a valid one; but it was returned dishonoured on presentation. The endorsement was proved not to be R.'s. Willes, J., held that the endorsement, if genuine, would have rendered R. liable on the cheque, the same as an endorsement on a bill of exchange, and if the writing of R.'s name was intended to obtain credit with the bankers, it was a forgery with intent to defraud, and the case was left to the jury to determine whether the prisoner had endorsed R.'s name with the intention of inducing the bank to cash the cheque for him; and, if so, they were directed to find the prisoner guilty (*k*).

Authority to use Name.—It is forgery for a person to put the name of another on a bill of exchange as acceptor without that person's authority, even though the person putting the name expects to be able to meet it when due, or expects that such other person will overlook it. But if the prisoner either had authority from such other person, or from the course of their dealings *bonâ fide* considered that he had such authority, it is not forgery (*l*).

Upon an indictment for forging and uttering an acceptance on a bill of exchange in the name of John W., W. proved that the acceptance was not in his handwriting, and that he did not authorise any person to accept the bill. But he admitted that he had known the prisoner eight years, and had in 1829 been connected with him in trade, as a partner in a hat manufactory, and had had many money and bill transactions with him, and they had trusted each other largely; a mutual accommodation existed between them; none of those bills were accepted by procuration; the prosecutor had accepted for the prisoner's accommodation since 1836 to take up former acceptances; the prosecutor did not always know what the acceptances were for, as he depended on the prisoner's honour; and he might have drawn on the prosecutor five or six years before without apprising him of it; but the prosecutor had never before paid any bill on which the prisoner had used his name, and he always signed J. W., which the prisoner must have known. Coleridge, J., in summing up, said: 'We now come to the statement W. makes, and upon which it is supposed that the prisoner may rely for an acquittal; because he says that he has been for the last eight years in habits of great intimacy and in partnership with him. Now I put the question whether, though he had not authorised the signing of his name on that particular bill, he had ever given the prisoner a general authority. If he had said to the prisoner, "You may use my name whenever you like," it

(*j*) R. *v.* Whyte, 5 Cox, 290. Alderson, B., and Talfourd, J.

(*k*) R. *v.* Wardell, 3 F. & F. 82.

(*l*) R. *v.* Forbes, 7 C. & P. 224.

would be idle to say that the acceptance was a forgery. It is not merely writing another man's name, but writing it without authority and with intent to defraud. But I go further, because I think that if a person had reasonable ground for believing, from the acts of the party, that he had authority to accept, and did in point of fact act upon that, it would not be forgery. Put the case that upon a former occasion the prisoner had done what he is supposed to have done here, and on the bill being presented, W. had paid it without remark or remonstrance. If he had done that on three or four occasions, he might fairly say, "I infer that he authorised me to do it," and after that he could not be said to come within the description of a person who forged. But I cannot go the length which has been suggested. Let me suppose one or two cases:—Suppose the prisoner to have meant to raise £200 for two or three months, and trusted that at the end of the time he should receive £1000 and would be able to repay it, if he used another person's name without authority, and not believing that he had authority, that would be a distinct forgery. No man has a right to use another's name, trusting that he may be able to take up the bill. So, if a person having no authority were to say, "I want to raise a sum of money, and I am sure my father is so fond of me that he will not proceed against me criminally," and were to write his father's name to an acceptance, that would be forgery. No man has a right to trust to the kindness of another man. If you are of opinion that the prisoner acted in either of those ways, knowing that he had no authority, but meaning to repay the bill or trusting that W. would not prosecute, in either of those cases this would be forgery. There can be nothing short of the person believing that he had authority, and having a fair ground for that belief from the other party. The authority need not be express; it may be implied from acts. I put the question to see whether the prisoner had any reason for thinking that he had authority to use W.'s name. Now you are to judge whether you have any reason to believe, looking at the circumstances fairly between the Crown and the prisoner, not stretching it on one side or on the other, that the prsioner believed that he had authority and from circumstances had reasonable grounds for so believing. There was great intimacy between these parties: there had been great dealings between them. All which is to be taken into account. You certainly find that the moment W. is called upon he does not pay the bill, and he does not in the least adopt the act that was done by the prisoner: that is really the only point in the case' (*m*).

By the repealed Public Health Act, 1848 (11 & 12 Vict. c. 63,) s. 25, 'If any voter cannot write, he shall affix his mark at the foot of the voting paper in the presence of a witness, who shall attest and write the name of the voter against the same,' &c. The prisoners were indicted for forging and uttering certain voting papers purporting to have been signed under this provision, and the charge against them was that they had put the

(*m*) R. *v.* Beard, 8 C. & P. 143. See R. *v.* Parish, 8 C. & P. 94. In such cases, where the course of dealing between the prisoner and the prosecutor shews that the prosecutor on receiving notice that the prisoner has signed his name does not at once repudiate it, it is usually unsafe to convict. See R. *v.* Beardsall, 1 F. & F. 529. R. *v.* Smith, ib. 304.

marks of the voters to the voting papers, and signed their names as attesting these marks, whereas the voters had neither put their marks, nor authorised their being put; but it appeared that the voting papers had been filled up by the prisoners, either with the express or implied consent of the voters, or with the consent of some person whom the prisoners might reasonably believe to have authority; and Crompton, J., thereupon directed an acquittal. It was possible that the irregularity committed might be indictable; as it was clear the statute intended that the voter should affix his mark *propriâ manu* (*n*); but the attestation in the mode adopted in this case was not forgery. The essence of the crime of forgery is making a false entry or signature knowing it to be without authority, and with intent to defraud (*o*).

Evidence of honest belief in Authority.—As it is not forgery where the act is done under the honest belief that the party doing it had a right to do it, although in point of fact he had really no such right, evidence, which tends to shew that there was reasonable ground for such belief, is admissible on behalf of the prisoner. Upon an indictment for forging a receipt for £5, it appeared that the prisoner had in November, 1844, procured one Bartlett to sign the name of W. S. to a post-office order for £5, by means of which that sum was obtained from the post-office. When the prisoner was apprehended he stated that he had received a letter from W. S. desiring him to procure Bartlett to obtain the money. It was proposed to put in a letter purporting to come from W. S., dated August 30, 1844, and bearing post-marks of that date. That letter purported to inform the prisoner that W. S., who had been in America to avoid a charge of felony, had just returned, but was afraid of it being discovered where he was, and that he wanted money from his father, and for the purpose of avoiding detection requested the prisoner to write to any friend he had to ask him to post a letter to his father asking for the money, and that the prisoner was to copy any letters sent by W. S. in order to conceal him. It was contended that this letter was evidence for the prisoner; for whether it was written by W. S., or by his authority, or by some one without his authority, was immaterial; for if the jury believed that the prisoner acted as he had done in consequence of this letter, the prisoner was not guilty of forgery. Platt, B., having consulted Pollock, C.B., 'Supposing no post-mark at all were on the letter, yet his lordship thinks with me that the statement of the contents of the letter may be made, as it is pertinent to the matter in issue. But this letter having the post-marks of Bristol and Cheltenham upon it, and at a time before any of the frauds alleged against the prisoner were committed, the Lord Chief Baron has not the least doubt that it may be laid before the jury' (*p*).

The prisoner was indicted for forging a cheque on the prosecutors, J., L., and Co., with intent to defraud them. The prisoner and Dawson and Davies were members of a trade society. The funds of the society were provided by weekly contributions, and a sum of £400 was deposited in the bank of J., L., and Co., in the names of the prisoner and Dawson and Davies, and it was not to be paid out unless all three

(*n*) *Vide ante*, Vol. i. p. 646.
(*o*) R. *v.* Hartshorn, 6 Cox, 395.
(*p*) R. *v.* Clifford, 2 C. & K. 202.

attended to receive it. The bankers were not acquainted with the signatures of any of the three. The prisoner, having procured two persons to personate Dawson and Davies, went with them to the bank, and drew out the money. The clerk who paid the money asked their names, and the names of the three members were given; and the clerk, after referring to the ledger and to the pass-book, which was brought by the prisoner, and finding the names to accord, paid the money. It was held that this was a forgery with the intent to defraud J., L., and Co.' (*q*).

Validity of Thing Forged, if Genuine.—It is in no way material whether a forged instrument is made in such manner that, if it were in truth such as it is made to appear, it would be valid; (*r*) but it seems to be material that the false instrument should carry on the face of it the semblance of that for which it is counterfeited, and should not be illegal in its very frame (*s*). One of the definitions of forgery is given, as 'the false making an instrument, which purports *on the face of it* to be good and valid for the purposes for which it was created, with a design to defraud' (*t*).

Thus forgery of a protection in the name of A.B., as being a member of parliament, who in truth at the time was not a member, has been held as much an offence at common law as if he were so (*u*).

Where the defendant was convicted upon an indictment on 5 Eliz. c. 14 (rep.), which stated that one G. and his wife were seised in fee of certain messuages, lands, and tenements, called J., in the parish of C., in Essex, and that the defendant intending to molest them, and their interest in the premises, forged a lease and release as from G., and his wife, whereby they were supposed, for a valuable consideration, to convey to him 'all that park called J., in the parish of C., in Essex, containing eight acres in circumference, with all the deer, wood, &c., thereto belonging;' it was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those which were really the estate of G., and his wife, that it was impossible this conveyance could ever molest or disturb them. But it was held unnecessary that there should be a charge, or a possibility of a charge, and that it was sufficient if it were done with such intent, and that the jury had found that it was done with intent to molest G., and his wife in the possession of their land (*v*).

So where an indictment for forgery at common law of a surrender of the lands of J. S. did not aver that J. S. had any lands, it was held good upon the principle that it was not necessary to shew that the party was prejudiced (*w*).

Wills.—Upon the same principle, forgery may be committed by the false making of an instrument, purporting to be the will of a person still living, although the will can have no effect till his death (*x*); or by forging

(*q*) R. *v.* Dixon, 2 Lew. 178.
(*r*) 1 Hawk. c. 70, s. 7. 2 East, P. C. 948.
(*s*) 2 East, P. C. 948.
(*t*) By Eyre, B., in R. *v.* Jones, 1 Leach, 366; 2 East, P. C. 991.
(*u*) R. *v.* Deakins, 1 Sid. 142. 1 Hawk. c. 70, s. 7. 2 East, P. C. 948.
(*v*) R. *v.* Crook, 2 Str. 901; 2 East, P. C. 921.
(*w*) R. *v.* Goate, 1 Ld. Raym. 737.
(*x*) R. *v.* Murphy, 10 (Harg.) St. Tr. 183; 2 East, P. C. 949. R. *v.* Sterling 1 Leach, 99; 2 East, P.C. 950. R. *v.* Coogan, 1 Leach, 449; 2 East, P. C. 948. On an indictment for forging a will, the production of the probate unrevoked is not conclusive of the genuineness of the will. R. *v.* Buttery, R. & R. 342.

a will in the name of a non-existent person. On an indictment for such forgery, Patteson, J., said: 'There is nothing to limit the offence to the forgery only of the wills of persons that have existed, and it has been expressly held that forgery may be committed by the false making of the will of a living person' (*y*).

Administration Bond.—Upon an indictment for inciting S. R. to forge an administration bond, it appeared that S. R. had gone to Doctors' Commons, and executed the bond in question in the name of E. S. in order to obtain, as sister and next of kin, administration to the effects of J. S. The bond was also executed by two sureties in their own names. The evidence shewed that this was done for the purpose of fraudulently obtaining certain stock standing in the name of J. S. at the time of his death. It was objected that the Statute of Distributions (22 & 23 Car. II. c. 10) provided—that all the ordinaries shall 'of the respective person or persons to whom any administration is to be committed, take sufficient bond with two or more sureties' (*z*); and that in fact the bond in question was so taken; and, though in a wrong name, the bond was taken from the very person to whom administration was granted, and therefore was a bond taken in pursuance of the statute, and not a forgery. If an action had been brought upon the bond against S. R. in the name of E. S., she would be estopped by her execution of it in that name from denying her name to be S. But Gurney, B., Williams and Maule, J.J., were of opinion that the evidence shewed that the bond was forged, as it appeared that S. R. in the name of E. S., that not being her name at all, executed the bond as if she was really E. S. (*a*).

Deeds in Defective Form.—Forging a deed was held within 2 Geo. II. c. 25, sect. 1 (rep.) though subsequent statutes contained directory provisions as to instruments, for the purpose for which such forged deed was intended, being in a particular form, or complying with certain requisites, and the forged deed had not been made in pursuance of such provisions; for the *directory* provisions have not the effect of making a deed, not in the form prescribed, and without the requisites, altogether void (*b*).

Upon the same principle also, of its not being necessary that the instrument charged to be forged should be such as would be effectual if it were a true and genuine instrument, it has been held that forgery may be committed of an instrument which for validity requires to be stamped before its execution (*c*). The Stamp Acts are for this purpose treated as merely revenue laws, not affecting the crime of forgery.

Post-dated Cheque.—A bankers' cheque dated Aug. 29, but uttered on Aug. 28, has been held an order for the payment of money within 7 Will. IV.

(*y*) R. *v.* Avery, 8 C. & P. 596.

(*z*) Sect. 1. This part of the section was repealed in 1857 and replaced by 20 & 21 Vict. c. 77, ss. 81, 82.

(*a*) R. *v.* Barber, 1 C. & K. 434. The statement here is more correct than that in C. & K. The point is altogether misreported in R. *v.* Richards, 1 Cox, 62. C. S. G.

(*b*) R. *v.* Lyon, R. & R. 255: and see R. *v.* Froud, R. & R. 389; 1 B. & B. 300.

(*c*) R. *v.* Hawkeswood, 1 Leach, 257; 2 East, P. C. 955. R. *v.* Lee, 1 Leach, 258 n. R. *v.* Morton, 2 East, P. C. 955. R. *v.* Teague, 2 East, P. C. 979. R. & R. 33. R. *v.* Pike, 2 Mood. 70. R. *v.* Reculist, 2 Leach, 703. R. *v.* Davis, 2 Leach, 707 n.; 2 East, P. C. 956.

& 1 Vict. c. 66 (*d*). Cresswell, J. said, 'it is not necessary that the party should be bound to pay it at once if it were genuine' (*e*).

Genuine Appearance.—The resemblance of a false instrument on the face of it to that for which it is counterfeited need not be exact: and it seems to be sufficient if the instruments are so far alike that persons in general using their ordinary observation upon the subject may be imposed upon by the deception, though it would not impose upon persons having particular experience in such matters (*f*).

The prisoner was indicted for forging a Bank of England note. The fifth count, which was that on which the question turned, alleged that the prisoner 'did forge *a certain promissory note for the payment of money*, with the name of T. T., thereunto subscribed, purporting to bear date, &c., and to have been signed by one T. T., for the governor and company of the Bank of England, for the payment of £50 to Mr. Joseph Crook or bearer, on demand, the tenor of which, &c., with intention to defraud the governor and company of the *Bank of England*.' It appeared that the note had never been published, being found in the prisoner's possession at the time he was apprehended; but the forgery was brought home to him and he was convicted. The officers of the Bank of England proved that the note was in every respect similar to a bank note, both in the written and printed parts of it, except, firstly, that the number was not filled up; secondly, that the word 'pounds' was omitted in the body of the note; thirdly, that the texture of the paper was rather thicker than that used by the Bank; and fourthly, that, in the fabric of it, the water-mark, viz., the words 'Bank of England,' were not inserted; but they said that a bank note, with a like omission of the word 'pounds' in the body of it, being regular in other respects, would be paid, by the usage of the bank, after it had passed the examiner's office. And a real bank note of the same date and tenor, except as above excepted, was produced in evidence. It was contended that this was not a note resembling a bank note for want of the water-mark; and also that it was not a note for fifty pounds, the word 'pounds' being omitted; but, on a case reserved, the judges were of opinion that the conviction was right; as in forgery there need not be an exact resemblance, and it is sufficient if the instrument is *primâ facie* fitted to pass for a true instrument. The majority of the judges inclined to think that the omission of the word 'pounds' in the body of the note, had nothing else appeared, would not have exculpated the prisoner; and that it was a matter to be left to the jury, as it was done, whether it purported to be a note for fifty pounds, or any other sum; and all the judges agreed that the 'fifty' in the margin of it removed every doubt, and shewed that the fifty in the body of the note was intended for fifty pounds (*g*).

(*d*) In R. *v.* Hawkeswood, 2 East, P. C. 956, it is said by Buller, J. that the Stamp Acts apply only to genuine instruments. Under the Stamp Act, 1891 (54 & 55 Vict. c. 39, s. 14) (4), documents not duly stamped are admissible in 'criminal proceedings.'

(*e*) R. *v.* Taylor, 1 C. & K. 213. As to the legal position of post dated cheques, see Royal Bank of Scotland *v.* Tottenham [1894], 2 Q.B. 715.

(*f*) 2 East, P. C. 858, 950.

(*g*) R. *v.* Elliot, 1 Leach, 175; 2 East, P. C. 951; 2 B. & P. (N. R.) 93, (n). De Grey, C.J., and Smythe, C.B., were absent.

Where the prisoner was indicted for the forgery of bank notes, and a witness for the prosecution, who came from the Bank of England, stated that he could not have been imposed upon by the forged notes, the difference between them and the true notes being to him very apparent in several particulars, but it appeared that others had been deceived at first by them, though they were very ill executed. Le Blanc, J., ruled the case to be one of forgery (*h*).

Where the prisoner had engraved a counterfeit medicine stamp, so as to be like to a genuine stamp, except only that the centre part which in a genuine stamp specifies and denotes the duty, was blank in the first instance, but cut out before the counterfeit stamp was used, a paper with the words 'Jones, Bristol' on it being pasted over the vacancy, and then uttered such counterfeit stamp, it was holden that he was guilty of a forgery and uttering. Grose, J., in delivering the opinion of the twelve judges on this case, after stating that it was proved that those parts of the counterfeit stamp which remained were a perfect resemblance of the same parts on a genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of every common observer, further said, 'An exact resemblance or facsimile is not required to constitute the crime of forgery; for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient' (*i*). It has been determined on 25 Edw. III. stat. 5, c. 2, that splitting the great seal, and closing it again to a false patent, is a counterfeiting of the seal (*j*); and that where the seal is substantially counterfeited, the adding or omitting of a crown, the leaving out words in the style, or adding others, or making any other minute variation in the counterfeit, which is often done purposely, and by way of eluding the law, will not alter the case (*k*).

A mere literal mistake in the framing of the instrument itself will not make any difference. And where the prisoner, in forging an order for the delivery of goods, blundered in spelling the name, using *Desemockex* for *Desormeaux*, no stress was laid on such circumstance, though the indictment was held bad on other grounds (*l*).

F. and L. were indicted for forging the will of Peter P. The will began —'In the name of God, Amen, I, *Peter* P.,' &c., and ended '*John* his mark P.' The prisoner, F., carried the will to the office of the deputy-registrar, who, on observing the difference of the Christian names, told him that he must produce the person who had written the will, or the person who was present when it was executed, in order to account for this error, before the probate could be granted. F. accordingly produced the other

(*h*) R. *v.* Hoost, 2 East, P. C. 950.

(*i*) R. *v.* Collicott, 2 Leach, 1048; 4 Taunt, 300; R. & R. 212, 229.

(*j*) 1 Hale, 178, 184.

(*k*) R. *v.* Robinson, 2 Rolle, R. 50; 1 East, P. C. 86, an indictment under 1 Mary, c. 6 (rep.), for counterfeiting the privy signet. In East, *ubi supra*, it is said, 'The disparity, however, may be so great between the true and false seal that it would not amount to a counterfeiting within the statute, as if it be evident to the view of every man's eye.' See 24 & 25 Vict. c. 98, s. 1, *post*, 1683.

(*l*) R. *v.* Clinch, 1 Leach, 540; 2 East, P. C. 938, 953.

prisoner L., who, in the name of W., swore that he was one of the subscribing witnesses; that the name of the deceased was Peter P.; that the said Peter P. did make his mark to and deliver the said will; and that he (W.) by mistake had written the name John P. instead of Peter P. Upon this probate of the will was granted. The prisoners having been found guilty, the question was reserved, whether this was in law a forging of the will of Peter P., as laid in the indictment: and, though no opinion was ever publicly delivered, the prisoners were afterwards executed pursuant to their sentence (*m*).

On an indictment for forging and uttering a bill of exchange (*n*) it appeared that the prisoner took the bill to a banker, in order to get it discounted, and, upon receiving the discount, endorsed it there, but not in his own name; and though there was the endorsement of another name upon the bill besides that which the prisoner endorsed, yet there was no endorsement upon it of the names or firm of the drawers who were also the payees. It was objected that, as there was nothing upon the bill purporting to be an endorsement of the drawers, it could not pass as a bill of exchange, and was not capable of defrauding the persons whose names were forged (*o*). Wood, B., overruled the objection; and, upon the point being afterwards submitted to the consideration of the judges, they were of opinion that the conviction was right (*p*).

Upon an indictment for forging the following instrument, which was described as a bill of exchange,

'Flintshire District Banking Company.

'Twenty-one days after date pay (without acceptance) to the order of Mr. James Henderson, £70,

'For value received,

'For the Company,

'J. WATKINS, Manager.

'To the London and Westminster Bank,
Throgmorton Street, London.'

In overruling an objection that this was not a bill of exchange, Patteson, J., said, 'This instrument certainly differs from all others that I have seen as bills of exchange, by reason of the words "without acceptance." I do not, however, consider that the insertion of those words

(*m*) R. *v.* Fitzgerald, 1 Leach, 20; 2 East, P. C. 953.

(*n*) A bill of exchange is 'an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer. An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.' Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3 (1 and 2).

(*o*) See amongst other cases, R. *v.* Moffatt, *post*, p. 1637, note (*j*), and R. *v.* Wall, *post*, p. 1637, note (*j*) were cited.

(*p*) R. *v.* Wicks, MS. and R. & R. 149. Bayley, J., was not at the meeting of the judges, but he thought the conviction wrong, on the ground that for want of an endorsement the bill was not negotiable, and therefore, if genuine, would not have been of value to the taker of it. In R. *v.* Cartwright, R. & R. 106, an indictment was held bad, on the ground that the instrument given in evidence was not, as stated, an order for money. Le Blanc, J., questioned whether this paper, though not directed to any person as a drawer, might not, under the circumstances, have been treated as a bill or order: note (*l*).

alters the character of the instrument, so as to prevent its being a bill of exchange. All that is necessary to constitute a bill is, that the party making the instrument should direct it to some other party, requiring that other party to pay the money therein mentioned to some third person or his order, or to the order of the party so making the instrument. The drawer may in each case prescribe the terms upon which the payment is to be made. Here he has chosen to prescribe that the drawee is to make the payment "without acceptance"; the meaning of which I take to be that the holder is not to be put to the trouble of presenting it to the drawee, before it becomes due; but still if he should choose to present it, there is nothing to prevent the drawee from accepting it; actual acceptance, of course, is not necessary to make the instrument a bill of exchange. Bills are daily noted and protested as bills for non-acceptance; they must, therefore, be bills before acceptance. Bills at sight are not, in fact, commonly accepted. I think, therefore, that the instrument is properly described as a bill of exchange' (*q*).

A bill drawn upon the treasurer of the navy, payable to blank or order, and signed in the name of a navy surgeon, has been held not to be an order for the payment of money because there was no payee (*r*).

An instrument in the form of a bill of exchange with an acceptance on it has been held a bill of exchange, although there was no person named as drawee in the bill.

The indictment charged the uttering of a bill of exchange with a forged acceptance on the bill in which no drawee was named was written a forged acceptance, as follows:—

'Accepted, payable at Messrs. Gillett and Tawney's, Bankers, Banbury,

'W. S.'

Upon a case reserved, a majority of the judges present held that the instrument upon which the forged acceptance was written was properly described as a bill of exchange, though not addressed to any person as drawee (*s*).

The prisoner was convicted of uttering the following instrument:—

'Bristol, 17th February, 1843.

'£150. Three months after date pay to the order of Mr. Smith the sum of one hundred and fifty pounds for value received, as advised by the Bristol Old Bank.

(*Signed*) 'HENRY BUSH & COMPY.

'At Messrs. Prescott, Grote & Co., Bankers, London.'

Endorsed by S. S. Smith and several others. Rolfe, B., having a doubt whether such an instrument, there being no drawee and no acceptor, could be said to come within the description of a bill of exchange, a promissory note, an order for the payment of money, or a warrant for

(*q*) R. *v.* Kinnear, 2 M. & Rob. 117.

(*r*) R. *v.* Richards, R. & R. 193. R. *v.* Randall, R. & R. 195. See Chamberlain *v.* Young [1893], 2 Q.B. 206; 63 L. J. Q.B. 28, *post*, p. 1747, and R. *v.* Snelling, *post*, p. 1747.

(*s*) R. *v.* Hawkes, 2 Mood 60. Parke, B., and Patteson and Coleridge, JJ., dissented. Littledale, and Park, JJ., and Bolland, B., were absent. Gray *v.* Milner, 8 Taunt. 739, was cited.

the payment of money, reserved the question for the opinion of the judges, who all thought the instrument a bill of exchange (*t*).

But an instrument in the following form :—

'Hylton, Feb. 17, 1841.

'Please to pay on demand to the bearer the sum of twenty pounds for value received, as witness our hand,

(*Signed*) 'T. G. & Co.'

was held not to be a bill of exchange there being neither drawee nor acceptance (*u*).

And where an instrument was not addressed to any person, great doubts were expressed whether an instrument could be a bill of exchange unless it had both a drawer and a drawee ; and Alderson, B., thought he was wrong in R. *v.* Hawkes (*v*), and that in that case the fact was not adverted to that Gray *v.* Milner (*w*) might be explained on the ground that a bill made payable at a particular place or house is meant to be addressed to the person who resides at that place or house ; therefore in that case the bill was on the face of it directed to some one. The Court held that as the defendant promised to pay it, that was conclusive evidence that he was the party to whom it was addressed ; and Parke, B., said that the fact of the defendant's acceptance was conclusive evidence that he lived at that house, and consequently the drawer was induced to look no further (*x*).

The prisoner was indicted for forging a warrant for the payment of money, which purported to be a cheque drawn in the name of a society, and signed by the chairman and three members of a sub-committee of the society. By the rules of the society all cheques drawn on the bankers of the society, on account of the society, were to be signed by the chairman and three members of a sub-committee, and were then to be countersigned by the clerk of the society. The prisoner brought the cheque alleged to be forged, bearing four signatures, which purported to be those of the chairman and three members of a sub-committee, to B., and he, supposing the signatures to be genuine, countersigned the cheque in the usual manner. The four signatures were forgeries. It was objected that without the name of B. the instrument was not complete. It was answered that it was a complete order without B.'s signature, which was no part of the instrument, but merely a guarantee that the other signatures were genuine ; and Denman, C.J., overruled the objection (*y*).

An indictment charged the uttering of a forged document, described as a warrant for the payment of money in one count, and as an order for the payment of money in another. The prisoner was in the employment of a railway company, and it was

(*t*) R. *v.* Smith, 2 Mood. 295. Gray *v.* Milner *ubi sup.* was considered in point.

(*u*) R. *v.* Curry, 2 Mood. 218. R. *v.* Hawkes (*supra*) was distinguished on the ground that the acceptance there created a sort of estoppel.

(*v*) *Supra.*

(*w*) 8 Taunt, 739.

(*x*) Peto *v.* Reynolds, 9 Ex. 410. When this case was in error, 11 Ex. 418, the Court avoided expressing any opinion on this question. And in Fielder *v.* Marshall, 9 C. B. (N. S.) 606, a similar course was adopted. The latter case shews that sometimes an instrument of this kind may be a promissory note, and therefore in any case of doubt the indictment should contain counts for forging, &c., a promissory note.

(*y*) R. *v.* Lee, 3 Cox, 80.

the duty of him and a fellow-clerk to fill up the dividend warrants payable to the proprietors, and to place the stamps on them, and put the initials of the company on the stamp, and to take them to the secretary of the company to sign, and afterwards to post them. The instrument in question was regularly, and in the course of their duty, made out by the prisoner and his fellow-clerk, and was properly stamped and initialed by them, and was afterwards duly signed by the secretary. The endorsement of the proprietor was afterwards forged, and the prisoner uttered the document with the forged endorsement on it. The bankers would not have paid the money mentioned in the order, even to the proprietor himself, without his endorsement; upon a case reserved, it was held that, as there appeared to have been no authority to pay the money mentioned in the document without the endorsement of the proprietor, that endorsement might be considered as necessary to make the instrument a perfect order or warrant authorising or requiring the payment. Whether the document were regarded as the warrant or order of the company upon their bankers, or as the warrant or order of the proprietor to the bankers to pay out of the company's funds (made subject to his order to the amount specified in the instrument), it still was imperfect without the proprietor's endorsement, and contained neither an authority or request to pay without such endorsement. And therefore the forging of the signature of the proprietor amounted to a forgery of the entire document (*z*).

Latent Defect.—It is no objection to the charge of forgery that the instrument is not available, by reason of some collateral objection not appearing upon the face of it (*a*). Thus, on an indictment, for forging an order for the payment of prize-money, where it appeared that the person whose name was forged was a discharged seaman, and was, at the time the order bore date, within seven miles of the port where his wages were payable. Under such circumstances his genuine order would not have been valid unless made as prescribed by 32 Geo. III. c. 34, s. 2 (rep.); the offence was held to be forgery, the order itself purporting, on the face of it, to be made at another place beyond the limited distance (*b*).

(*z*) R. *v.* Autey, Dears & B 294: 26 L. J. M. C. 190.

In R. *v.* Turpin, 2 C. & K. 820. Platt, B., held that a cheque on the treasurer of a poor law union which required the signature of the majority of the parish officers was not an order for payment of money nor a warrant to pay money. And that altering before completion was not forgery. This decision seems very questionable. R. *v.* Bingley, R. & R. 446. R. *v.* Kirkwood, 1 Mood. 304, and R. *v.* Dade, ibid 307, shew that if several make distinct parts of a forged instrument, each is a principal, though it is finished by one alone in the absence of the others. It is plain, therefore, that a party may be guilty of forging an instrument, though at the time he executes part of it, such instrument is in an incomplete state. If, therefore, a person alters an incomplete instrument, with intent that it shall afterwards be completed, and it is afterwards completed, it should seem that he is then guilty of forging such instrument, especially where the only false part is that executed by himself. In this case also the prisoner appears to have signed the cheque last, and until he signed there was not a majority of the officers who had signed; the forged instrument therefore, was completed by the prisoner himself. Again, the prisoner must have uttered the cheque to some one, and to whom is immaterial, if it was then in its altered state, and of that no question seems to have been made, and therefore he ought to have been convicted of uttering. See R. *v.* Cooke, 8 C. & P. 582. (*Ante*, p. 1604), C. S. G.

(*a*) 2 East, P. C. 956.

(*b*) R. *v.* M'Intosh, 2 East, P. C. 942; 2 Leach, 883.

The indictment against the prisoner was for forging and uttering an order on the treasurer of a poor law union purporting to be signed by 'J. W., Presiding Chairman; J. R., J. C., Guardians; H. P. (the prisoner), Clerk to the Board of Guardians of the said Union.'

The signatures of W. and R. were proved to have been written by them at a meeting of the guardians of the union, but it was not proved that W. was the presiding chairman when he signed the order. The signature of J. C. was proved to be forged. Upon a case reserved, it was contended that though the instrument purported to be signed by the presiding chairman, and so was on the face of it valid, yet it might be shewn on the part of the prisoner that in fact the person signing and describing himself as presiding chairman did not fill that character, and that the instrument would then be equally invalid, as if the deficiency had been on the face of the instrument: but these contentions were held to be unfounded (*c*).

Instruments not resembling a Genuine Instrument or Illegally Framed (*d*).—Where the instrument charged to be forged was an order in the name of a creditor to a gaoler, for the discharge of a debtor who was in prison under an attachment for a contempt, it was objected that such instrument was a mere nullity in itself, even if genuine; but it became unnecessary to decide upon the objection (*e*).

Where the false instrument was in the following form, without any signature:—

'No. F. 946.

'I promise to pay John Wilson, Esq., or bearer, Ten Pounds.

'London, March 4, 1776.

£ *Ten.* 'For Self and Company, of my Bank in England.'

'Entered, JOHN JONES,'

and it was laid in one set of counts as a paper writing, purporting to be a bank note; and in another as purporting to be a promissory note, for the payment of money; the prisoner was held entitled to an acquittal, though it was specially found by the jury that the prisoner averred that the instrument was a good bank note, and uttered and published it as a good bank note. The Court said that the representation of the prisoner could not alter the purport of the instrument, which was what appeared upon the face of the instrument itself; and that although such false representations might make the party guilty of a fraud or cheat, they could not make him guilty of a felony (*f*).

Where a bill of exchange was directed to 'John *Ring*,' and the acceptance was by 'John *King*;' and the indictment stated that the bill

(*c*) R. *v.* Pike, 2 Mood. 70. Abinger, C.B., said, 'It does not lie in the prisoner's mouth to set up that Warnes was not in fact chairman. By uttering the bill he represents the whole as true.'

(*d*) *Ante*, p. 1627.

(*e*) R. *v.* Fawcett, 2 East, P. C. 862, 952, where it is said that it does not appear whether the judges decided the case on that ground; as, at any rate, the indictment was held good as a cheat. And see R. *v.* Gibbs, 1 East, 173, 2 East. P. C. 864.

(*f*) R. *v.* Jones, 1 Doug. 300: 1 Leach. 204: 2 East, P. C. 883, 952. Upon this case, Sir J. Mansfield, C.J., in the case of R. *v.* Collicott, 4 Taunt. 303, 2 Leach at p. 1053 observed, 'Jones's crime was that of telling a falsehood.'

purported to be directed to John *King* by the name of John *Ring*, and that the prisoner forged the acceptance in the name of John *King*; judgment was arrested, because *Ring* could not purport to be *King* (*g*).

The prisoner was convicted of uttering a forged promissory note for the payment of £40, with intent, &c. The note in question had been originally issued by the Bedford bank as a one pound note, but was afterwards altered by cutting out or obliterating the word one and pasting in or inserting in the place of it the word forty, and by cutting off the last line which contained the signature, and by some other smaller alterations. The note thus altered was uttered by the prisoner, as a note for forty pounds, and the prosecutor gave him forty pounds in change for it. Objection was taken on behalf of the prisoner, that this note as uttered by him was incomplete, and was not, nor did it purport to be a promissory note, for want of the signature; and that, therefore, it was not the subject of forgery within the statute (which made forgery of bank notes a capital offence); and, on a case reserved, the judges were unanimously of opinion that the objection was well grounded and the conviction wrong (*h*).

The prisoner was convicted of a misdemeanor, at common law, on a count which charged in substance as follows; that the prisoner unlawfully and fraudulently did dispose of and put away to one J. H. a certain forged *promissory note*, which was as follows:—

'I promise to take this as thirty shillings on demand, in part for a two pound note value received.

'Entd. J. C.

'For C., B., & Co.'
'R. C.'

with intent, &c. It was objected that this instrument could not in any legal sense be denominated a promissory note, as charged in the indictment; and the learned judge reserved the point, it appearing also to him that there was great doubt whether the genuine instrument or writing, supposed to be forged and uttered, had any legal validity; and whether it was not a mere nullity, for the forgery of which no indictment could be sustained; and the judges decided that judgment should be arrested (*i*).

So where the prisoner was indicted for forging and uttering a bill of exchange in the following form:—

'Please to pay to your order the sum of forty-seven pounds for value received.

'To Mr. G. P., Yeovil.' 'J. B.'

'Accepted, G. P.,' and endorsed 'J. B.;' it was objected that this was not a bill of exchange; it was nothing more than a request to

(*g*) R. *v.* Reading, 2 Leach, 590: 2 East, P. C. 952, 981.

(*h*) R. *v.* Pateman, R. & R. 455. See R. *v.* Harper, 7 Q.B.D. 78; 50 L.J.M.C. 90, R. *v.* Mopsey, 11 Cox, 143, and Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3.

(*i*) R. *v.* Burke, R. & R. 496. The instrument stated in the indictment was not payable to the bearer on demand; was not payable in money; the maker only promised to take it in payment; and the requisitions of 17 Geo. III. c. 30 (rep.) were not complied with. See 45 & 46 Vict. c. 61, s. 83.

a man to pay himself, and the acceptance of such a document laid the acceptor under no obligation to a third party; Erskine, J., said he would reserve the point, and the prisoner was convicted, but the learned judge afterwards thought the objection so clearly good, that he recommended a pardon for the offence (*j*).

Upon an indictment (*jj*) for uttering an order for the payment of money with intent to defraud B. in one count, and W. in another, it appeared that the prisoner applied to B., a relieving officer of A., for payment of money under the instrument described in the indictment, and represented herself as the wife of W. H. therein mentioned, and stated as a reason for his not presenting it personally, that he was sick. B. stated that, except as relieving officer, he was not an overseer, but that he was authorised by W., the overseer, to pay money to persons producing prisoners' passes under the 5 Geo. IV. c. 85 (rep.) The instrument in question, after reciting the provision in 5 Geo. IV. c. 85, as to discharged prisoners being entitled to a certain allowance from the overseers of the poor of any place through which they might pass to the places of their settlement, required the overseers of the poor of the places mentioned in the route to issue to the discharged prisoner the said allowance specified in the said route, as required by the said Act. The instrument contained the 'Route for W. H., his wife and children,' which specified 'the names of the places through which the discharged prisoner is to travel' (amongst which A. was *not* included). The seals to the instrument were small pieces of paper, affixed to it by wafers. Upon a case reserved after conviction, it was objected, *inter alia*, that this instrument was not a warrant, as the statute, sect. 23, required it to be sealed with the county seal, or with a seal to be specially provided for that purpose —in this case the seals were common paper seals without any impression. The forgery, therefore, was incomplete. The Court, however, upheld the conviction.

SECT. II.

THE WRITTEN INSTRUMENTS IN RESPECT OF WHICH FORGERY MAY BE COMMITTED.

Common Law.—At common law, the counterfeiting of a matter of record is forgery; for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified (*k*). It is also forgery to counterfeit any authentic matter of a public nature; as a privy seal (*l*), or a certificate of holy orders (*m*), or of ordination (*n*). A man may be guilty of a

(*j*) R. *v.* Bartlett, 2 M. & Rob. 362. In R. *v.* Moffatt, 1 Leach 431; 2 East, P. C. 954, a bill of exchange in a form void by statute was held not to be the subject of forgery within 2 Geo. II. c. 25 & 7 Geo. II. c. 22. See R. *v.* Wall, 2 East P. C. 953, as to forging a will of lands in a form invalid by s. 5 of the statute of Frauds. And *Cf.* R. *v.* Donnelly, 1 Mood. 438: R. *v.* McConnell, 2 Mood. 298, 1 C. & K. 371, as to orders for relief of prisoners under 5 Geo. IV. c. 85 (rep).

(*jj*) R. *v.* McConnell, *supra*.

(*k*) 1 Rolle Abr. 65, 76. Yelv. 146. Cro. Eliz. 178. 8 Mod. 66.

(*l*) 1 Rolle Abr. 68, pl. 33. Cro. Car. 326. 1 W. Jones, 325, or a licence from the barons of the Exchequer to compound a debt (Rolle Abr. 65 pl., 2 Bulstr. 137).

(*m*) 1 Lev. 138.

(*n*) R. *v.* Etheridge, 19 Cox at 678. Kennedy, J.

forgery at common law, by forging a deed (*o*); or will (*p*). In the earlier authorities there are some strong opinions that counterfeiting writings of a nature inferior to those above-mentioned is not forgery at common law (*q*). And it was held, that the forging of another's hand, and thereby receiving rent due to him from his tenants, was not punishable at all (*r*). But Hawkins remarks, that it cannot surely be proved by any good authorities, that such base crimes are wholly disregarded by the common law as not deserving a public prosecution; and that the opinion of their being punishable by no law seems not to be maintainable, since many of them are most certainly punishable by force of 33 Hen. VIII. c. 1 (rep.); and that it cannot be a convincing argument that they are not punishable by the common law, because they are of a private nature, as much as other writings concerning other matters; no one being ready to affirm that the making of a false deed concerning a private matter is not punishable at common law. He further says that, perhaps it may be reasonable to make this distinction between the counterfeiting of such writings, the forgery whereof, as in the above cases, is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature; that the former is in itself criminal whether any third person be actually injured thereby or not; but the latter is no crime, unless some one receive a prejudice from it (*s*). The distinction thus taken by Hawkins tends to confound forgery with cheats in general (*t*): and it does not appear to have been adjudged or even generally laid down in the authorities to which he refers, that counterfeiting of any writing if done *lucri causa* or *malo animo* is not forgery (*u*). Those books which seem at first sight most strongly to warrant the notion that writings of an inferior nature, such as letters, are not the subjects of forgery at common law, if fairly considered and compared, amount to no more than this, that the imputation of counterfeiting letters or writings frivolous or of no moment, or from whence no damage could ensue, or of uncertain signification, is not actionable; and that such letters or writings are incapable from their substance, not from their form, of supporting a charge of forgery, the chief ingredients of which are fraud and intention to deceive (*v*).

After full consideration of the points above discussed it was held in R. *v.* Ward (*x*), which is considered to have established that counterfeiting any writing with a fraudulent intent, whereby another *may be* prejudiced, is forgery at common law. The case arose upon a charging that the defendant being bound to deliver alum, of the value of £1000, to B., contriving and intending to defraud B. of the alum, and with fraudulent intent to avoid delivery of the said alum on, &c., upon the

(*o*) 1 Rolle. Abr. 66. T. Raym. 81. Ow. 47. 1 Sid. 278. 3 Leon. 170.

(*p*) Moore (K.B.) 760. Noy, 101. Dy. 302. 1 Hawk. c. 70, s. 10.

(*q*) 1 Rolle. R. 431. 1 Sid. 16, 155, 451. 1 Roll. Abr. 66. Winch, 40, 90. 1 Leon. 101. 3 Leon. 231. Cro. Eliz. 296, 853. 3 Bulstr. 265. Some acts of falsification of accounts are forgeries, Re Arton (No. 2) (1896) 1 Q.B. at p. 517: 65 L. J. M. C. 50.

(*r*) Cro. Eliz. 166. Yelv. 146. 3 Bulstr. 265.

(*s*) 1 Hawk. c. 70, s. 11.

(*t*) 2 East, P. C. 859. And as to the distinction between forgery and cheats, see *ante*, p. 1508.

(*u*) 2 East, P. C. 860.

(*v*) Id. ibid.

(*x*) 2 Str. 747; 2 Ld. Raym. 1461; 2 East, P. C. 861. See Bac. Abr. 'Forgery' (B.).

back of a certain certificate in writing, signed by one A. N., falsely forged and counterfeited a certain writing, in the words and figures following :—

'Schedule

Tons	C.	
660	5	'Mr. John Ward. I do hereby order you to charge the quantity of 660 tons and 1 quarter of alum to my account, part of the quantity here mentioned in this certificate; and out of the money arising by the sale of the alum in your hands pay to Mr. W. Ward and yourself £10 for every ton according to agreement; and for your so doing this shall be your discharge.—B.—April 30th, 1706.'
315	5	
975	10	

A second count charged that he published the same forged writing, knowing it to be forged, &c. The defendant having been convicted, it was moved, in arrest of judgment, that the instrument set forth was not the subject of forgery at common law, and the offence was not, therefore, punishable in this form, but at most punishable only as a cheat; being merely a thing of a private nature, and in effect nothing more than a letter. And it was argued that if the counterfeiting of a letter had been punishable as a forgery at common law, then it was nugatory to pass 33 Hen. 8. c. 1 (rep.) to punish those who got the money or goods of others under colour of false tokens or counterfeit letters. It was also argued that it nowhere appeared that B. had been prejudiced, and that if B. had been so prejudiced the defendant might have been indictable as for a cheat but not as for forgery at common law. But all the Court held that this was indictable as a forgery at common law; that none of the books confined the offence to the particular kinds mentioned in 3, Co. Inst. 169; and that as forging a writing not sealed came within all the mischief of forging a deed, the maxim applied, *ubi eadem est ratio eadem est lex;* that this was recognised in the preamble of 5 Eliz. c. 14 (rep.), which recited that the forging of writings, as well as of deeds, was punishable by law before that statute; but that offenders had been encouraged by the too great mildness of the punishments; and that the 33 Hen. 8, c. 1 (rep.), did not create new offences, but only enhanced the penalty where the fraud was executed (*z*).

In the argument upon this case, the following instances of indictments at common law, for forging instruments not under seal, were referred to for the Crown, and relied upon by the Court; for forging letters of credit to raise money (*a*), for forging a bill of exchange or a promissory note (*b*), a bill of lading (*c*), an acquittance (*d*), a warrant of attorney (*e*), a marriage register (*f*), a protection from a member of parliament (*g*), with several other cases (*h*). And the offence of forgery was

(*z*) R. *v.* Ward, 2 Str. 747; 2 Ld. Raym. 1461; 2 East, P. C. 861.

(*a*) R. *v.* Savage, Styles, 12.

(*b*) R. *v.* Sheldon, Hil. 34 Car. ii, Rot. 35. 2 Str. 747 *cit.* R. *v.* Ward, Mich. 6 Geo. I.

(*c*) R. *v.* Stocker, 5 Mod. 137; 1 Salk. 342. The Court held the indictment bad for uncertainty; but not because the offence was not forgery at common law.

(*d*) R. *v.* Ferrers, 1 Sid. 278. The record is in Trem. Entr. 129.

(*e*) R. *v.* Farr, T. Raym. 81.

(*f*) R. *v.* Dudley, 2 Sid. 71; 3 Leon. 170.

(*g*) R. *v.* Deakins, 1 Sid. 142.

(*h*) See 2 East, P. C. 862, note (*g*), where R. *v.* Hales, 17 St. Tr. 161 and R. *v.* Gibson, 1 Sess. Cas. 428, 432, are referred to, as relating to promissory notes and endorsements; and a reference is made upon the subject in general to 13 Vin. Abr. 460. Trem. P. C. 100. 2 Show. 20. R. *v.* O'Brien, 7 Mod. 378, 2 Sess. Cas. 366; 2 Str. 1144.

distinguished from cheats at common law and upon 33 Hen. 8, c. 1 (rep.), where the party received an actual prejudice, which was considered not to be necessary to constitute forgery, in which it was sufficient if the party might be thereby prejudiced (*i*).

In R. *v.* Fawcett (*j*), the prisoner, who had been committed to gaol under an attachment for a contempt in a civil suit, was indicted for forging a writing, purporting to be signed in the name of A. D. (the party who had prosecuted the writ of attachment against him) and to contain the authority of D. to the sheriff for his discharge. The defendant having been convicted, the following questions amongst others were submitted to the consideration of the judges: whether the order was a matter of such a public nature, that the counterfeiting of it would be a forgery at common law; and also whether, as the attachment was not for non-payment of money, the order, if genuine, would not have been a mere nullity, and the sheriff not authorised to discharge the prisoner under it. Kenyon, C.J., and Eyre, C.J., said that there was an injury to a third person, and that it was an interruption to public justice: but the latter thought it was not a forgery, but a cheat. The matter was adjourned to a subsequent term, when Eyre, C.J., was still not satisfied as to the forgery, though he thought the indictment good as for a cheat. But all the judges concurred in holding that the offence was indictable as for a misdemeanor at common law; and a great majority also thought it was forgery at common law (*k*).

In R. *v.* Harris, (*l*) H., being a prisoner in the county gaol for want of sureties for his appearance at the sessions, caused to be written and conveyed to the governor of the gaol, a letter purporting to be signed by J. a magistrate authorizing the governor to discharge H. from gaol as bail had been given. On the trial of H. for forgery at common law for forging this letter, the governor stated the usual course to be that where a man was in custody merely for want of sureties, and the governor received a letter from a magistrate of the county, certifying that sureties had been entered into before him, the governor discharged such prisoner upon entering into his own recognizances before a magistrate in the neighbourhood; but he stated that he certainly should not have discharged the prisoner, as he did not believe the letter was in the handwriting of J. Upon a case reserved the judges held that the counterfeiting amounted to forgery at common law.

The defendant was indicted for forging a County Court summons. The paper in question was a printed form of a distringas, which had had the words respecting the distraining struck out with a pen, and the word 'summon' inserted instead. It appeared that when the County Court clerk was absent, the clerks in the office, if they were busy, sometimes gave

(*i*) 2 East, P. C. 862. And see R. *v.* Wilcox, R. & R. 50, where a doubt was entertained whether the offence came under the denomination of forgery at common law.

(*j*) 2 East, P. C. 862.

(*k*) And see 2 East, P. C. 864, note (*a*), where it is said that Buller, J.'s MS. only made a *quære* as to the opinion of Eyre, C. J.; but that it appeared from other MSS. as well as Buller, J.'s, that the judges all concurred to sustain the conviction only on the general ground before mentioned.

(*l*) 1 Mood. 393. In R. *v.* Barrett [1899], 130 C. C. C. Sess. Pap. 797, the prisoners were indicted for conspiracy to forge a letter of admission to a prison to see a prisoner awaiting trial.

out blank summonses to the attorneys, who filled them up themselves; Patteson, J., said, 'It is highly irregular; but I know that these summonses are sometimes given out in blank. I am not prepared to say, that, after the notice that this trial will give parties, as to the impropriety of the practice, I should not hold that this mode of filling up a summons, or altering a distringas into a summons, was not forgery' (*m*).

One count of an indictment alleged that the prisoner unlawfully, fraudulently, &c., did make, forge, and counterfeit a certain writing to the likeness and similitude of, and as and for a true and genuine writing of and under the hand of one W. N., as the master of a vessel, certifying that he, the prisoner, therein described as F. T., had served with the said W. N. as able seaman on board the said vessel, with intent thereby and by means thereof to deceive, injure, prejudice, and defraud W. P., G. P., C. F., and F. F. Another count alleged the intent to be to deceive, injure, prejudice, and defraud the Corporation of the Trinity House of Deptford Strond. Upon a case reserved, both counts were held to be good as charging a misdemeanor at common law (*n*).

Upon an indictment for forging and uttering letters with intent fraudulently to obtain, and whereby the prisoner did fraudulently obtain, the situation of a police constable, it appeared that the prisoner forged and uttered letters giving him a character purporting to be signed by other persons, and by means of them got a situation as constable. Upon a case reserved, it was held that this was a forgery at common law (*o*).

In R. *v.* Sharman (*p*), on an indictment at common law for forgery and uttering, it appeared that the situation of schoolmaster being vacant in a parish school, the prisoner applied for it, and sent in to the rector a paper purporting to be a copy of a testimonial from the Rev. R. H. J., Rector of L.; and on the day appointed for producing the original testimonials, he produced the writing set forth in the indictment, and falsely alleged that it was the testimonial of the Rector of L. The document was altogether a forgery. Upon a case reserved, after a verdict of guilty of uttering the above document, the conviction was affirmed on the ground that it is an offence at common law to utter a forged instrument the forgery of which is an offence at common law (*q*).

The prisoner had formerly been confined in a convict prison, from which he had been liberated on a ticket of leave. Under a rule of the prison every prisoner was credited with a sum of money called 'convict money,' and the prisoner was entitled under this rule to a certain sum, which would have been paid him on the production of a certificate

(*m*) R. *v.* Collier, 5 C. & P. 160.

(*n*) R. *v.* Toshack, 1 Den. 492; 4 Cox, 38. See the form of indictment, 1 Den. 494. In R. *v.* Etheridge, 65 J. P. 761, before Kennedy, J., the defendant was convicted for forging (at common law)) and uttering a letter applying, in the name of R., to the Bishop's registrar for the certificate of R.'s ordination, and also for forging and uttering two letters containing testimonials as to the defendant's character.

(*o*) R. *v.* Moah, Dears & B. 550; 27 L. J. M. C. 204, Bramwell, B., *dub.*

(*p*) Dears. 285; 23 L. J. M. C. 51.

(*q*) Jervis, C.J., in delivering the judgment of the Court, said, 'We are of opinion that this is a common law offence to utter a forged instrument, the forgery of which is an offence at common law. We think that the view of the law taken in R. *v.* Boult, 2 C. & K. 604, was not a correct one. In that case Cresswell and Patteson, JJ., held that it was an offence at common law to forge a railway pass, but not an offence to utter a forged railway pass unless the fraud succeeded. See R. *v.* Withers, 4 Cox, 17, 20.

signed by two witnesses and the clergyman of the parish, that he was getting his living honestly. He sent to the superintendent of the prison a document purporting to be signed by two persons and certifying that the prisoner was gaining his living by hawking. Both signatures were forgeries. Williams, J., ruled that the certificate was not an undertaking warrant or order for the payment of money, but the prisoner was convicted on an indictment for misdemeanor (*r*).

A forgery at common law must be of some document or writing; therefore forging the name of an artist on a picture is not forgery at common law, for such name is in the nature of a mark put upon the painting with a view of identifying it, and is no more than if the painter had put any other arbitrary mark as a recognition of the picture being his (*s*).

Upon an indictment for forgery it appeared that G. B. was in the habit of selling powders called 'B.'s Baking Powders and B.'s Egg Powders,' which were invariably sold in packets wrapped up in printed papers. The baking powders were wrapped in papers containing the name G. B., but the name was not visible till the packet was opened. The prisoner went to a printer, and, representing his name to be B., desired him to print 10,000 labels as nearly as possible like those used by B. The labels were printed, and a considerable quantity of the prisoner's powders sold by him as B.'s powders wrapped up in those labels. The imitation label of the baking powders was exactly like the genuine label, but omitted the conclusion, 'The public are requested to see that each wrapper is signed "G. B.," without which none is genuine,' and the signature. The genuine and imitation egg powder label was—

'B.'s METROPOLITAN EGG POWDER.'

In neither imitation did B.'s name appear except in the heading; and, upon a case reserved, it was held that this was not forgery at common law; the real offence was the enclosing the false powder in the false wrapper and selling that (*t*).

SECT. III.—THE INTENT TO DEFRAUD.

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 44 (*u*). 'It shall be sufficient, in any indictment for forging, *altering*, uttering, offering, disposing of, or putting off any instrument whatsoever, *where it shall be necessary to allege an intent to defraud*, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such

(*r*) R. *v.* Mitchell, 2 F. & F. 44. The indictment for misdemeanor contained a count for attempting to obtain money by false pretences, and one count for forging a certificate, and another for uttering a forged certificate; and all that is reported is that the prisoner was convicted.

(*s*) R. *v.* Closs, Dears & B. 460, *ante*, p. 1508. See 25 & 26 Vict. c. 68.

(*t*) R. *v.* Smith, Dears & B. 566. See the Merchandise Marks Act, 1887, *ante*, p. 1591. R. *v.* Closs and R. *v.* Smith do not appear to be very satisfactory. If the mark or printed matter be adopted by the prisoner as his own, and is issued by him fraudulently as being that of another person, it would seem to be immaterial in principle whether it was printed or stamped or otherwise impressed in whole or in part.

(*u*) Taken from 14 & 15 Vict. c. 100, s. 8, with the additions italicised.

offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.'

This enactment appears to apply to every form of forgery, and long before it was passed it was argued and apparently accepted by the Court that it was no answer to a charge of forgery to say that there was no special intent to defraud any particular person, because a general intent to defraud is sufficient to constitute the crime; for if a person does an act the probable consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent (*v*). Although in cases of forgery, properly so called (*w*), it is immaterial whether any person be actually injured or not, provided he may be thereby prejudiced, yet the fraud and intention to deceive constitute the chief ingredients of this offence. Thus Buller, J., speaks of it as the making a false instrument 'with intent to deceive' (*x*); and Eyre, B., as a false signature made 'with intent to deceive' (*y*). In the word 'deceive' must doubtless be intended to be included an intent to defraud (*z*); and the offence was accordingly defined by Grose, J., as the false making a note or other instrument 'with intent to defraud' (*a*). Eyre, B., also, defined the offence to be the false making an instrument which purports on the face of it to be good and valid, for the purposes for which it was created, 'with a design to defraud' (*b*).

The offence of disposing of and putting away forged bank notes was held complete, though the person to whom they were disposed of was an agent for the bank to detect utterers, and applied to the prisoner to purchase forged notes, and had them delivered to him as forged notes for the purpose of disposing of them (*c*). It was held that if the prisoner put the notes off with intent to defraud, the intent existing in the mind was the essence of the crime, although, from circumstances of which he was not apprised, he could not in fact defraud the prosecutor (*d*).

Uttering a forged stock receipt to a person, who employed the prisoner to buy stock to the amount therein specified, and had advanced the money, was held sufficient evidence of an intent to defraud that person; and it was also held that the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, did not repel the presumption of an intent to defraud (*e*).

(*v*) By Shepherd, *arguendo* in Tatlock *v.* Harris, 3 T. R. 176. It is said in 1 Leach, 216, note (*a*), that this doctrine was seemingly adopted by the Court. See R. *v.* Powell, 1 Leach, 77. R. *v.* Bigg, 3 P. Wms. 419; 2 East, P. C. 854. But as a matter of pleading allegation of particular intent was at common law usual, if not essential, 2 East, P. C. 988. R. *v.* Hodgson, Dears. & B. 3; 25 L. J. M. C. 78. This decision was challenged by Mr. Greaves as erroneous. See 4th edition of this work, Vol. ii. p. 786, note (*v*).

(*w*) R. *v.* Ward, *ante*, p. 1639.

(*x*) R. *v.* Coogan, 2 East, P. C. 853, 948, and *ante*, p. 1627.

(*y*) R. *v.* Taylor, 2 East, P. C. 853, 960.

(*z*) 2 East, P. C. 853. As to the meaning of deceive and defraud see *re* London and Globe Finance Corporation [1903], 1 Ch. 728, 732, Buckley, J.,and *ante*, p. 1413, note (*f*).

(*a*) R. *v.* Parkes, 2 East, P. C. 853, 963. 2 Leach, 775.

(*b*) R. *v.* Jones, 1 Leach, 366; 2 East, P. C. 991.

(*c*) Under 45 Geo. III. c. 89, s. 2 (rep.).

(*d*) R. *v.* Holden, R. & R. 154; 2 Taunt, 334; 2 Leach, 1019. It was also objected that the indictment did not set out the name of the person to whom the forged note was disposed, but the indictment was held sufficient.

(*e*) R. *v.* Sheppard, R. & R. 169.

If a person gives his employer a forged receipt for money, with intent to make the employer believe that money already obtained has been applied in a certain way, he is guilty of uttering with intent to defraud his employer (*f*).

There was a society, supported by monthly payments, for the relief of sick and burial of deceased members, of which the prisoner's wife was a member, and the prisoner was the secretary. At a meeting of the society he was directed by the society to pay into the H. Savings' Bank £40, which was at the time given him for that purpose. At the then next meeting the prisoner delivered to the society a book, endorsed 'Savings' Bank, N. Street, H.,' On the first page was written, '1855. Oct. 30. Received, £40 0 0.' When he delivered the book he said, 'that is the book belonging to the money.' The book was put into the society's box. On an indictment for forging the entry, and endorsement, the actuary of the H. Savings' Bank proved that neither the endorsement nor the entry was in the handwriting of himself or of any person employed at the bank. If the money had been paid into the bank on Oct. 30, 1855, and remained in the bank till the Oct. 30, 1861, more than £12 10*s.* would have been allowed on it as interest. The prisoner continued to receive his salary from the society till November, 1861; but did not receive any other money belonging to the society. The fact that the £40 had not been paid into the bank was not discovered until November, 1861. The prisoner never paid any money into the bank to the credit of the society. It was objected that the prisoner, being the husband of one of the members of the society, was part owner of the money, and could not be made criminally liable for defrauding his co-owners, and that the prisoner having received the £40 before he uttered the forged writing, there was no evidence of any uttering with intent to defraud; but the objections were overruled, and the jury were asked; 1st. Whether the prisoner uttered the writing upon and in the book, knowing it to be forged, in order to induce the society to believe that he had paid the money into the bank? 2nd. Did he do this for the purpose of being continued in the office of secretary, and thereby obtaining further money? 3rd. Was the society in fact defrauded by his uttering the forged writing? The jury answered all the questions in the affirmative; and, on a case reserved it was held that all the objections taken on behalf of the prisoner were untenable. It was true that the prisoner, in right of his wife, was jointly interested in the property of the society; but the forgery would defraud the whole of the company, and therefore the indictment would lie (*g*).

On an indictment for forging a receipt for £16 15*s.* 6*d.* with intent to defraud E. G., it appeared that the prisoner in 1830, and for many successive years down to 1837, had been assistant overseer of R., and that he was in the habit of receiving warrants from G., the high constable of the hundred, ordering him to levy on the inhabitants of R. their quota of the county rate. In 1830, having levied to the amount of £11 5*s.* 6*d.*, he paid that sum into a bank, to the credit of the high constable, and the clerk of the bank gave him a receipt for £11 5*s.* 6*d.* In 1838, the prisoner was

(*f*) R. *v.* Martin, 1 Mood. 483. (*g*) R. *v.* Moody, L. & C. 173; 31 L. J. M. C. 156.

removed from his office, and handed over to his successor a great bundle of papers, amongst which the receipt in question was found, but the figures had been altered from £11 5*s*. 6*d*. to £16 15*s*. 6*d*. The prisoner's accounts had been passed and allowed from time to time. It was contended that there was no felonious uttering of the receipt; it was not delivered over by him with any intention that it should be used as a voucher. His own accounts had been settled, and the time for auditing them had passed. There was no evidence of any intent to defraud the high constable, or that the utterance of the instrument in its altered form would have that effect. Alderson, B., said: 'I am of opinion, that if the prisoner handed the receipt over to his successor as one of his vouchers, knowing that the figures had been fraudulently altered, he was thereby guilty of a felonious uttering, and that the intention is correctly described to be that of defrauding G., the high constable: for what is the necessary effect of so handing over the altered receipt? The parish would discover from that receipt that the high constable had been paid £16 15*s*. 6*d*. instead of £11 5*s*. 6*d*. (to which latter sum only he was entitled); and the effect would be, that the high constable becomes liable to refund to the parish the sum which the receipt shewed that he received in excess. That being the necessary consequence of the prisoner's act, it must be presumed that he intended it, and no proof of such actual intention is necessary. That has been ruled by all the judges, in a case reserved (*h*), in consequence of a supposed opinion of Lord Abinger to a different effect. The lapse of time can make no substantial difference. Supposing a party forges a receipt for the payment of a debt of more than six years' standing, it is true the debtor might be already protected by the Statute of Limitations, but still the forged receipt would alter the position in which the creditor would stand, and it would clearly be a felonious forgery'(*i*).

Uttering a bill of exchange, all the names on which are fictitious, is within the Forgery Statutes, though the party uttering intended to provide for the payment of the bill, the fact of the parties not being real not being known to the person taking the bill. In R. *v.* Hill (*j*), Alderson, B., told the jury (after consulting Gurney, B.) that if they were satisfied that the prisoner uttered the bill in payment of a debt due to M. (the person to whom the bill was given), knowing at the time he so uttered it that it was a forgery, and meaning that M. should believe it to be genuine, they were bound to infer that he intended to defraud M. The prisoner was convicted; and the judges, upon a case reserved, held that the conviction was right.

The fact that the prisoner had given guarantees to his bankers, to whom he paid a forged note to a larger amount than the note, was held not to negative the intent to defraud the bankers; there being still a question for the jury whether there was an intent to defraud (*k*).

So where the prisoner was indicted for forging and uttering a bill of

(*h*) R. *v.* Hill, *infra*.

(*i*) R. *v.* Boardman, 2 M. & Rob. 147.

(*j*) 2 Mood. 30. Parke, B., said, 'It appears that this bill has since been paid by the prisoner, but that will make no difference if the offence has been once completed at the time of the uttering.' See R. *v.* Geach, 9 C. & P. 499.

(*k*) R. *v.* James, 7 C. & P. 553.

exchange, which he had given to a bank as a security for the debt he owed them; Patteson, J., told the jury: 'If the prisoner at the time he uttered this bill knew that the acceptance was forged, and meant the bill to be taken as a bill with a genuine acceptance upon it, the inevitable conclusion is that he meant to defraud. This was the opinion of the judges in a late case reserved for their consideration (*l*). There was an earlier case of R. *v.* James (*ll*), tried before me at Gloucester, in which I did not lay down this proposition strongly enough; but the law on the point is as I have now stated' (*m*). And upon a similar indictment against the same prisoner, Patteson, J., said: 'If a person knowingly pays a forgery away as a good bill, it is a consequence, and almost a consequence of law, that he must intend to defraud the person to whom he pays the bill, and also the person whose name is used; as everything which is the natural consequence of the act must be taken to be the intention of the prisoner' (*n*).

One count charged the prisoners with uttering the forged will of W. T., with intent to defraud the heir-at-law of W. T.; another with intent to defraud a certain person or persons whose names are unknown to the jurors. One of the prisoners was the son of W. T., whose will was forged. A witness stated that he had heard that W. T. had had a son by a former marriage, but had never seen any reputed child or children of the first marriage, and knew nothing of their existence except by report. No other evidence was offered to prove that there had been any former marriage, or any children of the marriage. Coltman, J., thought that under these circumstances the allegation of an intent to defraud the heir of W. T. was not supported, there being no proof of there ever having been any heir-at-law except the prisoner, but as the forgery was clearly proved, and it appeared highly improbable that such a forgery should be committed except for the purpose of defrauding some one, he left the question to the jury upon the count 'with intent to defraud a person or persons unknown;' and the jury convicted, but Coltman, J., entertained a doubt whether a prisoner could properly be convicted on such a count without proof that the forged instrument was capable of effecting a fraud on some person or other, and therefore reserved the point; and after argument on behalf of the prisoner, the judges were evenly divided upon this question (*o*).

Upon an indictment for forging and uttering a transfer of shares in a railway company from P. H. to E. P., with intent to defraud, it appeared that O. had been the original proprietor of the shares, and being anxious to protect himself from liability in respect of the shares, had transferred them, without any consideration, to P. H.; but the actual transfer was not proved. In order, however, to shew that H. was registered as a shareholder in respect of those shares, and that he would be treated by the company as a person entitled to deal with

(*l*) R. *v.* Hill, *supra*.

(*ll*) *Vide ante*, p. 1645.

(*m*) R. *v.* Cooke, 8 C. & P. 582.

(*n*) R. *v.* Cooke, 8 C. & P. 586. See also R. *v.* Beard, 8 C. & P. 143, where Coleridge, J., said, 'As to the intent, I must tell you that every man is taken to intend, the natural consequences of his own act. If I present to you a bill with the name of one of my friends upon it, knowing it to be forged, it would be idle to say that I had no intent to injure him.' Cf. R. *v.* Todd, 1 Cox, 57.

(*o*) R. *v.* Tylney [1848], 1 Den. 319: 18 L. J. M. C. 36. See the next case.

them, to receive any dividends payable on them, or to transfer them, the register of shareholders, bearing the seal of the company, and kept according to the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 9, was tendered as evidence, and, after objection on the part of the prisoner, received. It was further objected that the title of H. should be shewn, and that the transfer from O. to him should be proved for that purpose; but this objection also was overruled. The railway company had paid no dividend, and there seemed no probability of any being declared at the time of the forgery; the question of winding up the company had been considered; the shares were not of any marketable value, but the company had power to enforce payment of calls, and one of £2 a share was about to be made. The jury were directed, upon the question of intention to defraud, that it was not necessary to find an intent to defraud any one in particular, but they must have in view some person who could be defrauded, so that the consequence of the prisoner's act would necessarily or possibly be to defraud some person, and that it was for them to say whether, as H. would be the person to whom the dividends, if any (of which there did not seem to be much probability), would legally be payable, he might not have been defrauded if the company had got into better circumstances; or whether the company might not have been defrauded, if they had been induced by the forgery to insert P.'s name on the register, and had made a call, which they appeared to be about to do, or whether any person might not have been defrauded if induced to advance money on the shares, in anticipation of the company coming round, and on the faith that P. was the real owner of them. The jury having convicted, the Recorder requested the opinion of the judges as to whether he was right in receiving the register of shareholders in evidence, under the circumstances for the purpose above stated, or whether further evidence of the transfer of the shares from O. to H. was necessary; and also whether he was right in thus leaving the case to the jury; and after argument the judges were unanimously of opinion that the register of shareholders was properly admitted in evidence, 'it being under the seal of the company, and kept pursuant to the Act of Parliament, and it appearing from the register that H. was a shareholder, that it was unnecessary for the purpose of sustaining this indictment that H.'s title should be further gone into' (*p*). 'The register was part of H.'s title if his name was on it. The fraudulent act of the prisoner tended to injure that part of H.'s title. The register was admissible to shew that the act of the prisoner might have had that effect. A complete title in H. was not necessary in order that he should be defrauded in respect of something which was a step to a complete title' (*q*). With respect to the direction to the jury, 'the substantial meaning of what the Recorder said to the jury was that, though it was not necessary to shew an intent to defraud any particular individual, there must be somebody to be defrauded, and that there were several parties who might have been defrauded' (*r*). 'His observations that H. was entitled to the dividends seems to have

(*p*) Per Cresswell, J.
(*q*) Per Lord Campbell, C. J.
(*r*) Per Cresswell, J.

been grounded on the supposition that, in order to convict a prisoner of an intent to defraud, there must be somebody to be defrauded or hurt in some way; but it is not necessary that any person should be in a situation to be defrauded. If the Recorder had been set right upon that point, it would have been so much worse for the prisoner; for the only chance the prisoner had to get off was the belief of the jury that he could not be convicted unless he intended to defraud somebody in particular, and that to have intended to defraud was not enough' (*s*); and the conviction was affirmed (*t*). In this case (*u*) Cresswell, J., referring to his own rulings in R. *v.* Marcus (*v*), said that the case was one before the recent statute (14 & 15 Vict. c 100, s. 8) respecting indictments for forgery, and that he had considered there was no intention to defraud anyone. In R. *v.* Hoatson (*w*), Rolfe, B., had not accepted the directions of Cresswell, J. in R. *v.* Marcus.

In R. *v.* Hodgson (*x*) the prisoner procured a diploma actually issued by the College of Surgeons, erased the name of the person mentioned in it, and substituted his own. He hung it up in his sitting-room, and on being asked by two medical practitioners whether he was qualified, he said he was, and produced this document to prove his assertion. When a candidate for an appointment as vaccinating officer, he stated he had his qualification, and would shew it. He did not, however, then produce or shew it. The prisoner was found guilty, and the facts are to be taken to be that he forged the document in question with the general intent to induce a belief that the document was genuine, and that he was a member of the College of Surgeons, and that he shewed it to two persons with the particular intent to induce such belief in these persons; but that he had no intent in forging, or in uttering or publishing (assuming there was one), to commit any particular fraud or specific wrong to any individual; and, upon a case reserved, it was held that the conviction was wrong. Jervis, C.J., said: 'The 14 & 15 Vict. c. 100, s. 8 (*y*) alters and affects the forms of pleading only, and does not alter the character of the offence charged. The law as to that is the same as if the statute had not been passed. This is an indictment for forgery at common law. I will not stop to consider whether this is a document of a public nature or not, though I am disposed to think that it is not a public document; but whether it is or not, in order to make

(*s*) Per Maule, J.

(*t*) R. *v.* Nash [1852], 21 L. J. M. C. 147; 2 Den. 493. Maule, J., during the argument, said, 'The recorder seems to have thought that in order to prove an intent to defraud, there should have been some person defrauded, or who might possibly have been defrauded. But I do not think that at all necessary. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque, either to try his credit, or to imitate his handwriting, there would be no intent to defraud, though there would be parties who might be defrauded. But where another person has no account at his bankers, but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded.' And again, 'This man might have been convicted, though Hanstock's name was not on the register. There may be an intent to defraud without the power or the opportunity to defraud.' See R. *v.* Crowther, *post*, p. 1649.

(*u*) 21 L. J. M. C. 150.

(*v*) 2 C. & K. 356.

(*w*) 2 C. & K. 777.

(*x*) Dears & B. 37; 25 L. J. M. C. 78.

(*y*) Re-enacted as 24 & 25 Vict. c. 98, s. 44, *ante*, p. 1642.

out the offence, there must have been, at the time of the instrument being forged, an intention to defraud some person. Here there was no such intent at that time, and there was no uttering at the time it is said there was an intention to defraud.' Wightman, J., said: 'Before the late statute it was necessary to allege an intent to defraud some one, and there must be an intention to do so now. In this case it does not appear that at the time when the forgery was committed there was an intention to defraud anyone.' Cresswell and Erle, JJ., and Bramwell, B., concurred (*z*).

It has been held that the jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, even although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose upon him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation (*a*).

Upon an indictment for forging and uttering an order for the payment of money, signed J. P., with intent to defraud F. R. and others, it appeared that the order was presented at R.'s bank; but they would not pay the amount; and no person named J. P. kept cash with them; it was objected that there could be no intent to defraud R., as there was not the most remote chance of their paying the money; but it was held that the prisoner's going to R.'s, and presenting the paper for payment, was quite sufficient evidence of an intent to defraud them (*b*).

It is said by Hawkins (*c*) that the notion of forgery does not seem so much to consist in the counterfeiting a man's hand and seal, which may often be done innocently; but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have. But as the fraud and intention to deceive, by imposing upon the world that as the act of another which he never consented to, are the chief ingredients which constitute this offence, it has been held that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this as the other's hand and sealing, being done by his approbation and command (*d*). So, if a man writes a will for another without any directions from him, and he for whom it is written

(*z*) By the Medical Act, 1858 (21 & 22 Vict. c. 90), s. 40, it is an offence punishable on summary conviction for any person to falsely pretend to be a physician, &c., or to use any description implying that he is registered under that Act.

(*a*) R. *v.* Mazagora, R. & R. 291. Where the jury found that the prisoner had the intention to defraud whoever might take the note, but that the intention of defrauding the bank in particular did not enter into her contemplation, and it was held that the jury ought to have inferred an attempt to defraud the bank.

(*b*) R. *v.* Crowther, 5 C. & P. 316, Bosanquet, J.

(*c*) 1 Hawk. c. 70, s. 2.

(*d*) 1 Hawk. c. 70, s. 2, and Bac. Abr. 'Forgery' (A.).

becomes *non compos* before it is brought to him, it is not forgery; for it is not the bare writing of an instrument in another's name, without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery (*e*). Nor is a man guilty of forgery who rases the word *libris* out of a bond made to himself, and substitutes *marcis*, because there is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by the erasure. But it would be forgery if by the circumstances of the case it should in any way appear to have been done with any view of gaining an advantage to the party himself, or of prejudicing a third person; and such an alteration, even without these circumstances has been held to be a misdemeanor; though it does not amount to forgery (*f*). So that it is well observed that at any rate it is very dangerous to tamper in these matters (*g*).

Sect. IV.—Indictment, Trial, Evidence, and Punishment.

In indictments for forgery at common law it is usual to charge that defendant 'unlawfully and falsely did forge and counterfeit.' In indictments for statutory forgery it is usual to charge in the indictment that the party *forged and counterfeited* without adding *falsely*, which is sufficiently implied in either of those terms, particularly in the word to *forge*, which is always taken in an evil sense (*h*).

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 42, 'In any indictment for forging, *altering*, *offering*, uttering, *disposing or putting off* any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof' (*i*).

By sect. 43. 'In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful *custody or* possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by

(*e*) Moore (K.B.), 760. 1 Hawk. c. 70, s. 5. Bac. Abr. 'Forgery' (A.).

(*f*) 1 Hawk. c. 70, s. 4, Bac. Abr. 'Forgery' (A.). As to the alteration of deeds, see Shep. Touch. 68, 69. Crediton (Bishop) *v.* Exeter (Bishop) [1905], 2 Ch. 455.

(*g*) 2 East, P. C. 854.

(*h*) 2 East, P. C. 985. R. *v.* Savage, Styles, 12. The Latin words were *fabricavit et contrafecit*. R. *v.* Mariot, 2 Lev. 221. R. *v.* Dawson, 1 Str. 19. An indictment was held good which stated that G. falsely forged a false writing. R. *v.* Goate, 1 Ld. Raym. 737.

(*i*) Taken from 14 & 15 Vict. c. 100, s. 5. The words in italics were not in the former Act. By some accident the word 'of' has been omitted after 'disposing,' in the second line of the clause. In the 6th edition of this work, Vol. ii. p. 642, several cases under the (repealed) 2 & 3 Will. IV. c. 123, s. 3, are referred to on the question of the sufficiency of the description of the instrument alleged to be forged. Under the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100, s. 1, *post*, p. 1972), the Courts have very extensive powers of amendment, and it is not considered necessary to refer to those cases here.

any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing' (*j*).

These enactments alter the common law practice which required the instruments, &c., to be set out according to their tenor, or in copy as facsimile (*k*).

When it is still desired to insert a count setting out the forged instrument, the following decisions may still be of use as a guide (*l*).

Sewing to the parchment, on which the indictment is written, impressions of forged notes taken from engraved plates, was not a sufficient setting out of the notes in the indictment (*m*).

Description of Instruments.—The recital of the instrument is usually prefaced by the words, 'to the tenor following, that is to say,' &c., or, 'in the words and figures following,' which imports an exact copy. But where the indictment was for forging a certain receipt for money, 'as follows,' and then set forth the receipt in words and figures, all the judges held that the words, 'as follows,' were to be taken as the same as 'according to the tenor following,' or 'in the words and figures following'; and that if the prosecutor had failed in evidence in proving the receipt verbatim as laid, it would have been a fatal variance (*n*). Therefore, though there is no technical form of words for expressing that the instrument is set forth in words and figures, the prosecutor cannot, by varying the terms in which he introduces the instrument, relieve himself from any accuracy which is otherwise requisite (*o*).

Tenor.—In setting forth the tenor of the instrument, mere literal variance does not vitiate the indictment. Thus where an indictment for forging a bill of exchange, containing, in the words set forth, the words, 'value *received*,' but the bill produced in evidence, though otherwise corresponding with that set forth, was written, 'value *reiceed*,' it was held that the variance was not material, as it did not change the word (*p*). So where the prisoner was indicted for uttering a bill of exchange, directed to Messrs. M., P., and Co., with a forged endorsement thereon; and it was objected that there was a variance in the indictment, which imported to set out the bill according to its tenor, inasmuch as the letter *r* in Messrs. was omitted, and the abbreviation Mess^{s}. might stand for words which Messrs. could not; the objection was overruled; and the judges, upon the point being referred to them, held that the indictment was

(*j*) Taken from 14 & 15 Vict. c. 100, s. 6.

(*k*) R. *v.* Mason, 2 East, P. C. 975. R. *v.* Lyons, 2 Leach, 597, 608. R. *v.* Wilcox, R. & R. 50.

(*l*) Many of the following cases would now be amended under the powers possessed, and exercised, under 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972.

(*m*) R. *v.* Warshaner, 1 Mood. 466. 7 C. & P. 423, and 429. 'In note (*b*), ibid. p. 430, it is said that "a considerable majority of the judges were of opinion that the sewing the papers to the indictment was of itself sufficient to vitiate those counts, but some did not seem so clearly of that opinion; and as the special counts were bad upon other grounds, it was not necessary to come to a decision as to the papers being sewed to the indictment." As every indictment, being a record, must be upon parchment, Co. Litt. 260*a*, it is difficult to see how an indictment, part of which is on paper, can be good.' C. S. G.

(*n*) R. *v.* Powell, 2 W. Bl. 787; 1 Leach, 77; 2 East, P. C. 976, where the learned writer questions Smith's case, Salk. 342, where it is said in the report that where a deed with the mark of I. S. was forged, the indictment need not set out the mark.

(*o*) 3 Chit. Cr. L. 1040.

(*p*) R. *v.* Hart, 1 Leach, 145; 2 East, P. C. 977.

sufficient (*q*). So where an order for the payment of money, as set out in the indictment, appeared to be signed by 'J. McNicole and Co.,' with intent to defraud J. McNicole, but the name was really McNicoll, it was held that substituting *e* for *l* did not make it a different name (*r*). But if, by addition, omission, or alteration, the word was so changed as to become another word, the variance will be fatal unless amended (*s*).

Where the note charged to be forged set forth the *attestation* of the witness, and the words 'M. W., her mark'; and it appeared that when the prisoner subscribed the note those parts of it were not written; it was doubted whether the prisoner had not in fact forged a note differing in the tenor of it from that set forth in the indictment. But upon consultation, it was held that the indictment was in this respect well proved (*t*).

It was sufficient, at common law (except in the cases which will be presently mentioned) to charge that the defendant forged such an instrument, naming it, and setting forth the tenor. But laying it to be a paper writing, &c., purporting to be such an instrument (as the statute on which the indictment was framed described) was good; and it was said that in strictness of language there might be more propriety in so laying it, considering that the purpose of the indictment was to disaffirm the reality of the instrument (*u*). Where the prisoners had been convicted upon an indictment, charging them with publishing 'as a true will, a certain false, forged, and counterfeited paper writing, *purporting* (*v*) *to be the last will* of Sir A. C., &c.,' and setting out the tenor of the will, it was objected that it ought to have been laid that they forged *a certain will*, and not a paper writing, *purporting to be the last will*, &c., as the words of the statute are 'shall forge a will.' But, after a variety of precedents being produced, all the judges held it to be good either way. And it was also held, that as the will was set forth in *hæc verba*, and three names appeared as witnesses, it was sufficient, without stating that it purported to be attested by three witnesses (*w*).

Where the prisoner was indicted for forging and uttering a bill of exchange, which was described in the indictment to be 'a certain bill of exchange,' . . . it appeared that the signature to the bill, 'H. H.,' was a forgery. On a case reserved it was held that the indictment averring it to have been *signed by him* (and not merely that it *purported* to have been signed by him), which was a substantial allegation, was disproved (*x*).

The prisoner was indicted under (rep.) 9 & 10 Vict. c. 95, s. 57, for feloniously causing to be delivered to T. C. a certain paper falsely pur-

(*q*) R. *v.* Oldfield, *cor.* Bayley, J., Durham Sum. Ass. 1811, MS.

(*r*) R. *v.* Wilson, 1 Den. 284: 17 L. J. M. C. 282. These are the very cases in which an amendment ought to be made under 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972.

(*s*) R. *v.* Bear, Carth. 407. R. *v.* Drake, 2 Salk. 661. 1 Stark. Cr. Pl. p. 255. 1 Chit. Cr. L. p. 294. And in R. *v.* Beach, 1 Cowp. 229, where it was held that in an indictment for forgery a variance in writing the word 'understood' instead of 'understood' was not material, Lord Mansfield said, 'The true distinction seems to be taken in R. *v.* Drake, which is this, that where the omission or addition of a letter does not change the word as to make it another word, the variance is not material.' In R. *v.* Robson, 9 C. & P. 423, the first count had the words 'guard curbs,' but the instrument 'guards curbs,' and the question whether this was a variance was reserved, but not decided by the judges, the conviction being held right on another count.

(*t*) R. *v.* Dunn, 2 East, P. C. 976.

(*u*) 2 East, P. C. 980.

(*v*) As to purport, see *post*, p. 1654.

(*w*) R. *v.* Birch, 2 W. Bl. 790; 1 Leach, 79; 2 East, P.C. 980.

(*x*) R. *v.* Carter, 2 East, P. C. 985.

porting to be a copy of a certain process of a County Court. The document was, in fact, a notice to produce certain accounts, &c. On a case reserved, it was held that the document did not purport to be anything in the shape of process of the Court (*y*).

Where the indictment charged the prisoner with forging a receipt to an assignment of a certain sum in a navy bill, and the tenor of the receipt as set forth merely consisted of the signature of the party, it was holden to be defective; on the ground that the mere signing of such name, unless connected with the previous matter, did not purport on the face of it to be a receipt, and that it ought to have been averred that such navy bill, &c., together with such signature, did purport to be, and was a receipt, &c., and that the prisoner feloniously forged the same (*z*). But where a forged receipt as set forth in the indictment, was in this form, '18th March, 1773. Received the contents above by me, S. W.,' and it appeared in evidence that such receipt was forged at the bottom of a certain account; upon objection taken that the account itself should have been set forth in order to make it appear that the receipt, as stated, was a receipt for money, all the judges held that the indictment was sufficient, and that the account was only evidence to make out the charge as stated in the indictment (*a*).

In R. *v.* Martin (*b*) on a case reserved, it was held that a count setting out as an acquittance an invoice of goods sold, with the word 'settled' at the foot, and signed with a name in full, is good without any averment of the meaning of the word 'settled.'

In R. *v.* Boardman (*c*) an indictment charged the forgery of a receipt for the payment of money, in form following (that is to say):—'6th January, 1830, £16 15*s.* 6*d.*, for the High Constable, J. H.' It was objected that the document set out was not on the face of it necessarily 'a receipt for the payment of money.' Alderson, B. said, 'The cases cited (*d*) are clearly distinguishable from the present. In Hunter's case the forgery consisted in merely counterfeiting the signature of the party, which, of course, meant nothing without reference to other documents. In Thompson's case, the forgery consisted in writing the word "settled" on an account; that, also, was an expression in itself entirely ambiguous: it might mean either that the party was satisfied as to the correctness of the items, or that he had received the amount. But, indeed, that case has been expressly overruled by R. *v.* Martin. I think there is nothing in the objection.'

The prosecutrix gave the prisoner the bill of Sadler, a cheesemonger, with money to pay that bill and a variety of others, and the prisoner brought the bill back again to the prosecutrix, with the words, 'Paid, sadler,' at the bottom of the bill, with a little *s*, and no Christian name; on an indictment for forging and altering the writing describing it as an acquittance and receipt for money, it was contended that the words

(*y*) R. *v.* Castle, Dears & B. 363: 27 L. J. M. C. 70.

(*z*) R. *v.* Hunter, 2 Leach, 624; 2 East, P. C. 928, 977. See R. *v.* Barton, 1 Mood. 141. R. *v.* Martin, 1 Mood. 483.

(*a*) R. *v.* Testick, 1 East 181 n; 2 East, P. C. 925. See 2 East, P. C. 977. R. *v.* Taylor, 1 Leach 215; 2 East, P. C. 960.

(*b*) 1 Mood. 483; overruling R. *v.* Thompson, 2 Leach, 910.

(*c*) 2 M. & Rob. 147.

(*d*) R. *v.* Hunter, *supra*. Thompson, *ubi supra*. R. *v.* Barton, 1 Mood. 441, *post*, p. 1654.

'Paid, sadler,' did not necessarily import a receipt by Sadler, but they might be a memorandum of the prisoner of her having paid the money to him. But Denman, C.J., told the jury, 'You must be satisfied that this was a receipt for money, and I apprehend that that does not admit of any kind of doubt. The prisoner clearly produced it as a receipt; but it is said that it might be merely a memorandum of her own, denoting that she had paid the bill; but I apprehend that where a person writes under a bill the word "paid," with the name of the tradesman, it will be difficult to say that it does not purport to be a receipt for the money' (*e*).

In R. *v.* Inder (*f*), on a case reserved on a verdict of guilty on an indictment for forging and uttering as genuine a receipt for money in the following form 'Recd. H. H.,' the judges held the indictment bad, because there was nothing to shew what the initials 'H. H.' meant, or what connection one Henry Hargreaves mentioned in the indictment had with the receipt (*g*).

The prisoner was indicted for uttering a forged 'receipt for money' as stated in some counts, and for uttering a forged 'acquittance and receipt for money' as stated in other counts. The instrument was as follows:—

'Received from B., due to W., 17*s.* 0*d.*, Settelled.' The prisoner was servant to W., and applied to B.'s wife for payment of a debt of 17*s.* due to W. She refused, unless she had W.'s receipt, and the prisoner went away and returned with the above document; upon which she paid the money. Upon a case reserved, six of the judges (*h*) thought the conviction good, as the receipt sufficiently appeared to be the receipt of W., especially considering the conduct of the prisoner in producing it as such, and if so it was a forgery. The other five judges (*i*) thought it did not purport to be the receipt of W., and therefore was no forgery, inasmuch as if it was taken to be the receipt of the prisoner it was no forgery; and that the offence of the prisoner was obtaining money by false pretences.

Purporting.—The word 'purport' imports that what appears on the face of the instrument alleged to have been forged is the apparent and not the legal import. Failure to keep in view the meaning of the word was under the old system of pleading fatal to many indictments. Thus where the indictment charged the forgery of a paper writing purporting to be directed to K. M. & H. bankers, judgment was arrested,

(*e*) R. *v.* Houseman, 8 C. & P. 180.

(*f*) 1 Den. 325; 2 C. & K. 635. The marginal note in Den. is quite unwarranted by the statement in the body of the report.

(*g*) R. *v.* Barton, 1 Mood. 141. The receipt had been given by Henry Hargreaves for other money. In order to avoid any such objections as were raised in this case, the better course in similar cases would be to describe the instrument as 'a certain receipt for money, that is to say, a receipt for the sum of £3,' which has been held to be sufficient. In R. *v.* Guy, 1 Cox 18, a receipt was written at the foot of an account for meat supplied headed, 'A. B. to Joseph Locke,' and the receipt was, 'Received, Joseph Locke, junior;' and the account was set out in some counts, and it was objected that these counts were bad, because there was nothing to shew what connection J. Locke, junior, had with the debt of J. Locke; but Erskine, J., refused to stop the case, and the prisoner was convicted on these as well as other counts which were unobjectionable.' C. S. G.

(*h*) Denman, C.J., Wilde, C.J., Platt, B., Cresswell, Erle, and Williams, JJ.

(*i*) Parke, Rolfe, BB., Patteson, Coltman and Wightman, JJ.

as the names of K. M. & H. did not appear on the face of the writing (*k*). So where a writing described as purporting to be a bank note did not so purport on its face (*l*). But in R. *v.* Reeve (*m*) the indictment, charged that the prisoner forged a scrip receipt 'with the name C. O. thereunto subscribed, *purporting* to have been signed by one Christopher O.' It was objected that this must necessarily be bad, as C. O. 'did not, on the face of it, purport to be Christopher O., but might be Charles, &c.' But the Court thought that this case differed in some degree from the two cases cited in support of the objection, namely, R. *v.* Jones (*l*) and R. *v.* Gilchrist (*k*); inasmuch as the note in R. *v.* Jones did not purport to be a bank note, and, therefore, the indictment, charging that it did so purport, was bad; and in R. *v.* Gilchrist, as the name of Lord K. did not appear on the face of the bill, it could not purport to be directed to him; but that, in the present case, this scrip receipt being subscribed with the name C. O., and the indictment charging that it purported to be signed in the name of Christopher O., a cashier of the Bank of England, it was not, upon the face of it, repugnant to the bill, or inconsistent with itself (*m*).

The prisoner was charged in one count with uttering a number of acquittances and receipts for money. The court refused to make the prosecutor elect on which receipt he would proceed as it appeared that all the receipts were uttered at one and the same time, and upon a case reserved it was held that this refusal was proper (*n*).

The prisoner was indicted for forging and uttering 'a certain warrant for the payment of money, to wit, for the payment of the sum of £4 10*s*.,' and there were no prefatory allegations or innuendoes. The prisoner was a chimney sweeper, and had on several occasions been employed to sweep the funnels of the steam vessel 'Princess Victoria.' The prisoner presented the following forged document at the counting-house of the owners.

'This is to satisfy that R. R. has swept the flues, and cleaned the bilges, and repaired four bridges of the "Princess Victoria."

'J. N.

'£4 10*s*.'

Parke, B., said, 'I think that the written evidence and the parol testimony taken together shew that the paper, if genuine, would have authorised the payment of the sum mentioned in it. Under the old law, averments would have been necessary, to shew that this was a warrant for the payment of money; but, as the law is at present, no such averments are necessary, if the indictment is framed on 2 & 3 Will. IV. c. 123, s. 3 (rep.) In the present case it appears, by the evidence which has been given, that this (if genuine) was a voucher for the payment of this money. If you describe the instrument in the

(*k*) R. *v.* Gilchrist, 2 Leach 657; 2 East, P. C. 982. For a similar case see R. *v.* Edsall, 2 East, P. C. 984; 2 Leach, 662 n.

(*l*) 2 East, P. C. 864; *ante*, p. 1635.

(*m*) 2 Leach, 808, 814; 2 East, P. C. 984. Heath and Lawrence, JJ., and Thomson, B. The case was reserved for the consideration of the twelve judges but it does not appear to what conclusion they came on this point.

(*n*) R. *v.* Thomas, 2 Leach, 877; 2 East, P. C. 934.

indictment instead of setting it out, averments are, since 2 & 3 Will. IV. c. 123, not necessary, as they were before that Act; and if the instrument be described under that statute it is matter of evidence whether the instrument comes within the description given of it by the indictment' (*o*).

Instruments in a Foreign Language.—If the instrument forged be in a foreign language, it must be set out (if at all) in that language, and a complete and accurate translation must also be set out. Judgment was arrested upon an indictment for forging a Prussian treasury note, on the ground that the indictment did not contain any English translation of the note, which was in a foreign language (*p*).

An indictment charged the prisoner with having in his possession plates upon which there was engraved a promissory note in the Polish language, which was set out, and was translated into the English language. In the rim and margin of the plate of the note, in the Polish language, were certain words, which in English denoted 'year,' '1824,' and 'five florins,' but none of these words were stated in the translation. The decree of 1823, mentioned in the note, ordered that the notes were to be marked of the year 1824, and directed that the year 1824 should be put upon them; and that 'five florins' should be put upon them; and the words 'year,' '1824,' and 'five florins' were part of a genuine Polish note, and a note without these words would not be received at the government offices. It was objected that this translation was inaccurate and insufficient, and the point was reserved for the consideration of the judges, who expressed no opinion upon it, as they held the conviction right upon another count, but it is said that they were unanimously of opinion that the translation was imperfect (*q*). The majority are said to have held that it was not sufficient on an indictment for forgery of a foreign note to describe it in the English language (*r*), but that the objection, provided the description is in the words of the statute creating the offence, could only be taken advantage of by demurrer, and was cured, after verdict, by 7 Geo. IV. c. 64, s. 21 (*s*).

Where an indictment charged the uttering of a bill of exchange, which was as follows:—

'No. 6811. § Due 7th December.

'St. Petersburgh, le 4 Août, 1834. B. P. £500 stg. A quatre mois de date par cette lettre de change à l'ordre de nous-mêmes la somme de cinq cent livres sterling, value en moi-même, que passerez suivant l'avi de

'S. & Co.

'Messrs. B., D., H., Dublin. 'Payable, Londres.'

(*o*) R. *v.* Rogers, 9 C. & P. 41, Parke, B., and Bosanquet, J., See R. *v.* Rice, 6 C. & P. 634.

(*p*) R. *v.* Goldstein, R. & R. 473.

(*q*) R. *v.* Harris, R. *v.* Moses, R. *v.* Balls, 7 C. & P. 429, (n). R. *v.* Warshaner, 1 Mood. 466.

(*r*) R. *v.* Harris, 7 C. & P. 429. This ruling was given notwithstanding 2 & 3 Will. IV. c. 123, s. 3. re-enacted as 24 & 25 Vict. c. 98, s. 42, *ante*, p. 1650.

(*s*) R. *v.* Harris, R. *v.* Warshaner, *ubi sup.*

And which in English is as follows :—

'No. 6811. $ Due 7th December.

'St. Petersburgh, the 4th August, 1834. Good for £500 sterling. At four months date by this bill of exchange, to the order of ourselves, the sum of five hundred pounds sterling, value in myself, which you will pass according to the advice of

'S. & Co.'

'Messrs. B., D., H., Dublin. 'Payable, London.'

It was objected that this was not a bill of exchange, for that it contained no order to pay, and that the word 'livres' did not mean pounds; but, upon a case reserved, the conviction was held right (*t*). An indictment for uttering a foreign promissory note need not allege it to be payable out of England (*u*).

Intent to Defraud.—The mode of stating the intent to defraud, which is an essential element in the offence (*v*), is governed by 24 & 25 Vict. c. 96, s. 44 (*ante*, p. 1642). It is not necessary to state in the indictment the manner in which the party was to have been defrauded (*w*).

Description of Offence.—If the indictment proceeds upon a statute, the charge should, in general, be set forth in the very words of the statute describing the offence (*x*). But unsubstantial variations from the statutory words are not fatal.

Thus an indictment for forging a stamp on foreign muslins, which stated the duty to be chargeable 'for, on, and in respect of,' foreign muslin, was held good; though the words of the statute in the clause imposing the duty were, 'for and upon;' in other clauses, 'for;' in others, 'on;' and in others, 'upon' (*y*).

And an indictment on 2 Geo. II. c. 25 (rep.) which charged that the prisoner 'did feloniously *alter* and cause to be altered a certain bill of exchange, *by falsely making, forging, and adding* a cipher 0 to the letter and figure £8, &c.' was held good, though the words of the statute were 'if any person shall *falsely make, forge, or counterfeit*,' and the word *alter* was not used in the statute (*z*). The judges considered that there was no difference in substance or in the nature of the charge, whether the indictment were for feloniously altering, by falsely making and forging, or for feloniously making and forging by falsely altering, &c. (*a*). We have already seen that if any part of a true instrument is altered, the offence may be treated as a forgery of the whole instrument, and be so laid in the indictment (*b*).

A superfluous description will not make an indictment bad (*c*), nor

(*t*) R. *v.* Szudurskie, 1 Mood. 429.

(*u*) R. *v.* Lee, 2 M. & Rob. 281, decided on 11 Geo. IV. & 1 Will. IV. c. 60, s. 30 (rep.).

(*v*) *Ante*, p. 1643.

(*w*) R. *v.* Powell, 2 East, P. C. 989; 1 Leach, 77. R. *v.* Elsworth, 2 East, P. C. 986.

(*x*) 2 East, P. C. 985.

(*y*) R. *v.* Hall, 2 East, P. C. 895, 988. And an indictment at common law was held bad for uncertainty, which stated that the defendant forged, or caused to be forged, a bill of lading. R. *v.* Stocker, 5 Mod. 137; 1 Salk. 342, 371; and see R. *v.* Walcot, Rep. temp. Holt, 345.

(*z*) R. *v.* Elsworth, 2 East, P. C. 986, 988.

(*a*) Id. ibid.

(*b*) *Ante*, pp. 1600 *et seq.* But under the old strict pleading it was usual to state the particular alterations in at least one count. 2 East, P. C. 980.

(*c*) 2 East, P. C. 985.

will the insertion of superfluous words not contained in the statute on which it is founded (*d*). Where, upon an indictment on 2 Geo. II. c. 25 (rep.), for forging 'a bond *and* writing obligatory,' it was objected that, as the statute used the term *bond* as well as the term *writing obligatory*, the indictment ought to have described the offence more particularly, either as a forgery of the one or the other; that it should have described the instrument in this case as a *writing obligatory*, as it had neither a defeasance nor penalty annexed to it; and that, although a bond were a writing obligatory, yet the converse did not hold; but the indictment was held good (*e*).

Where an indictment charged the prisoner with having forged 'a certain warrrant and order for the payment of money,' which was a cheque on a bank in the ordinary form (to P. or bearer). The indictment was held good, for the instrument was both a warrant and order; a warrant authorising the banker to pay, and an order upon him to do so (*f*).

In R. *v.* Dixon (*g*) where an indictment charged the forgery of a warrant *and* order for the payment of money, which was as follows:—

'Gentlemen,—I do hereby authorise the bearer of this note to draw the money that you now hold belonging to me.—W. S.'

Alderson, B., after consulting Coleridge, J., held the indictment bad, because the instrument set out was a warrant and not an order.

But in R. *v.* Williams (*h*), the indictment charged the prisoner in different counts with forging and uttering 'a certain warrant, order, and request for the delivery of goods,' which said forged warrant, order, and request was in the words, &c., following:—

'Mr. B.,—S. Pleas to sen by bearer a quantity of basket nails a clasp for

'E. L.'

L. was in the habit of buying ironmongery from B., and had for some time employed the prisoner to sell goods for him on commission. The prisoner presented to B. a paper in the terms set out in the indictment, which was proved to be a forgery of L.'s handwriting. It was objected that the document was neither a warrant nor an order, but only a request for goods; and that in order to satisfy the indictment it must be a warrant and order as well as a request (*i*). The prisoner was convicted of of uttering, and, on a case reserved, the judges held that as the instrument

(*d*) R. *v.* Brewer, 6 C. & P. 363.

(*e*) R. *v.* Dunnett, 2 East, P. C. 985; 2 Leach, 581. With respect to this case it has been said that the term bond may be properly applicable to an obligation without a condition, although for the sake of distinction it is usually called a single bill. 6 Evans, Coll. Stat. Pt. V. Cl. xii. p. 581. And he refers to 2 Bl. Com. 340.

(*f*) R. *v.* Crowther, 5 C. & P. 316, & MS. C. S. G. Bosanquet, J. And see R. *v.* Gilchrist, C. & M. 224; 2 Mood 233.

(*g*) 3 Cox, 289. This case is stated from the indictment and case together. The judges sent for a copy of the indictment before deciding.

(*h*) 2 Den. 61: 20 L. J. M. C. 106.

(*i*) R. *v.* Williams, 2 C. & K. 51, was cited, where a document described as a warrant and order was held by Wightman, J., to be a warrant only and the variance fatal.

was set out *in hæc verba*, it need not be proved to answer all the terms of the description and that the conviction was right.

Jurisdiction and Venue.—Forgery could not, at common law, be tried at quarter sessions (*j*) and is excluded from the jurisdiction of that Court by the Quarter Sessions Act, 1842 (*k*).

Where an indictment stated the forgery to have been committed in the County of Nottingham, and it was proved to have been committed in the county of the town of Nottingham, it was held that, although under the Counties of Cities Act, 1798 (38 Geo. III. c. 52), it was triable in the county at large, the offence should have been laid in the county of the town (*l*).

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 41, 'If any person shall commit any offence against this Act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged, or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any Act passed or to be passed, every such offender may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody in the same manner in all respects as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed in such county or place' (*m*).

This enactment, it will be seen, applies to all kinds of forgery. It is not necessary to aver in the indictment that the accused was in custody in the county in which it is proposed to try him (*n*).

By sect. 50, 'All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, enquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner

(*j*) R. *v.* Gibbs, 1 East, 173; 2 East, P.C. 684. 2 Hawk. c. 8, s. 84. Cf. R. *v.* Higgins, 2 East, 5, 18. R. *v.* Rigby, 8 C. & P. 770.

(*k*) 5 & 6 Vict. c. 38, s. 1: *post*, p. 1932.

(*l*) R. *v.* Mellor, R. & R. 144. Where the indictment is preferred in the next adjoining county, under 38 Geo. III. c. 52, for an offence in the county of a city or town, though the indictment must state the offence to have been committed in the inferior county, it need not aver that the county in which the indictment is preferred is the next adjoining county. But it may be stated in the caption, when the record is regularly drawn up. R. *v.* Goff, R. & R. 179.

(*m*) Taken from 11 Geo. IV. & 1 Will. IV. c. 66, s. 24. R. *v.* James, 7 C. & P. 553.

(*n*) See R. *v.* Smythies, 1 Den. 498; decided on the authority of R. *v.* Whiley, which is correctly reported 1 C. & K. 150, but wrongly reported 2 Mood. 186. At the first meeting of the judges to consider that case the indictment *per se* was considered bad; but at the second meeting it was held that on the whole record, including the caption, plea, &c., the conviction was good. 1 Den. 499, note.

in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed on "the high seas;" Provided that nothing herein contained shall alter or affect any of the laws relating to the government of [His] Majesty's land or naval forces' (*o*).

Evidence.—The evidence in forgery must support the material facts stated in the indictment. The intent to defraud may be alleged and proved generally (*p*). And the manner in which the fraud was carried or intended to be carried into effect is peculiarly matter of evidence (*q*).

The testimony of the person whose name has been forged, when disinterested, is in general the most satisfactory of any on the question of his handwriting (*r*); but on an indictment for forging a bank note, it was ruled that the handwriting of the cashier of the bank might be disproved by any person who was acquainted with his handwriting (*s*).

Upon an indictment for uttering a forged cheque, evidence was given of various facts tending to shew that the prisoner uttered the cheque with a guilty knowledge that it was a forgery, and the handwriting of the drawer, Mrs. P., was disproved by the evidence; but she was not called, although alive and within reach of a subpœna. Cresswell, J., said: 'Assuming the cheque to be forged, there is evidence, from the prisoner's conduct to shew guilty knowledge; and it being proved not to be in P.'s handwriting, the same facts may be used to shew that P. did not authorise the use of her name, and that the prisoner was aware of that fact' (*t*).

As to proof of handwriting and as to comparing a disputed writing with any writing proved to be genuine, see 28 & 29 Vict. c. 18, s. 8, *post*, Bk. xiii, tit. 'Evidence' (*u*).

Where the question is, whether a seal has been forged, seal engravers may be called to shew a difference between a genuine impression and that supposed to be false (*v*).

In R. *v.* Hevey (*w*), an indictment against B. and others, for a conspiracy to defraud, by means of a fraudulent acceptance of a bill of exchange, averred that B. in pursuance of the conspiracy, did fraudulently, &c., write his acceptance to the bill. No other evidence was given either of the fact of writing the acceptance, or of the handwriting of B., than

(*o*) As to Admiralty jurisdiction, *vide ante*, Vol. i. pp. 31 *et seq.*

(*p*) 24 & 25 Vict. c. 98, s. 44, *ante*, p. 1642.

(*q*) *Ante*, pp. 1643 *et seq.*

(*r*) 2 East, P. C. 999. R. *v.* Smith, Gould and Yates, JJ., 2 East, P. C. 1000.

(*s*) R. *v.* Hughes; 2 East, P. C. 1002. Le Blanc, J., R. *v.* M'Guire, id. And see R. *v.* Downes, *post*, p. 1669, where a father was admitted to disprove the handwriting of his son, who was at Jamaica. And in the Bank Prosecutions, R. & R. 378, it was held, on a case reserved, that it is not necessary that the signing clerk should be produced, if witnesses acquainted with his handwriting state that the signature to the note is not his handwriting.

(*t*) R. *v.* Hurley, 2 M. & Rob. 473.

(*u*) In Phillips on Evidence (2nd ed.) 223, the evidence of experts, &c., as to handwriting, is considered not to be secondary evidence. *Vide post*, p. 2149.

(*v*) By Lord Mansfield, in Folkes *v.* Chad, 1783, MS., cited in Phill. Evid. 227.

(*w*) 2 East, P. C. 858, note (*a*): 1 Leach, 232.

that of a witness, who proved that the bill, with the acceptance written upon it, was shewn to B., who, being asked whether it was a good bill, answered that it was very good. Upon a case reserved for the consideration of the judges, whether this evidence supported the allegation that B. wrote the acceptance: all the judges were of opinion that it was proper evidence to be left to the jury, upon which they might found their verdict that B. wrote the acceptance.

In R. *v.* Williams (*x*) the prisoner was indicted for uttering a forged will, and it was stated in the opening that the supposed will, together with ten different pieces of paper used for the purpose of setting it up, had writing, which was apparently written over pencil marks, which had been rubbed out. An engraver, called as a witness, stated that he was in the habit of looking at minute lines on paper, and had examined the papers, to see if there were marks of pencil, with a mirror, and had traced marks on the paper both of letters and words, and he had no doubt that the pencil had been rubbed. Upon being asked what he had observed, the counsel for the prisoner objected that the rule had been rather to narrow this sort of evidence than to extend it; the rule now acted on was, that witnesses shall not be called to state to the jury that which they, as intelligent persons are capable of deciding for themselves: it would be dangerous to suffer a witness to be called to prove that he can see what the jury are unable to discover. It was answered that this was not a question of opinion: it was a matter of fact. The paper required minute inspection, by habit and practice to discover the marks upon it. The witness had examined the paper out of court, and could pledge his oath to the fact that the marks did exist; and if the words were pointed out to the jury they could see them. This was evidence of a fact, and the question was whether the jury were to be assisted in forming a conclusion as to that fact? Parke, B., after consulting Tindal, C.J., said that they were both of opinion that the evidence was admissible, but the weight of it would depend upon the way in which it would be confirmed.

The prisoner was indicted, for that he, having in his possession a certain bill of exchange, forged the following acceptance on it:—

'Accepted, payable at L. and Co.'s, bankers, London.'

The bill was drawn, endorsed, and accepted by the prisoner. On being taken into custody, he did not deny or attempt to disguise the fact; neither did he personate, or in any manner shew an intention to personate any other person. The bill was paid away to one of the parties named in the indictment, as intended to be defrauded by it; but it was never presented for payment, and consequently not refused. Littledale, J., was of opinion that the acceptance, being proved to be in the handwriting of the prisoner, was not in itself *primâ facie* evidence of a forgery sufficient to put him on his defence. But, after some discussion, he allowed the case to go to the jury, intimating that he should reserve the point in the event of a conviction (*y*).

(*x*) 8 C. & P. 434. See *post*, p. 2261. 'Evidence.'

(*y*) R. *v.* Musgrave. 1 Lew. 138. The prisoner was acquitted. There were several other points in the case which are not here relevant.

On an indictment for forging an endorsement on a bank post bill, it appeared that M. A. C. lost the bill, which was payable to herself and unendorsed. The prisoner asked D. if it was a good bill, and he replied that no doubt it was good, but to be of use it must have the name of the party to whom it was payable. The prisoner left, and returned with the bill, and it then had the endorsement, 'M. A. C.,' which was not her signature. It did not appear whether the prisoner could write or not. It was urged that there was no evidence of the forgery. Erle, J., 'I think if a man has an instrument in his possession without an endorsement, or other writing, the subject of the alleged forgery, and half an hour afterwards is found with the instrument endorsed, there is some evidence of forgery to go to the jury. Although the prisoner might not be able to write himself, yet if he got any one to write the name, he is as much guilty of forgery as if he wrote it himself' (*z*).

On an indictment for forging and uttering requests or orders for the delivery of goods, it appeared that one forged order purporting to be signed by one T., and dated B. was received by C. and Co., in London; and having a customer of the name of T. at B., they forwarded the goods by railway as directed. A witness stated his belief that this order was in the prisoner's writing. A similar forged order was received the same day by B. and Co., who executed the order: but the witness declined to say that this was in the prisoner's writing. Both parcels arrived on the evening of the same day at the B. station, and the prisoner came and asked if there were some parcels for T., and ultimately the goods were given up to him. On the back of a letter found on the prisoner were the names of B. and Co. Wightman, J.: 'If the evidence of the receipt of the goods was given as proof of the uttering, that is to say, to prove a guilty knowledge, I am of opinion it is no evidence in either case of the utterance by the prisoner; neither order has been traced to him beyond the proof of handwriting in the one case. If no proof of handwriting had been given, I should have rejected the evidence of the receipt of the goods altogether. As it is, I shall tell the jury that there is no evidence, not the slightest, of the uttering of either order. There is the evidence of forgery in the one case, but no evidence at all in the other' (*a*).

Uttering, etc.—On an indictment for uttering a forged acceptance of a bill of exchange, it appeared that a witness had received a letter in the prisoner's handwriting, enclosing the bill, and the day before the bill became due, the prisoner wrote a letter to the witness, admitting that the acceptance was a forgery. Wightman, J., told the jury that on the evidence as to the letter containing the bill, it would be for them to say whether they were satisfied that the prisoner did in fact utter the bill,

(*z*) R. *v.* James, 4 Cox, 90, Erle, J.

(*a*) R. *v.* Johnson, 6 Cox, 18. 'This decision deserves reconsideration. By asking for the goods, as the prisoner did, he shewed that he knew both the parcels were ordered, and the time when they were ordered. Therefore, he must have known the contents of both orders. By claiming the goods and obtaining their delivery to himself he proved that he was obtaining them for himself; and there was not even a suspicion of any one else being engaged in the transaction; there was, therefore, on these facts alone, a strong presumption that he sent the orders, or at all events enough to call on him to shew who had done so. And when the proof of the handwriting to one of the orders is added to the other facts, the only rational conclusion is that the prisoner sent both orders.' C. S. G.

and whether he was the person who sent, or caused to be sent, the letter in which the enclosure was. But it did not entirely rest there; for the day before the bill would become due, the prisoner wrote another letter, stating that the bill would be dishonoured, and admitting that the acceptance was a forgery. And on these facts it was for the jury to determine whether the prisoner uttered the bill (*b*).

Giving a forged note to an innocent agent or an accomplice, in order that he may pass it, is a disposing of and putting it away (*c*). The first count (*cc*) charged the prisoner with disposing of and putting away a forged £5 bank note, and the second with offering to one A. N. a forged £5 bank note. It appeared from the confession of the prisoner that he met T. and bought of him six forged £5 bank notes. The prisoner delivered to B. a £5 bank note, which, it appeared from the prisoner's confession, was one of the six £5 bank notes purchased by him from T. The prisoner directed B. to endeavour to get the note changed at a butcher's. B. accordingly went into the shop of N., leaving the prisoner waiting near the top of the street. B. purchased some meat, and offered in payment the said £5 forged bank note. N. took the note, deducted the price of the meat, and gave B. the change. Before B. had quitted the shop, one H. came in and made some communication privately to N., upon which he insisted on having the meat and the change returned to him, which B. complied with. B. was then detained by N. and H., on suspicion of having paid to the former the forged £5 bank note knowing it to be forged. For the prosecution it was contended that the offer of a £5 forged note by B. to N., as the agent of the prisoner, was the act and offer of the prisoner. For the prisoner, it was contended that he, not having been present, ought to have been indicted as an accessory before the fact, and could not legally be convicted as a principal. Vaughan, B., told the jury that if they should be of opinion that B. knew when he offered the note to N. that it was a forged note, the prisoner could not be considered as a principal; but that if B. was employed by the prisoner as an innocent instrument, being ignorant that the note was a forged one, it would then be the act of the prisoner, and he might properly be convicted. The learned judge added also that he thought the delivery of the prisoner to B. of the note in question, if delivered with a knowledge of its being forged, and for the purpose of being uttered by B., was in itself a disposing of and putting away of the note in question, within 15 Geo. II. c. 13, s. 11 (rep.). The jury found the prisoner guilty, and added that B. did not know that the note given to him by the prisoner, and by him offered in payment to N., was a forged note. And, upon a case reserved, the judges thought that B. knew it was forged, but were of opinion that the giving the note to B. that he might pass it was a disposing thereof to him, and that the conviction was right (*d*).

The prisoner was indicted (*e*) for uttering a forged copy of the register of a marriage. It appeared that H. B. had become pregnant

(*b*) R. *v.* McQuin, 1 Cox, 34.

(*c*) Fost. 349. R. *v.* Palmer, 1 B. & P. (N. R.) 96; 2 Leach, 978; R. & R. 72. *Vide ante*, Vol. i. p. 105.

(*cc*) Under 15 Geo. ii. c. 15, s. 11 (rep).

(*d*) R. *v.* Giles, 1 Mood. 166. See R. *v.* Finkelstein, 16 Cox, 107.

(*e*) Under 1 Will. IV. c. 66, s. 30. See now 24 & 25 Vict. c. 98, s. 36, *post*, p. 1732.

by the prisoner, and, in order that her father might consent to her cohabiting with the prisoner, the latter procured the marriage lines of another person, printed a copy thereof, leaving certain blanks, and filled up these blanks with his own name and that of H. B., at the same time adding the name of the parish clergyman as having performed the ceremony, and that of the parish clerk as having been witness thereof. He then gave the document to H. B., in order that she might shew or give it to her father, and this H. B. accordingly did. Alderson, B., 'If you can shew no uttering except to H. B., who was herself a party to the transaction, I think you will fail to shew an uttering within the statute. It is like the case of one accomplice delivering a forged bill of exchange to another with a view to uttering it to the world' (*f*).

The prisoner was indicted for forging and uttering an endorsement on an instrument, in the form of a bill of exchange, in which one Aickman was the payee. The endorsement was 'received, R. Aikman.' It appeared that the prisoner took the instrument to the bank where it was payable and presented it for payment; but the clerk, perceiving that the name of the payee in the instrument was spelt Aickman, with a *c*, but in the endorsement was spelt without any *c*, objected to pay it; upon which the prisoner altered the endorsement so as to make it stand, 'Received for R. Aickman, G. Arscott.' It was objected that this did not constitute an uttering of the original endorsement, as the whole that took place, viz. the presentment of the bill, the objection by the clerk, and the alteration by the prisoner, formed but one transaction; but it seems to have been ruled that the presenting of the bill to the clerk, previous to his objection, was a sufficient uttering (*g*).

Conditional Uttering.—In R. *v.* Cooke (*h*) upon an indictment for forging and uttering a forged acceptance of a bill of exchange, it appeared that the prisoner gave the bill to the manager of a bank to which he was indebted, saying he hoped the bill would satisfy the bank as a security for the debt he owed, and the manager replied that that would depend on the result of his inquiries respecting the acceptors of the bill. It was submitted that there was no sufficient uttering, as it was at most conditional; and was like the delivery of a deed as an escrow, as the bill was to be placed to the prisoner's credit or not according to circumstances; but Patteson, J., held that a conditional uttering of a forged instrument is as much a crime as any other uttering.

In R. *v.* Harris (*i*), the prisoner was indicted for uttering a Polish note. The prisoner shewed to one F. a Polish note on one occasion, and told him that two thousand and a half of those notes had been lately made, and proposed to him to purchase some of them; F. said he could not use them, and wished to have Austrian notes. The prisoner said

(*f*) R. *v.* Heywood, 2 C. & K. 352. The prisoner was accordingly acquitted. It is clear that there was an uttering by H. B.; but as that was in the absence of the prisoner, the prisoner was only an accessory before the fact to that uttering. R. *v.* Soares, R. & R. 25. R. *v.* Morris, R. & R. 270. See R. *v.* Giles, *ante*, p. 1663, that the facts here stated would have proved a disposing and putting away of the document by the prisoner. Under 24 & 25 Vict. c. 94, s. 1 (*ante*, Vol. i. p. 130), the prisoner might have been convicted as an accessory before the fact.

(*g*) R. *v.* Arscott, 6 C. & P. 408, Littledale, J., Vaughan and Bolland, BB.

(*h*) 8 C. & P. 582.

(*i*) 7 C. & P. 428.

nothing more then, but afterwards, when they became more acquainted, he gave F. a Polish note (the one mentioned in the indictment), and said that they were good, and that they were well made; that he had a quantity of them, and wished the witness to buy some. Littledale told the jury, 'If the prisoner meant it as a specimen, or that the witness might see whether the others were made according to the pattern, then, in my opinion, it would not be an uttering within the meaning of the Act. If you are satisfied that it was not uttered with intent to put it into circulation, but was to be kept as a pattern, and afterwards thrown away or put in the fire, then you may acquit the prisoner.'

An indictment (*j*) charged that the prisoner unlawfully, &c., uttered and published a promissory note, containing the words 'five hundred,' expressing the sum of the said promissory note in white letters on a black ground, without being authorized, &c., by the Bank of England. The note was as follows:—

'Bank of England, 1811.

'No. 43106. No. 43106.

'I promise to pay Mr. James Jones, or bearer, on demand, the sum of five hundred pens.

'June 11, London. 11 June, 1811.

'For the Governor and Company of the Bank of England.

'Rd. Denton.'

The defendant, in order to persuade an innkeeper that he was a man of substance, one day after dinner, pulled out a pocket-book, and shewed the innkeeper a 500 and a 50 note of the above description, of which at the time the innkeeper only saw the sums and general form. The defendant said he did not like to carry so much property about him, and desired the innkeeper to take care of them for him. The innkeeper took charge of them accordingly, and thought the defendant acted very prudently. They were put into a cover and sealed up by the defendant himself; the innkeeper received them from him in an envelope, which, after having kept for some time, upon some suspicions afterwards created by the conduct of the defendant, he broke open, and found it to contain the notes above mentioned. Upon a case reserved as to whether there was a sufficient uttering, etc., of the note, the conviction was held wrong. The judges seem to have thought that, in order to make it an uttering, it should be parted with or tendered or offered, or used in some way to get money or credit upon it (*k*).

Upon an indictment for uttering a forged receipt, it appeared that

(*j*) Under 13 Geo. III. c. 79, s. 2 (rep.), which made any person, who shall utter, or publish any promissory note, &c., containing the words 'Bank of England or bank post bill, or any word or words expressing the sum, or amount of such promissory note, &c., in white letters, on a black ground, punishable by six months' imprisonment.

(*k*) R. *v.* Shukard, R. & R. 200. 'This case appears to me to have been much misunderstood, and by no means to warrant the marginal note. "Shewing a man an instrument, the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, is not an uttering or publishing within the 13 Geo. III. c. 79." It is manifest that the whole of the notes was not shewn, both from the statement and from the word "pens," and that what the prisoner really did was to shew so much only of the notes as should lead to the supposition that they were bank notes, which they were not.' C. S. G. See p. 1667, note (*o*).

the prisoner had bought stone at a quarry managed by T., to the amount of more than £5. He was repeatedly applied to for payment, and made repeated promises of payment, but at last he alleged that he had paid for the stone at the time, and that he had a receipt signed by T. On this F., who had succeeded T. as manager, went to him, and the prisoner produced the receipt, and exhibited it to him to look at, but would not part with it out of his hand. A few days after F. returned to him, taking T. with him, and again called on him to produce the receipt, which he did produce, and held it up for him and T. to look at, but refused to part with it out of his hand. F., however, got it from him. On a case reserved, it was held that there was an *uttering* (*l*).

Upon an indictment for uttering, disposing of, and putting off a forged receipt with intent to defraud, it appeared that G. applied to the prosecutor for a loan of money, and proposed the prisoner as a surety for the amount. The prosecutor went to the prisoner for the purpose of satisfying himself as to the prisoner's responsibility, and with this object required the production of the prisoner's receipts in respect to his house. The prisoner, with a view of causing the money to be advanced to G. (who was found to be a man of no responsibility) upon their joint security, produced to the prosecutor, and placed in his hands, but for the purpose of inspection only, three documents purporting to be receipts for poor rates in respect of the house, one of which was the forged receipt in question. The prosecutor inspected these documents in the presence of the prisoner, who then received them back from the prosecutor, and placed them on a bill file. The jury found the prisoner guilty, and that he placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance the money to G.; on a case reserved upon the question whether the evidence amounted in law to an uttering, &c., the conviction was affirmed. Campbell, C.J., said: 'Upon consideration there clearly seems to have been an uttering of the forged receipt within 11 Geo. IV. and 1 Will. IV. c. 66, s. 10. If it had been used in the manner stated for the direct purpose of gaining credit for the payment, which it purports to vouch, there can be no doubt, since the case of R. *v.* Radford (*m*), that there would have been a sufficient uttering. But the prisoner's counsel contended that there cannot be an uttering of a forged receipt unless it be used directly to gain credit upon it by its operating as a receipt; so that merely using this receipt for the purpose proved, to induce a belief that he had paid the money, and therefore was a man of substance, does not amount to an uttering within this Act of Parliament. R. *v.* Shukard (*n*), which was mainly relied upon for this distinction, does not seem to us to support it. That case is entitled to the highest respect, and upon similar facts we should submit to its authority. But the learned judges there did not proceed upon the distinction that to make the using of a forged negotiable instrument a felonious uttering, the intention of the prisoner must be to gain credit upon it by making it operate as such. They appear to have thought that there the evidence

(*l*) R. *v.* Radford, 1 Den. 59: 1 C. & K, 707. In the course of the argument, Coleridge, J., said, 'This was not a *tendering*, for there was no intention to give.'

(*m*) *Supra.*

(*n*) *Ante*, p. 1665, note (*k*).

was not sufficient to shew an intention in the prisoner to induce the innkeeper to advance any money or to give credit upon it to him. The doctrine supposed to be established by that decision is " that in order to make it an uttering it should be parted with or tendered, or used in some way to get money or credit upon it." The words " upon it " we consider equivalent to " by means of it," otherwise there could hardly be an uttering of court rolls and other instruments enumerated in the statute. In the present case it is expressly found " that the prisoner placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance money to G." This was a using of the forged receipt to get money upon it, or by means of it, as much as if the prisoner himself had been the borrower of the money, and the receipt had purported that he had paid the rates, and the prosecutor had thereupon advanced him a sum of money, and had been cheated out of it by him. We therefore think that the conviction was according to decided cases and sound principles of law ' (*o*).

(*o*) R. *v.* Ion, 2 Den. 475: 21 L. J. M. C. 166. ' This appears to be one of the clearest cases when the words of the clause are considered. 11 Geo. IV. and 1 Will. IV. c. 66, enacted that if any person shall ' utter,' &c., ' knowing the same to be forged,' ' any receipt,' &c., ' with intent to defraud *any person whatsoever*.' In order therefore to bring a case within this clause it is necessary to prove, first, that the receipt was forged; secondly, that the prisoner knew it to be so; thirdly, that he uttered it; and lastly, that the uttering was one with intent to defraud some person. Now in this case it is clear that the receipt was forged, and that the prisoner knew it was so. It is equally clear that the receipt was uttered; for there was an actual manual tradition out of the hands of the prisoner into the hands of the prosecutor; and whatever be the extent of the meaning of the term ' utter,' there can be no doubt that at all events it includes every case where the instrument passes out of the hands of one person into the hands of another. Lastly, the jury found that the act was done with intent to defraud: and there was abundant evidence of it. The confusion in the argument arose from confounding the uttering with the intent to defraud, instead of considering each separately. The fact of uttering being clear, the only remaining question was, did the intent to defraud ' any person whatsoever ' exist ? There is not an expression in the act that indicates that there must be a fraud committed; still less that such fraud must be committed by means of or upon the faith of the instrument. R. *v.* Shukard (*ante*, p. 1665) seems to have been entirely misunderstood in this case. In that case the prisoners shewed a five hundred and fifty note of the description mentioned, but of which the inn-keeper ' *only saw the sums and general form.*' The *whole* of the notes, therefore, never was in fact seen by the innkeeper, and it is equally clear was never intended to be seen by him, as the word ' pens ' would have at once disclosed that the notes were not bank notes at all. ' The judges held the conviction wrong, being of opinion that this did not amount to an uttering,' and they were clearly right; for assuming that there may be an uttering by shewing an instrument, it is clear that can only be where the whole of the instrument is exposed to view, or possibly where it is produced and an opportunity afforded of inspecting the whole of it. The report adds ' that in order to make it an uttering they seemed to be of opinion that it should be parted with, or tendered, or offered, or used in some way to get money or credit upon it,' now the words ' to get money or credit upon it,' obviously only apply to the words ' used in some way,' and not to the previous words—and the judges, being clear that a parting with, tendering, or offering an instrument, would be an uttering, also thought that there might be a case where an instrument might be so used as to get money or credit upon it, though it was neither parted with, tendered, or offered, and that this would likewise be an uttering. Such is the case of R. *v.* Radford, *ante*, p. 1666, where the instrument was shewn, but neither parted with, tendered, or offered. The words ' used to get money,' &c., mean ' with intent to get money,' &c.; and are adopted to indicate that where there is not a parting with, tendering, or offering, the facts must shew such a user as denotes an intent to get money or credit. Where an instrument is parted with, tendered, or offered, the act done is an uttering; but where the act done does not amount to a parting with, tendering, or offering, it may well be that the object with which that act is done may be necessary in order to determine whether that act does not amount to an uttering.

Upon an indictment for uttering a forged accountable receipt for goods, it appeared that proceedings were taken against the prisoner, who was a pawnbroker, for not restoring certain goods pledged with him, and that on the hearing the prisoner was defended by an attorney, who in his presence produced the forged accountable receipt (*i.e.* a pawnbroker's ticket), and stated that it was the ticket the prisoner had given when the goods were pledged. The jury found that it was forged, and that the prisoner did, through the hand of his attorney, deliver to the justices, as being the genuine ticket, the said forged ticket, he knowing it to be forged. Upon a case reserved, it was held that the ticket must, on this finding, be taken to have been produced by the attorney with the full sanction of the prisoner; and that such production was as much an uttering by him as if he had delivered it with his own hand (*p*).

A person who causes to be uttered in England a bill of exchange forged abroad is indictable in England for the uttering; and if he gave it to a banker abroad in order that it might be presented in England, this would be evidence that he uttered the bill in England (*q*).

The prisoner procured the prosecutor to write his name and the word 'accepted' on a blank stamp, and afterwards produced the bill to one E. when perfectly blank with the exception of the acceptance. It was submitted that, as the shewing the paper to E. might be considered as an uttering, the prosecutor should elect whether he would press this as the uttering, or state what uttering he intended to go upon, as every uttering was a distinct felony. For the prosecution, it was stated, that there were charges in the indictment for forging and uttering, and it was proposed to prove them by shewing a series of circumstances. Littledale, J., said: 'It is not as if they proposed to give evidence of acts quite distinct from each other. I think we must hear all the facts, which form parts of one continued transaction, and we cannot put the prosecutor to any election till his case is concluded' (*r*).

Questions have frequently arisen as to the necessary proof of the identity or non-existence (*s*) of the person whose name is charged to be forged.

In a case in which it became necessary to shew that the payee of a bill of exchange, whose name was W. P., and whose endorsement was alleged to be forged, was the identical W. P. to whom the bill was made payable, the drawer of the bill, whose testimony was considered as

During the argument, Jervis, C.J., said, 'If in the case of justification of bail a person had produced some (forged) bank notes to shew that he was possessed of a sufficient amount of property, would not that amount to an uttering of the notes?' Wightman, J., 'Suppose the proposed bail were asked in examination before the judge at chambers, "Have you paid all the rates due in respect of your house?" and he had said, "Yes, and I now produce the receipts," and he then produced for inspection, among others, one which was a forgery? or supposing a man proposes to borrow a sum of money, and, in order to satisfy the lender, who inquires, has he paid all his rates, he replies in the affirmative, and produces the receipts as proof of having paid them, what would you say to that case?' Jervis, C.J., 'Take the case of justification of bail; a man produces a forged deed, or a forged lease, to prove that he is of sufficient property, would that be an uttering?' C. S. G.

(*p*) R. *v.* Fitchie, Dears & B. 175; 26 L. J. M. C. 90.

(*q*) R. *v.* Taylor, 1 F. & F. 511, Piggott, B.

(*r*) R. *v.* Hart, 1 Mood. 486, Littledale, J., and Bolland, B.

(*s*) See also *ante*, pp. 1613 *et seq.*

the best evidence of the fact, was not produced; and the question was then raised, whether a letter of advice which P. had received from the drawer, with whom he was intimate, signifying that such a bill had been remitted to him, and desiring him, as an act of friendship, to pay the produce to one C. was sufficient evidence. Adair, Recorder, held that it was not sufficient; and the testimony of P., to shew the handwriting to be forged, was ultimately rejected, on the ground that though it might not be his handwriting, yet it might be the handwriting of another W. P., to whom the bill might be payable (*t*). But upon this case a doubt is suggested, whether the fact of W. P. being an intimate acquaintance and correspondent of the drawer, no evidence being given of the existence of any other W. P. to whom it might be supposed that the bill was made payable, was not sufficient evidence of the identity of the payee (*u*).

Upon an indictment for personating a proprietor of stock, he was examined as a witness, to shew the amount of the stock he had at the bank; and that the sum for which the prisoner had obtained the dividend warrant was the exact sum due to him at the time; evidence which would have the effect of proving his identity (*v*).

In R. *v.* Downes (*w*), the prisoner was indicted for forging a bill of exchange, purporting to have been drawn by H., payable to the order of J. S. From letters, written by the prisoner after his apprehension, it clearly appeared that the name of the supposed drawer, A. H., who was the prisoner's uncle, was forged; and it also appeared from the same letters that the J. S., whose endorsement was intended to be counterfeited by the prisoner, was the son of another person of the same name at Liverpool. A witness to whom the prisoner paid away the bill stated that he questioned the prisoner at the time, and that the account he gave was that the drawer of the bill, A. H., was a gentleman of credit, and that the endorser had received the bill in payment for cheeses; and the prisoner further said, that he might depend on it, it was a good bill. Neither A. H. nor J. S. the son were called as witnesses: but J. S. the father, swore that the endorsement was not in his handwriting; that he had lived thirty-six years in Liverpool, and knew no other person of the same name there, either a cheesemonger or otherwise, except his son. That his son had failed, and was lately gone to Jamaica. That the endorsement was not at all like his son's handwriting; and he did not believe it to be his. That the prisoner and his son were acquainted, and the prisoner had bought corks of him. Another witness also proved that the endorsement was not like the handwriting of the son, and that he did not believe it to be his. An objection was taken on behalf of the prisoner, that A. H., the drawer of the bill, ought to have been called to prove what J. S. it was, in whose favour it was drawn; but the evidence was left to the jury, and the prisoner was found guilty. And the point being afterwards submitted to the consideration of the twelve judges, they were all of opinion that the conviction was proper. Buller, J., who

(*t*) R. *v.* Sponsonby, 1 Leach, 332; 2 East, P. C. 996.

(*u*) 2 East, P. C. 997. There seems to have been sufficient evidence of the identity.

(*v*) R. *v.* Parr, 1 Leach, 434.

(*w*) 2 East, P. C. 997.

afterwards passed sentence upon the prisoner, in adverting to the reasons upon which the opinion of the judges proceeded, said that the objection supposed that there was a genuine drawer of the bill; whereas it was apparent, from the prisoner's own acknowledgments in his letters, that the name of the drawer, as well as that of the endorser, was forged by the prisoner: and if no real drawer existed, and the objection were allowed, it would be to excuse one forgery because another had been committed. He observed, in the second place, that the prisoner himself had ascertained who was intended by the J. S. whose endorsement was forged; for, when he negotiated the bill, he represented him to be a cheesemonger at L., and by another letter of the prisoner it was clear that he meant S. the son; for thereby he requested his uncle to go to S.'s mother, and desire her to say nothing about it, whether he had any concern or not, or whether he endorsed it or not. And he concluded by saying that, it being proved that the endorsement was not the handwriting of S. the son, the evidence of the forgery was full and complete, and the conviction right (*x*).

In R. *v.* Backler (*y*) where a prisoner was indicted for forging and uttering a cheque purporting to be drawn by G. A. on J., L., and Co., proof by a clerk of their house that no person of the initial and name of G. A. kept any account there, or had any right to draw cheques on their house, was held sufficient *primâ facie* evidence to go to the jury that G. A. was a fictitious person. In R. *v.* King (*z*) on an indictment for forging a bill purporting to have been accepted by 'S. K., Market-place, B.,' the prosecutor stated that he had been twice there to inquire after K., and had, on the second occasion, inquired at the bank there, and at a place where the overseers of the poor met, and he had made inquiries at N., at which place the bill purported to be drawn for T. W. the drawer, but was not able to hear anything of him; and he admitted that he was a stranger to both these places. It was submitted that the evidence was not sufficient, and that witnesses should have been called, who were acquainted with B. and N. respectively; but it was held that it was evidence to go to the jury. It was not certainly the most satisfactory evidence; nor was it the evidence that was usually given in such cases; but it was evidence, and it was for the jury to say whether it was sufficient, in the absence of any evidence on the part of the prisoner, who best knew the state of the matter (*z*).

W. Brothers were lace manufacturers, and D. was their traveller. In letters to D., W. wrote, suggesting that D. should get blank bill stamps signed in the manner of acceptances by men of straw. W. drew a bill on G. S., draper at B., which bore an acceptance G. S. not in W.'s handwriting. W. had endorsed the bill in question, and D., being charged with forging it, admitted that he had got it signed by a stranger, and produced the above letters to prove his innocence. G. S., a draper at B., proved that the words 'G. S.' in the acceptance were not his handwriting, and that he had made inquiries personally, and could not discover any other G. S., a draper in B., and had searched the

(*x*) R. *v.* Downes, 2 East, P.C. 997.
(*y*) 5 C. & P. 118, Parke and Gaselee, JJ.
(*z*) 5 C. & P. 123. Park and Parke, JJ., and Bolland, B.

directory, and there did not appear to be any other G. S., a draper, in B. It was objected that there was no proof that the name was not written by some other G. S., or that the G. S. was not an existing person; and that there was no sufficient evidence that the acceptance was not the acceptance of another G. S., at B. Cockburn, C.J., said, 'I think there is a case to go to the jury. There is some evidence that the G. S. who has been called is the only draper of that name living at B. If there is another G. S., a draper there, he might have been called as a witness for the prisoner. I am also of opinion that there is some evidence that the name "G. S." is fictitious, and that the acceptance was not the acceptance of a man of straw signing his real name' (*a*).

The prisoner was indicted for forging and uttering a cheque for £10 drawn in the name of J. W., on C. and G. It was proved by a clerk of C. and G. that they were bankers and army agents, and that there was no person of the name of J. W. had any account there, and that the cheque was presented to him and payment refused on that ground. He added that he was a clerk in the army agent department; he could not swear he knew the names of all the customers in the house, but he did not know any one of the name of J. W. in his department, and had inquired of the other clerks, and was informed by them that there was no such person in the banking department. It was objected that the evidence was not sufficient, as it was partly hearsay; but it was held that it was *primâ facie* evidence, and was sufficient to call upon the prisoner to shew that in fact there was a J. W. having an account with C. and G. (*b*). So where the prisoner was indicted for forging and uttering a cheque dated at K., and purporting to be drawn by J. H. on P.'s bank at L., and a clerk from that bank proved that the bank had no customer of the name of J. H., and that he knew the village of K., which was about a mile from L., and that there was no J. H. living there who would be likely to have an account with a banker: Bramwell, B., held that there was some evidence to go to the jury that J. H. was a fictitious person (*c*).

Proof that the prisoner, on uttering a note, represented the maker as living at a particular place and in a particular line of business, with evidence that it is not that person's note, is sufficient to prove it a forgery, if the prisoner be the payee of the note; and proof that there is another person of that name in a different line of business will not make it necessary to prove that it was not that person's note. The prisoner was indicted for forging and uttering a promissory note purporting to be drawn by W. H., payable to the prisoner or his order. The prisoner told the person to whom he uttered the note that it was drawn by W. H., who kept the Bull's Head at T., who was a respectable man.

(*a*) R. *v.* White, 2 F. & F. 554. The jury found that the prisoners got the acceptance signed in the name of G. S. by a person not of the name of G. S., and this prevented the question being reserved whether, if D. got the genuine acceptance of a G. S., and the prisoners converted it into the simulated acceptance of another G. S., a draper at B., with the fraudulent intention of inducing those to whom the bill was endorsed to suppose that it was the genuine acceptance of that G. S., the prisoners were guilty of forgery—a point clearly settled by the cases, *ante*, pp. 1609 *et seq.*

(*b*) R. *v.* Brannan, 6 C. & P. 326, Park and Patteson, JJ., and Gurney, B.

(*c*) R. *v.* Ashby, 2 F. & F. 560.

The note was dishonoured; and the prisoner, on being informed by the prosecutor that H. said he knew nothing of the note, said 'Does not he? I will let him see that.' H. proved that he kept the Bull's Head at T.; that the note was not made by him, or by his order, or with his knowledge, and there was no other publican of his name at T.; but there was a gentleman of the same name living there on his means, who for distinction was called gentleman H. The jury found the prisoner guilty of uttering the note knowing it to be forged, and said they were satisfied that when the prisoner represented it to be the note of H. of the Bull's Head, he knew it was not his note. And, upon a case reserved, the judges held that, as the prisoner had stated that W. H. of the Bull's Head was the maker, and from being payee of the note he must have known the particulars, it was sufficient for the prosecutor to shew it was not the note of that W. H.; and it lay on the prisoner to prove it the genuine note of another W. H., if it were so (*d*).

Guilty Knowledge.—The publication of the forged instrument, with knowledge of the fact, is made a substantive offence by most of the statutes which relate to forgery (*e*); and in cases of this kind the knowledge of the fact, or, as it is frequently termed, the *guilty knowledge*, becomes a material part of the evidence.

Upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been previously uttered by the prisoner, in order to shew his knowledge of the forgery (*f*).

So where the prisoner was indicted for forging and for uttering with guilty knowledge a bill of exchange, purporting to be drawn upon a certain banking-house, other forged bills upon the same house, which were found upon the prisoner at the time of his apprehension, were held admissible as evidence of guilty knowledge (*g*).

A prisoner was indicted for disposing of and putting away a forged note. The note in question was forged and was uttered by the prisoner on June 17, 1807, so that the only remaining question was as to his guilty knowledge of the forgery. To establish this, evidence was admitted that on March 20th preceding he had passed off a £10 Bank of England note, likewise forged, and of the same manufacture, and that there had been paid into the Bank various forged notes, dated between December, 1806, and March, 1807, all of the same manufacture, and having different endorsements upon them, in the handwriting of the prisoner. It likewise appeared that when he was apprehended he had in his possession paper and implements fit for making notes of the same kind as those produced. The twelve judges being consulted as to the admissibility of this evidence, were of opinion that it was admissible to prove the knowledge of the prisoner that the note was forged, and that everything which he said or did was proper to be admitted to shew his knowledge of the forgery (*h*).

(*d*) R. *v.* Hampton, 1 Mood. 255.
(*e*) *Ante*, p. 1600.
(*f*) R. *v.* Wylie, 1 B. & P. (N. R.) 92. 2 Leach, 983. See also *post*, p. 2113.
(*g*) R. *v.* Hough, R. & R. 120.
(*h*) R. *v.* Ball, 1 Camp. 324; R. & R. 132; 2 Leach, 987 (n). See also R. *v.* Colclough, 10 L. R. Ir. 241; 15 Cox, 92 (I).

Where the prisoner was indicted for forging a promissory note (not a note of the Bank of England), and also for uttering it, evidence was given that, in the same pocket-book belonging to the prisoner in which the forged note was found, on which the indictment proceeded, there was also found another promissory note for £100, payable to the prisoner or order, appearing to be signed by one W. G. It was held that W. G. might be called to prove that the signature was not his and that he did not owe the prisoner £100 (*i*).

Where, in order to shew guilty knowledge the prosecutor wished to prove the uttering of another forged note five weeks *after* the uttering in question, and it was objected that only *previous* acts could shew *quo animo* the thing was done, it was held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or it could be shewn that the notes were of the same manufacture (*j*). But in a later case of uttering, where for the purpose of proving guilty knowledge it was proposed to give in evidence other forged bills, precisely similar, with the same drawers' and acceptors' names, &c., passed a month *after* the uttering in question: Gaselee, J., after consulting Alexander, C.B., was disposed to allow the evidence to be received and reserve the point, when the counsel for the prosecution declined to press the evidence (*k*).

Upon indictments for uttering forged notes, other forged notes of other and different banks, found upon the prisoner or uttered by him have been held admissible to prove guilty knowledge. Thus on an indictment for uttering a forged Rochdale Bank note, two forged £5 Bank of England notes were admitted (*l*). So on an indictment for uttering a forged £5 note of the Bank of Ireland, two forged notes of B. and Co., bankers, Dublin, were held admissible (*m*).

In R. *v.* Edwards (*n*), where the uttering charged was of a warrant or shop ticket for the delivery of goods, Rolfe, B., received evidence of an uttering of a similar order three days before the one charged in the indictment (*n*). In R. *v.* Jackson (*o*), where the order or request was for twelve quarts of ale purporting to be issued by a sub-contractor on a railway in favour of the prisoners, who were working on the line, and it was proposed to give in evidence a similar order uttered the day before; Platt, B., refused to admit the evidence, observing that there was a wide distinction between this case and that of forged notes and coin (*o*). In R. *v.* Phillips (*p*), the prisoner was indicted for uttering a forged acquittance for money, and it appeared that the prosecutor had employed the prisoner to drive cattle for him, and had paid him the expenses, the prisoner producing vouchers for the payments, and the prisoner produced the acquittance in question for hay for some cattle

(*i*) R. *v.* Crocker, 2 Leach, 987; 2 B. & P. (N. R.) 87; R. & R. 97, Le Blanc, J.

(*j*) R. *v.* Taverner, Carr. Supp. 195; 4 C. & P. 413, note (*a*).

(*k*) R. *v.* Smith, 4 C. & P. 411. The date of the bill on which the indictment was founded was the 1st March, 1830, and it had been uttered on the 15th of May, 1830; the other bills were passed in June, 1830, but their dates are not mentioned. See the cases on false pretences, *ante*, pp. 1581, 1582.

(*l*) R. *v.* Sunderland, 1 Lew. 102.

(*m*) R. *v.* Kirkwood, 1 Lew. 103, Littledale, J., R. *v.* Martin, 1 Lew. 104. R. *v.* Green, 3 C. & K. 209. Cresswell, J.

(*n*) 3 Cox, 89 (b).

(*o*) 3 Cox, 89 (a).

(*p*) 3 Cox, 88.

at the Swan Inn, at N., where in fact he had never been; and the uttering of another similar forged acquittance two months previously for money alleged to have been paid at the Chandos Arms, at K., was proposed to be proved. It was urged that the case was different from the uttering of notes and coin (R. *v.* Jackson was cited); and that the two utterings were in no way connected; and that the interval of two months had occurred between them. Rolfe, B., was clearly of opinion that the evidence was admissible; and having consulted Platt, B., Rolfe, B., added: 'I find that my Brother Platt's opinion is still the same as expressed at Stafford. I shall therefore receive the evidence, but reserve the question for the judges. I yield to the authority, and not to the reasoning. My opinion is that the evidence is receivable.' (*q*). As to the distance of time, Rolfe, B., said: 'Even in the case of an interval of twenty years between the utterings, the evidence would be receivable in principle; but I should in that case direct the jury to pay no attention to it' (*r*).

In R. *v.* Salt (*s*), where the prisoner was indicted for forging and uttering a bill for £40, and it was proposed to prove guilty knowledge by shewing that the prisoner had, at different times, uttered other forged bills drawn on different persons; it was objected that the uttering of a forged bill on one person was not admissible on a charge of uttering a forged bill on another; and that the uttering of any other forged bills must be of recent occurrence. Williams, J., was clearly of opinion that he was bound to receive the evidence.

In R. *v.* Balls (*t*) the prisoner was indicted for forging and uttering a Polish note. In support of the *scienter* as to this note, the prosecutor gave in evidence what took place at a meeting on August 24, 1835, between the prisoner B., H., and a person called T., at which B. agreed with F. to make him one thousand Austrian notes for fifty florins each, at the price of three shillings for each note: £30 was paid by F. to B. in advance, and the £30 was to be reckoned in account. H. told F. that the notes should be ready in six weeks; F. was to have security for the money, and a bill of exchange was drawn by B. upon T., which T. accepted, and B. signed and endorsed the bill, and H. also endorsed it. This evidence was objected on behalf of the prisoner, as it related to Austrian notes, which were of quite different description from Polish notes, because no Austrian notes were in fact made, and the transaction took place a week before September 1. The learned judge admitted the evidence. The prosecutor had begun his case by proving that in September, 1834, the prisoner had brought to an engraver a front plate already engraved, and a back plate; the back plate was not found to answer, and the engraver got another back plate, which the prisoner directed the engraver to engrave; the prisoner, who as well as the engraver was ignorant of the Polish language, said it was for a mining ticket; the engraver completed the back plate, and took off 500 impressions from the front plate,

(*q*) Counsel for the Crown, however, did not give the evidence.

(*r*) Ibid.

(*s*) 3 F. & F. 834. Not a single date is given of any bill in this report. See Roupell *v.* Haws, 3 F. & F. 784, where sundry forged deeds and wills were admitted in evidence.

(*t*) 1 Mood. 470; 7 C. & P. 426, 429.

and 500 impressions from the back plate, and for which B. paid him; and the engraver stated that the plates had been a great deal used since the engraver used them. This evidence was objected to, but admitted, as there were counts in the indictment for forging the note as well as for uttering; and the learned judge did not then know whether the note in the indictment might or might not turn out to be taken from those plates. At the close of the case, however, it appeared that these plates were calculated to make impressions of Polish cash notes, and that they could not have produced the note in the indictment. That put an end to the counts for forging the notes, and the learned judge thought there might be a question, as the note was not taken from these plates, whether the evidence ought to have been retained as admissible, so as to submit it to the jury in support of the *scienter* on the remaining counts. The prisoner was found guilty, and, upon a case reserved, the judges held that the evidence was admissible, and the conviction was affirmed.

On an indictment for uttering a forged Bank of England note, Alderson, B., admitted another forged Bank of England note in evidence, although the subject of another indictment (*u*). And in a later case Denman, C.J., said that 'he could not conceive how the relevancy of the fact to the charge could be affected by its being the subject of another charge;' and offered to admit the evidence (*v*).

But if the possession of other forged instruments is offered in evidence to prove guilty knowledge, there must be regular evidence that such instruments are forged, and proof that the prisoner returned the money on any such instrument and received the instrument back again, is not sufficient without producing the instrument, or duly accounting for its non-production (*w*).

Upon an indictment for uttering a £5 note, it appeared that on a former occasion the prisoner had paid away a £1 note, that the woman to whom he paid it, on finding it to be bad, sent word of it to the barracks, whereupon the prisoner, accompanied by one of the sergeants of the regiment, came to the woman's house to ask for the note, and to give good money in exchange for it. They found, however, that the woman had given the note to the constable, whom they immediately sent for; the constable, however, did not come to them, and the sergeant and the prisoner were obliged to return to the barracks without seeing him. But before they went away, they left two half sovereigns to make good the debt. Soon after they were gone, the constable came in, and finding that the woman was satisfied as to her money, he put the note into the fire. When the facts relating to the uttering the £5 had been gone through, counsel for the prosecution was about to prove these facts respecting the £1 note. But Bayley, J., interposed, and expressed a strong doubt whether they were admissible, no evidence having been given of the note being a forged note, and the note itself not being

(*u*) R. *v.* Josiah Aston, Worcester Spr. Ass. 1838. MS. C. S. G.

(*v*) R. *v.* Lewis, Archb. Cr. Pl. (23rd ed.) p. 721. In R. *v.* Smith, 2 C. & P. 633, Vaughan, B., held that if a subsequent uttering were made the subject of a distinct indictment it could not be given in evidence. It is clear, however, now that the admissibility of the evidence is not affected by the fact of its being the subject of another charge.

(*w*) R. *v.* Millard, R. & R. 245. See R. *v.* Moore, 1 F. & F. 73.

produced; he, however, consented to receive the evidence, stating that, if the prisoner should be convicted, he would reserve the point for the opinion of the judges (*x*).

On the trial of an indictment for forging a bill of exchange, evidence of what the prisoner said respecting other bills of exchange which are not in evidence has been held inadmissible (*y*). And although a letter written by the prisoner to a third person, stating that that person's name is on another bill, and desiring him not to say that the bill is a forgery, is receivable in evidence, yet the jury ought not to consider it as evidence that the other bill is forged, unless it is produced, and proved to be forged in a regular way. Upon an indictment for forging and uttering an acceptance of W. P. to a bill of exchange, a letter written by the prisoner to one L., in which he stated that a £20 bill was the last one of P.'s with L.'s name upon it, and requested L. on no account to say it was a forged bill, and to be careful of speaking to P., was tendered in evidence, and objected to, as it related to another bill, and, at all events, that the bill to which it referred ought to be put in. Coleridge, J., held the letter receivable, and in summing up, said: 'With respect to the letter that has been read, I think that you ought not to take it as proof that the bill mentioned in it is forged. Bills which are not the subject of indictment are often given in evidence to shew guilty knowledge, but there is in such cases strict proof that those bills are forged. No such evidence is given there, nor is the bill even produced. It therefore may be that the bill alluded to in the letter is in some respects irregular, but still it may not be a forgery' (*z*).

S. was indicted for uttering a forged order upon C., and P. as an accessory before the fact, for having incited S. so to do. Several other orders of the same character had previously been presented to, and paid by, C. They and the one mentioned in the indictment were in P.'s handwriting, but there was no evidence to shew by whom they were uttered. It was objected that these other orders were not admissible against S.; for she was in no way connected with them; and they were not evidence against P. who was not charged with uttering; and the evidence was rejected (*a*).

(*x*) R. *v.* Phillips, 1 Lew. 105. The result of the case is not stated, but it is said that the learned judge subsequently expressed the following opinion: 'That the prosecutor could not give in evidence any thing that was said by the prisoner at a time collateral to a former uttering, in order to shew that what he said at the time of such former uttering was false, because the prisoner could not be prepared to answer or explain evidence of that description. That the prisoner is called upon to answer all the circumstances of a case under consideration, but not the circumstances of a case which is not under consideration; that the prosecutor is at liberty to shew other cases of the prisoner having uttered forged notes, and likewise his conduct at the time of uttering them. But that what he said or did at another time, collateral to such other utterings, could not be given in evidence, as it was impossible that the prisoner could be prepared to combat it.'

(*y*) R. *v.* Cooke, 8 C. & P. 586, Patteson, J. In R. *v.* Brown 2 F. & F. 559, where on an indictment for forging and uttering a bank note, evidence of statements made by the prisoner as to other bank notes, supposed to have been the subject of a guilty uttering by him, was tendered, and this case was cited, Crompton, J., said, 'I confess that I entertain doubts upon the subject; but I think you had better not offer the evidence in question. I do not see the force of the reasoning upon which Cooke's case was decided; but I am not at present prepared to overrule it.'

(*z*) R. *v.* Forbes, 7 C. & P. 224.

(*a*) R. *v.* Sullivan, 2 Cox, 80. Pollock, C.B., after consulting Erle, J.

Punishment.—The punishment of forgery at common law is, as for a misdemeanor, by fine, or imprisonment without hard labour (*b*), or both. The punishments ordained for the offence by the statute law will be mentioned, with the other enactments of the different statutes, in the succeeding chapters.

Sect. V.—Enactments as to Forgery Generally.

By the Forgery Act, 1861 (24 & 25 Vict. c. 98) s. 39. 'Where by this or by any other Act any person is or shall hereafter be made liable to punishment for forging or altering, or for offering, uttering, disposing of or putting off, knowing the same to be forged or altered, any instrument or writing designated in such Act by any special name or description, and such instrument or writing, however designated, shall be in law a will, testament, codicil, or testamentary writing, *or a deed, bond, or writing obligatory*, or a bill of exchange, or a promissory note for the payment of money, or an endorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, order, *authority, or request* for the payment of money, *or an endorsement on or assignment of an undertaking, warrant, order, authority, or request for the payment of money*, within the true intent and meaning of this Act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this Act, and punished accordingly' (*c*).

By sect. 40, 'Where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this Act expressed to be an offence, if any person shall, in England or Ireland, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter in whatsoever place or country out of England and Ireland, whether under the dominion of [His] Majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England or Ireland; and if any person shall in England or Ireland forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any endorsement on or assignment of any bill of exchange or promissory note for the

(*b*) R. *v.* Hamilton [1901], 1 K.B. 740. Whipping, which was one of the common law punishments for misdemeanors, is now, in practice, only inflicted under statutory authority. See 1 Hawk. c. 70, s. 1. 4 Bl. Com. 247. Bac. Ab. Forgery. 2 East, P. C. 1003. As to the pillory, *vide ante*, Vol. i. p. 250.

(*c*) Taken from 1 Will. IV. c. 66, s. 4, and extended to Ireland.

'The words in italics were introduced to make this section correspond with the other parts of this Act.' C. S. G.

payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, *authority or request* for the payment of money, *or for the delivery or transfer of any goods or security*, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), *or any endorsement on or assignment of any such undertaking, warrant, order, authority, request, deed, bond, or writing obligatory*, in whatsoever place or country out of England and Ireland, whether under the dominion of [His] Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, *authority, request*, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, order, *authority or request* be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England or Ireland' (*d*).

Sects. 41—44 will be found set out elsewhere (*e*).

By sect. 45, 'Where the having any matter in the custody or possession of any person is in this Act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, *or shall knowingly and wilfully have any such matter in the actual custody or possession of any other person*, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this Act' (*f*).

By sect. 46, 'If it shall be made to appear, by information on oath or affirmation before a justice of the peace, that there is reasonable cause to believe that any person has in his custody or possession, without lawful authority or excuse, any note or bill of the Governor and Company of the Bank of England or Ireland, or of any body corporate,

(*d*) Taken from 1 Will. IV. c. 66, s. 30, and extended to Ireland. The words in italics are introduced to make this section correspond with the other parts of the Act. This section disposes of the doubts expressed in R. *v.* Dick, 1 Leach, 68; R. *v.* M'Kay, R. & R. 71; and R. *v.* Kirkwood, 1 Mood. 311. Forging an endorsement in Ireland on a bill drawn in America on a person in Ireland, and payable in Ireland, was within the Irish Act, 39 Geo. III. c. 63. R. *v.* Roberts, 7 Cox, 422 (I).

(*e*) Sect. 41, *ante*, p. 1659. Sects. 42 & 43 *ante*, p. 1650. Sect. 44, *ante*, p. 1642.

(*f*) Taken from 1 Will. IV. c. 66, s. 28, and extended to Ireland. It disposes of the doubts raised in R. *v.* Rogers, 2 Mood. 85. 45 Geo. III. c. 89, s. 6 (rep.), made it felony if any person should knowingly have 'in his, her, or their possession or custody,' &c., any forged bank note, &c., and in a case upon this section, in which the circumstances necessary to constitute 'the having in possession' of forged notes, came under the consideration of the judges, they seemed to be of opinion that every uttering included having in custody and possession within the statute; and some of them thought that, without actual possession, if the notes had been put in any place under the prisoner's control, and by his direction, the result would have been the same. R. *v.* Rowley, R. & R. 110.

company, or person carrying on the business of bankers, or any frame, mould, or implement for making paper in imitation of the paper used for such notes or bills, or any such paper, or any plate, wood, stone, or other material having thereon any words, forms, devices, or characters capable of producing or intended to produce the impression of any such note or bill, or any part thereof, or any tool, implement, or material used or employed or intended to be used or employed in or about any of the operations aforesaid, or any forged security, document, or instrument whatsoever, or any machinery, frame, mould, plate, die, seal, paper, or other matter or thing used or employed or intended to be used or employed in the forgery of any security, document, or instrument whatsoever such justice may, if he think fit, grant a warrant to search for the same; and if the same shall be found upon such search, it shall be lawful to seize and carry the same before some justice of the county or place, to be by him disposed of according to law; and all such matters and things so seized as aforesaid shall by order of the Court where any such offender shall be tried, or, in case there shall be no such trial, then by order of some justice of the peace, be defaced and destroyed or otherwise disposed of as such Court or justice shall direct' (*g*).

(*g*) This section was new in England in 1861, and was framed partly by the 38 Geo. III. c. 53, s. 6 (I.), and 39 Geo. III. c. 63, s. 6 (I.), and partly on 2 Will. IV. c. 34, s. 14, with great additions.

Wherever information on oath is made before a justice that there is reasonable cause to believe that any persons has in his custody or possession without lawful authority or excuse any of the things mentioned in the clause, the justice may issue a search warrant under which it may be seized and secured to be used as evidence or otherwise dealt with according to law.

The cases embraced by this section are:

1. Where any person has in his possession, without lawful authority or excuse, any note or bill of the bank of England or Ireland, or of any other bank. This provision is intended to reach any case where any bills or notes of any of these banks may have been unlawfully taken away before they were regularly issued. It is true that in such a case the bills or notes are not forged, but they have been unlawfully taken out of the bank, and ought not to be circulated, and the case is at least as strong as that of coining tools conveyed out of any of his Majesty's mints without lawful authority or excuse, which may be seized under a search warrant. See the Coinage Offences Act, 1861, sects. 25, 27.

2. Where any person has in his possession without lawful authority or excuse, any frame, &c., for making paper in imitation of any of the paper used for such notes or bills,—or any such paper, or any plate, wood, &c., having thereon any words, devices, &c., capable of producing the impression of any such note or bill,—or any tool, &c., used about any of those operations.

3. Where any person has in his possession, without lawful authority or excuse, any forged security, document, or instrument whatsoever. This clause includes every forged instrument whatsoever, and it authorises the search for such an instrument in every case at the instance of the Crown or a private prosecutor. It is clear that a search may be made under it wherever there is reasonable cause to believe that the instrument is in the possession of the forger, for he can have no lawful authority or excuse for its possession; just as clearly is that the case where it is in the possession of any agent of the forger, for he can have no more authority or excuse for its possession than the forger. But perhaps it may be said that where a forged instrument is delivered to an attorney under such circumstance that, if it were a genuine instrument, he would be privileged from producing it, the attorney has a lawful authority or excuse for keeping possession of it; but this clearly is not so; the words, 'without lawful authority or excuse,' are introduced in this clause for the like purpose as in the other sections of this Act (sects. 9, 10, 11, 13, 14, 16, 17, 18, 19), and in the similar sections of the Coinage Offences Act, 1861 (sects. 6, 7, 8), viz. to protect persons who are lawfully in possession, &c., of the things specified, and their agents, and are inapplicable to persons who are unlawfully in possession of the things, or their agents, whether attorneys or not. Consequently all such questions as arose in R. *v.* Smith, 1 Phill. Ev. 171; R. *v.* Avery, 8 C. & P. 596; R. *v.* Hayward, 2 C. & K.

By sect. 47, 'Whosoever shall be convicted of any offence which shall have been subjected by any Act or Acts to the same pains and penalties as are imposed by the Act passed in the fifth year of the reign of Queen Elizabeth, intituled "An Act against Forgers of False Deeds and Writings" (*h*), for any of the offences first enumerated in the said Act, shall be guilty of felony, and shall, in lieu of such pains and penalties be liable . . . (*i*) to be kept in penal servitude for any term not exceeding fourteen years . . . ' (*j*).

By sect. 48, 'Where, by any Act now [6th August, 1861] in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased, or altered, or any person demanding or endeavouring to receive or have any thing, or to do or cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased, or altered, would, according to the provisions contained in any such Act, be guilty of felony, and would, before the passing of the Act of 1 Will. IV. c. 66, have been liable to suffer death as a felon; or where by any Act now in force any person falsely personating another, or falsely acknowledging anything in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any such Act, be guilty of felony, and would before the passing of the said Act of 1 Will. IV., c. 66, have been liable to suffer death as a felon; or where by any Act now in force any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words

234; 2 Cox, 23; R. *v.* Jones, 1 Den. 166; R. *v.* Farley, 2 C. & K. 313; 1 Den. 197; and R. *v.* Tuffs, 1 Den. 319, may be avoided in future by seizing the forged instrument under a search warrant issued in pursuance of this clause. Nor is there any reason why this should not be done; for it is perfectly clear that a stolen deed, bill, or note, delivered by a client to his attorney, may be seized under a search warrant issued under sect. 103 of the Larceny Act, 1861; so that this construction places the search for forged and stolen instruments on precisely the same footing.

Lastly, where any person has in his possession, without lawful authority or excuse, any machinery used in the forgery of any security, document, or instrument whatsoever. Greaves' Crim. Law Consol. Acts (2nd ed.) p. 310.

(*h*) 5 Eliz. c. 14, rep. in 1830, (11 Geo. IV. and Will. IV. c. 66, s. 31).

(*i*) As to other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted were repealed in 1893. (S. L. R.)

(*j*) Taken from 1 Will. IV. c. 66, s. 23, and extended to Ireland to meet any cases, if such there be, to which its provisions may apply.

to appear visible in the substance of any paper, would, according to the provisions contained in any such Act, be guilty of felony, and would before the passing of the said Act 1 Will. IV. c. 66 (*k*) have been liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall after the commencement of this Act be convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling, or procuring the commission thereof, and the same shall not be punishable under any of the other provisions of this Act, every such person shall be liable . . . (*l*) to be kept in penal servitude for life . . . ' (*m*).

By sect. 51, 'Whenever any person shall be convicted of a misdemeanor under this Act it shall be lawful for the Court, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, to fine the offender, and to require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in all cases of felonies in this Act mentioned it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments by this Act authorized: provided that no person shall be imprisoned under this clause, for not finding sureties, for any period exceeding one year' (*n*).

(*k*) Repealed (except s. 21) by 24 & 25 Vict. c. 95.

(*l*) Or not less than three years, or to imprisonment for not more than two years with or without hard labour, 54 & 55 Vict. c. 69, s. 1, *ante*, pp. 211, 212. The words omitted are repealed.

(*m*) Taken from 1 Will. IV. c. 66, s. 1, and extended to Ireland, to meet any case, if such there be, to which its provisions may apply. Sect. 50 is set out, *ante*, p. 1659.

(*n*) Sect. 52 was repealed in 1893 and ss. 53, 56, in 1892. Sect. 54, as to costs, is repealed by 8 Edw. VII. c. 15, *post*, p. 2046. As to the costs of prosecutions for offences under the Act of 1861, *vide post*, p. 2039.

CANADIAN NOTES.

FORGERY.

Sec. 1.—What Constitutes Forgery.

Definition.—See Code sec. 466.

False Document, Meaning of.—Code sec. 335.

Fraudulent Intent, How Proven.—Code sec. 338.

A promissory note was drawn up and signed on January 1st, 1896, payable "twelve months after date." The payee, who drew the note, used an old form with the figures "188—" printed in the place for the date. When drawing the note, the payee added the figure "6," thus making the date read January 1st, 1886, instead of 1896. Some time after the issue of the note the payee discovered the mistake and corrected it by writing a figure "9" over the last "8," without asking or obtaining the consent of the makers. Held, that this was not a "material alteration" within the meaning of the Bills of Exchange Act, 1890, sec. 63, but being only the correction of an error, making the contract appear what it was originally intended to be, did not invalidate the note. McLaren v. Miller, 36 Can. Law Jour. 680.

The uttering of a false letter of introduction, the signature to which is forged, is an indictable offence under Code secs. 466 and 467, if the person uttering same knows it to be a false document, and to have been made with intent that it should be acted upon as genuine to the prejudice of any one. The first sub-section of Code sec. 466 extends the definition of forgery to cases not included in former statutory definitions in Canada of that term, and which would not be forgery at common law. Re Abeel, 8 Can. Cr. Cas. 189, 7 O.L.R. 327.

The officer of a company who fraudulently signs in the company's name a dividend cheque nominally in favour of a firm of which he is a member, but really for his own benefit and appropriates the proceeds for his own use upon his own endorsation of the firm name, when neither he nor his firm have any claim to the dividends, may properly be charged either with embezzlement of the money or with theft of the cheque. The officer would be guilty of forgery in fraudulently signing the cheque really for his own purposes, but purporting to be a dividend cheque, and drawn upon an account kept with the company's bankers from which only dividend payments could properly be made. R. v. Rowe (1903), 8 Can. Cr. Cas. 28.

Where the prisoner was indicted for forging a note for $500; having changed a note of which he was the maker from $500 to $2,500, it was held to be a forgery of a note for $500, though the only fraud committed was on the endorser. R. v. McNevin, 2 R.L. (Que.) 711.

To forge is, in its general sense, to counterfeit, to falsify; though to convict the person who made the false instrument of a crime the intent to defraud must be made to appear. R. v. Dunlop (1857), 15 U.C.Q.B. 118.

Mr. Justice Stephen, in his third edition of his Digest of the Criminal Law, p. 285, defines forgery as the "making of a false document with intent to defraud." The making of a false document includes the alteration of it, for the alteration of a genuine instrument makes it a false instrument. R. v. Bail (1884), 7 Ont. R. 228.

To constitute the crime of forgery it is not necessary that the writing charged to be forged should be such as would be effectual if it were a true and genuine writing. R. v. Portis (1876), 40 U.C.Q.B. 214.

The counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. Ex parte Cadby (1886), 26 N.B.R. 452, 492; R. v. Stewart (1875), 25 U.C.C.P. 440.

The prisoner, with intent to defraud, wrote out a telegraph message purporting to be sent by one C. to D., authorizing the latter to furnish the prisoner with funds. This was left by a boy, as from the telegraph office, being written on paper having the heading and appearance of a telegraphic despatch. Afterwards on the same day prisoner called on D., who told him he had received a telegram from C., prisoner said, "I thought so." Upon the faith of the document D. went with prisoner to the bank and endorsed a draft drawn by the prisoner on C. for $85, the proceeds of which were handed over to the prisoner. It was held that the counterfeiting of what purported to be only a copy of C.'s signature was a forgery. R. v. Stewart (1875), 25 U.C.C.P. 440.

It is a forgery to fraudulently make a deed which purports to be something quite different from that which it really is, *ex gr.*, by antedating it for a fraudulent purpose, even though it is executed by the parties between whom it is expressed to be made. R. v. Ritson (1869), L.R. 1 C.C.R. 200. The execution of a deed by prisoner in the name of and representing himself to be another may be a forgery if done with intent to defraud, even though he had a power of attorney from such person, but fraudulently concealing the fact of his being only such attorney, and assuming to be the principal. R. v. A. I. Gould (1869), 20 U.C.C.P. 151.

Where a person passing under an assumed name falsely represents that he is in the employment of a certain firm, and that he is author-

ized to make a draft upon such firm, his signature in such assumed name to a draft upon the firm, and his fraudulent negotiation of it, constitute forgery, if the credit obtained in negotiating the bill was not personal to himself alone, without relation to his supposed employers, and if the false name, although that of a non-existent person, was assumed for the very purpose of perpetrating the fraud. Re M. B. Lazier (1899), 3 Can. Cr. Cas. 167 (Ont. C.A.).

Two prisoners were tried and convicted on an indictment charging them with feloniously offering, etc., a certain forged note, commonly called a provincial note; the evidence shewed that the prisoners had, with the knowledge that the figure "5" had been pasted over the figure "1," and the word "five" over the word "one" upon a note purporting to be a note issued by the Government of the late Province of Canada, passed off and uttered the same as a five dollar note of that denomination, but no evidence was given that the note so altered was a note issued by the Government of Canada, beyond the production of the note. It was objected, but not before the jury were prepared to deliver their verdict, that no proof had been given of the note being a provincial note. The evidence further shewed that when the attention of the prisoners were called to the paper, they both said, "give it back if it is not good and we will give good money for it," but upon its being placed upon the counter one of the prisoners took it up and refused to return it, or substitute good money for it. The prisoners were found guilty and sentenced. On a case reserved by the Judge at the trial it was held that looking at the particular character of the forgery—that is to say an alteration—and the conduct of the prisoners with regard to it, that the onus was on them to dispute the validity of the writing, if its invalidity would be a defence. R. v. Portis (1876), 40 U.C.Q.B. 214.

A forged paper purporting on the face of it to be a bank note is within the definition, although there be no such bank as named. R. v. McDonald, 12 U.C.Q.B. 543.

The alteration of a Dominion note for $2 to one for $20, such alteration consisting in the addition of a cipher after the figure two wherever that figure occurred in the margin of the note, was held to be forgery. R. v. Bail (1884), 7 O.R. 228.

On an indictment charging prisoner with uttering a certain writing —to wit, a certain bank note "with intent to defraud," on which he was convicted, it was insisted by prisoner's counsel that there should have been evidence that the bank whose note it purported to be was a corporation legally authorized to issue notes such as that described in the indictment. Carter, C.J., delivering the judgment of the Supreme Court of New Brunswick, said: "The writing in question carries on its face the semblance of a bank note issued by a company in the State of Maine, and there is nothing in its frame which

shews that it is illegal, even it there were no charter or Act of incorporation authorizing the issue of such note. The evidence proved that there are genuine instruments of which this is an imitation, which are of value in the State of Maine, and if the illegality of such instrument would afford a defence to the prisoner, and such illegality could be shewn by the Act of incorporation or any other evidence, such proof would lie on him, rather than the negative proof on the Crown." Assuming that illegality of the note would be a defence the Court held that the onus of proving illegality lay upon the prisoner. R. v. Brown, 3 Allen (N.B.) 13.

Uttering Forged Documents.—See Code sec. 467.

Each count for an indictment must contain a statement of all the essential ingredients which constitute the offence charged, and in charging the offence of uttering a forged instrument the indictment must aver that the defendants made use of or uttered the instrument knowing it to have been forged. The Queen v. Weir (No. 5), (1900), 3 Can. Cr. Cas. 499 (Que.).

Where a defendant had forged the name of the payee of a cheque, payable to his order, on the back of a cheque it was held that he was rightly convicted of uttering a forged "order for the payment of money," but that he could not be convicted of uttering a forged cheque. R. v. Cunningham (1885), 6 N.S.R. 31.

Prisoner drew a promissory note payable two months after date to the order of T. S., who endorsed it; after the endorsement by T. S. prisoner altered the note, making it payable at three months after date. The indictment contained six counts, the fourth of which was "offering and putting off a forged promissory note," and the prisoner was convicted on the fourth count of the indictment. On motion for a new trial it was held that the moment the note was altered in a material point it ceased to be that which T. S. had endorsed; and that being uttered in the altered state as a note endorsed by him, when it was not the note endorsed by him, such uttering was the uttering of a note altered so as to constitute forgery—a forgery of a note at three months, endorsed by T. S.—and not a forgery of T. S.'s endorsement on a genuine note at three months. R. v. Craig (1858), 7 U.C.C.P. 241. The transfer of the note to a third party who had sued the endorser and failed to recover because of the alteration is evidence of the intent to defraud which is a question for the jury. *Ibid.*

Sec. 2.—Of the Instruments in Respect of Which Forgery may be Committed.

Documents the Forgery of which Constitutes an Indictable Offence.—See Code sec. 468.

Forgery of Property Registration, Public Register, etc.—See Code sec. 469.

Forgery of Sundry Documents.—See Code sec. 470.

Jurisdiction.—In Ontario a provincial statute, 53 Vict. ch. 18, was passed, by which it was declared that Courts of general sessions should have jurisdiction to try any person for any offence under certain sections of the Forgery Act, R.S.C. ch. 165. It was held that the Provincial Legislature had power to so enact, and that such a provision was one relating to the constitution of a Court rather than to criminal procedure. R. v. Levinger, 22 O.R. 690. But a provision in the same statute authorizing police magistrates to try and to convict persons charged with forgery was declared *ultra vires.* R. v. Toland, 22 O.R. 505.

Indictment.—Where in an indictment for forgery the forged documents is set out verbatim it is not necessary to give a description of its legal character. R. v. Carson (1864), 14 U.C.C.P. 309.

Authority for Payment of Money.—A writing not addressed to any one may be an order for the payment of money if it be shewn by evidence for whom it was intended. In this case the order was for $15 in favour of "bearer or R. R. and purported to be signed by one B." The prisoner in person presented it to M., representing himself to be the payee and a creditor of B. It was held that it might fairly be inferred to have been intended for M., and a conviction for forgery was sustained. R. v. Parker (1864), 15 U.C.C.P. 15.

Evidence.—The fact of his flight from a charge of forgery militates against the accused. R. v. Judd (1788), 2 T.R. 255; R. v. Van Aerman (1854), 4 U.C.C.P. 288.

Corroboration.—Code sec. 1002.

A witness who testified that the forged signatures were written by the accused is not corroborated in a "material particular by evidence implicating the accused" by proof that certain other signatures were in the same handwriting, when the only evidence shewing that the latter signatures were written by the accused was the testimony of the same witness who had testified to the handwriting of the signatures first mentioned. R. v. McBride (1895), 2 Can. Cr. Cas. 544 (Ont.).

Where in an indictment for forgery the forged document is set out verbatim it is not necessary to give a description of its legal character. R. v. Carson (1864), 14 U.C.C.P. 309.

An indictment may be laid for unlawfully and with intent to defraud signing a promissory note by procuration, although the name signed is the name of a testamentary succession or of an estate in liquidation (*e.g.*, "Estate of John Doe"), but if the indictment does not disclose the particulars, an order will be made against the Crown to furnish particulars of the names and capacities of the persons repre-

senting such estate at the time when the offence is alleged to have been committed, and directing that the defendants be not arraigned until after the particulars have been delivered. R. v. Weir (No. 2) (1899), 3 Can. Cr. Cas. 155.

A count of an indictment charging the defendant with having with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed. Such a defect is one of substance and cannot be amended under Code sec. 629. R. v. Weir (No. 5) (1900), 3 Can. Cr. Cas. 431 (Que.).

CHAPTER THE THIRTY-THIRD.

OF FORGING, ETC., RECORDS, JUDICIAL PROCESS, AND EVIDENCE.

Common Law.—At common law, a person may be guilty of forgery by falsely and fraudulently making or altering any matter of record (*a*). If, therefore, a man should insert in an indictment the names of persons against whom in truth it was not found, it would be forgery (*b*).

Even if the offence should not constitute a forgery, yet in no instance can the counterfeiting or alteration of any judicial process or matter be less than a very high misdemeanor, as tending to stop or impede the course of justice, or to encroach upon the judicial power (*c*). The defacing or rasure of any record, without due authority, is an offence at common law, highly punishable by fine and imprisonment (*d*). And it has been held that any person making or knowingly using a false affidavit, taken abroad (though perjury or forgery could not be assigned on it here) in order to mislead our own Courts, and to prevent public justice, is punishable on indictment as a misdemeanor (*e*).

Judges are highly punishable at common law for offences of this kind (*f*).

Statutes.—By 8 Rich. II, c. 4 (*g*), it was enacted that 'if any judge or clerk' offend by the false entering of pleas, rasing of rolls, or changing of verdicts, to the disherison of any one, he should be punished by paying a fine to the King, and making satisfaction to the party.

By the Forgery Act, 1861 (24 & 25 Vict. c. 89) sect. 1, 'Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the Great Seal of the United Kingdom, [His] Majesty's Privy Seal, any privy Signet of [His] Majesty, [His] Majesty's Royal Sign

(*a*) *Ante*, pp. 1600 *et seq.* 1 Hawk. c. 70, s. 1, 8. Bac. Abr. 'Forgery' (B.). Rolle. Abr. 65, 76. Yelv. 146. Cro. Eliz. 178.

(*b*) R. *v.* Marsh, 3 Mod. 66. 1 Hawk. c. 70, s. 2.

(*c*) 2 East, P. C. 866, *vide ante*, Bk. i. pp. 537 *et seq.*

(*d*) 3 Co. Inst. 71, 72. 1 Hale, 646. 1 Hawk. c. 47, s. 1.

(*e*) O'Mealy *v.* Newell, 8 East, 364. *Vide, ante*, Bk. i, p. 145. And see R. *v.* Fawcett, 2 East, P. C. 862. *Ante*, p. 1640.

(*f*) 3 Co. Inst. 72. 1 Hale, 646. In 3 Co. Inst. 72, the case of Justice Ingham (or Hengham, or Engham, or, as Hawkins says, Ingram), who was a judge in the reign of Edward I., is mentioned thus: He paid 'eight hundred marks for a fine, for that a poor man being fined in an action of debt at thirteen shillings fourpence, the said justice, moved with pity, caused the roll to be rased, and made it six shillings eightpence. This case Southcot, J., remembered when Catlyn, C.J., of the Queen's Bench, in the reign of Queen Elizabeth, would have ordered a rasure of a roll in the like case, which Southcot, one of the judges of that Court, utterly denied to assent unto, and said openly, that he meant not to build a clock-house; for (said he) with the fine that Ingram paid for the like matter, the clock-house at Westminster was builded, and furnished with a clock, which continueth to this day.'

(*g*) Repealed, 1881.

Manual, any of [His] Majesty's seals appointed by the twenty-fourth Article of the Union between England and Scotland to be kept, used, and continued in Scotland, the Great Seal of Ireland, or the Privy Seal of Ireland, *or shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter, or utter knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .' (*h*).

By the Public Record Office Act, 1838 (1 & 2 Vict. c. 94) s. 1, the records in the Tower of London, Chapter House of Westminster, Roll's Chapel, Petty Bag Office, offices in the custody of the King's Remembrancer of the Exchequer, or of any other officer of the Exchequer, Augmentation Office, First Fruits and Tenths' Office, office of the Land Revenue and Enrolments, of the late auditor of the land revenues of England and Wales, and the records lately deposited in the office of the Pells of the Exchequer, and now in the custody of His Majesty's Comptroller of the Exchequer, the records belonging to the Courts of Chancery, Exchequer, and Admiralty, King's Bench, Common Pleas, and Marshalsea, the records of the lately abolished Courts of Wales and of Chester, Durham, and of the Isle of Ely, are placed under the charge of the Master of the Rolls (*i*). Under sect. 8, a public record office has been established, and by sect. 12 the Master of the Rolls may allow a copy to be made of any of the said records, which is to be 'certified as a true and authentic copy by the deputy-keeper of the records, or one of the assistant record keepers,' and to 'be sealed or stamped with the seal of the record office'; and by sect. 13 such copies are made evidence.

By sect. 19, 'Every person belonging to or employed in the said public record office, who shall certify any writing as a true and authentic copy of a record in the custody of the Master of the Rolls, knowing the same to be false in any material part, and every person who shall counterfeit the signature of an assistant record keeper for the purpose of counterfeiting a certified copy of a record, or shall forge or counterfeit the seal of the public record office, shall be guilty of felony, and being duly

(*h*) The words omitted are repealed. As to punishment, 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. Taken from 1 Will. IV. c. 66, s. 2; 2 & 3 Will. IV. c. 123; and 1 Vict. c. 84, ss. 2, 3.

Under 1 Will. IV. c. 66, s. 2, the offences mentioned in the earlier part of this clause were treason; but as the capital punishment had been abolished, it was thought proper to reduce them to felonies.

The part in italics was new in 1861. By the Great Seal Act, 1884 (47 & 48 Vict. c. 30) s. 2 (3), Any person making or preparing any warrant for passing any instrument under the Great Seal of the United Kingdom, or procuring any instrument to be passed under that seal otherwise than as provided in the Act or the Crown Office Act, 1877 (40 & 41 Vict. c. 41), shall be guilty of a misdemeanor.

(*i*) Under sect. 2, the King in Council may order records in other offices to be included in the Act. See also the Public Record Office Acts (40 & 41 Vict. c. 55; 61 & 62 Vict. c. 12).

convicted thereof shall be liable . . . to be transported beyond the seas for life . . . ' (*j*).

By sect. 20, ' In this Act the word " records " shall be taken to mean all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature belonging to [Her] Majesty, or now deposited in any of the offices of places of custody before mentioned.'

By the Forgery Act, 1861 (24 & 25 Vict. c. 98) s. 27 (*k*), ' Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognisance, cognovit actionem, or warrant of attorney, or any original document whatsoever of or belonging to any Court of Record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order or decree, or any original document whatsoever of or belonging to any Court of Equity or Court of Admiralty in England or Ireland, or any document or writing, or any copy of any document or writing, used or intended to be used as evidence in any court in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years ' (*l*).

By sect. 28, ' Whosoever, being the clerk of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, shall utter any false copy or certificate of any record, knowing the same to be false; and whosoever, other than such clerk, officer, or deputy, shall sign or certify any copy or certificate of any record as such clerk, officer, or deputy; and whosoever shall forge or fraudulently alter, or offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any copy or certificate of any record (*m*), or shall offer, utter, dispose of, or put off any copy or certificate of any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or forged; and whosoever shall forge the seal of any Court of Record, or shall forge or fraudulently alter any process of any court (*n*) other than such courts as in the last preceding section mentioned, or shall serve or enforce any forged process of any court whatsoever, knowing the same to be forged, or shall deliver or cause to be delivered to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any Court of Law or Equity, or a copy thereof, knowing the same to be false, or shall act or profess to act under any such false process, knowing the same to be false, shall be guilty of felony, and being convicted thereof

(*j*) Now penal servitude. For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted were repealed in 1893 (S.L.R.).

(*k*) This section was new law in 1861.

(*l*) The words omitted are repealed. As to present punishment, see 54 & 55 Vict. c. 69, s. 1 *ante*, Vol. i. pp. 211, 212.

(*m*) The prisoner was indicted under this section for forging a certificate of ordination. Kennedy, J., held that this certificate was not a record of a Court within the meaning of the section. The certificate was that of the registrar of the diocese of Worcester and not of the Consistory Court, or a Court of Record. The section applies only to Courts of Record. R. *v.* Etheridge, 19 Cox, 676; 65 J. P. 761.

(*n*) It seems that an indictment for forgery under this part of the section must allege an intent to defraud. R. *v.* Powner, 12, Cox, 235, Quain, J.

shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . .' (*o*).

On an indictment under 9 & 10 Vict. c. 95, s. 57 (*p*), for acting under false colour of the process of a county court, it appeared that J. Roberts was indebted to the prisoner in the sum of ten shillings, and that the prisoner, for the purpose of obtaining payment of such debt, sent to J. Roberts the following document, headed by 'V. R.' and the Royal Arms:

Welshpool, October 17th, 1836.

'To Mr. *John Roberts*,

'Sir,

'I hereby give you notice that unless the amount of your account, £0 10*s.* 0*d.*, *which is* due to me, is paid on or before *the 23rd instant to me at the quarry*, proceedings will be taken to obtain the same in pursuance with the provisions of the statute 9th and 10th of *Victoria*, cap. 25th of the new County Court Act, for the more easy recovery of small debts, &c.

'Yours, &c.,

'*Frederick Mugliston, Clerk to Court, Instructed by John Evans.*'

The whole except the parts in italics was in print. After the letter had been received, the wife of Roberts went to the prisoner and asked if he had sent the letter. He replied that he had ordered the court to send it; and on being so informed she paid the prisoner the ten shillings demanded in the letter. Whilst the money was lying on the table, the prisoner asked her for fifteen pence for County Court expenses, as he wanted to put the full amount in the receipt, which he was then writing. She said she had not any more money, and no money was paid for costs, and a receipt for ten shillings alone was given. On a case reserved, that the words every person 'who shall act or profess to act under any false colour or pretence of the process of the said court' (*q*), applied to a person pretending to act under process of the court when there was in fact no process, and therefore applied to the present case. The mere sending of the letter by the prisoner would not have been sufficient (*r*), but he afterwards pretended that fifteen pence was due for County Court expenses; and, there could be no doubt, intended the woman to believe

(*o*) This section was new in 1861 as a general provision, but is framed from 7 & 8 Geo. IV. c. 28, s. 11 (E.), and 9 Geo. IV. c. 54, s. 21 (I.) (which relate to certificates of previous convictions of felony); 2 Will. IV. c. 34, s. 9 (which related to copies of previous convictions in coining cases); and 9 & 10 Vict. c. 95, s. 57 (which related to the forgery, &c., of proceedings in the County Courts).

In R. *v.* Evans, Dears. & B. 236; 26 L.J. M.C. 92, and R. Richmond, Bell, 142, Bramwell, B., differing from the other judges, thought that the words in 9 & 10 Vict. c. 95, s. 57, 'who shall act or profess to act under any false colour or pretence of the process of the Court,' implied an acting under genuine process by false colour or pretence; and, in order to prevent any such doubt, the words 'any such false pretence' are substituted in this clause.

(*p*) Repealed, but re-enacted 51 & 52 Vict. c. 43, s. 180, *post*, p. 1690.

(*q*) See R. *v.* Richmond, *post*, p. 1687.

(*r*) The words of 9 & 10 Vict. c. 95, s. 57, were, 'every person who shall forge the seal or any process of the Court, or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to any person, any paper purporting to be a copy of any summons or process of the said Court, knowing the same to be false, or who shall act or profess to act under any false colour or pretence of the process of the said Court.'

that he had process which entitled him to receive that sum; and that he had incurred costs in respect of proceedings in the County Court (*s*).

On a similar indictment on the same section it appeared that the prisoner had obtained blank forms for the plaintiff's instructions to issue a County Court summons, one of which he filled up, and without any authority signed it 'W. G., Registrar of the T. Court,' and wrote on the back, 'Unless the whole amount claimed by A. R., draper, of T., is paid on Saturday, an execution warrant will be immediately issued against you. Witness my signature, W. G.' G. was the registrar, but the signatures on the face and back were forgeries. The prisoner sent this document to T. S., the person named in it as defendant, who owed the prisoner the sum mentioned in it. The document was sent to S. in order to obtain payment of the said sum. On a case reserved, in consequence of the observation in R. *v.* Evans (*supra*) that the mere sending the letter would not have been acting under colour of process, it was held that the offence proved was certainly a professing to act under a colourable process of the court (*t*).

But where on a similar indictment it appeared that K. had brought an action against W. in a County Court, and the summons, dated May 7, called on the defendant to appear on June 7, which he did not do, and on June 30, the prisoner called at the defendant's house, and said he was authorised by the Court to receive the debt and costs, and if the amount was not paid on that day, or before ten o'clock the next morning, he should bring an execution and take the goods. The prisoner asked £1 6*s*. 9*d*. for the debt; the defendant shewed him the summons claimed £1 7*s*. The prisoner said there was a mistake, and if the defendant paid him £1 8*d*. 9*d*. it would cover all expenses; and the defendant paid the money. Crompton, J., stopped the case, saying that the charge was not made out, as he thought the Act applied to false instruments, and not to mere false representations as to the authority or employment of the prisoner. There was no acting or professing to act under the process of the County Court (*u*).

Where an indictment alleged that the prisoner delivered a certain paper falsely purporting to be a certain process of a County Court, and the document in question was a mere notice to produce, it was held that the prisoner ought not to have been convicted (*v*).

The Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28) s. 11, after reciting the expediency of providing for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, and enacting such punishment, regulates the form of indictment for the subsequent felony, and then enacts, that 'a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be

(*s*) R. *v* Evans, Dears & B. 236: 26 L. J. M. C. 92.

(*t*) R. *v.* Richmond, Bell, 142: 28 L.J. M.C. 188.

(*u*) R. *v.* Myott, 6 Cox, 406. In R. *v.* Evans, *supra*, Campbell, C.J., during the argument, said, 'Suppose there had been no letter, and money had been demanded for County Court expenses, the defendant saying, "I have sued out a summons, and so much is due for expenses," would not that be acting under pretence of the process of the Court?'

(*v*) R. *v.* Castle, Dears & B. 363; 27 L. J. M. C. 70, *ante*, p. 1653.

signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy shall utter a false certificate of any indictment and conviction for a previous felony, or if any person, other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony, and, being lawfully convicted thereof, shall be liable . . . to be transported beyond the seas for the term of seven years . . .' (*w*).

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 29, 'Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence by any Act passed or to be passed, and for which offence no punishment is herein provided, shall be guilty of felony, and being convicted thereof shall be liable. . . (*x*) to be kept in penal servitude for any term not exceeding seven years. . . .' (*y*)

By sect. 30, 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any court roll or copy of any court roll relating to any copyhold or customary estate, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .' (*z*).

By sect. 32, 'Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, knowing the same to be forged or altered, any summons, conviction, order, or warrant of any justice of the peace, or any recognisance purporting to have been entered into before any justice of the peace or other officer authorised to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the peace, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .' (*a*).

By the Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), s. 8, 'Whoever forges, counterfeits, or fraudulently alters the seal or signature of any person authorised by or under this Act, to administer an oath, or tenders in evidence, or otherwise uses, any affidavit having any seal or signature so forged or counterfeited, or fraudulently altered, knowing the same to be forged, counterfeited, or fraudulently altered, shall be guilty of felony, and liable on conviction to penal servitude for

(*w*) Now penal servitude for any term not exceeding seven and not less than three years. 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

The provisions of the section as to whipping were repealed in 1888 (51 & 52 Vict. c. 57.).

(*x*) For punishment, see Vol. i. pp. 211, 212. (The omitted words were repealed in 1893. S. L R.)

(*y*) This section was new in 1861.

(*z*) Taken from 1 Will. IV. c. 66, s. 10, and new in Ireland in 1861.

(*a*) For terms of penal servitude and imprisonment, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted are repealed.

any term not exceeding seven years, and not less than five years (*b*), or to imprisonment with or without hard labour, for any term not exceeding two years ' (*c*).

By the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 147, ' If any person forges the signature of a Master (*cc*), or forges or counterfeits the seal of the Masters' office, or knowingly concurs in using any such forged or counterfeited signature or seal, or tenders in evidence any document with a false or counterfeit signature of a Master, or with a false or counterfeit seal, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony and shall, upon conviction, be liable to penal servitude for a term not exceeding seven years (*d*), or to be imprisoned for a term not exceeding three (*dd*) years, with or without hard labour.'

By the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 4, if any person commits any of the offences following ; that is to say,—

(1) Prints any copy of any proclamation, order, or regulation which falsely purport to have been printed by the government printer, or to be printed under the authority of the legislature of any British colony or possession, or tenders in evidence any copy of any proclamation, order or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed ; or,

(2) Forges or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorised to be annexed to a copy of or extract from any proclamation, order, or regulation,

he shall be guilty of felony, and shall on conviction be liable to be sentenced to penal servitude . . . (*e*).

By the Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 3, ' If any person prints any copy of any Act, proclamation, order, regulation royal warrant, circular, list, gazette or document which falsely purports to have been printed under the superintendence or authority of H. M. stationery office, or tenders in evidence any copy which falsely purports to have been printed as aforesaid, knowing that the same was not so printed, he shall be guilty of felony and shall, on conviction, be liable to penal servitude for a term not exceeding seven years, or to be imprisoned for a term not exceeding two years, with or without hard labour (*f*).'

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 235, ' If any person forges the seal or signature affixed or subscribed to a bye-law made under this Act, or the signature subscribed to any minute of proceedings of the Council, or tenders in evidence any such document, with a false or counterfeit seal or signature, knowing it to be false or counterfeit, he shall be liable to imprisonment with hard labour for any term not exceeding two years.'

(*b*) Now three years. 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*c*) As to venue, see sect. 9, *ante*, Vol. i. p. 27.

(*cc*) By sect. 341, ' Masters ' means the Masters in Lunacy.

(*d*) Nor less than three years, *vide ante*, p. 211.

(*dd*) *Quære* reduced to two years, *vide ante*, p. 212.

(*e*) This Act is extended to Ireland by the Act of 1882. As to present punishment, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*f*) These Acts apply to the Board of Agriculture & Fisheries. See 58 & 59 Vict. c. 9, and 62 and 63 Vict. c. 50, s. 21 (3) and *post* pp. 2121 *et seq.*

The following acts also contain enactments relating to the forgery of seals and process of Court and instruments of evidence.

The Inferior Courts Act, 1844 (7 & 8 Vict. c. 19), s. 5, makes it a felony (*j*) to forge the seal, or any process of any inferior local court, of civil jurisdiction, or to enforce any such forged process (*g*).

The Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 4, makes it a felony to forge the seal, stamp, or signature to the documents therein mentioned, or to utter such forged documents, &c.

The Crown Cases Act, 1848 (11 & 12 Vict. c. 78), s. 6, makes it a felony to forge or alter the documents therein mentioned (*h*).

The Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 17, makes it a felony (*j*) to forge the seal or the documents therein mentioned, or to tender in evidence any such documents with a forged seal thereto.

The Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 28 makes it a felony (*j*) to forge the signature of any registrar, or the seal of the Court of probate, or to tender in evidence any document with such forged signature or seal thereto (*i*).

The County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 180 provides that 'every person who shall forge the seal or any process of the Court, or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of the said court, knowing the same to be false or who shall act or profess to act under any false colour or pretence of the process or authority of the said court, shall be guilty of felony' (*j*).

The general provisions of the Forgery Act, 1861 (24 & 25 Vict. c. 98). include the greater part at least of the offences in these statutes, and to have inserted their penal provisions at length would have been attended with no commensurate advantage; for, wherever a prosecution takes place under any of these Acts, it will be necessary to refer to many other provisions in the Act, in order to ascertain what the offences created by the penal clause really are.

(*g*) On an indictment under this section Mathew, J., held that no intent to defraud need be proved. R. *v.* Rippier [1897], 32 L. J. (Newsp.) 350.

(*h*) See the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 20 (4), and *post*, p. 2009.

(*i*) 20 & 21 Vict. c. 79, s. 33, applies to Ireland.

(*j*) Punishable as stated *ante*, Vol. i. p. 247.

CANADIAN NOTES.

FORGERY OF JUDICIAL DOCUMENTS.

Definition of Forgery.—See Code sec. 466.

Uttering Forged Documents—See Code sec. 467.

Forgery of Property Registration, etc.—See Code sec. 469.

Forgery of Records of Court of Justice.—See Code sec. 470.

Where in an indictment for forgery the forged document is set out verbatim it is not necessary to give a description of its legal character. R. v. Carson, 14 U.C.C.P. 309.

Counterfeiting Seals of Courts or Registry or Burial Records.—See Code sec. 473.

Drawing Document Without Authority.—See Code sec. 477.

Obtaining Anything by Forged Instruments or Probate of Will.—See Code sec. 478.

Destroying, Mutilating or Defacing Judicial Document.—See Code sec. 480.

A register is none the less defaced or injured because when produced in Court the torn part has been pasted in and is as legible as before the offence. *Ibid.*

Concealing Judicial Document.—See Code sec. 481.

Uttering False Copy of Record.—See Code sec. 482.

Knowingly Certifying False Copy by Official.—See Code sec. 483.

CHAPTER THE THIRTY-FOURTH.

OF FORGERIES RELATING TO THE PUBLIC FUNDS, AND THE STOCKS OF PUBLIC COMPANIES.

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 2, 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, or of or in the capital stock of any body corporate (*a*), company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered power of attorney (*b*) or other authority, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . (*c*).

By sect. 3, 'Whosoever shall falsely and deceitfully personate any

(*a*) By the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102) s. 19, for the purposes of the Forgery Act, 1861, all 'consolidated stock' shall be deemed to be capital stock of a body corporate within the meaning of that Act. The London County Council are the successors of the Metropolitan Board of Works: Local Government Act, 1888 (51 & 52 Vict. c. 41) s. 40 (8). By the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59) s. 21, 'For the purposes of the Forgery Act, 1861, Colonial Stock to which this Act applies shall be deemed to be capital stock of a body corporate.'

(*b*) Such a power of attorney was held to be a 'deed' within 2 Geo. II. c. 25 (E.). R. *v.* Fauntleroy, 1 Mood, 52; 2 Bing. 413.

(*c*) For present punishment see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted are repealed.

Framed from 1 Will. IV. c. 66, s. 6; 2 & 3 Will. IV. c. 123; 1 Vict. c. 84, ss. 1, 2, 3; and 37 Geo. III. c. 54, ss. 12, 15 (I.).

The words 'offer, dispose of, or put off,' are introduced to render this clause consistent with the subsequent clauses in this Act.

The words 'under or by virtue of' are introduced to include any company established *under the provisions* of any Act; though not established by the Act itself.

In R. *v.* Gade, 2 Leach, 732; 2 East, P. C. 874, on an indictment under 33 Geo. III. c. 30, s. 2 (rep.), it appears to have been held that it was not necessary to prove that the transfer was in order according to the rules of the bank, if otherwise it was a complete transfer. Under the Forged Transfers Act, 1891 (54 & 55 Vict. c. 43), companies and local authorities have power to make compensation for losses from forged transfers, and by sect. 1 (4) such company or local authority may impose such reasonable restriction on the transfer of their shares, stock or security or with respect to powers of attorney for the transfer and as they may consider requisite.

owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, *under or by virtue of any* Act of Parliament, or any owner of any dividend *or money* payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavour to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . ' (*d*).

By sect. 4, 'Whosoever shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness, attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is in either of the last two preceding sections mentioned, or to receive any dividend or money payable in respect of any such share or interest, or shall offer, utter, dispose of, or put off any such power of attorney, or other authority, with any *such* forged name, handwriting, or signature thereon, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable (*e*) . . . to be kept in penal servitude for any term not exceeding seven years . . . ' (*f*).

By sect. 5, 'Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the Bank of England or the Bank of Ireland, in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the Bank of England or at the Bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any of such owners in any of the said books, with intent in any of the cases aforesaid to defraud; or shall wilfully make any transfer of any share or interest of or in any stock annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . ' (*g*).

By sect. 6, 'Whosoever being a clerk, officer, or servant of or other person employed or entrusted by the Bank of England or the Bank of Ireland, shall knowingly make out or deliver any dividend warrant,

(*d*) Framed from 1 Will. IV. c. 66, s. 7, and the latter part of sect. 6; but there were similar provisions in 37 Geo. III. c. 54, s. 12 (I.), relating to the Bank of Ireland. As to the words in italics, see the last note.

(*e*) See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted are repealed.

(*f*) Taken from 1 Will. IV. c. 66, s. 8. It was new in Ireland in 1861.

The words of that section were 'forge the name or handwriting of any person as or purporting to be a witness,' and the terms of this section were substituted in order to prevent a doubt in case the name of a non-existing person were used in the attestation of a power of attorney.

(*g*) Taken from 1 Will. IV. c. 66, s. 5, but there were similar provisions in 37 Geo. III. c. 54, ss. 14, 16 (I.), relating to the Bank of Ireland.

or warrant for payment of any annuity, interest, or money payable at the Bank of Ireland or England, for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . ' (*h*).

By the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 20, any person who, with intent to defraud, makes any false entry in or alters any word or figure in any of the said books for transfers of consolidated stock [created by the Metropolitan Board of Works (*i*)], or in any manner falsifies any of the said books, or makes any transfer of any consolidated stock [created by the Metropolitan Board of Works], in the name of any person who is not the true owner thereof, shall be guilty of felony, and on conviction shall be liable to penal servitude for any term not exceeding fourteen years . . . (*j*).

By sect. 21, any person who, being a clerk, officer, or servant of, or employed by the board (*i*), or the persons or body corporate, who keep the book for transfer of consolidated stock [created by the Metropolitan Board of Works], does, with intent to defraud, make out or deliver any stock certificate, dividend warrant, or document for the payment of money in relation to any consolidated stock [created by the Metropolitan Board of Works], for a greater or less amount than the person on whose behalf such certificate, warrant, or document is made out is entitled to, shall be guilty of felony, and shall be liable on conviction, to be kept in penal servitude for any term not exceeding seven years . . . (*j*).

By the Forgery Act, 1870 (33 & 34 Vict. c. 58), s. 3 (*k*), ' If any person forges or alters or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any stock certificate or coupon, or any document purporting to be a stock certificate or coupon, issued in pursuance of Part V. of The National Debt Act, 1870 (*l*), or of any former Act, or demands or endeavours to obtain or receive any share or interest of or in any stock as defined in The National Debt Act, 1870, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, he shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . ' (*m*).

By sect. 4, ' If any person falsely and deceitfully personates any owner of any share or interest of or in any such stock as aforesaid, or of any such stock certificate or coupon as aforesaid, and thereby obtains or endeavours to obtain any such stock certificate or coupon,—or receives

(*h*) Taken from 1 Will. IV. c. 66, s. 9, except the words, ' warrant for payment of any annuity, interest, or money,' which are taken from 37 Geo. III. c. 54, s. 17 (I.).

(*i*) Now the London County Council. See 51 & 52 Vict. c. 41, s. 40 (8).

(*j*) See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*k*) By sect. 2, ' This Act shall have effect as one Act with the Forgery Act 1861, but shall extend to the United Kingdom.' By the Colonial Stock Act, 1877 (40 & 41 Vict. c. 59) s. 21, ' The Forgery Act, 1870, shall apply to a stock certificate and a coupon issued in pursuance of this Act, and to Colonial Stock to which this Act applies, in like manner as if the same were a stock certificate, coupon, or stock mentioned in that Act.'

(*l*) 33 & 34 Vict. c. 71.

(*m*) See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

or endeavours to receive any money due to any such owner, as if such person were the true and lawful owner,—he shall be guilty of felony, and being convicted thereof shall be liable,' as in sect. 3.

By sect. 5, 'If any person without lawful authority or excuse, the proof whereof shall lie on the party accused, engraves or makes on any plate, wood, stone, or other material any stock certificate or coupon purporting to be such a stock certificate or coupon as aforesaid, or to be such a stock certificate or coupon as aforesaid in blank, or to be a part of such a stock certificate or coupon as aforesaid,—or uses any such plate, wood, stone, or other material for the making or printing of any such stock certificate, or coupon, or blank stock certificate or coupon as aforesaid, or any part thereof respectively or knowingly has in his custody or possession any such plate, wood, stone, or other material,—or knowingly offers, utters, disposes of, or puts off, or has in his custody or possession, any paper on which any such blank stock certificate or coupon as aforesaid, or part of any such stock certificate or coupon as aforesaid, is made or printed,—he shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*n*).

By sect. 6, 'If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any certificate or duplicate certificate required by Part VI. of The National Debt Act, 1870, or by any former like enactment, with intent in any of the cases aforesaid to defraud, he shall be guilty of felony, and being convicted thereof shall be liable,' as in sect. 3.

In Acts authorising the raising of public loans clauses are usually inserted, in substance nearly the same as the above section, by which it is made a felony to forge certificates, debentures, receipts, &c., mentioned in the Acts (*o*).

Treasury or Exchequer Bills, &c.—By 24 & 25 Vict. c. 98, s. 8 (*p*), 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill (*q*) or exchequer bond, or exchequer debenture, or any endorsement on or assignment of any exchequer bill or exchequer bond or exchequer debenture, or any receipt or certificate for interest accruing thereon, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable (*r*) . . . to be kept in penal servitude for life . . .'

(*n*) 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*o*) By the Local Loans Act, 1875 (38 & 39 Vict. c. 83), s. 32, 'For the purposes of the Forgery Act, 1861, debenture stock under this Act shall be deemed to be capital stock of a body corporate, and any other security issued in pursuance of this Act shall be considered to be a writing obligatory in any coupon bearing across its face an addition in written, printed or stamped letters, of the name of any banker or of the words 'and company' in full or abbreviated, between two transverse lines, shall be deemed to be a cheque or draft on a banker.'

(*p*) Taken from part of 1 Will. IV. c. 66, s. 3, and 16 & 17 Vict. c. 23, s. 41. There was a similar section in 48 Geo. III. c. 1, s. 9 (I.), as to the forgery of exchequer bills in Ireland.

(*q*) By the Treasury Bills Act, 1877 (40 & 41 Vict. c. 2) s. 10, ss. 8, 9, 10, 11, 'shall apply to Treasury bills, and shall have effect as if "Exchequer Bill" in those sections included "Treasury Bill."' And by the War Loan Act, 1900 (63 Vict. c. 2) sect. 4 (3), they were similiarly applied to war bonds.

(*r*) The omitted parts were repealed in 1893 (S. L. R.). See, as to punishment, 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

By sect. 9 (*rr*), 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or shall aid or assist in making, or shall knowingly have in his custody or possession any frame, mould, or instrument having therein any words, letters, figures, marks, lines, or devices peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills (*s*) or exchequer bonds or exchequer debentures, or any machinery for working any threads into the substance of any paper, or any such thread, and intended to imitate such words, letters, figures, marks, lines, threads, or devices, or any plate peculiarly employed for printing such exchequer bills, bonds, or debentures, or any die or seal peculiarly used for preparing any such plate, or for sealing such exchequer bills, bonds, or debentures, or any plate, die, or seal intended to imitate any such plate, die, or seal as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . ' (*t*).

By sect. 10 (*u*), 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or aid or assist in making, any paper in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or to be provided or used for such exchequer bills (*s*), bonds, or *debentures*, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall knowingly have in his custody or possession any paper whatsoever, in the substance whereof shall appear any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any parts of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall cause or assist in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, to appear in the substance of any paper whatever, or shall take or assist in taking any impression of any such plate, die, or *seal* as in the last preceding section mentioned, shall be guilty of felony, and being convicted thereof shall be liable (*t*) . . . to be kept in penal servitude for any term not exceeding seven years . . . ' (*u*).

By sect. 11, 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive, or knowingly have in his custody or possession, any paper manufactured and provided by or under the directions of the commissioners of inland revenue or commmissioners of [His] Majesty's treasury, for the purpose of being used as exchequer bills (*s*) or exchequer bonds or *exchequer debentures*, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate, die, or *seal* as in the last two

(*rr*) Framed on 5 & 6 Vict. c. 66, s. 9, and 16 & 17 Vict. c. 132, s. 10, which extended to Ireland. The words 'frame,' 'mould,' 'exchequer debentures,' and 'seal,' were new in 1861.

(*s*) See note (*q*) *ante*, p. 1694

(*t*) See note (*r*) *supra*.

(*u*) Framed on 5 & 6 Vict. c. 66, s. 9, and 16 & 17 Vict. c. 132, s. 10, which extended to Ireland.

The words 'debentures' and 'seal' were new in 1861.

preceding sections mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding three years, with or without hard labour' (*v*).

By the Exchequer Bills and Bonds Act, 1866 (29 & 30 Vict. c. 25), s. 15, 'If any person or persons shall forge or counterfeit any such exchequer bill or coupon for interest, or any endorsement or writing thereupon, or therein, or tender in payment any such forged or counterfeited bill or any exchequer bill with such counterfeit endorsement, or writing thereon, or shall demand to have such counterfeit bill, or any exchequer bill with such counterfeit endorsement or writing thereupon or therein exchanged for ready money or for another exchequer bill, by any person or persons, body or bodies politic (*w*) or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the endorsement or writing thereupon or therein, to be forged or counterfeited, and with intent to defraud [His] Majesty, or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate who shall contract or circulate or exchange the same, or any of them, or any other person or persons, body or bodies politic or corporate, then every such person or persons so offending, being thereof lawfully convicted shall be adjudged a felon, and shall suffer accordingly' (*ww*).

By sect. 20, 'Every person who shall make, or cause or procure to be made, or shall aid or assist in making, or shall knowingly have in his possession, not being legally authorised by the Treasury (*x*), and without lawful excuse (the proof whereof shall lie on the person accused), any instrument having therein any distinguishing marks peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills, or any machinery for working such distinguishing marks into the substance of any paper, and intending to imitate such distinguishing marks, or any plate peculiarly employed for printing exchequer bills, or any die peculiarly used for preparing any such plate, or for sealing such exchequer bills, or any plate or die intended to imitate such plates or dies respectively; and also every person, except as before excepted, who shall make or cause or procure to be made, or aid or assist in making, any paper in the substance of which shall appear any distinguishing marks peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills, or any part of such distinguishing marks, and intended to imitate the same; and also every person, except as before excepted, who shall knowingly have in his possession, without lawful excuse (the proof whereof shall lie on the person accused), any paper whatever, in the substance whereof

(*v*) Framed on 5 & 6 Vict. c. 66, s. 10, and 16 & 17 Vict. c. 132, s. 11, which extended to Ireland. See also 24 & 25 Vict. c. 5, s. 19.

The words 'exchequer debentures' and 'seals' are new.

(*w*) 'Public' in the Revised Statutes, 2nd ed.

(*ww*) For punishment, *vide ante*, Vol. i. p. 247.

(*x*) The expression 'The Treasury' means 'the Lord High Treasurer for the time being or the Commissioners for the time being of His Majesty's Treasury.' Interpretation Act, 1889. (52 & 53 Vict. 63), s. 12.

shall appear any such distinguishing marks, or any part of such distinguishing marks, and intended to imitate the same; and also every person, except as before excepted, who shall cause or assist in causing any such distinguishing marks or any part of such distinguishing marks, and intended to imitate the same, to appear in the substance of any paper whatever, or who shall take or assist in taking any impression of any such plate or die as aforesaid, shall be guilty of felony.'

By sect. 21, 'Every person not lawfully authorised and without lawful excuse (the proof whereof shall lie on the person accused), who shall purchase, or receive, or take, and have in his custody any paper manufactured and provided by or under the directions of the Treasury (*xx*), for the purpose of being used as exchequer bills, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate or die as aforesaid, shall for every such offence be guilty of a misdemeanor, and, being convicted thereof, shall, at the discretion of the Court before whom he shall be tried, be imprisoned for any period not more than *three* years nor less than *six* calendar months' (*y*).

By sect. 25, 'All the provisions and penalties of this Act contained in sections 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, shall be applied and extended to such exchequer bills made out and issued in pursuance of any former Act or Acts as shall remain outstanding after the commencement of this Act.'

By sect. 26, 'The several sections 3, 4, 5, 6, 14, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of this Act, applicable to exchequer bills, shall apply and be construed to and in relation to all exchequer bonds to be made out and issued from and after the commencement of this Act under the authority of any Act or Acts of Parliament, as well as to such exchequer bonds made out and issued in pursuance of any former Act or Acts, as shall remain outstanding after the commencement of this Act, so far as the same are applicable, in like manner and as fully and effectually to all intents and purposes as if such several sections had been particularly repeated and enacted in this Act in relation to such exchequer bonds: provided always that such exchequer bonds may be made out and issued from and after the commencement of this Act, with coupons for the interest becoming due thereon from time to time for any term not exceeding six years from the date thereof.'

Companies.—By the Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 38 (1) (*z*). 'If any person (i) with intent to defraud, forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant, or coupon, issued in pursuance of this Act, or by means of any such forged or altered share warrant, coupon, or document purporting as aforesaid, demands or endeavours to obtain or receive any share or interest of or in any company under this Act, or to receive any dividend or money payable in respect thereof, knowing the warrant, coupon, or document to be forged or altered . . . he

(*xx*) See note (*x*) *ante*, p. 1696.

(*y*) *Quære* the effect on this section, of 54 & 55 Vict. c. 69, s. 1, *ante* Vol. i. p. 212.

(*z*) A re-enactment of 30 & 31 Vict. c. 131, s. 34.

shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years (*c*).

Sect. 38 (1), clause ii., makes it felony (punishable as under clause i.), falsely to personate owners of shares, share warrants or coupons (*b*).

By sect. 38, ' (2) If any person, without lawful authority or excuse, the proof whereof shall be on him, engraves or makes on any plate, wood, stone, or other material any share warrant or coupon purporting to be a share warrant or coupon issued or made by any particular company in pursuance of this Act, or to be a blank share warrant or coupon so issued or made, or to be a part of such a share warrant or coupon, or uses any such plate, wood, stone, or other material for the making or printing of any such share warrant or coupon, or of any such blank share warrant or coupon, or any part thereof respectively, or knowingly has in his custody or possession any such plate, wood, stone, or other material, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years (*a*).

(*a*) Or to imprisonment as stated, *ante*, Vol. i. p. 212.
(*b*) See the clause, *post*, p. 1767.
(*c*) A re-enactment of 30 & 31 Vict. c. 131, s. 36.

CANADIAN NOTES.

FORGERY RELATING TO THE PUBLIC FUNDS AND THE STOCKS OF THE PUBLIC COMPANIES.

Definition of Forgery.—See Code sec. 466.

Uttering Forged Documents.—See Code sec. 467.

Forgery of Transfer of Stocks, etc.—See Code sec. 468.

Machinery for Forgery.—See Code sec. 471.

Counterfeiting Government Seals, etc.—See Code sec. 472.

Drawing Documents Without Authority.—See Code sec. 477.

Penalty for Counterfeiting Stamps, Seals, Brands, etc.—See Code sec. 479.

Forgery in Public Account Books.—See Code sec. 484.

Making or Delivering False Dividend Warrants.—See Code sec. 485.

CHAPTER THE THIRTY-FIFTH.

OF FORGING BANK NOTES AND OF MAKING PLATES FOR BANK NOTES, ETC.

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 12, 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the Bank of England or of the Bank of Ireland, *or of any other body corporate, company, or person carrying on the business of bankers*, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any endorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, (*a*) shall be guilty of felony, and being convicted thereof shall be liable . . . (*b*) to be kept in penal servitude for life . . .' (*c*).

By sect. 13, 'Whosoever, without lawful authority *or* excuse (the proof whereof shall lie on the party accused), shall purchase or receive from any other person, or have in his custody or possession (*d*) any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable . . . (*b*) to be kept in penal servitude for any term not exceeding fourteen years . . .' (*e*).

By sect. 14, 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use, or knowingly have in his custody or possession (*f*) any frame, mould, or instrument for the making of paper with the words "Bank of England" or "Bank of Ireland" or any part of such words intended to resemble and pass for the same,

(*a*) See sec. 44, *ante*, p. 1642.

(*b*) The omitted words were repealed in 1893. As to other punishments see 54 & 55 Vict. c. 69, *ante*, Vol. i. pp. 211, 212.

(*c*) Taken from 1 Will. IV. c. 66, s. 3 (E.). There were similar clauses in 21 & 22 Geo. III. c. 16, s. 15 (I.), 33 Geo. III. c. 53, s. 2 (I.), and 9 Geo. III. c. 63, s. 2 (I.), relating to the forgery in Ireland of bank notes of the banks of England and Ireland.

The words in italics were new in 1861, and although most of the notes of common bankers fell within the former enactments relating to the forgery of promissory notes, yet the new words include cases not formerly provided for. Thus the note of a country bank promising 'to pay the bearer one guinea on demand in cash or Bank of England note,' was held not to be a promissory note for the payment of money within 2 Geo. II. c. 25 (rep.). R. *v.* Wilcock, 2 Russ. Cr. & M. (4th ed.), 944. But such a case would clearly fall within the new words of this section

(*d*) See s. 45, *ante*, p. 1678.

(*e*) Taken from 1 Will. IV., c. 66, s. 12. (E.). There was a similar section in 49 Geo. III., c. 13, s. 2 (I.), relating to bank notes, &c., of the Bank of Ireland.

A question may be raised whether this section includes the notes of common bankers. Neither of the old enactments did; but placed as this enactment is, immediately after the one including such notes, which describes them as commonly called by the very terms used in this section, there can be no doubt that they would be held to be within it.

The words 'without lawful authority,' &c. are made uniform throughout this Act.

(*f*) See s. 45, *ante*, p. 1678.

visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, visible in the substance of the paper [or with any device or distinction peculiar to and appearing in the substance of the paper used by the Banks of England and Ireland respectively], or shall make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper whatsoever with the words " Bank of England " or " Bank of Ireland," or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper [or with any device or distinction peculiar to and appearing in the substance of the paper used by the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively], or shall by any art or contrivance cause the words " Bank of England " " Bank of Ireland," or any part of such words intended to resemble and pass for the same [or any device or distinction peculiar to and appearing in the substance of the paper used by the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively], to appear visible in the substance of any paper, or shall cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable,' as in sect. 13 (*g*).

By sect. 15, 'Nothing in the last preceding section contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling, appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the watermarks of the paper used by the Banks of England and Ireland respectively' (*h*).

(*g*) Framed from 1 Will. IV. c. 66, s. 13 (E.), 38 Geo. III. c. 53, s. 3 (I); and 39 Geo. III. c. 63, s. 3 (I).

The parts between brackets are taken from the two latter Acts; those Acts had the words 'or the greater part of such words' for which the Select Committee of the Commons substituted 'any part of such words intended to resemble and pass for the same,' as the greater part of the words 'Bank of Ireland' or 'Bank of England' might be visible in paper, and yet might neither resemble nor be intended to resemble either of those expressions.

(*h*) Taken from 1 Will. IV. c. 66, s. 14 (E.) it was new in Ireland in 1861.

By sect. 16, (*i*) 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any promissory note, bill of exchange, or bank post bill, or part of a promissory note, bill of exchange, or bank post bill, purporting to be a bank note, bank bill of exchange, or bank post bill of the Bank of England or of the Bank of Ireland, or of any other (*j*) body corporate, company, or person carrying on the business of bankers, or to be a blank bank note, blank promissory note, blank bank bill of exchange, or blank bank post bill of the Bank of England or of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or to be a part (*k*) of a bank note, promissory note, bank bill of exchange, or bank post bill of the Bank of England or of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid or any name, word, or character resembling or apparently intended to resemble any subscription to any bill of exchange or promissory note issued by the Bank of England or the Bank of Ireland, or by any such other body corporate, company, or person as aforesaid, or shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank note, bank bill of exchange, or bank post bill, or part of a bank note, bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill of the Bank of England or of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or part of a bank note, bank bill of exchange, or bank post bill, or any name, word, or character resembling or apparently intended to resemble any such subscription, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years' (*l*).

By sect. 17, (*m*) 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other

(*i*) Framed from 1 Will. IV. c. 66, ss. 15, 18 (E). There were similar provisions in 38 Geo. III. c. 53, s. 4 (I). 39 Geo. III. c. 63, s. 4 (I). 41 Geo. III. c. 57, ss. 2, 3 and 1 Geo. IV. c. 92, s. 1.

(*j*) To engrave upon a plate part of a note purporting to be a note of a Scotch banking company, is an offence within this section and that effect of the section is not prevented by sect. 55, which provides that nothing in the Act contained shall extend to Scotland. R. *v.* Brackenridge, L. R. 1 C. C. R. 133; 37 L. J. M. C. 86. See 24 & 25 Vict. c. 98, s. 40, *ante*, p. 1677.

(*k*) A plate engraved with part of a promissory note of a Canadian bank was held to be within 1 Will. IV. 4 c. 66, s. 18, incorporated in this section. R. *v.* Hannon 2 Mood. 77. 9 C. & P. 11; and see R. *v.* Keith, Dears 486; 24 L. J. M. C. 110, an indictment for engraving the centre part of a note of a Scotch bank. The word 'note' is not limited to the parts of a promissory note in a legal sense, but includes all that is on the paper upon which the note is written. *Ibid.* Coleridge, J.

(*l*) The omitted parts were repealed in 1893. (8. L. R.) For other punishments see 54 & 55 Vict. c. 69, *ante*, Vol. i. pp. 211, 212.

(*m*) Taken from 1 Will. IV. c. 66, s. 16 (E.), and extended to Ireland; there was a similar provision as to the notes, &c., of the Bank of England in 1 Geo. IV. c. 92, s. 2. The section is extended to common bankers.

material, any word, number, figure, *device*, character, or ornament, the impression taken from which shall resemble or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the Bank of England or of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or shall use, or knowingly have in his custody or possession, any such plate, wood, stone, or other material, or any other instrument or device for the impressing or making upon any paper or other material any word, number, figure, character, or ornament which shall resemble or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the Bank of England or of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper or other material upon which there shall be an impression of any such matter as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude or any term not exceeding fourteen years . . .' (*mm*).

By sect. 18, (*n*) 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any body corporate, company, or person carrying on the business of bankers (other than and except the Banks of England and Ireland respectively), appearing visible in the substance of the paper, or knowingly have in his custody or possession any such frame, mould, or instrument, or make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper in the substance of which the name or firm of any such body corporate, company, or person shall appear visible, or by any art or contrivance cause the name or firm of any such body corporate, company, or person to appear visible in the substance of the paper upon which the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*o*).

By sect. 19, (*p*) 'Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in any wise make upon any plate whatsoever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatsoever language the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order of any foreign prince, or state, or of any minister or

(*mm*) *Vide* note (*l*), *ante*, p. 1701.

(*n*) Taken from 1 Will. IV. c. 66, s. 17 (E.). There were similar provisions in 41 Geo. III. c. 57, s. 1. The Select Committee of the Commons struck out the words 'by any art or contrivance;' but, by some accident, they were not omitted in the reprint of the bill. C. S. G.

(*o*) The omitted words were repealed (S. L. R.) 1893. See 54 & 55 Vict. c. 69, s. 1., *ante*, Vol. i. pp. 211, 212, as to other punishments.

(*p*) Taken from 1 Will. IV. c. 66, s. 19. There were similar provisions in 43 Geo. III. c. 139, ss. 1, 2.

officer in the service of any foreign prince or state, or of any body corporate or body of the like nature, constituted or recognised by any foreign prince or state, or of any person or company of persons, resident in any country not under the dominion of [His] Majesty, or shall use, or knowingly have in his custody or possession, any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any part of any such foreign bill, note, undertaking, or order shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding fourteen years . . .' (*q*).

The prisoner employed a photographer to counterfeit Austrian bank notes, his directions being to take the impression of the note on glass by means of a photographic process, and then get it engraved on metal or wood, so as afterwards to strike off the notes when the proper bank-note paper could be procured from the Continent. The photographer, accordingly, took off, on a glass plate, a ' positive ' impression of the note, and shewed it to the prisoner, who was apprehended whilst approving of the impression and giving further direction with respect to it. On a case reserved it was held that the statute applied to any stage of the process of making counterfeit securities and included the photographic copy even though it were an undertaking of an evanescent form (*r*).

The prisoner was indicted at the Central Criminal Court under sect. 17 of the Forgery Act, 1861 (*supra*), for having in his possession two copper plates for the impressing of a bank note of a bank of the South African Republic. It was objected that this section only referred to a body corporate established in this country, but the Recorder overruled the objection (*s*).

An indictment under 1 Will. IV. c. 66, s. 19 (*t*), charged B., M., and H., in some of the counts, with engraving on a plate, in the Polish language, a note for the payment of money; in other counts with feloniously using the plates, on which the notes were engraved. At the close of the case for the prosecution, Littledale, J., required the counsel for the prosecution to elect, whether they would go on the the counts for engraving, or the counts for using the plates, as they were distinct offences; and counsel for the Crown, admitting that there was no evidence of a joint engraving, relied on the counts for using the plates. It was then objected for the prisoners that there was no evidence of a joint using of the plates. It was answered that there was evidence to go to the jury, as it was clear that B. had the plate at one time and M. at another, and that H. was active in bringing the parties together, so that F. might have the impression. Any act traced to one was traced to all; and the question was, whether the notes were not struck off with the joint consent of all the parties.

(*q*) See note (*n*) to s. 18.

(*r*) R. *v.* Rinaldi, L. & C. 330; 33 L. J. M. C. 28.

(*s*) R. *v.* Auffret, 62 J. P. 521. The Recorder. See R. *v.* Zeigert, 10 Cox 555, Willes, J.

(*t*) Repealed but re-enacted as 24 & 25 Vict. c. 98, s. 19, *supra*.

Littledale, J., in summing up, said, 'In a case of felony you can only go upon one act committed. There is a very great difficulty in this case for you to know which act the prosecutor relies on, all these things being done at different times. The prosecutor does not fix on any particular day; if you find that at any one time all three did concur in using the plates, then you may find them guilty. There are four different times at which notes were taken. As to what has been said about these parties being general dealers, it is not sufficient; they are not indicted one for doing the act, and the others as accessories before the fact, but are all charged as principal felons. There may be cases in which acts done at different times may be evidence of a joint using, as, for instance, if one were to find the plate, and one the paper, and one to do the work, I should say it was a joint using, but there is no evidence of that sort here. There is no evidence that by common concert these parties did such things. If one struck off the impressions, and the others wished him to do it, and shared in the profits, that would not make them principal felons. As this is an indictment against all three, you must be satisfied that they were all three present at one time, or assisting in some way at that time, either by watching at the door or something of that sort. Having the notes in possession is not sufficient evidence of having used the plate; as in the case of forgery, uttering is not sufficient evidence of having forged. Balls, it seems, had the plate the year before, but that is no evidence under this indictment, as the using under it must be since August, 1835, as H. and M. do not come on the stage till that time. The only evidence against H. is the negotiations he entered into with Saltzman and others respecting this note; there is no proof of his having the plate in his possession. M. had it in his possession, and is proved to have said before that he had the plate, and could print as many as he liked; this may be something like evidence of a using, on his part, of the plate. It does not seem to me that there is any evidence to prove a joint using at any one time, which, in my opinion, is necessary to prove this indictment; you may find two of them guilty, or one of them guilty, or all three of them guilty' (*u*).

Upon an indictment against several for engraving plates, under 1 Will. IV. c. 66, s. 19 (rep.) the jury must have been satisfied that they jointly employed the engraver, but it was not necessary that they should all be present when the order was given; it was sufficient if one first communicated with the others, and all concurred in the employment of the engraver (*v*).

(*u*) R. *v.* Harris, 7 C. & P. 416, *cor.* Littledale and Gaselee, JJ. The facts proved on the trial are not stated in the report, and although there is a reference to R. *v.* Balls, 7 C. & P. 426, for the principal facts of the case, the statement there does not contain any of the most important facts alluded to by the learned judge in his summing up. For other points decided in other cases against the same prisoners, see R. *v.* Warshaner, 1 Mood. 466; R. *v.* Harris, 7 C. & P. 429; R. *v.* Balls, 1 Mood. 470, *ante*, p. 1656. In a similar case now all the prisoners who had taken such a part as to make them accessories before the fact, might be convicted with the principal under 24 & 25 Vict. c. 94, s. 1, *ante*, Vol. i. p. 130.

(*v*) R. *v.* Mazeau, 9 C. & P. 676. See R. *v.* Bull, 1 Cox, 281.

CANADIAN NOTES.

FORGERY OF BANK NOTES AND OF MAKING PLATES FOR BANK NOTES.

Definition of Forgery.—See Code sec. 466.

Uttering Forged Documents.—See Code sec. 467.

Forgery of Bank Notes, Exchequer Bills.—See Code sec. 468.

Having or Making Machinery for Making Bank Notes, etc.—See Code sec. 471.

Drawing Documents Without Authority.—See Code sec. 477.

Counterfeiting Stamps, Dies, etc.—See Code sec. 479.

Forging Dividend Warrants, etc.—See Code sec. 485.

CHAPTER THE THIRTY-SIXTH.

OF FORGING EAST INDIA SECURITIES, DEBENTURES, ETC.

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 7 (*a*), 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bond commonly called an East India bond, *or any bond, debenture, or security issued or made under the authority of any Act passed or to be passed relating to the East Indies*, or any endorsement on or assignment of any such bond, *debenture, or security*, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*b*).

By sect. 26 (*c*), 'Whosoever shall fraudulently forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any debenture issued under *any lawful authority whatsoever, either within* [*His*] *Majesty's dominions or elsewhere*, shall be guilty of felony, and being convicted thereof shall be liable . . .) to be kept in penal servitude for any term not exceeding fourteen years . . .' (*b*).

By the India Stock (*d*) Transfer Act, 1862 (25 & 26 Vict. c. 7), s. 14, 'If any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting any certificate or duplicate certificate required by this Act, or shall alter any number, figure, or word therein, or shall utter or publish as true any such false, forged, counterfeited, or altered certificate with intent to defraud the Bank of England or the Bank of Ireland, or any body politic or corporate, or any person or persons whomsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or willingly acting or assisting in the forging or counterfeiting, or altering, uttering, or

(*a*) Taken from part of 1 Will. IV. c. 66, s. 3, with the addition of the words in italics, which are introduced to include bonds, debentures, and securities issued or made under any future Act relating to British India.

(*b*) The omitted parts were repealed, S. L. R. 1893. For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*c*) Framed from 37 Geo. III. c. 54, s. 11 (I.), which related to debentures of the Bank of Ireland, and extended to any debenture issued under any lawful authority whatsoever, whether within the King's dominions or without.

The words of this clause originally were 'forge or alter'; but as the clause contained no intent to defraud, the Select Committee of the Commons thought 'fraudulently' ought to be prefixed to 'alter'; but by some mistake it is placed before 'forge.' Elsewhere in the Act it is correctly placed. C. S. G.

(*d*) By sect. 1, 'The expression "India Stock" means stock created or to be created for the raising of money in the United Kingdom on the credit of the Revenues of India, but does not include the stock commonly known by the name of East India Stock.'

publishing as aforesaid, being convicted thereof in due form of law, shall be adjudged guilty of felony' (*e*).

By the India Stock (*f*) Certificate Act, 1863 (26 & 27 Vict. c. 73), s. 13, 'Whosoever shall forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any India stock certificate or coupon, or any document purporting to be any India stock certificate or coupon, issued in pursuance of this Act or shall demand or endeavour to obtain or receive any share or interest of or in India stock, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*g*).

By sect. 14, 'Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in India stock, or of any India stock certificate or coupon issued in pursuance of this Act, and shall thereby obtain or endeavour to obtain any such India stock certificate or coupon, or receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for life' (*g*).

By sect. 15, 'Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, shall engrave or make upon any plate, wood, stone, or other material, any India stock certificate or coupon purporting to be an India stock certificate or coupon issued or made under and in pursuance of this Act, or to be a blank India stock certificate or coupon issued or made as aforesaid, or to be a part of such a stock certificate or coupon, or shall use any such plate, wood, stone, or other material for the making or printing any such India stock certificate or coupon, or any such blank India stock certificate or coupon, or any part thereof respectively, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any such blank India stock certificate or coupon, or part of any such India stock certificate or coupon, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable . . . (*g*) to be kept in penal servitude for any term not exceeding fourteen years . . .'

By the East India Loan Act, 1869 (32 & 33 Vict. c. 106), s. 13, 'All provisions now in force in anywise relating to the offence of forging

(*e*) For punishment, see 7 & 8 Geo. IV. c. 28, s. 11, *ante*, Vol. i. p. 247, and 54 & 55 Vict. c. 69, *ante*, Vol. i. pp. 211, 212.

(*f*) By sect. 2, 'India Stock shall mean any stocks which have been or may be created and issued under the Acts aforesaid (22 & 23 Vict. c. 39; 23 & 24 Vict. c. 130; 24 & 25 Vict. c. 25) transferable in the books of the bank (*i.e.* of England or of Ireland), and "share in India Stock" shall include any part of a share.' By the South Indian Railway Purchase Act, 1890 (53 & 54 Vict. c. 6) s. 17, 'any capital stock created under this Act shall be deemed to be and shall mean India Stock' within 26 & 27 Vict. c. 70.

(*g*) As to other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted are repealed.

or altering, or offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any East India bond, with intent to defraud, shall extend and be applicable to and in respect of any debenture issued under the authority of this Act, as well as to and in respect of any bond issued under the same authority' (*h*).

(*h*) Sect. 13 of the East India Loan Act, 1873 (36 & 37 Vict. c. 32), is in identical language with s. 13 of the Act of 1869. So is s. 13 of the East India Loan Act, 1874 (37 & 38 Vict. c. 3).

Sect. 15 of the East India Loan Act, 1877 (40 & 41 Vict. c. 51) is in identical terms with s. 13 of the Act of 1869, except that the words "or bill" are inserted after the word "debenture," as is also the case in the Act of 1879 (42 & 43 Vict. c. 60) s. 14.

Sect. 12 of the East India Loan (East Indian Railways Debentures) Act, 1880 (43 Vict. c. 10) is identical with s. 13 of the 1869 Act, except that the words "or bond" are inserted after the word "debenture," and the section ends at the word "Act." The same is the case in s. 12 of the East India Loan Act, 1885 (48 & 49 Vict. c. 28).

Sect. 17 of the East India Loan Act, 1893 (56 & 57 Vict. c. 70) ends at the word "Act," and in place of "debenture" are the words "bond, debenture, or bill."

Sect. 8 of the East India Loan Act, 1893 (61 & 62 Vict. c. 13) makes the provisions of the Act of 1893 as to criminal offences apply to "bonds, debentures, or bills," issued under that Act, and the same is the case in s. 7 of the East India Loan (Great Indian Railway Debentures) Act, 1901 (1 Edw. VII. c. 25).

Sect. 5 of the East India Loans (Railways) Act, 1905 (5 Edw. VII. c. 19) incorporates s. 17 of the Act of 1893. So does the East India Loans Act, 1908 (8 Edw. VII. c. 54), by s. 6.

CANADIAN NOTES.

OF FORGING DEBENTURES.

Definition of Forgery.—See Code sec. 466.

Uttering Forged Documents.—See Code sec. 467.

Forging Debentures.—See Code sec. 468.

Having Machinery in Possession for Forging Debentures.—See Code sec. 471.

Drawing Document Without Authority.—See Code sec. 477.

CHAPTER THE THIRTY-SEVENTH.

OF FORGING AND TRANSPOSING STAMPS.

THE Stamp Duties Management Act (*a*), 1891 (54 & 55 Vict. c. 38), by sect. 1, provides that 'all duties for the time being chargeable by law as stamp duties shall be under the care and management of the Commissioners, and this Act shall apply to all such duties and to all fees which are for the time being directed to be collected or received by means of stamps.'

By sect. 27, 'In this Act, unless the context otherwise requires,—

'The expression "Commissioners" means Commissioners of Inland Revenue:

'The expression "officer" means officer of Inland Revenue:

'The expression "chief office" means chief office of Inland Revenue:

'The expression "head offices" means the head offices of Inland Revenue in Edinburgh and Dublin:

'The expression "duty" means any stamp duty for the time being chargeable by law:

'The expression "material" includes every sort of material upon which words or figures can be expressed:

'The expression "instrument" includes every written document:

'The expression "die" includes any plate, type, tool, or implement whatever used under the direction of the Commissioners for expressing or denoting any duty, or rate of duty, or the fact that any duty or rate of duty or penalty has been paid, or that an instrument is duly stamped, or is not chargeable with any duty or for denoting any fee, and also any part of any such plate, type, tool, or implement:

'The expressions "forge" and "forged" include counterfeit and counterfeited:

'The expression "stamp" means as well a stamp impressed by means of a die as an adhesive stamp for denoting any duty or fee:

'The expression "stamped" is applicable as well to instruments and material impressed with stamps by means of a die as to instruments and material having adhesive stamps affixed thereto:

'The expressions "executed" and "execution," with reference to instruments not under seal, mean signed and signature:

'The expression "justice" means justice of the peace.

By sect. 13, 'Every person who does or causes or procures to be done, or knowingly aids, abets, or assists in doing, any of the acts following; that is to say,—

(*a*) This Act repealed sections 22 to 30 of the Post Office (Duties) Act, 1840 (3 & 4 Vict. c. 96). The rest of that Act is repealed by the Post Office Act, 1908 See ss. 60, and 64 of that Act for penaltie on imitation of stamps, &c.

(1) Forges a die or stamp;
(2) Prints or makes an impression upon any material with a forged die;
(3) Fraudulently prints or makes an impression upon any material from a genuine die;
(4) Fraudulently cuts, tears, or in any way removes from any material any stamp with intent that any use (*b*) should be made of such stamp or of any part thereof;
(5) Fraudulently mutilates any stamp, with intent that any use should be made of any part of such stamp;
(6) Fraudulently fixes or places upon any material or upon any stamp, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any way removed from any other material, or out of or from any other stamp;
(7) Fraudulently erases or otherwise either really or apparently removes from any stamped material any name, sum, date, or other matter or thing whatsoever thereon written, with the intent that any use should be made of the stamp upon such material;
(8) Knowingly sells or exposes for sale or utters or uses any forged stamp, or any stamp which has been fraudulently printed or impressed from a genuine die;
(9) Knowingly, and without lawful excuse (the proof whereof shall lie on the person accused) has in his possession any forged die or stamp or any stamp which has been fraudulently printed or impressed from a genuine die, or any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise either really or apparently removed,

shall be guilty of felony, and shall on conviction be liable to be kept in penal servitude for any term not exceeding fourteen years (*bb*), or to be imprisoned with or without hard labour for any term not exceeding two years.'

By sect. 14, 'Every person who without lawful authority or excuse (the proof whereof shall lie on the person accused)—

(a) Makes or causes or procures to be made, or aids or assists in making, or knowingly has in his custody or possession, any paper in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or used by or under the direction of the Commissioners (*c*) for receiving the impression of any die, or any part of such words, letters, figures,

(*b*) See R. *v.* Field, 1 Leach, 383. Some other cases on the following, or on repealed, statutes will be found at the end of this chapter.

(*bb*) *Vide ante*, p. 211.

(*c*) By the Revenue Act, 1898 (61 & 62 Vict. c. 46) s. 12, 'Sects. 14, 15, and 16, of the Stamp Duties Management Act, 1891 . . . shall extend to paper used for excise licences in like manner as if it were paper provided by the Commissioners of Inland Revenue for receiving the impression of a die.'

marks, lines, threads, or other devices, and intended to imitate or pass for the same; or

(*b*) Causes or assists in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices and intended to imitate or pass for the same to appear in the substance of any paper whatever,

shall be guilty of felony, and shall on conviction be liable to be kept in penal servitude for any term not exceeding seven years (*cc*), or to be imprisoned with or without hard labour for any term not exceeding two years.'

Sect. 15, 'Every person who without lawful authority or excuse (the proof whereof shall lie on the person accused) purchases or receives or knowingly has in his custody or possession—

(a) Any paper manufactured and provided by or under the direction of the Commissioners, (*d*) for the purpose of being used for receiving the impression of any die before such paper shall have been duly stamped and issued for public use; or

(b) Any plate, die, dandy-roller, mould, or other implement peculiarly used in the manufacture of any such paper,

shall be guilty of a misdemeanor, and shall on conviction be liable to be imprisoned with or without hard labour for any term not exceeding two years.'

By sect. 16, 'On information given before a justice upon oath that there is just cause to suspect any person of being guilty of any of the offences aforesaid (*dd*), such justice may, by a warrant under his hand, cause every house, room, shop, building, or place belonging to or occupied by the suspected person, or where he is suspected of being or having been in any way engaged or concerned in the commission of any such offence, or of secreting any machinery, implements, or utensils applicable to the commission of any such offence, to be searched, and if upon such search any of the said several matters and things are found, the same may be seized and carried away, and shall afterwards be delivered over to the Commissioners.'

By sect. 17, '(1) Any justice having jurisdiction in the place where any stamps are known or supposed to be concealed or deposited, may, upon reasonable suspicion that the same have been stolen or fraudulently obtained, issue his warrant for the seizure thereof, and for apprehending and bringing before himself or any other justice within the same jurisdiction the person in whose possession or custody the stamps may be found, to be dealt with according to law.

'(2) If the person does not satisfactorily account for the possession of the stamps or it does not appear that the same were purchased by him at the chief office or at one of the head offices, or from some person duly appointed to sell and distribute stamps or duly licensed to deal

(*cc*) Nor less than three years: *vide ante*, Vol. i. p. 211.

(*d*) By the Revenue Act, 1898 (61 & 62 Vict. c. 46) s. 12, 'Sects. 14, 15, and 16, of the Stamp Duties Management Act, 1891 . . . shall extend to paper used for excise licences in like manner as if it were paper provided by the Commissioners of Inland Revenue for receiving the impression of a die.

(*dd*) See note (*c*), *ante*, p. 1710.

in stamps, the stamps shall be forfeited, and shall be delivered over to the Commissioners (*e*).

'(3) Provided that if at any time within six months after the delivery any person makes out to the satisfaction of the Commissioners that any stamps so forfeited were stolen or otherwise fraudulently obtained from him, and that the same were purchased by him at the chief office or one of the head offices, or from some person duly appointed to sell and distribute stamps, or duly licensed to deal in stamps, such stamps may be delivered up to him.'

Sect. 18.—'(1) If any forged stamps are found in the possession of any person appointed to sell and distribute stamps, or being or having been licensed to deal in stamps, that person shall be deemed and taken, unless the contrary is satisfactorily proved, to have had the same in his possession knowing them to be forged, and with intent to sell, use, or utter them, and shall be liable to the punishment imposed by law upon a person selling, using, uttering, or having in possession forged stamps knowing the same to be forged.

'(2) If the Commissioners have cause to suspect any such person of having in his possession any forged stamps, they may by warrant under their hands authorise any person to enter between the hours of nine in the morning and seven in the evening into any house, room, shop, or building of or belonging to the suspected person, and if on demand of admittance, and notice of the warrant, the door of the house, room, shop, or building, or any inner door thereof, is not opened, the authorised person may break open the same and search for and seize any stamps that may be found therein or in the custody or possession of the suspected person.

'(3) All officers of the peace are hereby required, upon request by any person so authorised, to aid and assist in the execution of the warrant.

'(4) Any person who—

(a) Refuses to permit any such search or seizure to be made as aforesaid; or

(b) Assaults, opposes, molests, or obstructs any person so authorised in the due execution of the powers conferred by this section or any person acting in his aid or assistance,

and any officer of the peace who upon any such request as aforesaid, refuses or neglects to aid and assist any person so authorised in the due execution of his powers shall incur a fine of fifty pounds' (*f*).

Sect. 19, 'Where stamps are seized under a warrant, the person authorised by the warrant shall, if required, give to the person in whose

(*e*) By s. 11 of the Revenue Act, 1898 (61 & 62 Vict. c. 46), 'If any person who is a maker or seller of any article chargeable with any duty required to be denoted by a stamp provided by the Commissioners of Inland Revenue, receives or has in his possession any stamp or portion of a stamp so provided which has been previously used for denoting any such duty, that stamp or portion of a stamp shall be forfeited.'

(*f*) By s. 26, 'All fines imposed by this or by any Act for the time being in force relating to stamp duties charged in respect of medicines or playing cards may be proceeded for and recovered in the same manner and in the case of summary proceedings with the like power of appeal as any fine or penalty under any Act relating to the excise.

custody or possession the stamps are found an acknowledgment of the number, particulars, and amount of the stamps, and permit the stamps to be marked before the removal thereof.'

By sect. 20, 'Every person who by any writing in any manner defaces any adhesive stamp before it is used shall incur a fine of five pounds: Provided that any person may with the express sanction of the Commissioners, and in conformity with the conditions which they may prescribe, write upon or otherwise appropriate an adhesive stamp before it is used for the purpose of identification thereof.'

By sect. 21, 'Any person who practises or is concerned in any fraudulent act, contrivance, or device, not specially provided for by law, with intent to defraud [His] Majesty of any duty shall incur a fine of £50.'

Post Office.—Duties of postage are chargeable as stamp duties and all enactments relating to stamp duties apply accordingly as to offences with reference to postage stamps, money orders, etc. See 8 Edw. VII. c. 48, sects. 60, 64, 65, *ante*, p. 1429 *et seq* (Post Office offences).

Stamps denoting Fees.—By the Local Stamp Act (*g*) 1869 (32 & 33 Vict. c. 49), s. 8, 'If any person is guilty of any of the following offences:—

'(1) Forges or counterfeits, or causes or procures to be forged or counterfeited, any stamp or die, or any part of any stamp or die, provided, made, or used in pursuance of this act; or

'(2) Forges or counterfeits, or causes or procures to be forged or counterfeited, the impression, or any part of the impression, of any such stamp or die as aforesaid upon any document; or

'(3) With intent to defraud the local authority, stamps or marks, or causes or procures to be stamped or marked, any document with any such forged or counterfeited stamp or die; or

'(4) Sells or exposes for sale any document having thereupon the impression of any such forged or counterfeited stamp or die, or part of any such stamp or die, or any such forged or counterfeited impression or part of an impression, knowing the same to be forged or counterfeited; or

'(5) Fraudulently cuts or gets off, or causes or procures to be cut or got off, the impression of any such stamp or die from any document, with intent to use the same for any other document; or

'(6) Knowingly and without lawful excuse (the proof whereof lies on the person accused) has in his possession any false, forged, or counterfeited die, plate, or other instrument, or part of any such die, plate, or instrument, resembling or intended to resemble, either wholly or in part, any stamp or die which at any time whatever has been or may be provided, made, or used by or under the direction of the local authority for the purposes of this act; or

'(7) Knowingly and without lawful excuse (the proof whereof lies on the person accused) has in his possession any vellum, parchment, or paper having thereon the impression of any such false, forged, or counterfeit stamp or die, or having thereon any false, forged, or counterfeit stamp, mark or impression resembling or representing, either wholly

(*g*) This is an Act to enable local authorities to collect fines and fees by means of stamps.

or in part, or intended or liable to pass or be mistaken for any such stamp or die;

'(8) With intent to defraud the local authority, forges, or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any certificate of a Justice of the peace under this Act, or any signature to any certificate purporting to be signed by a Justice of the peace under this act;

'Every person so offending, and every person knowingly and wilfully aiding and abetting any person in committing any such offence, and being thereof lawfully convicted, shall be judged guilty of felony, and shall be liable . . . to penal servitude . . . ' (*h*).

By the Public Offices Fees Act, 1879 (42 & 43 Vict. c. 58), s. 5, all enactments relating to the forgery and counterfeiting of stamps under the control of the Commissioners of Inland Revenue, and of dies or paper for the same, and to the fraudulent use thereof shall apply in the case of stamps under this Act.

Gold and Silver Marks and Stamps.

Plate.—By the Gold and Silver Wares Act, 1844 (7 & 8 Vict. c. 22), s. 2, 'Every person, who shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, any die or other instrument, or any part of any die or other instrument, provided or used or to be provided or used by the company of goldsmiths in London, or by any of the several companies of goldsmiths in the cities of York, Exeter, Bristol, Chester, or Norwich, or the town of Newcastle-upon-Tyne, or by the companies of guardians of the standard of wrought plate in the towns of Sheffield or Brimingham respectively, for the marking or stamiping of any gold or silver wares; and every person who shall mark with any such forged or counterfeit die or other instrument, or with any part of such forged or counterfeit die or other instrument as aforesaid, any ware of gold or silver, or any ware of base metal, or shall utter any such ware of gold or silver, or any such ware of base metal so marked as aforesaid, knowing the same to be so marked as aforesaid; and every person who shall forge or counterfeit, or by any means whatever produce an imitation of, or shall utter, knowing the same to be forged or counterfeit or an imitation, any mark or part of any mark of any die or other instrument provided or used or to be provided or used as aforesaid upon any ware of gold or silver, or any ware of base metal; and every person who shall transpose or remove, or shall utter, knowing the same to be transposed or removed, any mark of any die or other instrument provided or used or to be provided or used as aforesaid, from any ware of gold or silver to any other ware of gold or silver, or to any ware of base metal; and every person who shall without lawful excuse (the proof whereof shall lie on the party accused) have in his possession any such forged or counterfeit die or other instrument as aforesaid, or any ware of gold or silver, or any ware of base metal, having thereupon the mark of any such forged or counterfeit die or other instrument as aforesaid, or having thereupon any such

(*h*) For present punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted parts were repealed in 1893 (S. L. R.).

forged or counterfeit mark or imitation of a mark as aforesaid, or any mark which shall have been so transposed or removed as aforesaid, knowing the same respectively to have been forged, counterfeited, imitated, marked, transposed, or removed; and every person who shall cut or sever from any ware of gold or silver any mark or any part of any mark of any die or other instrument provided or used or to be provided or used as aforesaid, with intent that such mark or such part of a mark shall or may be placed upon or joined or affixed to any other ware of gold or silver, or to any ware of base metal; and every person who shall place upon or join or affix to any ware of gold or silver or any ware of base metal any mark of any die or other instrument provided or used or to be provided or used as aforesaid, which shall have been cut or severed from any ware of gold or silver; and every person who shall, with intent to defraud [His] Majesty, or any of the said several companies of goldsmiths and guardians respectively, or any person whatever, use any genuine die or other instrument provided or used or to be provided or used as aforesaid, and every person counselling, aiding, or abetting any such offender, shall be guilty of felony, and shall . . . be transported (*i*) for any term not exceeding fourteen years . . .' (*j*).

On an indictment under 13 Geo. III. c. 59, s. 14, (*k*) and 38 Geo. III. c. 69, s. 7 (*k*) for unlawfully transposing the lion passant from one gold ring to another, the jury found the prisoner guilty of transporting the hall-mark from one genuine ring to another genuine ring, but without any fraudulent intent; it was held, that as there were no words in the statutes referring to any fraudulent intent, that finding amounted to a verdict of guilty (*l*).

But on an indictment, under the Stamp Act, 1772 (12 Geo. III. c. 48) (*m*), which made it a felony to write upon any stamped document anything which made it liable to a new stamp before such new stamp was put upon it. Lord Abinger, C.B., said: 'I consider that no fraud is proved. To come within the mere words of the Act, it is not necessary that it should have been done fraudulently; still I am of opinion, that if a person innocently, and without any intent to defraud, wrote anything on this paper, it would not be an offence. Whether fraud was intended is a question for the jury.' And in summing up, he said: 'The Act of Parliament does not say that an intent to deceive or defraud is essential to constitute this offence, but it is a serious question whether a person doing this thing innocently, and intending to pay the stamp duty, is liable to be transported. I am of opinion, and I hope I shall not be found to be wrong, that to constitute this offence there must be a guilty mind. It is a maxim, older than the law of England, that a man is not guilty

(*i*) Now penal servitude. For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted parts were repealed in 1893 (No. 2, S. L. R.).

(*j*) S. 3 imposes a pecuniary penalty on every dealer in gold and silver wares having in his possession wares with forged marks on them. For the meaning of the terms used in the Act, see s. 14. And see the Gold and Silver Wares Act, 1854, 17 & 18 Vict. c. 96, and Goldsmiths Co. *v.* Wyatt [1907] 1 K.B. 95 for the history of the law as to gold and silver wares.

(*k*) Repealed as to England, 7 & 8 Vict. c. 22.

(*l*) R. *v.* Ogden, 6 C. & P. 631, Park, J., and Bolland, B. In R. *v.* Spittle [1902], 18 T. L. R. 436, Bigham, J., held that an intent to defraud is not necessary under 7 & 8 Vict. c. 22, s. 2.

(*m*) Repealed.

unless his mind be guilty. If a person through mistake thought he could alter this licence, and send the 7*s.* 6*d.* to Somerset House, that would be no felony in law, any more than it would be in reason, justice, or common sense. If the defendant meant to defraud the government of 7*s.* 6*d.*, he is guilty; but as it could have been easily proved, if the duty had not been paid on H.'s licence, and no such evidence has been given, I think you should presume in favour of innocence. You will say whether you think that the defendant intended to commit any fraud. You may find that he made the alterations in the licence, but that he did so without any fraudulent intent, and I can put the matter in a train of investigation; or you may (and you have a right, if you think proper to do so) find a verdict of not guilty' (*n*).

One who innocently cut off the stamp and part of the parchment, etc., from an instrument was guilty of an offence under 55 Geo. III., c. 184, s. 7 (now rep.) if he afterwards got off such stamp from such part of the parchment with intent to use it again. And it was equally an offence, whether the impression was made before or after 55 Geo. III. c. 184. (*o*)

The proprietor of a newspaper which circulated amongst stamp collectors had in his possession a die, which he had ordered to be made for him abroad. From this die representations of a current Cape of Good Hope postage stamp could be produced. The only purpose for which he had ordered, or had in his possession, the die, was for making upon the pages of an illustrated stamp catalogue, or newspaper, illustrations in black and white, and not in colours, of the stamp in question; such catalogues were intended for sale only to stamp collectors and others and as part of the newspaper. Upon a special case the court held that the possession of the die for making a false stamp, known to be such to its possessor, was, however innocent the use that he intended to make of it, a possession without lawful excuse within sect. 7 (c) *ante*, of the Post Office Protection Act, 1884 (*p*).

In a case where the indictment was framed on the Medicines Stamp Act, 1804 (*q*), for forging and uttering medicine stamps, the first count charged that the prisoner feloniously did forge and counterfeit, &c., *a certain mark* provided and used in pursuance of a certain Act of Parliament, entitled, &c. The second count charged that he did feloniously utter *a certain paper* with a forged and counterfeit mark, which mark was forged and counterfeited to resemble a certain mark provided and used in pursuance of the said Act, he well knowing the said mark to be forged. The third count was for knowingly vending and selling a certain paper with a forged mark, &c. The four remaining counts were the same as the former, except that they described it as *a stamp* instead of *a mark*: and all the counts laid the intention to be to defraud His Majesty of the duties charged and imposed by the said Act. The prisoner was a vendor

(*n*) R. *v.* Allday, 8 C. & P. 136. R. *v.* Page, 8 C. & P. 122, was cited for the prisoner. See A. G. *v.* Shillibeer, 3 Ex. 71.

(*o*) R. *v.* Smith, 1 Mood. 314; 5 C. & P. 107.

(*p*) Dickens *v.* Gill [1896], 2 Q. B. 310. See now 8 Edw. VII. c. 48, s. 65.

(*q*) 44 Geo. III. c. 98, repealed except so far as it relates to the duties on medicines, and on licences for vending the same (S. L. R. 1872), and 53 & 54 Vict. c. 21, s. 40.

of patent medicines, and sold certain boxes of pills, with the counterfeit label on them. Many of these counterfeit labels were found in his possession entire. They were similar to the stamps for patent medicines issued by government; and having like them, at one end, the word 'stamp,' and at the other end the word 'office,' printed transversely, and on a blank on the first-mentioned end, printed longitudinally, the words 'value above 1*s.*,' and on a blank on the other end, also printed longitudinally, the words 'not exceeding 2*s.* 6*d.*,' as the legal stamps had; and having in the centre a white circle, which in the counterfeit was all blank, except that it bore the words, 'Jones, Bristol,' printed thereon; whereas in the legal stamp in that circular space were printed the words, 'duty, threepence'; and impressed in red ink the figure of a crown. When the prisoner used these stamps, he cut out the circular space bearing the words, 'Jones, Bristol,' and pasted on the packets of medicine the two ends of the label without the middle part, and concealed the deficienty of that part by a waxen seal extending over it. Stamps were uttered in his state by the prisoner affixed to the pills which he sold. Upon these facts the jury found the prisoner guilty; but two objections were taken in his behalf: first, that the forged stamp was not a sufficiently near resemblance of the genuine stamp to constitute forgery; secondly, that the indictment was deficient for not setting out or describing what the stamp was that was forged. The objections were referred to the consideration of the twelve judges, ten of whom (Lawrence and Bayley, JJ., being absent) were of opinion that the objections were unfounded, and the conviction right. Grose, J., in delivering their opinion, said: 'As to the first point, it was proved that this stamp had, in every respect, and in all its parts, a perfect resemblance to a genuine stamp, excepting only that the centre part in a genuine stamp, which specifies and denotes the duty, was in the forged stamp cut out; and a paper with the words "Jones, Bristol," on it pasted over the vacancy. It was also proved that those parts which still remained were a perfect resemblance of the same parts on the genuine stamp, and that the whole was a fabrication so artfully contrived as to be likely to deceive the eye of any common observer. An exact resemblance, or *facsimile*, is not required to constitute the crime of forgery; for if there be a sufficient resemblance to shew that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient. In this case the jury, by their verdict, have found that this stamp has a sufficient likeness to give it an aptitude to deceive, which is all the law requires. As to the second point, the indictment charges the prisoner with having forged a certain *mark*, and with having uttered a certain paper with a forged and counterfeited *mark*, resembling a mark provided and used in pursuance of the Act; and the other counts described it to be a *stamp*. The statute makes the forging and uttering of such *a mark* or *stamp*, as is thereby directed to be affixed to these articles, a capital offence. The indictment contains all the words that the Act requires to constitute the offence' (*r*).

(*r*) R. v. Collicott, 2 Leach, 1048; 4 Taunt. 300; R. & R. 212, 229.

CANADIAN NOTES.

Definition of Forgery.—See Code sec. 466.

Uttering Forged Documents.—See Code sec. 467.

Counterfeiting Stamps, Disposal of Same, Making Die for Same, Removing or Mutilating Stamps, Using Stamps Fraudulently, Erasing Marks Thereon, Possessing Mutilated or Erased Stamps, Counterfeiting Government Marks or Stamps, etc.—See Code sec. 479.

CHAPTER THE THIRTY-EIGHTH.

OF THE FORGERY OF OFFICIAL PAPERS, SECURITIES, AND DOCUMENTS.

FORGERIES of official papers, securities, and documents have been made in many instances the subject of especial legislative enactments.

Land Tax Papers, &c.—The Land Tax Act, 1812 (52 Geo. III. c. 143), s. 6, enacts that if any person shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited or altered, or knowingly or wilfully act or assist in the forging, counterfeiting, or altering any contract, assignment, certificate, receipt, or attested copy of any certificate made out or purporting to be made out by any person or persons authorised to make out the same by any Act of Parliament touching the redemption or sale of the land tax, or of any part thereof; or if any person shall wilfully utter any such forged, counterfeited, or altered contract, assignment, certificate, receipt, or attested copy of certificate, knowing the same to be forged, counterfeited, or altered, with intent to defraud His Majesty, his heirs or successors, or any body or bodies politic or corporate, or other person or persons: every person so offending and being thereof convicted shall be adjudged guilty of felony . . . . (*a*).

Woods and Forests.—By the Crown Lands Act, 1829 (10 Geo. IV. c. 50) s. 124 (*b*), 'If any persons or persons shall knowingly and wilfully forge or counterfeit, or knowingly and wilfully act or assist in forging or counterfeiting, the name or handwriting of the lord high treasurer or of the commissioners of His Majesty's treasury for the time being, or of any or either of them, to any power of attorney for the sale or transfer of any stock, or the name or handwriting of the said commissioners of woods, or of any or either of them, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the Bank of England, or of the Bank of Ireland, or of any private banker, on account of the said commissioners, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in the forging or counterfeiting, any draft, instrument, or writing in form of a draft, made by the said commissioners, or any or either of them, or shall utter or publish any such, knowing the same to be forged or counterfeited, with an intent to defraud the Bank of England, or of the Bank of Ireland, or any private banker, or any body corporate, or any person or persons whomsoever,

(*a*) The omitted part was repealed in 1890 (S. L. R.). For punishment, *vide ante*, Vol. i. p. 247.

(*b*) The Crown Lands Acts, 1829 to 1894, are applied to the Osborne Estate by 2 Edw. VII. c. 37, s. 1 (3).

every person or persons so offending, being thereof lawfully convicted, shall be and is and are hereby declared and adjudged to be guilty of felony' (*c*).

Registry of Deeds.—By the Forgery Act, 1861 (24 & 25 Vict. c. 98) s. 31 (*d*), 'Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any memorial, affidavit, affirmation, entry, certificate, endorsement, document, or writing, made or issued under the provisions of any Act passed or hereafter to be passed for or relating to the registry of deeds, or shall forge or counterfeit the seal of or belonging to any office for the registry of deeds, or any stamp or impression of any such seal; or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of any person to any such memorial, affidavit, affirmation, entry, certificate, endorsement, document, or writing, which shall be required or directed to be signed by or by virtue of any Act passed or to be passed, or shall offer, utter, dispose of, or put off any such memorial or other writing as in this section before mentioned, having thereon any such forged stamp or impression of any such seal, or any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*e*).

Paymaster-General, etc.—By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 33 (*f*), 'Whosoever, with intent to defraud, shall forge or alter any certificate, report, entry, endorsement, declaration of trust, note, direction, authority, instrument, or writing made or purporting, or appearing to be made by [the accountant-general (*g*), or] any other officer of the Court of Chancery in England or Ireland *or by any judge or officer of the Landed Estates Court in Ireland, or by any officer of any court in England or Ireland*, or by any cashier or other officer or clerk of the Bank of England or Ireland, or the name, handwriting, or signature of any such [accountant-general] judge, cashier, officer, or clerk as aforesaid, or shall offer, utter, dispose of, or put off any such certificate, report, entry, endorsement, declaration of trust, note, direction, authority, instrument or writing, knowing the same to be forged or altered, shall be guilty of felony, and

(*c*) Punishable under 7 & 8 Geo. IV. c. 28, s. 8, *ante*, Vol. i. p. 247.

(*d*) Framed on 2 & 3 Anne, c. 4, s. 19; 6 Anne, c. 35, s. 26; and 8 Geo. II. c. 6, s. 31, relating to Yorkshire; 7 Anne, c. 20, s. 15, relating to Middlesex; and 6 Anne, c. 2, s. 17 (I.); 8 Anne, c. 10, s. 4 (I.); 8 Geo. I. c. 15, s. 4 (I.), and 13 & 14 Vict. c. 72, s. 62 (I.), relating to Ireland.

(*e*) The omitted words were repealed in 1893 (S. L. R.). For other punishments, see 54 & 55 Vict. c. 69, s. 1, Vol. i. pp. 211, 212.

(*f*) Framed from 12 Geo. I. c. 32, s. 9, and 23 & 24 Geo. III. c. 22, s. 22 (I.), and extended to the certificates, &c., of any judge or officer of the Landed Estates Court in Ireland, and of any officer of any Court in England or Ireland.

(*g*) By 35 & 36 Vict. c. 44, s. 4, 'The Paymaster-General shall perform all the duties and exercise all the power and authorities which previously were performed or vested in the Accountant-General of the Court of Chancery. And by sect. 12, 'The provisions of the Forgery Act, 1861, which have reference to the forging or altering of any instrument made or purporting to be made by the Accountant-General of the Court of Chancery, shall apply to every instrument made, signed, or countersigned, or purporting to be made, signed, or countersigned, by the Paymaster-General, or any deputy, clerk, or officer of the Paymaster-General, and to the forging and alteration of any signature or countersignature of such Paymaster-General, deputy, clerk, or officer.

being convicted thereof shall be liable, . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*h*).

Sea Fisheries.—By the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 17 (subsects. 1–3) provision is made for the admissibility in evidence of certain documents and certificates specified in the section and in the First Schedule (*hh*); and by sub-sect. 4, 'If any person forges the signature of a sea fishery office to any such document as above mentioned, or makes use of any such document knowing the signature thereto to be forged, such person shall be liable, on summary conviction, to imprisonment for a term not exceeding three months, with or without hard labour, and on conviction on indictment, to be imprisoned with or without hard labour for a term not exceeding two years, and the cost of the prosecution of any such person on indictment may be paid as in cases of felony' (*i*).

Excise Permits.—By the Excise Permit Act, 1832 (2 & 3 Will. IV. c. 16), s. 3, 'Every person who shall make, or cause or procure to be made, or shall aid or assist in the making, or shall knowingly have in his, her, or their custody or possession, not being authorised by the said commissioners, and without lawful excuse the proof whereof shall lie on the person accused, any mould or frame, or other instrument having therein the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of the paper used by the said commissioners for permits, or with any or part of such words, figures, marks, or devices, or any of them, intended to imitate or pass for the same; and every person, except as before excepted, who shall make, or cause or procure to be made, or aid or assist in the making, any paper in the substance of which the words "excise office," or any other words, figures, marks, or devices peculiar to or appearing in the substance of the paper used by the commissioners of excise for permits or any part of such words, figures, marks, or devices, or any of them, intended to imitate and pass for the same, shall be visible; and every person, except as before excepted, who shall knowingly have in his, her, or their custody or possession, without lawful excuse (the proof whereof shall lie on the person accused), any paper whatever in the substance of which the words "excise office," or any other words, figures, marks, or devices, peculiar to and appearing in the substance of paper used by the commissioners of excise for permits, or any part of such words, figures, marks, or devices, or of any of them, intended to imitate and pass for the same, shall be visible; and every person, except as before excepted, who shall by any art, mystery, or contrivance, cause or procure, or aid or assist in causing or procuring the words "excise office," or any other words, figures, marks, or devices peculiar to and appearing in the substance of the paper used by the commissioners of excise for permits, or any or part of such words, figures, marks, or devices, or any of them, intended to imitate and pass for the same, to appear visible in the substance of any paper whatever; and every person not authorized or appointed as aforesaid, who shall engrave, cast, cut, or make, or cause or procure to be engraved,

(*h*) The omitted parts were repealed in 1893 (S. L. R.). For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*hh*) The North Sea Fisheries Convention and Certificates of Sea Fishery Officers.

(*i*) For present law as to costs *vide post*, p. 2039.

cast, cut, or made, or aid or assist in engraving, casting, cutting, or making any plate, type, or other thing in imitation of or to resemble any plate or type made or used by the direction of the commissioners of excise, for the purpose of marking or printing the paper to be used for permits; and every person, except as before excepted, who shall knowingly have in his or her custody or possession, without lawful excuse proof whereof shall lie on the person accused, any such plate or type, shall for every such offence be adjudged a felon, and shall be transported for the term of seven years (*j*), or shall be imprisoned, at the discretion of the Court before whom such person shall be tried, for any period not less than two years.'

By sect. 4, 'Every person who shall counterfeit or forge, or cause or procure to be counterfeited or forged, or assist in counterfeiting or forging any permit, or any part of any permit, or shall counterfeit any impression, stamp, or mark, figure, or device provided or appointed, or to be provided or appointed by the commissioners of excise to be put on such permit, or shall utter, give, or make use of any counterfeited or forged permit, knowing the same or any part thereof to be counterfeited or forged, or shall utter, give, or make use of any permit with any such counterfeited impression, stamp, or mark, figure, or device, knowing the same to be counterfeited; or if any person or persons shall knowingly or willingly accept or receive any counterfeited or forged permit, or any permit with any such counterfeited impression, stamp, or mark, figure, or device thereon, knowing the same to be counterfeited; shall for every such offence be adjudged guilty of a misdemeanor, and shall be transported for the term of seven years (*j*), or fined and imprisoned, at the discretion of the Court.'

Sect. 13 imposes a penalty of £500 and forfeiture on every person who shall forge or counterfeit any request note for a permit, or who shall fraudulently procure or alter permits, or who shall misapply or misuse them.

Sect. 15 renders every officer of excise who shall deliver out blank permits, or permits to persons not entitled to them, or false permits, or makes untrue entries in the counterparts, &c., guilty of a misdemeanor and liable to fine and imprisonment.

By sect. 18 of the Liqueur Act, 1848 (11 & 12 Vict. c. 121), 'Every person not being so authorised or appointed by the said commissioners who engraves, casts, cuts or makes (or causes, &c.) any plate or type made or used by the directions of the said commissioners for the purpose of marking or printing the paper to be used for certificates, and every person (except as aforesaid) who knowingly has in his custody or possession without lawful excuse (the proof whereof shall lie on the person accused) any such plate or type; and every person who counterfeits or forges (or causes, &c.) any such certificate as aforesaid, or any part of any such certificate, or counterfeits any impression, mark, or stamp, number, or device provided or appointed by the said commissioners to be put on such certificate or who utters, gives, or makes use of any counterfeit or

(*j*) Now penal servitude for any term not exceeding seven and not less than three years. See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. p. 211, 212.

forged certificate knowing the same or any part thereof to be counterfeited or forged, or who utters, &c., any such certificate with any such counterfeited impression, &c., knowing the same to be counterfeited, and every person who knowingly or willingly accepts or receives any counterfeited or forged certificate or any certificate with any such counterfeited impression, &c., thereon, knowing the same to be counterfeited, shall suffer punishment as provided by the Excise Permit Act, 1832 (*ante*, p. 1721), for persons adjudged guilty of similar offences for and in respect of the plates or types provided by the commissioners for the printing of permits.

Customs.—By the Customs Laws Consolidation Act, 1876, (39 & 40 Vict. c. 36), s. 28, 'If any person or persons shall knowingly and wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act or assist in forging or counterfeiting the name or handwriting of any commissioner of customs, or of any accountant and comptroller-general of the customs, or of any person acting for them respectively, to any draft, intrument, or writing, whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the "Bank of England," on account of the said commissioners of customs, or shall forge or counterfeit, or cause or procure to be forged or counterfeited, or knowingly and wilfully act to assist in the forging or counterfeiting, any draft, instrument, or writing in form of a draft, made by such accountant and comptroller-general or person as aforesaid, or shall utter or publish the same, knowing it to be forged or counterfeited with intent to defraud any person whomsoever; every such person or persons so offending, being thereof convicted, shall be declared and adjudged to be guilty of felony' (*k*).

Tobacco Labels.—By the Manufactured Tobacco Act, 1863 (26 & 27 Vict. c. 7), s. 7, 'The labels by this Act directed to be provided by the Commissioners of Customs shall be printed or stamped with such device as they shall think proper; and if any person shall forge or counterfeit any such label or the device thereon, or shall utter any such label or device knowing the same to be forged or counterfeited, he shall on conviction of such offence, be imprisoned in the house of correction, with hard labour, for any term not exceeding six calendar months nor less than three calendar months.'

Income Tax.—By the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 181, 'If any person shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly or wilfully act or assist in forging, counterfeiting, or altering, any certificate of the commissioners of stamps and taxes, or of any other commissioners acting in the execution of this Act, or any certificate or receipt which the cashier of the Bank of England, or the receiver-general of stamps and taxes, or any officer for receipt, is by this Act authorised to give on the receipt of any money payable under this Act, or shall utter any such forged, counterfeited, or altered certificate or receipt as aforesaid, with intent to defraud [His] Majesty, or any body politic or corporate, or any person whomsoever, every person so offending, and being thereof

(*k*) Taken from 34 & 35 Vict. c. 103, s. 8. For punishment, *vide ante*, Vol. i. p. 247.

lawfully convicted, shall be adjudged guilty of felony, and shall be transported for a term not exceeding fourteen years' (*l*).

Government Annuities.—The statutes authorizing the government to raise money by way of annuities, usually contain clauses making it a felony to forge, &c., any register, certificate, affidavit, &c., therein mentioned, or to personate any true nominee.

The Government Annuities Act, 1829 (10 Geo. IV. c. 24), s. 41 enacts that 'if any person or persons shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any register or registers of the birth, or baptism, or death, or burial, of any person or persons to be appointed a nominee or nominees under the provisions of this Act, or any copy or certificate of any such register, or the name or names of any witness or witnesses to any such certificate, or any affidavit or affirmation required to be taken for any of the purposes of this Act, or any certificate of any justice of the peace or magistrate, or of any officer acting under the said commissioners for the reduction of the national debt, of any such affidavit or affirmation having been taken before him, or any certificate of any governor or person acting as such, or minister, or consul, or chief magistrate of any province, town, or place, or other person authorized by this Act to grant any certificate of the life or death of any nominee; or shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any certificate or certificates of any officer of the commissioners for the reduction of the national debt, or of any cashier or clerk of the Bank of England, or the name or names of any person or persons in or to any transfer of any bank annuities or long annuities, or in or to any certificate or other instrument for the payment of money for the purchase or any annuity under the provisions of this Act, or in or to any transfer or acceptance of any such annuity in the books of the Bank of England, or in or to any receipt or discharge for any such annuity, or in or to any receipt or discharge for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument to authorize, or purporting to authorize, the transfer or acceptance of any bank annuities or long annuities, or any life annuity, or any annuity for years of whatsoever kind, under the provisions of this Act, or authorizing or purporting to authorize the receipt of any life annuity, or any annuity for years of whatsoever kind, granted under this Act, or any payment or payments due or to become due thereon; or if any person or persons shall wilfully, falsely, and deceitfully personate any true and real nominee or nominees, or shall wilfully utter or deliver or produce to any person or persons acting under the authority of this Act any such forged register or copy of register, or any such forged certificate, affidavit, or affirmation, knowing the same to be forged, counterfeited, or altered, with intent to defraud His Majesty, or with intent to defraud any person or persons whomsoever,

(*l*) Now penal servitude for any term not exceeding fourteen and not less than three years, or imprisonment. See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

then and in every such case all and every persons and person so offending and being lawfully convicted thereof, shall be adjudged guilty of felony, and shall suffer death' (*m*).

By the Government Annuities Act, 1832 (2 & 3 Will. IV. c. 59), s. 19, 'If any person or persons shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any declaration, warrant, order, or other instrument, or any affidavit or affirmation required to be made by this Act, or by the commissioners for the reduction of the national debt, under any of the provisions of this Act, or under any authority given to them for that purpose; or shall forge, counterfeit, or alter, or shall cause or procure to be forged, counterfeited, or altered, or shall knowingly or wilfully act or assist in the forging, counterfeiting, or altering, any certificate or order of any officer of the commissioners for the reduction of the national debt, or the name or names of any person or persons in or to any transfer of any annuity, or in or to any certificate, order, warrant, or other instrument for the payment of money for the purchase of any annuity under the provisions of this Act, or in or to any transfer or acceptance of any such annuity in the books of the commissioners for the reduction of the national debt, or in or to any receipt or discharge for any such annuity, or in or to any receipt or discharge for any payment or payments due or to become due thereon, or in or to any letter of attorney or other authority or instrument to authorize, or purporting to authorize, the transfer or acceptance of any annuities or any life annuity of whatsoever kind, or authorising or purporting to authorize the receipt of any life annuity of whatsoever kind granted under any of the said recited Acts or this Act, or any payment or payments due or to become due thereon; or if any person or persons shall wilfully, falsely, and deceitfully personate any true and real nominee or nominees, or shall wilfully utter or deliver, or produce to any person or persons acting under the authority of this Act any forged register or copy of register of any birth, baptism, or marriage, or any forged declaration, affidavit, or affirmation, knowing the same to be forged, counterfeited, or altered, with intent to defraud His Majesty, or with intent to defraud any person or persons whomsoever; then and in every such case all and every person and persons so offending and being lawfully convicted thereof shall be adjudged guilty of felony' . . . (*n*).

The Government Annuities Act, 1853 (16 & 17 Vict. c. 45), which gave facilities for the purchase of government annuities through the Post-office Savings Banks, provides (sect. 31) for the forgery, &c., of registers, certificates, transfers, and other documents used or required under that Act.

(*m*) Several branches of the above enactment appear to be superseded by 24 & 25 Vict. c. 98. With respect to the remaining branches, the offences therein described not having been repealed by 1 Will. IV. c. 66, and that Act not having made them punishable with death, persons convicted thereof are punishable under 24 & 25 Vict. c. 98, s. 48, *ante*, p. 1690.

(*n*) The omitted words were repealed (S. L. R. 1874). Transportation for life was substituted by 7 Will. IV. and 1 Vict. c. 84, s. 1, for the punishment of death. See *ante*, Vol. i. p. 206.

Papers, &c., relating to the Navy (o) and Army.

The Army Prize Money Act, 1832 (2 & 3 Will. IV. c. 53), s. 49, enacts amongst other things, that 'if any person shall forge or counterfeit or alter, or cause or procure to be forged or counterfeited or altered, or knowingly and willingly act, or aid or assist in forging or counterfeiting or altering the name or handwriting of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable, for or on account of any service performed or supposed to have been performed by any officer, non-commissioned officer, soldier, or other person who shall have really served, or be supposed to have served, in His Majesty's army or other military service, or the name or handwriting of any officer or under officer, clerk, or servant of or in the employ of the commissioners of the said Royal Hospital at Chelsea, or the name or handwriting of any officer or person in any way concerned in the paying, or the ordering, directing, or causing the payment of any such prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid; or shall falsely make, forge, counterfeit, or alter, or willingly act, aid, or assist in the false making, forging, counterfeiting, procuring, or altering any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, authority, document, or writing whatsoever, relating to or in any wise concerning the payment of or the obtaining or claiming any such prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid, in order to receive, obtain, or claim any such prize-money, grant, bounty-money, share, or other allowance of money, due or payable, or supposed to be due or payable as aforesaid; or shall utter or publish as true, or knowingly and willingly act or aid, or assist in uttering or publishing as true, any falsely made, or forged, or counterfeited, or altered letter of attorney, bill, ticket, order, certificate, voucher, receipt, will or any other power, instrument, warrant, authority, document, or writing whatsoever, with intention to receive, obtain, or claim, or to enable any other person to receive obtain, or claim, from the said commissioners of the said Royal Hospital, or from any officer, under officer, clerk, or servant of the said commissioners, or from any person whatsoever authorized, or supposed to be authorized, to pay the same, the payment of any such prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid, with intention to defraud any person or persons whatsoever, or any body, or bodies politic or corporate whatsoever; or shall knowingly take a false oath in order to obtain letters of administration, or the probate of any will, in order to receive, obtain, or claim, or to enable any other person to receive, obtain, or claim any prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or

(o) As to uttering false affidavits, &c., to support claims to any pay or pension payable by the Admiralty, see the Admiralty Powers Act, 1865 (28 & 29 Vict. c. 124), ss. 6, 7, 8, & 9, *post*, pp. 1765, 1766.

payable, for or on account or in respect of the service of any officer, non-commissioned officer, soldier, or other person as aforesaid, who shall have really served, or be supposed to have served, in His Majesty's army or other military service; or shall demand or receive any prize-money, grant, bounty-money, share, or other allowance of money due or payable, or supposed to be due or payable as aforesaid, upon letters of administration, or a probate of a will, knowing the will on which such probate shall have been obtained to be false, forged, or counterfeited, or knowing such letters of administration, or the probate of such will as last aforesaid, to have been obtained by means of any such false oath, with intention to defraud any person or persons whatsoever, or any body or bodies politic or corporate whatsoever; all and every person so offending, being thereof lawfully convicted, shall be and are and is hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life, or for any term not less than seven years, (*p*) as the Court before whom such person or persons shall be convicted shall adjudge.'

The Chelsea and Kilmainham Hospitals Act, 1826 (7 Geo. IV. c. 16), by s. 38, enacts that 'if any person shall willingly and knowingly personate, or falsely assume the name or character, or procure any other to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any pension, wages, pay, grant or other allowance of money, prize-money, or relief, due or payable, or supposed to be due or payable, for or on account of any service, done or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid, in His Majesty's army, or other military service, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor, of any such officer, non-commissioned officer, or soldier, or other person as aforesaid, in order fraudulently to receive any pension, wages, pay, grant, or other allowance of money, prize-money, or relief due or payable or supposed to be due or payable, for or on account of any services done or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid; or if any person shall forge or counterfeit, or alter, or cause or procure to be forged, or counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering the name or handwriting of any officer, non-commissioned officer, soldier, or other person, entitled or supposed to be entitled to any pension, wages, pay, grant, allowance of money, prize-money, or relief due or payable, or supposed to be due or payable, for or on account of any such service, or supposed service, as aforesaid, or the name or handwriting of any officer, under officer, clerk, or servant of the said commissioners of the said hospital at Chelsea, or of any officer or person in any way concerned in the paying or ordering, directing, or causing the payment of the said pensions, wages, pay, money, allowance of money, prize-money, or relief, or any of them; or shall forge, counterfeit, or alter, or cause or procure to be forged, counterfeited, or altered, or knowingly and willingly act,

(*p*) Now penal servitude for life, or for any term not less than three years, or imprisonment. See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

aid, or assist in forging, counterfeiting, or altering any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, document, or authority whatsoever, relating to or anywise concerning the payment, or obtaining or claiming any pension, wages, pay, grant, allowance of money, prize-money, or relief, for and in order to the receiving, obtaining, or claiming any such pension, wages, pay, grant, allowance of money, prize-money, or relief; or shall utter or publish as true, or knowingly and willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged, counterfeited or altered, any such letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, or any other power, instrument, warrant, document, or authority whatsoever, with intent to obtain the payment of any such pension, wages, pay, money, or allowance of money, prize-money, (*q*) or relief from the said commissioners of the said hospital at Chelsea, or from any officer, under officer, clerk, or servant of the said commissioners, or from the person authorized or supposed to be authorized to pay the same, or with intent to defraud any person whatsoever, or any corporation whatsoever; every such person so offending, being thereof lawfully convicted, shall be and is hereby declared and adjudged to be guilty of felony, and shall and may be transported for life, or for such term of years as the Court shall adjudge' (*r*).

The first count of an indictment on the above section charged that the prisoner feloniously forged 'a certain receipt relating to and concerning the payment of a certain pension, viz. of £4 11*s.* 0½*d.*, supposed to be payable to one Nicholas Morrill, as an out-pensioner of Chelsea Hospital for a certain time, viz., for ninety-two days, from 1st July, 1838, to 30th September following, both days included. Of the other counts, some charged the forging and others the uttering of the receipt, omitting the certificate, others the forging, and the rest the uttering of the certificate, only, omitting the receipt, varying in each class the statement of the intent, but all alleging in the language set out from the first count, that the forged instrument related to, &c., &c., 'the payment of a certain pension (specifying the amount) supposed to be payable to the said N. M. as an out-pensioner of the said hospital.' And no count alleged such pension to be in fact payable; or that N. M. was an out-pensioner. The forged instrument in question was proved to have been made and uttered by the prisoner for the purpose of procuring payment of a pension that had ceased to exist by the death of the pensioner before the period for which the receipt was signed. An offence as stated in the indictment was not an offence comprehended in the clause recited, there being no allegation of an actual existing pension payable to some person, but only of a pension supposed to be payable. On a motion in arrest of judgment, it was argued that in order to constitute an offence under the latter branch of sect. 38, it was necessary that there should be an actually existing pension at the time of the commission of the act of forging or uttering, and that the indictment should allege the actual existence of such pension, and that it was not sufficient under that branch of the section to allege

(*q*) Lonsdale (St. Cr. L. 132) observes that the above enactment appears to be superseded as far as relates to prize money by 2 & 3 Will. IV. c. 53, s. 49, *ante* p. 1726

(*r*) Sec 54 & 55 Vict. c. 69, s. 1, *ante* Vol. i. pp. 211, 212.

(as in this indictment) that the instrument forged related to a pension supposed to be payable, so that on a case reserved it was contended that the latter part of sect. 38 created no offence, except in respect of a pension actually in existence, and there must be some person in existence to whom it was payable. There were in this branch of the section no such words as 'supposed to be due and payable'; those words were found in the first part of the section, and they appeared to have been intentionally omitted in the enactment respecting this offence. But even if the words were in the clause, the allegation would be bad for uncertainty, inasmuch as it did not state by whom the pension was supposed to be payable; it might be a supposition in the mind of the prisoner only, and that would not be enough. But the judges present were all of opinion that the conviction was right (except Littledale, J., and Coleridge, J., who thought otherwise), and the conviction was affirmed (*s*).

The Naval Enlistment Act, 1835 (5 & 6 Will. IV. c. 24), s. 3 enacts that "if any person shall forge or counterfeit any certificate of service in His Majesty's navy, or any instrument purporting to be a protection from such service, or shall fraudulently utter or publish any forged certificate of such service, or any forged instrument purporting to be a protection from such service, knowing the same to be forged, or shall fraudulently alter any certificate or protection which shall have been duly granted or issued; or if any person shall forge or fraudulently alter any extract from a baptismal register, or shall knowingly utter any false or fraudulently altered extract from a baptismal register, or any false affidavit, certificate, or other document, in order to obtain from the Admiralty office a protection from His Majesty's naval service for himself or any other person; or if any person, being in the possession of a protection, shall lend, sell, or dispose thereof to any other person, in order fraudulently to enable such other person to make an unlawful use of the same; or if any person shall produce, utter, or make use of as a protection for himself any protection which shall have been made out or issued for any other individual; every person in any such manner offending shall be deemed guilty of a misdemeanor (*ss*), and such protection shall thenceforth be null and void.'

The Pensions Act, 1839 (2 & 3 Vict. c. 51), by s. 8, forbids assigning or assisting to assign naval or military pensions otherwise than to the guardians of the poor, etc., and by sect. 9, 'If any person shall forge, or counterfeit, or alter,or cause or procure to be forged, counterfeited, or altered, or knowingly and willingly act, aid, or assist in forging, counterfeiting, or altering any minute, copy of minute, assignment of pension, superannuation, or other allowance as aforesaid, order, certificate, receipt, document, or authority whatsoever, relating to or in any wise concerning the claiming or obtaining payment of any pension-money or other allowance as aforesaid, or shall utter or publish as true, or knowingly and willingly act, aid, or assist in uttering or publishing as true, knowing the same to be forged, counterfeited, or altered, any such minute, copy, assignment, order, certificate, receipt,

(*s*) R. *v.* Pringle, 2 Mood. 127. As to personation, *vide post*, p. 1763.
(*ss*) For punishment, *vide ante*, Vol. i. p. 249.

document, or authority relating to or anywise concerning the claiming or obtaining payment of any pension-money or other allowance as aforesaid, or the name of any pensioner, justice of the peace, guardian, parish officer, or other officer, or any other person authorized, or supposed, or purporting to be authorized, to sign any such minute, copy, assignment, order, certificate, receipt, document, or authority, with intent or in order to obtain or to enable any other person to obtain, the payment of any such pension or pension-money, or other allowance as aforesaid from the commissioners of Chelsea Hospital or [His] Majesty's paymaster-general respectively, or from any officer, under officer, clerk, or servant of the said commissioners of Chelsea Hospital, or of [His] Majesty's paymaster-general respectively, or from any person authorized or supposed to be authorized to pay any pension or pension-money or other allowance as aforesaid, every such person so offending shall be guilty of felony. . . .' (*t*).

Papers, etc., relating to Merchant Shipping.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 66, 'If any person forges or fraudulently alters, or assists in forging or fraudulently altering, or procures to be forged or fraudulently altered any of the following documents, namely any register book, builder's certificate, surveyor's certificate, certificate of registry, declaration, bill of sale, instrument of mortgage, or certificate of mortgage or sale under this part of this Act, or any entry or endorsement required by this part of this Act to be made in or on any of those documents, that person shall in respect of each offence be guilty of felony' (*u*).

By sect. 104, 'If any person (*A*) forges or fraudulently alters, or assists in forging or fraudulently altering, or procures to be forged or fraudulently altered, any certificate of competency or an official copy of any such certificate; or (*B*) makes, assists in making, or procures to be made, any false representation for the purpose of procuring, either for himself or for any other person, a certificate of competency; or (*C*) fraudulently uses a certificate or copy of a certificate of competency which has been forged, altered, cancelled, or suspended, or to which he is not entitled; or (*D*) fraudulently lends his certificate of competency, or allows it to be used by any other person, that person shall in respect of each offence be guilty of a misdemeanor' (*v*).

By sect. 121, 'If any person fraudulently alters, makes any false

(*t*) Now penal servitude. See 54 & 55 Vict. c. 690, s. 1, *ante*, Vol. i. pp. 211, 212.

(*u*) Punishable under 7 & 8 Geo. IV. c. 28, s. 8, *ante*, Vol. i. p. 247.

(*v*) A re-enactment of 17 & 18 Vict. c. 104, s. 176. On an indictment under that section, it appeared that A. Goddard, a seaman, had served on board a British ship, and had been duly discharged in the presence of a shipping-master duly appointed under the said Act, and the master of the ship had signed, before the said shipping master, in the proper form, a report of the character of Goddard, in which, opposite to the space for 'character for ability in whatever capacity,' was put the letter M, which signified that it was middling. Goddard went to the prisoner, who for half-a-crown made and delivered to Goddard a fresh one, being a fac-simile of the genuine one, except that G, which signified good, was substituted for the letter M, in the place before mentioned; and, on a case reserved, it was held that the prisoner was guilty of a misdemeanor within the section. R. *v.* Wilson, Dears. & B. 558: 27 L. J. M. C. 230.

entry in, or delivers a false copy of any agreement with the crew, that person shall in respect of each offence be guilty of a misdemeanor. . .'

By sect. 130 (b) (c), it is a misdemeanor to forge or fraudulently alter a certificate of discharge or report of character or copy of a report of character, or to assist in committing or to procure to be committed any such offence.

By sect. 154, 'If any person, for the purpose of obtaining, either for himself or for any other person, any money deposited in a seamen's savings' bank, or any interest thereon, (a) forges, or fraudulently alters, assists in forging, or fraudulently altering, or procures to be forged, or fraudulently altered, any document purporting to shew or assist in shewing any right to any such money or interest; or (b) makes use of any document which has been so forged or fraudulently altered as aforesaid; or (c) gives, assists in giving, or procures to be given, any false evidence, knowing the same to be false; or (d) makes, assists in making, or procures to be made, any false representation, knowing the same to be false; or (e) assists in procuring any false evidence, or representation to be given or made, knowing the same to be false; that person shall for each offence be liable to penal servitude for a term not exceeding five years, or to imprisonment for any term not exceeding two years, with or without hard labour, or on summary conviction to imprisonment with or without hard labour for any period not exceeding six months' (*w*).

Sect. 180 renders any person forging, &c., any documents for the purpose of obtaining property of a deceased seaman liable as under sect. 154.

Sect. 197 (8) makes it a misdemeanor for any person, in making an application for the wages of a seaman received into the navy, to forge or fraudulently alter any document, or to use any document so forged, &c., or to be accessory to any such offence.

Sect. 282 makes it a misdemeanor to forge, &c., a declaration of survey, or a passenger steamer's certificate.

Sect. 564 relates to the forging of documents relating to salvage by His Majesty's ships, and imposes a maximum sentence of two years' hard labour, or, on summary conviction, six months' hard labour (*x*).

Sect. 695, after providing for the proof of documents declared to be admissible in evidence (*y*), and for the admissibility of copies if certified by the proper officer, enacts, '(3) If any such officer wilfully certifies any document as being a true copy or extract, knowing the same not to be a true copy or extract, he shall for each offence be guilty of a misdemeanor, and be liable on conviction to imprisonment for any term not exceeding eighteen months; (4) If any person forges the seal, stamp, or signature of any document to which this section applies, or tenders in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall for each offence be guilty of felony. . .' and is liable to seven years' penal servitude, and the document may be impounded.

(*w*) The Seamen's Fund Winding-up Act, 1851 (14 & 15 Vict. c. 102), contains provisions, in sect. 55, for the punishment of forgery and fraud in respect of that fund.

(*x*) The offence is not described as felony or misdemeanor. *Vide ante*, Vol. i. p. 10.

(*y*) This section is applied by the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), s. 7.

Sect. 722 (1). If any person (a) forges . . . the seal or any other distinguishing mark of the Board of Trade on any form issued by the Board of Trade under this Act; or (b) fraudulently alters . . . any such form . . . or (2) uses without reasonable cause forms not purporting to be approved by the Board, or prints, &c., forms purporting to be so approved knowing them not to be so approved, he is liable to a fine not exceeding ten pounds.

The misdemeanors created by the above enactments, unless otherwise stated in the section creating the offence, are punishable on conviction on indictment by imprisonment with or without hard labour, not exceeding two years, *or* by fine (*z*).

CERTIFICATES, REGISTERS, ETC., OF BIRTHS, MARRIAGES, OR DEATHS, ETC.

By the Births and Deaths Registration Act, 1836 (6 & 7 Will. IV. c. 86), s. 41, 'Every person who shall wilfully make or cause to be made, for the purpose of being inserted in any register of . . . marriage, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty of perjury' (*a*).

The Non-parochial Registers Act, 1840 (3 & 4 Vict. c. 92), s. 8, enacts that 'every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register or record of birth or baptism, naming, or dedication, death or burial, or marriage, which shall be deposited with the registrar-general by virtue of this Act, or any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register or record, or shall wilfully insert or cause to be inserted in any of such registers or records any false entry of any birth or baptism, naming, or dedication, death, or burial, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be an extract from any register or record, knowing the same register or record to be false in any part thereof, or shall forge or counterfeit the seal of the said office, shall be guilty of felony' (*b*). This Act is by 21 & 22 Vict. c. 25, s. 3, extended to registers deposited under that Act in the General Register Office.

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 35 (*c*), 'Whosoever shall forge or fraudulently alter any licence of or certificate for marriage, or shall offer, utter, dispose of, or put off any such licence or certificate, knowing the same to be forged or fraudulently altered, shall be guilty of felony, and being convicted thereof shall be . . . liable to be kept in penal servitude for any term not exceeding seven years . . .' (*d*).

(*z*) Sect. 680. They may be prosecuted summarily, in which event the fine may not exceed £100, nor the imprisonment six months.

(*a*) See *ante*, Vol. i. p. 479, 529. Some cases under this statute are referred to *post*, p. 1737. The section, so far as it related to registers of births and deaths, was repealed by 37 & 38 Vict. c. 88, s. 64; *vide* s. 40, of that Act, *post*, pp. 1733, 1734.

(*b*) As to punishment, *vide*, Vol. i. p. 246.

(*c*) Taken from 1 Will. IV. c. 66, s. 20, and extended to Ireland, and to certificates for marriage.

(*d*) The omitted parts were repealed in 1893 (8. L. R.). As to present punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

By sect. 36, 'Whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials which now is or hereafter shall be by law authorized or required to be kept in England or Ireland (*e*), or any part of any such register, or any certified copy of any such register, or any part thereof, or shall forge or fraudulently alter in any such register any entry relating to any birth, baptism, marriage, death, or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or shall knowingly and *unlawfully* insert or cause or permit to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and *unlawfully* give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing *such writing, or* the part of such register whereof such copy or extract shall be so given, to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register office or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony, and being convicted thereof shall be liable . . . (*f*) to be kept in penal servitude for life . . .' (*g*)

By sect. 37, 'Whosoever shall knowingly and wilfully insert or cause or permit to be inserted in any copy of any register directed *or required* by law to be transmitted to any registrar or other officer any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall *offer*, utter, *dispose of, or put off*, knowing the same to be forged or altered, any copy of any register so directed *or required* to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed *or required* to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, *or shall unlawfully destroy, deface, or injure, or shall for any fraudulent purpose take from its place of deposit, or conceal, any such copy of any register*, shall be guilty of felony, and being convicted thereof shall be liable' to the same punishment as in sect. 36 (*h*).'

(*e*) By the Registration of Births and Deaths (Ireland) Act, 1863 (26 & 27 Vict. c. 11) s. 55, and by the Registration of Marriages (Ireland) Act, 1863 (26 & 27 Vict. c. 90) s. 11. 'The 36th and 37th sections of the Forgery Act, 1861, shall be incorporated with and form part of this Act.'

(*f*) The omitted parts were repealed (S. L. R.) 1893. For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*g*) Framed on 1 Will. IV. c. 66, s. 20; 6 & 7 Will. IV. c. 86, s. 43, relating to the registering of births, deaths, and marriages in England; **7 & 8 Vict. c. 81, s. 75, relating** to the same purposes in Ireland; and 20 & 21 Vict. c. 81, s. 15, relating to burial boards. The three former statutes contained a proviso that no person therein mentioned shall be liable to punishment for correcting accidental errors in the manner therein specified; but in the present section the word 'unlawfully' is substituted for wilfully' in order that cases falling within the proviso should be excluded from this section by the terms used in it. The proviso in each Act is left unrepealed.

(*h*) Taken from 1 Will. IV. c. 66, s. 22. With the addition of the words in italics, which were introduced in consequence of **R. *v.* Bowen, 1 Den. 22; 1 C. & K. 501.**

The Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 40, enacts that

'Any person who commits any of the following offences, that is to say,

(1) Wilfully makes any false answer to any question put to him by a registrar relating to the particulars required to be registered concerning any birth or death, or wilfully gives to a registrar any false information concerning any birth or death, or the cause of any death; or,

(2) Wilfully makes any false certificate or declaration under or for the purposes of this Act, or forges or falsifies any such certificate or declaration, or any order under this Act, or, knowing any such certificate, declaration, or order to be false or forged, uses the same as true, or gives or sends the same as true to any person; or,

(3) Wilfully makes, gives, or uses any false statement or representation as to a child born alive having been stillborn, or as to the body of a deceased person or a stillborn child in any coffin, or falsely pretends that any child born alive was stillborn; or,

(4) Makes any false statement with intent to have the same entered in any register of births or deaths;

shall for each offence be liable on summary conviction to a penalty not exceeding ten pounds, and on conviction on indictment to a fine or . . . to penal servitude for a term not exceeding seven years' (*i*).

By the Burials Act, 1857 (20 & 21 Vict. c. 81), s. 15, 'Every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register book of burials, kept according to the provisions of this Act, or any part or certified copy of any part of such register, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register or certified copy thereof, or shall wilfully insert or cause to be inserted in any registry book or certified copy thereof any false entry of any burial, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any such register book, knowing the same to be false in any part thereof, or shall forge or counterfeit the seal of any burial board, shall be guilty of felony' (*j*).

The Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 10, provides that where any burial has taken place under the Act without the rites of the Church of England, the person responsible for it shall transmit a certificate, in the form given in the Schedule, to the rector, vicar, incumbent, or officiating minister in charge of the parish or district in which the churchyard or graveyard is situate, or to which it belongs; or in the case of a cemetery or burial ground, to the person required by law to keep the register of burials; and enacts that 'Any person who shall wilfully make any false statement in such certificate, and any rector,

(*i*) The omitted parts were repealed in 1893 (S. L. R.). For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. By sect. 45, where a person is charged before a Court of Summary Jurisdiction, the Court may, if it thinks proceedings should be by indictment, adjourn the case for such purpose. By sect. 46, a prosecution or indictment under sect. 40, must be commenced within three years after the commission of the offence.

The Births and Deaths Registration Act, (Ireland) 1880 (43 & 44 Vict. c. 13), s. 30, is similar to the above sect. 40.

(*j*) For punishment, *vide ante*, Vol. i. pp. 211, 212.

vicar, minister, or other such person as aforesaid, receiving such certificate, who shall refuse or neglect duly to enter such burial in such register as aforesaid, shall be guilty of a misdemeanor' (*k*).

REGISTERS RELATING TO PROPERTY, TRADE, PROFESSIONS, &C.

Copyright.—By the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 12, 'If any person shall wilfully make or cause to be made any false entry in the registry book of the stationers' company, or shall wilfully produce, or cause to be tendered in evidence, any paper falsely purporting to be a copy of any entry in the said book, he shall be guilty of an indictable misdemeanor and shall be punished accordingly' (*kk*).

Trade Marks.—By the Trade Marks Act, 1905 (5 Edw. VII. c. 15), s. 66, 'If any person makes or causes to be made a false entry in the register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor.'

Patents and Designs.—By the Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 89 (1), 'If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor' (*l*).

Partners.—By the Limited Partnerships Act, 1907 (7 Edw. VII. c. 24), s. 12, 'Every one commits a misdemeanor, and shall be liable to imprisonment with hard labour for a term not exceeding two years, who makes, signs, sends, or delivers for the purpose of registration under this Act any false statement known by him to be false.'

Medical Practitioners.—By the Medical Act, 1858 (21 & 22 Vict. c. 90), s. 38, 'Any registrar who shall wilfully make or cause to be made any falsification in any matters relating to the register, shall be deemed guilty of a misdemeanor in England or Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be imprisoned for any term not exceeding twelve months.'

Sect. 39. 'If any person shall wilfully procure or attempt to procure himself to be registered under this Act, by making or producing, or causing to be made or produced, any false or fraudulent representation or declaration, either verbally or in writing, every such person so offending, and every person aiding and assisting him therein, shall be deemed guilty of a misdemeanor in England and Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall on conviction thereof be sentenced to be imprisoned for any term not exceeding twelve months' (*m*).

Chemists.—By the Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 15, 'If any registrar under this Act shall wilfully make or cause to be made

(*k*) For punishment, *vide ante*, Vol. i. p. 249.

(*kk*) *Vide ante*, Vol. i. p. 249.

(*l*) The other sub-sections create offences punishable on summary conviction.

(*m*) See R. *v.* Hodgson, Dears & B. 3, *ante*, p. 1648.

any falsification in any matters relating to any register or certificate aforesaid, every such offender shall be deemed guilty of a misdemeanor.'

Sect. 16. 'If any person shall wilfully procure by any false or fraudulent means a certificate purporting to be a certificate of registration under this Act, or shall fraudulently exhibit a certificate purporting to be a certificate of membership of the Pharmaceutical Society, every such person so offending shall be adjudged guilty of a misdemeanor.'

By the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), s. 14, 'Any registrar who shall wilfully make or cause to be made any falsification in any matter relating to the said registers, and any person who shall wilfully procure or attempt to procure himself to be registered under the Pharmacy Act or under this Act by making or producing or causing to be made or produced any false or fraudulent representation or declaration, either verbally or in writing, and any person aiding or assisting him therein, shall be deemed guilty of a misdemeanor in England, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall on conviction thereof be sentenced to be imprisoned for any term not exceeding twelve months.'

Dentists.—By the Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 34, 'Any registrar who wilfully makes or causes to be made any falsification in any matter relating to any register under this Act shall be deemed guilty of a misdemeanor in England and Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be liable to be imprisoned for any term not exceeding twelve months.'

By sect. 35, 'Any person who wilfully procures or attempts to procure himself to be registered under this Act, by making or producing, or causing to be made or produced any false or fraudulent representation or declaration, either verbally or in writing, and any person aiding and assisting him therein, shall be deemed guilty of a misdemeanor in England and Ireland, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall, on conviction thereof, be liable to be imprisoned for any term not exceeding twelve months.'

Midwives.—By the Midwives Act, 1902 (2 Edw. VII. c. 17), s. 11, 'Any woman who procures, or attempts to procure, a certificate under this Act by making or producing, or causing to be made or produced, any false and fraudulent declaration, certificate or representation, either in writing or otherwise, shall be guilty of a misdemeanor, and shall, on conviction thereof, be liable to be imprisoned, with or without hard labour, for any term not exceeding twelve months.'

Veterinary Surgeons.—By the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 11, 'Any person who wilfully procures or attempts to procure himself to be placed on the register of Veterinary Surgeons by making or producing or causing to be made or produced any false or fraudulent declaration, certificate or representation either in writing or otherwise, and any person aiding and assisting him therein, shall be deemed guilty in England or in Ireland of a misdemeanor, and in Scotland of a crime or offence punishable by fine or imprisonment, and shall on conviction thereof be liable to a fine not exceeding £50 or to be imprisoned with or without hard labour for any term not exceeding twelve months.'

By sect. 12, 'If the registrar wilfully makes or causes to be made any falsification in any matter relating to the register of Veterinary Surgeons he shall be deemed guilty of a misdemeanor, and shall be liable to a fine not exceeding £50, or to be imprisoned with or without hard labour for any term not exceeding twelve months.'

Slave Trade.—As to forgery under the Slave Trade Act, 1824 (5 Geo. IV. c. 113), s. 10, *vide ante*, Vol. I. p. 273.

Hackney Carriages.—The London Hackney Carriage Act, 1843 (6 & 7 Vict. c. 86), s. 20, enacts, that 'every person who shall forge or counterfeit, or who shall cause or procure to be forged or counterfeited, any licence or ticket by this Act directed to be provided for the driver of a hackney-carriage, or for the driver or the conductor of a metropolitan stage-carriage . . . (*mm*); and also every person who shall sell or exchange, or expose to sale, or utter any such forged or counterfeited licence or ticket, and also every person who shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have or be possessed of such forged or counterfeited licence or ticket, knowing such licence or ticket to be forged or counterfeited, and also every person knowingly and wilfully aiding and abetting any person in committing any such offence as aforesaid, shall be guilty of a misdemeanor, and, being thereof convicted, shall be liable to be punished by fine or imprisonment, or by both, such imprisonment to be in the common gaol or house of correction, and either with or without hard labour, as the Court shall think fit, and it shall be lawful for any person to detain any such licence or ticket, or for any constable or peace officer, or any person employed for that purpose by the said registrar, to seize and take away any such licence or ticket, in order that the same may be produced in evidence against such offender, or be disposed of as the said registrar shall think proper' (*n*).

Other Documents.—There are other statutes (*nn*) relating to forgery which impose penalties for forging pedlars' certificates (34 & 35 Vict. c. 96), s. 12; pawnbrokers' certificates (35 & 36 Vict. c. 93), s. 44; licences, &c., under the Explosives Act, 1875 (38 & 39 Vict. c. 17), s. 81; certificates or warranties under the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 27; hawkers' licences (51 & 52 Vict. c. 33), s. 4 (2); certificates, &c., under the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), s. 139; the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 32; and characters of soldiers or sailors (6 Edw. VII. c. 5).

Cases on the above Enactments.—In R. *v.* Brown (*o*) the prisoner was indicted under 6 & 7 Will. IV. c. 86, s. 41 (*ante*, p. 1732), for making false statements of the particulars required by the Act for the registration of a marriage. The first count alleged that W. F. H. was a clergyman, &c., and that 'before the committing

(*mm*) The omitted portion was repealed in 1874 (S. L. R. No. 2).

(*n*) The Dublin Carriage Act, 1853 (16 & 17 Vict. c. 112), ss. 21 & 58, contains somewhat similar provisions.

(*nn*) See also the statutes referred to in the chapter on Cheats and Frauds, and for fuller list of statutes see Official Index to Statutes in force (ed. 1909), *tits.* 'Forgery' and 'Fraud.'

(*o*) 1 Den. 291; 17 L. J. M. C. 145.

of the offence in this count mentioned' he had solemnised a marriage between prisoner and E. F., and '*after* the solemnisation of the said marriage' the said W. F. H. was about to register the particulars relating to the said marriage, and that the prisoner wilfully, &c., made to the said W. F. H., 'for the purpose of being inserted in the register of marriages,' certain false statements, which were described. The prisoner made these statements to S. for the purpose of procuring the publication of the banns and were inserted in the banns book; and from the banns book by S., *before* the solemnisation of the marriage, copied into the register book of marriages, the prisoner at the time reiterating his previous statements; there was evidence to shew that these statements were untrue. There was no evidence that the register book had been provided by the registrar-general. After the marriage Mr. H. asked the prisoner whether the particulars entered previous to the marriage were correct, and an affirmative answer was given by the prisoner; after which the parties and witnesses signed the register. It was objected, (1) that it ought to have been proved that the register book had been furnished by the registrar-general; (2) that the prisoner could not be convicted under the first two counts, as they alleged the false statements to have been made to the officiating clergyman *after* the solemnisation of the marriage for the purpose of their being inserted in the register, whereas the insertion had been made before the marriage. But, on a case reserved on these objections, all the judges present agreed that the first count was proved.

An indictment on the same section alleged that the defendant made false statements of the particulars required to be registered in this,—that he was a widower, and the lady he married a widow. The defendant, being a widower, had, at the parish church of Paddington, married a widow, and a few months afterwards he had again married the same lady at St. George's, Hanover Square, he then stating, for the purpose of the registration of that marriage, that he was a widower and the lady a widow, which was alleged to be false, as he had married the same lady previously at Paddington. Campbell, C.J., told the jury that 'in order that you should convict the defendant on this indictment, you ought to be satisfied that he made the statement not only untruly, but wilfully and intentionally; for if you should think that he did it mistakenly, I am of opinion that he is not within the statute. It not unfrequently happens when persons have been married by a marriage perfectly legal and perfectly valid, that, for greater safety, they are re-married; and this often occurs, because a marriage in England is easier of proof than a marriage in Scotland, although both are equally valid' (*p*).

(*p*) R. *v.* Lord Dunboyne, 3 C. & K. 1. Lord Campbell referred to Lord Eldon's second marriage at Newcastle, where Lady Eldon was described by her maiden name, and added, 'Lord Eldon therefore did exactly the same in substance as that which is charged as a crime in the present case; indeed, if in the register of St. George's, Hanover Square, Lord Dunboyne had described the lady as Lady Dunboyne, which is what I suppose the prosecutor suggests he ought to have done, he would have appeared on the face of the register to have gone to that Church to marry his own wife; and I confess that it appears to me that that would have been extremely absurd.' In R. *v.* Hotine, 9 Cox, 146, which was an indictment for making false statements to the registrar as to the name of the mother of a child, several points were

The prisoner was indicted under 6 & 7 Will. IV. c. 86, for feloniously causing to be registered in the register of deaths for the borough of W. a false entry of the death of J. H. The prisoner would have been entitled to £50 on the death of J. H., if he died under the age of twenty-one; and in order to obtain the money, and persuade the trustee of the property that J. H. was dead, when in fact he was not, she went and desired the registrar at W. to register the death of J. H., who, she said, had died in her presence, and she gave him the particulars, which he entered in the register from her dictation, and she signed the register with her mark. The trustee paid her the £50 on the certificate of the register which was shewn him, and had to pay the amount again to J. H., who was alive. Cresswell, J., held that it was a felony within 6 & 7 Will. IV. c. 86, s. 43, to procure a false entry in a register in the manner which had been proved here (*q*).

The prisoner was indicted under 6 & 7 Will. IV. c. 86, for having feloniously caused a false entry of a birth to be made in a register of births. The prisoner went to J., the registrar of births, and asked him to register the birth of a child, which she said was her own, and stated that she was the wife of W. D., and that the child was born on November 1, 1849. J. cautioned her as to the necessity of making a true statement in the matter, and, as she persisted in the truth of her statement, he made the entry according to it, and she signed the entry as the person giving the information; the entry was false in every particular; and it was held that the prisoner was guilty of felony within 6 & 7 Will. IV. c. 86, s. 43, which made it a felony to 'cause to be inserted in any register book' 'any false entry of any birth;' and that she was not merely guilty of the misdemeanor under sect. 41 of the Act (*ante*, p. 1732), of wilfully making a false statement for the purpose of its being inserted in any register of births (*r*).

A count alleged that the prisoner feloniously and wilfully did destroy, deface, and injure a certain register of the baptisms, marriages, and burials in C. The prisoner called to search the register, and whilst the curate was looking into a chest for another book, and had his back turned, the prisoner tore off the lower portion of one of the leaves of the register; the part of the leaf was torn off and entirely separated from the residue. [The part torn off contained five entire entries, and the whole of the entry of a marriage except 'October 4th, 1741,' and the prisoner had obtained

raised, but not decided; as the jury acquitted the prisoner. He had first married M. A. Saunders, who left him, and he had afterwards married Sophia Robins, by whom he had had a son, whose birth he had registered, and under the heading 'Name and maiden surname of the mother,' he had caused to be entered 'Sophia Hotine, formerly Robins,' and it was alleged that the entry was false, as he knew his first wife was alive at the time he made it. It was objected that the Act did not require a man to state whether or not he was married to the mother of the child. A name might be gained by reputation, and the Act might apply to a woman's name gained by reputation. It was not confined to legitimate children. For the Crown it was contended that the words 'name and maiden surname of the mother,' must mean surname before being changed by marriage; but no opinion was expressed on the point. Another point taken in this and the preceding case was that the prosecution must be commenced within three years after the offence committed; in the preceding case Lord Campbell let the case proceed, and in this case the point would have been reserved together with the other.

(*q*) R. *v.* Mason, 2 C. & K. 622. See now 24 & 25 Vict. c. 98, s. 37, *ante*, p. 1733.

(*r*) R. *v.* Dewitt, 2 C. & K. 905, Cresswell, J., after consulting Alderson, B.

access to the registry of the Bishop of Worcester, and altered the transcript there deposited by substituting a fictitious marriage on the said 4th of October for the real entry, and the object of the prisoner was that this transcript should become good secondary evidence of the fictitious marriage on the destruction of the register.] (*s*) The curate immediately detected the prisoner. The defence was that it was torn by accident; but the jury found that it was done wilfully. It was objected—firstly, that this was neither a destroying, defacing, nor injuring within the meaning of the Act, as the register when produced had the torn piece pasted to the residue of the leaf, and was as legible as before. Tindal, C.J., thought that at the time it was actually torn off and separated, the register was defaced, or at all events injured, within the meaning of the statute. It was objected secondly, that the indictment was bad, as it stated three distinct offences,—the destroying, defacing, and injuring the register. Tindal, C.J., thought that the language of the statute having been followed, it was no objection that the offences were charged cumulatively, though one only was proved (*t*). Lastly, it was contended that the indictment ought to have charged that the offence was committed *scienter*; but Tindal, C.J., thought that was implied from the nature of the offence charged. And, on a case reserved, it was held that all that had been done was perfectly right on all three points (*u*).

Upon an indictment under the Forgery Act, 1861, s. 37, for making a false entry in a marriage register it is not necessary to prove that the entry was made fraudulently, and the fact that the marriage itself was bigamous is no defence. If a person knowingly signs another person's name he is within the section although he signed as a third witness where only two are by law necessary (*v*).

Where a man gave a forged certificate of a marriage to the pretended wife in order that she might shew it to her father it was held that the man was not guilty of uttering within 1 Will. IV. c. 66, s. 20 (*w*).

(*s*) The statement between brackets is from 1 C. & K. 501, but was not contained in the case submitted to the judges.

(*t*) R. *v.* Fuller, 2 Leach, 790.

(*u*) R. *v.* Bowen, 1 Den. 22; 1 C. & K. 501, and *vide ante*, p. 1733, n. (*h*).

(*v*) R. *v.* Asplin, 12 Cox, 391. Martin, B.

(*w*) R. *v.* Heywood, 2 C. & K. 352.

CANADIAN NOTES.

FORGERY OF OFFICIAL PAPERS, SECURITIES AND DOCUMENTS.

Definition of Forgery.—See Code sec. 466.

Uttering Forged Documents.—See Code sec. 467.

Forgery of Official Papers, etc.—See Code sec. 468.

Forgery of Other Official Papers, etc.—See Code sec. 470.

Unlawfully Printing Counterfeit Proclamation, etc.—See Code sec. 474.

Drawing Document Without Authority.—See Code sec. 477.

Destroying, Defacing or Mutilating Official Records, etc.—See Code sec. 480.

Concealing Official Records, and Making False Certificates of Copies Thereof.—See Code sec. 481.

False Certificates of Entries in Official Records, and Uttering False Copies of Records.—See Code sec. 482.

Knowingly Certifying False Copy by Official.—See Code sec. 483.

False Dividend Warrants.—See Code sec. 485.

CHAPTER THE THIRTY-NINTH.

OF THE FORGERY OF PRIVATE PAPERS, SECURITIES, AND DOCUMENTS.

Deeds, &c.—By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 20, 'Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory (*a*), or shall offer, utter, dispose of, or put off any deed, bond or writing obligatory having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable . . . (*b*) to be kept in penal servitude for life . . .' (*c*).

The prisoner was indicted under this section. He had altered the name of a person ordained deacon so as to change it to his own, and made other alterations in letters of orders signed, sealed, and issued under the episcopal seal of the Bishop of Bath and Wells. Upon a case reserved it was held that such document was not a deed within this section, and Blackburn, J., said: 'Spelman's is the best definition of a deed, viz. *scriptum solemne quo firmatur donum, concessio, pactum, contractus, et hujusmodi*. The words of the section under which this indictment is framed are, "and deed, bond, or writing obligatory"; and I think these words must be limited to something passing, or which is in affirmance of that which passes, a pecuniary interest. It is not necessary to consider the question whether the probate of a will would be a deed within this section. I rather think it would' (*d*).

A son, who bore the same name and description as his deceased father, and was his heir and one of his executors, executed mortgages of certain property disposed of by the will and applied the mortgage money to his own purposes. This he did without the knowledge of his co-executors. In an action against the mortgagees it was held that the son, in executing

(*a*) See R *v.* Dunnett, *ante*, p. 1658. R. *v.* Lyon, R. & R. 255; *ante*, p. 1628.

(*b*) The omitted parts were repealed in 1893 (8. L. R.). For other punishments, *vide ante*, Vol. i. pp. 211, 212.

(*c*) The first part of this section is taken from 1 Will. IV. c. 66, s. 10 (E), and is similar to 3 Geo. II. c. 4, s. 1 (I.), and 17 Geo. II. c. 11, s. 1 (I.).

The second part of the section was new in 1861, and created the following offences: 1, forging or uttering, knowing it to be forged, any assignment of any bond; 2, forging the name or signature of a witness attesting the execution of any deed or bond; 3, uttering any deed or bond, having on it any such forged name or signature, knowing it to be forged.

(*d*) R. *v.* Morton, L. R. 2 C. C. R. 22; 42 L. J. M. C. 581. See R. *v.* Etheridge, *ante*, p. 1641.

the deeds, had personated his father and that the deeds were forgeries (*e*). Fraudulently antedating a deed has been held to be forgery (*f*).

Wills.—By sect. 21 (*g*), 'Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for life . . .' (*h*).

Sect. 38 (*post*, p. 1761) contains provisions as to demanding or obtaining, &c., property under or by virtue of any probate or letters of administration, knowing the will on which such probate, &c., shall have been obtained to have been forged or altered, &c.

Bills of Exchange.—By sect. 22 (*i*), 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange (*j*), or any acceptance, endorsement, or assignment of any bill of exchange, or any promissory note (*k*) for the payment of money, or any endorsement or assignment of any such promissory note, with intent to defraud, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for life . . .' (*l*).

The following document was held to be a bill of exchange within 2 Geo. II. c. 25 (rep.); a document which after stating pay due and deductions, went on thus:—

'Gentlemen, 8*th* day of *August*, 1814.

'Ten days after sight,

'Please to pay to Mrs. Eliz^th. Coall, or order, the sum of twenty-two pounds six shillings and ninepence, being the net personal pay due to me as act^g. Lieutenant of his Majesty's ship Zealous between thirteenth day of May, 1814, and fourth day of August, 1814, for value received.

'Robt. Gore.'

'Approved,

'T. Boys, Captain of H.M.S. Zealous.

'To the Commissioners of his Majesty's Navy,
London.'

The following documents were held promissory notes within former Acts framed on similar lines.

(*e*) *Re* Cooper, 20 Ch. D. 611; 51 L. J. Ch. 862.

(*f*) See R. *v.* Ritson, *ante*, p. 1606.

(*g*) Taken from 1 Will. IV. c. 66, s. 3. There were similar provisions in 3 Geo. II. c. 4, s. 1 (I.) and 17 Geo. II. c. 11, s. 1 (I.). See R. *v.* Murphy, R. *v.* Buttery, R. *v.* Avery, *ante*, pp. 1627, 1628. R. *v.* Fitzgerald, *ante*, p. 1631. R. *v.* Wall, *ante*, p. 1637, n. (*j*).

(*h*) See note (*b*) to s. 20, *ante*, p. 1741.

(*i*) Taken from 1 Will. IV. c. 66, s. 3. There were similar provisions in 3 Geo. II. c. 4, s. 1 (I.) and 17 Geo. II. c. 11, s. 1 (I.). R. *v.* Chisholm, M. S. and R. & R. 297.

(*j*) See definition *ante*, p. 1631 note (*u*). A cheque is a bill of exchange drawn on a bank payable on demand (45 & 46 Vict. c. 61, s. 73). In addition to the cases mentioned hereafter other cases will be found *ante*, pp. 1637 *et seq.*, as to what constitute bills of exchange within this, or repealed Acts.

(*k*) By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 83 (1.), a promissory note is an unconditional promise in writing made by one person to another signed by the maker, enjoining to pay, on demand or at a fixed or determinable future time, a certain sum in money, to, or to the order of, a specified person or to bearer.

(*l*) See note (*b*) to s. 20, *ante*, p. 1741.

1. A writing in these terms :—

'On demand we promise to pay Mesdames Sarah Willis and Sarah Doubtfire, stewardesses for the time being of the Provident Daughters' Society, held at Mr. Pope's, the Hope, Smithfield, or their successors in office, sixty-four pounds, with 5 per cent. interest for the same, value received, this 7th day of February, 1815.

'For Felix Calvert and Co.

'£64.' 'JOHN FOSTER.' (*m*)

2. A note payable to the Temple of Peace United Lodge of Oddfellows, which was not incorporated (*n*).

Forgery of one of several names on a bill or note is within the section, though several names may be needed to make a complete endorsement (*o*).

Uttering a forged bill is within the section, even if it is uttered in an incomplete state, without endorsement, as a security for a debt (*p*).

Undertakings, Orders, Receipts, &c.—By the Forgery Act, 1861, s. 23 (*q*), 'Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order (*r*), authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any endorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any endorsement on or assignment of any such accountable receipt, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*s*).

Procuration.—By sect. 24 (*t*), 'Whosoever, with intent to defraud, shall

(*m*) R. *v.* Box, 6 Taunt, 325; R. & R. 303. The court held that the payers, though not legally stewards, were so known at the time and that though they could not have successors in office their executors or advisers could have sued on the note.

(*n*) R. *v.* Clarkson, 1 Cox, 110.

(*o*) R. *v.* Winterbottom, 1 Den. 41, decided on the corresponding section, 1 Will. IV. c. 68, s. 3.

(*p*) R. *v.* Birkett, R. & R. 86.

(*q*) Taken from 1 Will. IV. c. 66, ss. 3 and 10. There were somewhat similar clauses in 3 Geo. II. c. 4, s. 1 (I.); 17 Geo. II. c. 11, s. 1 (I.); 13 & 14 Geo. III. c. 14, s. 1 (I.); 25 Geo. III. c. 37, s. 1 (I.); and 39 Geo. III. c. 63, s. 1 (I.). The words 'for procuring or giving credit' were taken from 39 Geo. III. c. 63, s. 1 (I.).

This section was new in 1861 as far as it relates to any authority or request for the payment of money, or to any authority for the delivery or transfer of any goods, &c., or to any endorsement on or assignment of any such undertaking, warrant, order, authority, request, or accountable receipt as is mentioned in the clause

The words 'authority, or request for the payment of money,' were introduced to get rid of the question so commonly arising in cases of this kind, whether the forged instrument were either a 'warrant or order for the payment of money.' Requests for the payment of money were not within these words. R. *v.* Thorn, C. & M. 206; 2 Mood. 210. Whenever there is any doubt as to the legal character of the instrument, different counts should be inserted describing it in each by one only of the terms warrant, order, authority, or request.

A forged endorsement on a warrant or order for the payment of money was not within the former enactments. R. *v.* Arscott, 6 C. & P. 408.

(*r*) See R. *v.* Williams, 2 C. & K. 51, and R. *v.* Williams, 2 Den. 61, *ante*, p. 1658, and R. *v.* Gilchrist, 2 Mood. 233, *post*, p. 1752.

(*s*) The omitted parts were repealed in 1893. S. L. R. As to other punishments see *ante*, Vol. i. pp. 211, 212.

(*t*) This section was new in 1861, and was framed in order to make persons punishable who, without authority, make, accept, or endorse bills or notes 'per procuration,' which was not forgery under

draw, make, sign, accept, or endorse any bill of exchange (*u*) or promissory note, or any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority, or request so drawn, made, signed, accepted, or endorsed by procuration or otherwise, without lawful authority or excuse as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or endorsed as aforesaid, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*uu*).

Crossed Cheques.—By sect. 25 (*v*), 'Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words "and company," or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . .' (*w*)

A post-office money order, including a postal order, is to be deemed to be 'an order for the payment of money' and a 'valuable security' within the meaning of the Forgery Act, 1861 (*x*).

By the Post Office Act, 1908 (8 Edw. VII. c. 48), s. 59, '(2) If any person, with intent to defraud, obliterates, adds to, or alters any such lines or words on a money order as would in the case of a cheque be a crossing of that cheque, or knowingly offers, utters, or disposes of any money order with such fraudulent obliteration, addition, or alteration shall be guilty of felony, and be liable to the like punishment as if the order were a cheque' (*y*).

By sect. 25 of that Act, 'any banker, or corporation or company acting as bankers, in the British Islands who, in collecting in the capacity for

the former enactments. R. *v.* Maddocks, 2 Russ. C. & M., 946 (4th ed.). R. *v.* White, 1 Den. 208; 2 C. & K. 404.

(*u*) For definition of bill of exchange, see 45 & 46 Vict. c. 61, s. 3, *ante*, p. 1631, note (*n*).

(*uu*) The omitted parts were repealed in 1893. S. L. R. For other punishments see *ante*, Vol. i. pp. 211, 212.

(*v*) Taken from 21 & 22 Vict. c. 79, s. 3, and so framed as to meet the case of a draft either issued with a crossing on it, or crossed after it was issued. The section is extended to stocks under the Local Authorities Loans Act [1875] (38 & 39 Vict. c. 83), s. 32, *ante*, p. 1694, note (*o*), and by the Revenue Act, 1883 (46 & 47 Vict. c. 55), s. 17, the section is extended 'to any document issued by a customer of any bank and intended to enable any person or body corporate to obtain payment from such bank of the sum mentioned in such document and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument. For the purposes of this section [His] Majesty's Paymaster General, and the [King's] and Lord Treasurer's remembrancer in Scotland shall be deemed to be bankers and the public officers drawing on them shall be deemed customers.'

(*w*) See note (*b*) to s. 20, *ante*, p. 1741.

(*x*) 8 Edw. VII. c. 48, s. 59 (1). Cf. s. 89 for definition of valuable security, *ante*, p. 1432.

(*y*) A re-enactment of 43 & 44 Vict. c. 33, s. 3.

any principal, shall have received payment or been allowed by the Postmaster-General in account in respect of any postal order, or of any document purporting to be a postal order, shall not incur liability to any one except such principal by reason of having received the payment or allowment, *or having held or presented the document for payment;* but this section shall not relieve any principal for whom such order or document shall have been so held or presented of any liability in respect of his possession of the order or document or of the proceeds thereof' (*z*).

It is not necessary that the documents should appear on their face to be warrants, &c., for the payment of money, if in fact they are treated as such by the persons to whom they are delivered. So where a building society was in the habit of taking money on deposit at interest, and upon repaying such deposit required a receipt to be given by the depositor for the amount repaid, and the prisoner was convicted of forging one of such receipts, which was in the following form: 'Received of the S. L. Building Society the sum of £417 13*s.* on account of my share, No. 8071, pp., S. A., W. K.' S. A. was the depositor, and the prisoner a local agent of the society. By the custom of the society such a document was treated as an authority, warrant, or request to pay the deposit, but not as an order. Upon a case reserved, it was held, that the above document might be described in the indictment as a warrant, authority, or request for the payment of money by the procuration within the meaning of sect. 24 of the Forgery Act, 1861 (*a*).

Undertakings.—The prisoner, being pressed for the payment of a debt, gave as a security an I.O.U., purporting to be signed by himself and another person, the latter's signature being forged. He thereby obtained further time for payment. Upon a case reserved, it was held that this instrument was 'an undertaking for the payment of money' within sect. 23 (*b*).

Forging a document purporting to guarantee a master to a certain amount in money against the dishonesty of a clerk, is forging an undertaking for the payment of money within sect. 23 (*c*).

A written promise to pay a sum specified, or such other sum not exceeding the same, as A. B. might incur by a reason of suretyship, was an undertaking to pay money within the repealed 1 Will. IV. c. 66, s. 3, although it was not an absolute undertaking to pay any particular sum of money, and only an indemnity up to a fixed sum in case of the misbehaviour of a person (*d*).

A forged undertaking, purporting to be signed by A., that B. should pay for certain goods, was also an undertaking within that section (*e*), as was a forged guarantee of the payment of certain promissory notes of a third person, although it stated no consideration (*f*).

(*z*) A re-enactment of the proviso to 43 & 44 Vict. c. 33, s. 3, with the additions italicised. The section is limited to 'postal orders' as distinct from 'money orders'; see ss. 23, 24.

(*a*) R. *v.* Kay, L. R. 1 C. C. R. 257: 39 L. J. M. C. 118. See also R. *v.* Morrison, Bell 158: 28 L. J. M. C. 110. Allen *v.* Sea Assurance Co., 19 L. J. C. P. 305. R. *v.* Rogers, 9 C. & P. 41.

(*b*) R. *v.* Chambers, L. R. 1 C. C. R. 341: 41 L. J. M. C. 15.

(*c*) R. *v.* Joyce, L. & C. 576: 34 L. J. M. C. 168.

(*d*) R. *v.* Reed, 2 Mood. 62.

(*e*) R. *v.* Stone, 1 Den. 181: 2 C. & K. 364.

(*f*) R. *v.* Coelho, 9 Cox, 8.

Where the plaintiff and defendant in a suit in the County Court entered into an agreement which was as follows, excepting the parts between brackets: 'that the said plaintiff arranges to wait for the balance now due, and to waive all proceedings whatever against the defendant for the term of four months [viz. from the 13th day of May, 1861, to the 13th day of September, 1861; and to allow for putrid bacon £5 5*s.*, and on costs £1 5*s.* Balance due £7 3*s.* 8*d.*], upon the conditions as above, and now stated that the defendant do now pay to the plaintiff the sum of £4. Received the sum of four pounds on account of the debt and costs in this action, this 26th day of April, 1860 [and the balance, £7 3*s.* 8*d.*, to be paid 13th day of September, 1861],' which was signed by both parties, and the defendant afterwards inserted the parts between brackets, the effect of which was to reduce the balance by £6 10*s.*, and to postpone the payment of it nearly a year and five months instead of four months. Hill, J., held that this was not an undertaking for the payment of money, as the plaintiff did not undertake to pay anything (*g*).

Warrants, Orders, &c., for Payment of Money.—It has been frequently held that instruments which in the commercial world have peculiar denominations may yet be laid as warrants or orders for the payment of money, if they fall within those terms, and are such in effect. So that a bill of exchange may be laid as an order for payment of money (*h*), and in one case, where this point was considered by the judges, they were unanimously of opinion that it was well laid; and it was observed that every bill of exchange seemed to be an order for the payment of money, though not *vice versâ* (*i*). And in a subsequent case the judges all concurred in opinion that a bill of exchange or a banker's draft was well laid in the indictment as an order for payment of money, on the ground that, though it was a bill of exchange, it was also a warrant for the payment of money; it was, if genuine, a voucher to the bankers or drawees for the payment (*j*).

The following document has been held to be a bill of exchange or order for the payment of money.

A document whereof the material part was as follows:—

'Please to pay on demand to H. Y., or order, all my proportion of prize-money, due to me for my services on board His Majesty's ship L., for which this shall be your authority' (*k*).

The decisions as to what were orders for payment of money under former Acts in many cases turn on the lack of special averments, which were then considered necessary (*l*).

(*g*) R. *v.* Wright, 2 F. & F. 320. He also held that it was not forgery of a receipt as there was no alteration of the sum for which it was given.

(*h*) R. *v.* Lockett, 1 Leach, 94; 2 East, P. C. 940.

(*i*) R. *v.* Shepherd, 2 East, P. C. 944; 1 Leach, 226.

(*j*) R. *v.* Willoughby, 2 East, P. C. 944. By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3, a cheque is a bill of exchange drawn on a banker payable on demand, it is also an order for the payment of money and may be described as such even though post-dated. R. *v.* Taylor, 1 C. & K. 213 (*ante*, p. 1629). Cresswell, J. In R. *v.* Turberville, 4 Cox, 13, Erle, J., said: 'Bankers' cheques . . . make use of the words "please to pay," but they are not less orders for the payment of money. . . . The instrument in question is a warrant and an order and a request. Upon the face of it, it is an order, and by the evidence it is a warrant.'

(*k*) R. *v.* M'Intosh, 2 East, P. C. 942, and see *ante*, p. 1634.

(*l*) See R. *v.* Richards, R. & R. 193. R. *v.* Randall, ibid. 195, and R. *v.* Rogers, *ante*,

It was considered that bills, &c., did not fall within the repealed Acts (*m*), unless they purported on the face thereof, or were shewn by proper averments, to be made by one having authority to command payment or direct delivery, and to be compulsory on the person having an interest in or disposing of the subject matter of the order.

In R. *v.* Snelling (*n*), on an indictment for forging an order for payment of money it appeared that the prisoner called at the bank of Messrs. A., where R. kept an account, and said that she had called for £800, which she had deposited with R.—the clerk told her that he could not pay her without an order. The next day she came again, and handed to the cashier a forged paper as follows :—

'Holton, Mar. 31, 1853.

'Sirs,—Pleas to pay the Bearis, Mrs. Smart, the sum of Eaight Hundred and 50 4£ ten shillings for me,

'J. R.'

This paper was folded in the shape of a letter, and addressed outside, 'Mrs. Smart.' The cashier did not pay the money. He said that if he had seen R. write it, or had known that it was his writing, he should have treated it as an order, and have paid the money, although it was not addressed to Messrs. A. Upon a case reserved upon the question whether the paper above set forth was, under the circumstances, an order for the payment of money within the statute, it was held that it was. Supposing the facts to have been true, and the instrument to have been genuine, it would have been such an order as, if paid, would have relieved the bankers from any further demand for the money so paid. The facts supply the want of a formal direction to the banker. Suppose R. had told the prisoner to go to the bank, and that she had been told that they would not pay her without an order, and that she came back the next day with this document from R., it would then have been a good order.

But if the order purport to be one which the party has a right to make, although in truth he had no such right, and although no such person as the order purports to be made by existed in fact, it falls within the statute (*o*).

In R. *v.* Carter (*p*) the prisoner was indicted for forging an order for the payment of money, which was as follows :—

p. 1615. In Chamberlain *v.* Young [1893], 2 Q.B. 206 (C. A.), it was held that an instrument which was payable to '——— or order,' the blank never having been filled up, must be construed to mean that it was payable to the order of the drawer, and having been indorsed by him, it was a valid bill of exchange.

(*m*) 2 East, P. C. 936. R. *v.* Clinch, 2 East, P. C. 938; 1 Leach, 540. R. *v.* Newton, 2 Mood. 59 (under 1 Will. IV. c. 66). R. *v.* Mitchell, Fost. 119; 2 East, P. C. 936. R. *v.* Rushworth, R. & R. 317; 1 Stark. (N. P.) 396. R. *v.* Graham, 2 East, P. C. 945. R. *v.* Froud, R. & R. 389, which turned on a forged order to pay the expenses of drowned persons under 48 Geo. III. c. 75.

(*n*) Dears. 219; 29 L. J. M. C. 8. R. *v.* Clinch, *supra*, was distinguished on the ground that the averments in the indictment in that case were insufficient. But in this case the evidence supplied all that was necessary. This case seems to overrule R. *v.* Denny, 1 Cox, 178. R. *v.* Richards, R. & R. 193, R. *v.* Ravenscroft, R. & R. 161. R. *v.* Lockett, 1 Leach, 94; 2 East, P. C. 940, *ante*, p. 1746.

(*o*) 2 East, P. C. 940.

(*p*) 1 Den. 65; 1 C. & K. 741. In the argument, Parke, B., observed, 'It makes no difference at all whether the drawer has funds or not in the hands of the drawee.'

'Please to pay J. J. the sum of £13 by order of C. S., Thornton-le-Moor, brewer, the District Bank. I shall see you on Monday. Yours obliged,

'C. S.'

S. was a customer of the Y. District Bank, and had been, till shortly before the uttering, a brewer. The agent of the bank stated that S. was not in the habit of drawing on the bank, but that if he had been certain of the handwriting being his he should have paid the money; but it was not proved that S. at the date of the instrument, or the time of the uttering, had any effects in the bank. It was objected that the instrument was improperly described as an order; that it did not on the face of it purport to be an order; nor was it shewn that the party whose name was forged had any authority to order payment; but the jury having convicted, the judges, on a case reserved, held that it was an order for the payment of money, and therefore the conviction was right.

In R. *v.* Roberts (*q*), where the forged instrument did not purport on the face of it to be an order, and the party in whose name it was drawn had not the right or power to order the payment of the money at the time when the instrument was drawn, it was not an order for payment of money within 1 Will. IV. c. 66, s. 3 (rep.). The indictment charged the prisoner with forging an order for the payment of money, which was set out in the first count as follows:—

'Mr. F., I should feel greatly obliged to you if you will please to send by the bearer the sum of three pounds, now.

'T. D.'

with intent to defraud F. The instrument was described in all the succeeding counts generally as an order for the payment of money. Upon the trial, it appeared that the prisoner had written the letter, and forged the signature of D. thereto, and that F., on the faith of its being genuine, had paid the £3 to the bearer of the same. D. was a waterman living at M. at the time the letter was written. D. had overdrawn, and had no money due to him from F. The jury found the prisoner guilty, but a doubt occurred to Tindal, C.J., whether this could be considered an order for the payment of money within the meaning of 1 Will. IV. c. 66, s. 3 (*r*), and his lordship submitted that question to the consideration of the judges; and all the judges present agreed that this was not an order for the payment of money, the party who made the order not having any right or power to make it.

The prisoner went to Messrs. R. with the following letter, purporting

(*q*) MSS. C. S. G., and 2 Mood. 258. 'This report is taken from the case submitted to the learned judges. R. *v.* Rogers, 9 C. & P. 41, was referred to before the judges, where an indictment for forging a warrant for the payment of money under similar circumstances was held sufficient, because the instrument would have been a voucher for the payment.' C. S. G. Upon R. *v.* Rogers being cited at the trial, Tindal, C.J., said, 'In that case the instrument was charged as a warrant. The doubt I feel is whether such an order as this, made upon a person when there are no funds in his hands, is an order within the statute. Suppose Fisher had said, "I will not pay the money, I will have the bones first," Davis would have no remedy against him. A banker who had money in his hands could not say so. The question is whether this instrument is an order for the payment of money. It might be a very good warrant for the payment of it.' MSS. C. S. G.

(*r*) Re-enacted as 24 & 25 Vict. c. 98, s. 22, *ante*, p. 1742.

to come from Cologne from Messrs. S., who were correspondents of R., whose house had money of S. in their hands. He presented himself as F.

'Gentlemen,—I beg to introduce to you Dr. F., who intends stopping some time in England for scientific purposes. You would therefore much oblige me if you could acquire him the necessary access to public buildings, such as libraries, &c. I also request you, in case he should be at any time in want of money, to pay him at his desire to the extent of £60 sterling, as he is accredited with me, and I am consequently prepared to pay such an amount against his receipt.

'A. S.'

When the prisoner presented this letter he described himself as the Dr. F. therein mentioned, but at that time no money was paid him: but in two days he called for £30 and it was paid him on the credit of the letter. He brought the following receipt with him, 'For account of Mr. A. S., of Cologne, to have received of R. and Sons the sum of £30. Attests Dr. F.' He again went in two days more with another receipt for £30 more, and got that money—£60 altogether. It was proved that when such a paper as this letter is brought to Messrs. R. from a correspondent who has money in their hands, the person who brought it is paid whatever he claims, not exceeding the amount mentioned. If such person does not require the whole, the house write upon the letter whatever is paid, and they consider such a document exactly as they would a bill of exchange, and equally obligatory on them to pay to the extent of the fund in hand. The question was, whether the above document was a warrant or order for the payment of money, within 1 Will. IV. c. 66, s. 3 (rep.), and, upon a case reserved, the judges were unanimously of opinion that the facts with the paper, warranted their considering this document as an order (*s*).

The prisoner was indicted for uttering an order for the payment of £50. A letter of credit had been issued by the U. Bank of London, who were agents of the O. Bank in Australia, in the following form:—

'Original—£50(1,380)—On demand please honour the draft of Mr. R. T. for £50. Equivalent received here from the S. Banking Company.

'To the Oriental Bank Corporation, Melbourne.'

The prisoner presented this letter of credit at a bank in Walsall. The clerk saw that it was endorsed with the name of 'R. T.,' and asked the prisoner whether that was his name, and he said it was. The prisoner, had by misrepresentations induced the father of R. T., who was in Australia, to procure the letter of credit and send it to him. According to banking practice in this country, a letter of credit in this form was usually paid on the simple endorsement of the payee, but whether it would be so paid at Melbourne was not shewn. According to the regular practice, on the presentation of the letter of credit at Melbourne the bank there would take pains to ascertain the identity of the person credited, and, on being satisfied, would credit him to that amount, and in the terms of the letter of credit, would 'honour the draught' of the party to the extent

(*s*) R. *v.* Raake, 2 Mood. 66: 8 C. & P. 626.

of the letter of credit. It was submitted that the endorsement was not shewn to be an order. Bramwell, B., 'It is quite true that if the bank at Melbourne chose to pay such a letter of credit on the simple endorsement of the person credited, the latter could not afterwards oblige the bank to pay him a second time. But the letter of credit was directed to the O. Bank at Melbourne, who were to "honour the draught" of R. T. I think the simple endorsement in this country is not an order, not being within the original mandate, and therefore must direct the jury to acquit the prisoner' (*t*).

An instrument containing an order to pay the prisoner or order a sum of money, being a month's advance on an intended voyage, as per agreement with the master, in the margin of which the prisoner had written an undertaking to sail in a certain number of hours, was an order for the payment of money within 1 Will. IV. c. 66, s. 3 (rep.). The prisoner was indicted for uttering the following order for the payment of money :—

'On receiving this check I agree to sail in the ship Mary Ann, and to be on board within sixteen hours from the date of this check.'
May 1st.

'Three days after the ship Mary Ann sails from G., please to pay to W. B. or his order the sum of four pounds five shillings, being a month's advance in part of wages of an intended voyage to Quebec in the ship hereinbefore mentioned, as per agreement with your obedient servant.'

On a case reserved this document was held to be an 'order for the payment of money' within the meaning of 1 Will. IV. c. 66, s. 3 (*u*).

The prisoner had presented to a person who was in the habit of discounting seamen's shipping notes, an instrument in the following form :—

'In consideration of C. F. sailing as steward in the brig Kezia, from the port of L., I undertake to pay to C. F., or bearer, the sum of £2 15*s.* 0*d.* five days after the said brig Kezia shall sail from the said port to St. Thomas.'

Parke, B., after consulting Coltman, J., held the document to be an undertaking, warrant, or order, for the payment of money.

The prisoner was indicted for uttering the following order for payment of money :—

'Three days after the ship Selah has sailed from the port of Sunderland, please to pay to J. W., or bearer hereof, the sum of four pounds 0 shillings, and 0 pence (provided the said J. W. has actually sailed in the said ship), being part of his wages in advance on her intended voyage to Alexander' (*v*).

It was urged that this was not an order within the statute, as it was conditional, and if it did come within the statute, the indictment ought to have alleged the performance of the condition; but the indictment was held to be good (*w*). But where the prisoner was indicted for

(*t*) R. *v.* Wilton, 1 F. & F. 391.
(*u*) R. *v.* Bamfield, 1 Mood. 416, all the judges except Lyndhurst, C.B., Park, J., and Bolland, B., who were absent.
(*v*) R. *v.* Anderson, 2 M. & Rob. 469.
(*w*) R. *v.* Lonsdale, 2 Cox, 222. Alderson, B., after consulting Rolfe, B.

forging a seaman's advance note which was as follows: 'Ten days after the ship Candidate sails from the port of Liverpool the undersigned do hereby promise and agree to pay to any person who shall advance £4 to J. A. Howie on this agreement the sum of £4, provided the said J. A. Howie shall sail in the said ship from the said port of Liverpool.' Hannen, J., held that an advance note being an agreement to pay under certain conditions removed it from the class of promissory notes or cheques which were peremptory orders to pay without any condition affixed to them, and he quashed the indictment (*x*).

One count charged the prisoner with feloniously forging 'a certain warrant and order for the payment of money, to wit, a warrant and order for the payment of £85.' Another count described the instrument as 'an acquittance and receipt for money, to wit, for £85.' J. M. had deposited the sum of £85 with the D. Bank at S., and received from the bank an accountable receipt for that sum. The prisoner having this receipt in his possession, went to the bank, and representing himself to be J. M. therein mentioned, wrote the words 'J. M.' on the face of the receipt, and delivered it to the bankers, who paid him the sum of £87 17*s.* 6*d.*, being the amount mentioned in the receipt with interest. By the course of dealing between the bankers and their customers, interest was payable on their accountable receipts, and the bankers on having a receipt delivered back to them with the name of the party who had deposited written upon it by him, treated it as an order for the payment of the amount deposited with the interest then due, and paid such amount and interest accordingly. It was objected that on the evidence these counts were disproved; that the document itself, independent of the evidence, had no meaning, and that the evidence shewed it to be an order or warrant, not for £85, but for £87 17*s.* 6*d.*; but upon a case reserved upon the question whether the evidence supported these counts, or either of them, the judges held the conviction right (*y*).

An instrument may be described as a warrant *and* order, if the instrument be in fact both a warrant and order; a warrant authorising the banker to pay, and an order upon him to do so (*z*). And, where the prisoner was indicted for stealing four post-office money orders, which were described in some counts as 'warrants and orders for the payment of money,' and it was objected that such description was not correct, because it was uncertain; the judges, upon a case reserved, were all of opinion that what was meant by the indictment was, that the prisoner stole four instruments, or four valuable securities, each of which was both a warrant and order, and putting that construction upon the indictment, they were of opinion that the instrument stolen was a warrant and order. They were of opinion it was an order as well as a warrant, because assuming the postmaster had paid the order, the document itself delivered up to him would be a warrant, which would be a discharge from the person to whom he had to account for the

(*x*) R. *v.* Howie, 11 Cox, 320, Hannen, J. No cases were referred to.

(*y*) R. *v.* Atkinson, C. & M. 325; 2 Mood. 215. In the latter report it is said that the judges held that 'the conviction was good.' The document is an acquittance for £85 and interest.' No ground is given in C. & M. for the decision.

(*z*) R. *v.* Crowther, 5 C. & P. 316. See also R. *v.* Atkinson, *supra*.

post-office money. Therefore they were of opinion that the counts of the indictment were not uncertain, meaning that these instruments had both characters (*a*). The prisoner abstracted a number of forms of post-office orders from a local post-office, filled them up for various amounts, and signed them 'G. J., pro postmaster.' He uttered these orders in payment for goods, and signed them as having received the amounts. Upon a case reserved it was held that although no letters of advice had been forwarded, the post-office orders were orders for the payment of money, within the meaning of the Act (*b*).

The prisoners were convicted of forging a warrant for the payment of money. D. D. and a number of other persons, including the prisoners, were members of a benefit club. The funds of the club had been raised by the contributions of the different members. The club had at different times deposited with bank sums for which the bank gave common bankers' receipts, and by desire of the depositors they wrote across the receipts the names of six persons, who were represented to them as being the committee, and the bankers were directed not to pay the money mentioned in the receipts except to the order of the committee of the club. The receipts were kept with certain cash belonging to the club in a box with two locks, the key of one lock being kept by D. D., and the key of the other lock by another officer called deputy treasurer. The prisoners contrived to get possession of the box and its contents, and they presented the receipts at the bank, together with the following document purporting to be signed by three officers of the club.

'Urgant Lodge, Hirwann, 14th March, 42.

'Sir,—As we have had a plan, which will return more interest on our cash, with good security, the bearers are authorised to apply for the same. In witness hereof we subscribe our names, and affix the seal of our lodge.'

The prisoners, on producing the receipts and paper, desired to have the £130, and E., one of the partners of the bank, considering the paper produced to be an authority from the club, paid the money to the prisoners. E. stated that he should not have paid the money on the receipts alone without the paper, nor on the paper without the receipts. The signatures were all forged. On the part of the prisoners it was contended that this was not a warrant for the payment of money, and even if it were, yet that the prisoners, being members of the club, could not be convicted of forging; but, upon a case reserved, the judges all thought that this was a warrant, and that there was no ground of objection that the prisoners were joint owners (*c*).

The prisoner was convicted on an indictment under 1 Will. IV. c. 66, s. 3 (rep.), of uttering the following forged warrant and order for the payment of money:—

'Mr. M. will be pleased to send by the bearer £10 on Mr. H.'s account, as Mr. H. is very bad in bed, and cannot come himself.

'M. R., Foreman.'

(*a*) R. *v.* Gilchrist, 2 Mood. 233; C. & M. 224.

(*b*) R. *v.* Vanderstein, 10 Cox, 177 (Ir.); 16 Ir. Rep. C. L. 574.

(*c*) R. *v.* Harris, 2 Mood. 267; 1 C. & K. 179.

M. was clerk to C. & Co., bankers, with whom H. kept an account. It was the duty of R., the foreman, to pay H.'s labourers, but he had no general authority to draw money. He had once drawn a cheque, which H. had adopted, but he had given him no authority to draw this cheque. It was not in R.'s handwriting, nor had he or H. authorized anyone to draw it. M. paid the amount without hesitation, and stated that his impression was that the account was in H.'s favour. Upon a case reserved upon the question whether this instrument was, under the circumstances, a warrant *or* order for payment of money, the conviction was held right, and Coleridge, J., at the next assizes delivered judgment thus: 'Any instrument for payment, under which, if genuine, the payer may recover the amount against the party signing it, may properly be considered a warrant for the payment of money, and it is equally this whatever be the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed or not. This case may be said to be removed one step further than the ordinary one, where the name of the actual accountant is forged, because R. had himself no account with Messrs. C. & Co.; but by this instrument, if genuine, R. says, in effect, that he had authority from H., who had an account with them; as against him, therefore, it is as much a warrant as if he himself had had such account, and would have equally bound him. The difference in the fact, therefore, is immaterial in the principle. It may not be easy to reconcile all the decisions on this point, and one of the judges doubted on the propriety of that which I am now pronouncing, and principally on the case of R. *v.* Thorn (*d*). He was, however, quite satisfied with the soundness of the principle on which we proceed' (*e*).

The prisoner was convicted of uttering a forged warrant for the payment of money, which was as follows:—

'To Molyneux and Co.—Pay to my order, two months after date, to J. S., the sum of £80, and deduct the same out of my account.'

There was no signature, but across the front of the instrument was written, 'Accepted, L. L.,' and it was endorsed 'J. S., farmer, Hailsham, Sussex.' There was a J. S., a farmer at Hailsham, not a customer of the bankers. L. L. was a customer, and kept money with them; and, upon a case reserved on the question whether this instrument was properly described as a warrant for the payment of money, the judges all thought that it was a warrant from L. L. to the bankers to pay to J. S., and, if genuine, would have been a warrant to the bankers to pay the money (*f*).

The indictment charged the prisoner with uttering the following forged document:—

'Mr. Lowe, 'London.

'Bought of C. D., English and Foreign fruit merchant and potato salesman—

(*d*) 2 Mood. 210 (*ante*, p. 1743). Coleridge, J., doubted.
(*e*) R. *v.* Vivian, 1 Den. 35; 1 C. & K. 719. The judgment is from C. & K. 700.
(*f*) R. *v.* Smith, 1 Den. 79; 1 C. & K.

'Nov. 9th—2 bushells of apples—9*s*.

'Sir,—I hope you will excuse me sending for such trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock, there will be an action commenced against me, and I am obliged to hunt after every shilling.

'Yours, &c.

'F. D.'

L., to whom the document was directed, was indebted to D., the person by whom it purported to be signed, in the sum of 9*s*. for two bushels of apples. Upon a case reserved, the judges were unanimously of opinion that this was a warrant for the payment of money. If it had been a genuine document, and payment had been made on its production, proof of those facts would have been a good defence to an action for the 9*s*. The judges seemed also to think that it was an order for the payment of money (*g*).

The prisoner was indicted for forging and uttering the following warrant for the payment of money:—

'Sir,—You will please to comply with my wish, if possible, in sending a messenger with the bearer of this note; he is acting paymaster; but waiting for his commission: he is the total dependence whom the contract depends on. I want of you £20 in change, £10 in gold, £5 in silver, and £5 in copper; and I shall send you four £5 notes, Bank of England.

'T. P., Quartermaster-Sergeant.'

R. had on many occasions lent sums of money to the quartermaster-sergeants of the regiments stationed at the barracks, but had never lent money to T. P. Rolfe, B., after citing R. *v.* Carter (*h*): 'I think if this be a request to R. to pay £20 to the bearer on the writer's account, it is a warrant for the payment of money. The test is, if this were a genuine letter, and the money had been paid to the bearer, would R. have a right of action against P., the writer? I think he would. R. had been in the habit of lending money to quartermaster-sergeants of regiments in these barracks; this regiment had then recently come; and R. had never advanced money to this quartermaster-sergeant; but if the meaning of this document be that R. was to send that money by the bearer on P.'s credit and account, it is, I think, a warrant within the meaning of the statute.' But the next day Rolfe, B., said that on looking again at the document he thought that it did not authorise the payment of the money to the bearer, but only desired that a messenger of R.'s might be sent with it. The principle was as he had stated it, but the document did not come within it (*i*).

On an indictment for forging a warrant for the payment of money it appeared that a district lodge of a benefit society had a branch lodge, called 'The C. Lodge.' At a meeting of the C. Lodge that lodge was dissolved, and the funds in hand distributed among the members. The

(*g*) R. *v.* Dawson, 2 Den. 75; 20 L. J. M. C. 102. The initial is C. in one part, and F. in the other.

(*h*) 1 Den. 65, *ante*, p. 1747.

(*i*) R. *v.* Ferguson, 1 Cox, 241. See R. *v.* Williams, 2 C. & K. 51; R. *v.* Dixon, 3 Cox, 289; and R. *v.* Williams, 2 Den. 61, *ante*, p. 1658.

prisoners afterwards presented to the district secretary the following certificate :—

'C. Lodge.

'This is to certify that J. H. —— (or wife) labourer, resident at K., died the 10th day of April, 1849. He was initiated a member the 1st day of May, 1845, and was clear upon the books of the lodge at the time of his death. Certified by us this 11th day of April, 1849.'

This document purported to be signed by three officers of the Lodge, but there had not been any such persons, either members or officers of the C. Lodge, as those purporting to sign the certificate, and the name of the deceased member and his death were equally fictitious ; but the form was taken from the printed forms in the cheque-book, which had been used in the C. Lodge, and by the rules it was requisite, before any money could be paid to the family, that this certificate should be filled up with the name and dates of the death and admission of the deceased member, and signed by the officers of the lodge. The treasurer, being ignorant that the lodge had been dissolved, paid the prisoner £16, the proper amount under the circumstances mentioned in the certificate. It was objected that this was not a warrant for the payment of money. R. *v.* Rogers (*j*) was cited for the Crown. Erle, J. : 'That case appears to be in point as far as the question whether an instrument in this form might be a warrant within the statute, but there was there in fact such a course of business as would make the document effectual if genuine ; but here there was no C. Lodge in existence, and the order, if genuine, was of no force.' . . . 'No doubt an instrument in this form, "The bearer has laid three courses of masonry," might be shewn to be a warrant for the payment of money between the parties. So in the present case, although no stranger would understand the instrument to be a warrant for the payment of money, it might be shewn by extrinsic evidence that in the course of business between the parties it was such a warrant. Here, however, there is no society existing—no course of business authorising such a payment as was made. The C. Lodge had ceased to exist. If the words "Roman Lodge" or "Parisian Lodge" had been used, would it then have been valid ? How can you make that an order or warrant which, if all the names of persons mentioned in it were true, would yet be of no force ?' The case, however, was left to the jury, and the prisoners were convicted (*k*).

Upon an indictment for forging the following warrant for payment of money, purporting to be signed by a surgeon :—

'J. W. is entitled to the sum of six shillings '—

it appeared that a company allowed their sick workmen six shillings a week upon such documents as the preceding being obtained from their surgeon and presented to their cashier. The date and names of the surgeon were written, the rest was printed. It was held that this was a warrant for the payment of money ; for, if it had been genuine, it would

(*j*) 9 C. & P. 41.

(*k*) R. *v.* Rouse, 4 Cox, 7. The prisoners were afterwards convicted on another indictment, otherwise the point would have been reserved.

have authorised the payment of the money by the cashier, and entitled him to be repaid by the company (*l*).

The prisoner was indicted for uttering a warrant for the payment of money: he was in the employ of a tanner and paid by the job, and was employed also to arrange the accounts of himself and the other men. He made out the account weekly, and brought it to the foreman, stating the amount to which he was entitled. The foreman looked it over, and if he saw it was correct signed it. The prisoner took the account so signed to the cashier, who, on seeing the signature, paid the amount. The prisoner on one occasion altered the account for a larger sum than was due to him, with the foreman's name forged upon it. Bramwell, B., held that the document was not a warrant for the payment of money (*m*).

Orders and Requests for Delivery of Goods.—Where the prisoner had been convicted of forging an order for the delivery of goods to the following purport: 'Sir,—Please to deliver my work to the bearer—L. B.'; and it appeared that the goods in question were articles of plate, which had been sent by Mrs. B., a silversmith, to Goldsmiths' Hall, to be marked; and that the form of the order was the same as was usually sent upon such occasions, except that in strictness, and by the rule of the plate office, the several sorts of work, with the weight of the silver, ought to have been mentioned in it; the judges affirmed the conviction upon reference to them, after a motion in arrest of judgment. But the prisoner was pardoned on condition of transportation (*n*).

The prisoner was indicted for uttering an instrument described in some counts as a 'warrant for the delivery of goods,' in others as an 'order,' and in others as a 'request.' The prisoner went to the London Docks, and presented to a clerk in the service of the company a document called a tasting order. The course of business at the London Docks with reference to such orders is that the merchant, who has wine in the vaults, and wishes to enable a party to taste it, gives an order in the form as in the present case. It is then taken to the clerk before mentioned, and he writes his name across it, and when it has been so signed by him, but not otherwise, the coopers of the company are authorised to act upon it, and allow the party presenting it to taste the wines described in it. The instrument in question was presented to the clerk for his signature, but he, suspecting it was not genuine, refused to sign it. The signature was a forgery. The prisoner was convicted, and, upon a case reserved, it was held that this was a forged 'order for the delivery of goods' (*o*).

The following writings have been held to be requests for the delivery of goods.

(a) A letter not addressed to any one by name, but in the following terms:—

(*l*) R. *v.* Job Smith, Stafford Sum. Ass. 1850, Greaves, Q.C. MSS. C. S. G.

(*m*) R. *v.* Pilling, 1 F. & F. 324. See also R. *v.* Mitchell, 2 F. & F. 44, *ante*, p. 1642.

(*n*) R. *v.* Jones, 1 Leach, 53; 2 East, P. C. 941.

(*o*) R. *v.* Illidge, 1 Den. 404; 2 C. & K. 871. During the argument, Alderson, B., said, 'An order is an order by a party who may command to a party who must obey. A warrant is a like direction to a party who may obey, and is indemnified by the warrant if he does so. A request is an instrument addressed by any one person to another who has an interest in the subject-matter of the request, and may comply with the request if he pleases.'

'Gentlemen—

'Be so good as to let the bearer have 5½ yards of blue to pattern, and to send the drab cloth up, in the whole piece, on Monday morning, by 10 o'clock; also a yard measure, as I do not know what quantity will be wanted; and you will oblige

'W. R., Mortimer-street' (*p*).

(b) A paper taken by the prisoner, a butty-collier, to J., a grocer, in which sums of money were set against a list of names, and the sums were cast up and a forgery of the prosecutor's signature added (*q*). In this case the document was explained by evidence of the course of dealing between J. and the prosecutor, which involved the making out by the latter a list of persons to be supplied to a figure specified.

(c) 'Please to give bearer two bars of solder and two brushes.

'Mr. C.' (*r*).

(d) 'To Mr. E., Southgate-street, near the Cross.

'Please to let bearer, W. G., have spillshoul and grafting tool for me,

'E. R., of Stantway' (*s*).

(e) 'Sir,

'I beg to inform you that the thing is right and true. Please to let W. T. have such things [meaning thereby certain goods which the said W. T. then and there wanted] as he wants for the purpose.

'Sir, I have got the amount of seven and twenty pounds for M. C. in my keeping this many years.

'A. D.' (*t*).

(f) 'Please to let the lad have a hat, about 9*s*., and I will answer for the money.

'E. B.' (*u*).

Receipts.—It appears to have been held that an entry of the receipt of money or notes made by a cashier of the Bank of England in the bank-book of a creditor, was an *accountable receipt* for the payment of money within 7 Geo. II. c. 22 (rep.) (*v*).

The prisoner was the treasurer of a voluntary friendly society, which was not enrolled. His duty was (amongst other things) to pay into the bank moneys received at the meetings of the society in his own name. On the first Saturday in November, 1857, he received at a

(*p*) R. *v.* Carney, 1 Mood. 351. Cf. R. *v.* Pulbrook, 9 C. & P. 37.

(*q*) R. *v.* Walters, C. & M. 588. Ludlow, Serjeant, after consulting Patteson, J. *Secus* as to shop tickets for goods given by contractors to workmen in lieu of money. R. *v.* Ellis, 4 Cox, 258.

(*r*) R. *v.* Hussey, 1 Cox, 345. A similar document with the word 'for' after 'solder' was held not to be an order because it did not purport to be signed.

(*s*) R. *v.* Jones, 8 C. & P. 292, Gurney, B.

(*t*) R. *v.* Thomas, 2 Mood. 16; 7 C. & P. 851. All the judges except Abinger, C.B., Williams and Coleridge, JJ., who were absent. The doubt raised was whether the document was not merely a false pretence.

(*u*) R. *v.* White, 9 C. & P. 282. Gurney, B., held it none the less a request because it might also be an 'undertaking.' Cf. R. *v.* Robson, 9 C. & P. 423, and the mode of describing the request there adopted.

In R. *v.* Cullen, 1 Mood. 300; 5 C. & P. 116, a document running 'Per Bearer 2¼ counterpanes' and signed T.D. E.T., was held not to be on the face of it a request for delivery of goods, and in the absence of the necessary innuendoes a conviction for forging it was quashed.

(*v*) R. *v.* Harrison, 1 Leach, 180: 2 East, P. C. 926. In the last authority this point respecting *the accountable receipt* is not reported; but it is referred to as being stated in 1 Leach. See R. *v.* Lyon, 2 East, P. C. 933 Grose, J.

meeting of the society £20 to pay into the bank, and on the first Saturday in December following the prisoner, at a meeting of the society, said that he had paid it in, and produced a book purporting to be a banker's pass-book, in order to vouch to the society that the sum of £20 had been paid in to the said bank. At subsequent meetings of the society other sums were paid to him for the like purpose, and the said book was produced by the prisoner and shewn to the members at meetings of the society, to vouch the payment of the several sums into the bank. The book was fictitious and did not correctly represent the state of the account. The jury were told that if the prisoner presented a false account to the members with intent thereby to obtain credit for having duly paid into the bank the various sums which he had received, and to be continued in his office of treasurer with a view to obtain other moneys from the society, which he might fraudulently appropriate to his own use, they should find him guilty; and, upon a case reserved, it was held that the conviction was right on the authority of the preceding case (*w*).

A post-office money order (*x*), a turnpike toll-gate ticket (*y*), and a pawnbroker's ticket or duplicate, which was in the form required by the repealed Pawnbrokers Act, 1799 (39 & 40 Geo. III. c. 99), s. 6 (*z*), have been held to be receipts for money; an ordinary railway ticket has been held not to be so (*a*).

Scrip receipts not filled up with the name of the person from whom the money was received were held not to be receipts for money within 2 Geo. II. c. 25 (*b*), nor a receipt and acquittance within 1 Will. IV. c. 66 (*c*).

So has an acknowledgment of the receipt of £25 in an agreement to compound liability under a bastardy order (*d*).

A friendly society had branches in various towns. A member belonging to one branch could not be received into the court of another branch as a clearance member without a document called a 'clearance,' certifying that he had paid all the dues and demands of the branch to which he belonged, and authorising the other branch to receive him. The prisoner was convicted of forging this document, which was described as an acquittance or receipt for money, but, upon a case reserved, it was held that such 'clearance' was not an acquittance or receipt for money within sect. 23 of the Forgery Act, 1861 (*e*).

A rate collector received part of a rate from the prosecutor and gave a receipt. Subsequently, when he had ceased to be a rate collector, he collected the balance and, for a receipt, he altered the figures in the former receipt to make it appear to be a receipt for the entire rate.

(*w*) R. *v.* Smith, L. & C. 168: 31 L. J. M. C. 154. The case does not state or shew whether the indictment was for felony or misdemeanor; but it might well have been for uttering a forged accountable receipt. See R. *v.* Moody, L. & C. 173, *ante*, p. 1644. As to the necessary averments in the indictment where the document does not on the face of it purport to be a receipt, see R. *v.* Hunter, 2 Leach, 624; 2 East, P. C. 928, *ante*, p. 1653.

(*x*) R. *v.* Ansell, 8 Cox, 409, Byles, J.

(*y*) R. *v.* Fitch, L. & C. 159. R. *v.* Howley, ibid.

(*z*) R. *v.* Fitchie, Dears. & B. 175.

(*a*) R. *v.* Gooden, 11 Cox, 672. See R. *v.* Boult, *ante*, p. 1641 *n.*

(*b*) R. *v.* Lyon, 1 Leach, 597; 2 East, P. C. 933: and see R. *v.* Reeves, 2 Leach, 808.

(*c*) Clark *v.* Newsam, 1 Ex. 131: 16 L. J. Ex. 296. R. *v.* West, 1 Den. 258, where the nature of railway scrip is fully discussed.

(*d*) R. *v.* Hill, 2 Cox, 246, Coleridge, J.

(*e*) R. *v.* French, L. R. 1 C. C. R. 217: 39 L. J. M. C. 58.

Pigott, B., after consulting Martin, B., doubted whether this amounted to forging a receipt for money (*f*).

The following documents have been held to be properly described as receipts for money :—

(a) 'Received the 22nd day of May, 1834, of Messrs. Cox and Co., Paymasters, Royal Regiment of Artillery, the sum of £13 sterling, being a part of subsistence for a detachment of Captain B.'s company, second battalion Royal Artillery at W., for the month of June, 1834.

'R. M. P., Lieutenant Royal Artillery' (*g*).

(b) 'Received this 26th day of September, 1834, of Messrs. Cox and Co., Paymasters Royal Regiment of Artillery, the sum of £20, on account of subsistence for my detachment for the present month.

'£20. 'H. P., Capt. Adj. R.H.A.

(Endorsed) 'S. R., Gun. R.H.A.' (*h*).

(c) 'Herefordshire, To Wit. } 'To the Churchwardens and Overseers of the Poor of the Parish of Titley, in the County of Hereford.

'By virtue of an order of Her Majesty's Justices of the Peace in and for the said county, at their general quarter sessions assembled, you are hereby required, within thirty days from your receipt of this precept, or otherwise having had due notice thereof, to pay me out of the money by you collected, or to be collected, for the relief of the poor of your parish, the sum of £3 15*s.* 9*d.*, being the proportion of your said parish, for and towards the general county rate, to be applied for the several purposes mentioned and set forth in the several statutes in such case made and provided, and herein fail not at your peril.

'Given under my hand at Mowley, in the said county, the 6th day of December, 1837.

'Dec. 31. Rec^d. the above rate. J. POWELL.'

'JOHN POWELL, Chief Constable of the Hundred of——' (*i*).

'U. Branch Bank, No. 1.

(d) 'We have received from the L. Union four pounds sterling, which is placed to the credit of their account with the U. Banking Company.

'£40. 'S. C., Manager' (*j*).

(e) 'By order of R. F. Pries, we have this day transferred into the name of Messrs. Collman and Stolterfoht, 759 quarters and 4 bushels of wheat, ex August Ferdinand, Captain Richards, à Neustadt.

'Entered by R. F. Pries, and now lying in our granaries, Bermondsey Wall.

'The wheat is insured against risk of fire by us.

'BROWN AND YOUNG.

'Corn Exchange, October 23, 1852' (*k*).

(*f*) R. *v.* Sargent, 10 Cox, 161.
(*g*) R. *v.* Hope, 1 Mood. 414.
(*h*) R. *v.* Rice, 6 C. & P. 634.
(*i*) R. *v.* Vaughan, 8 C. & P. 276, Gurney, B. Cf. R. *v.* Griffiths, Dears. & B. 548, *ante*, p. 1602.
(*j*) R. *v.* Johnston, 5 Cox, 133 (Ir.). The amount in figures had been altered from 4 to 40.
(*k*) R. *v.* Pries, 6 Cox, 165, and though the word receipt was not named, Alderson, B., held it to be a receipt in substance. Masters, B., concurred.

(f) A note in the following form :—

Date 1857		To whom consigned	Specification of goods	Charges	Signature of parties acknowledging that the goods are lying on the quay at Duke's Dock at their own risk.	Date 1857		Time	
October	20	G. Fowler	4 Crates	£1 14*s.* 9*d.*	George Fowler	October	20	8	30

sent by carriers to consignees in ordinary course of dealing, and entitling the holder to receive a delivery note for the goods specified on payment of the charges in column 4 (*l*).

Telegrams.—The Post Office Protection Act, 1884 (47 & 48 Vict. c. 76), s. 11 (*m*), enacts that, 'Every person who forges, or wilfully and without due authority alters a telegram knowing the same to be forged or wilfully and without due authority altered, or who transmits by telegraph as a telegram or utters as a telegram any message or communication which he knows to be not a telegram shall, whether he had or had not an intent to defraud, be guilty of a misdemeanor, and shall be liable, on summary conviction, to a fine not exceeding £10, and, on conviction on indictment, to imprisonment with or without hard labour for a period not exceeding twelve months. . . . For the purposes of this section the expression "telegram" means a written or printed message or communication sent to or delivered at a post office, or the office of a telegraph company, for transmission by telegraph, or delivered by the post office or a telegraph company as a message or communication transmitted by telegraph . . .' (*n*).

The defendant sent a telegram to a brother-in-law whom he had not seen for several years, 'Prepare Daisy for most distressing news.—Wickham'; and a little later he sent another telegram to the same person, 'Poor dear Herbert shot himself last night and passed away this morning. —Wickham.' 'Herbert' meant the defendant himself, so both telegrams purported to come from some person named Wickham other than the defendant. The magistrates convicted the defendant summarily under this section of sending two forged telegrams. An application was made to quash the conviction on the ground that this was not forgery, but the Court held that there was ample evidence to show that there was forgery of a telegram within this section and refused the application (*o*).

(*l*) R. *v.* Meigh, 7 Cox, 401, Wightman, J.

(*m*) This section is expressly excepted from repeal by the Post Office Act, 1908, s. 92, *ante*, p. 1427.

(*n*) The section also contains definitions of 'telegraph company' and 'telegraph,' and also provisions as to improperly divulging telegrams. See *ante*, p. 1434; and R. *v.* Riley [1896], 1 Q.B. 309, *post*, p. 1761. In that case Lord Russell of Killowen said, at p. 322, 'It is quite clear that the prisoner in what he did committed an act of forgery at common law.'

(*o*) *Ex parte* Wickham [1894], 10 T. L. R. 266, Matthew and Collins, JJ.

CANADIAN NOTES.

FORGERY OF PRIVATE PAPERS, SECURITIES AND DOCUMENTS.

Definition of Forgery.—See Code sec. 466.
Uttering Forged Documents.—See Code sec. 467.
Forging Private Documents.—See Code sec. 468.
Sending Telegrams in False Names.—See Code sec. 475.
Sending False Telegrams.—See Code sec. 476.
Drawing Documents Without Authority.—See Code sec. 477.

A document here means any paper, parchment or other material used for printing or writing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material. Sec. 335(*f*).

An indictment may be laid for unlawfully and with intent to defraud signing a promissory note by procuration, although the name signed is the name of a testamentary succession or of an estate in liquidation (*e.g.*, "Estate John Doe"), but if the indictment does not disclose the particulars, an order will be made against the Crown to furnish particulars of the names and capacities of the persons representing such estate at the time when the offence is alleged to have been committed, and directing that the defendants be not arraigned until after the particulars have been delivered. R. v. Weir (No. 2) (1899), 3 Can. Cr. Cas. 155.

A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed. Such a defect is one of substance and cannot be amended under Code sec. 629. R. v. Weir (No. 5) (1900), 3 Can. Cr. Cas. 431.

CHAPTER THE FORTIETH.

OF DEMANDING PROPERTY UPON FORGED INSTRUMENTS.

By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 38 (*a*), 'Whosoever, with intent to defraud, shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . ' (*b*).

The prisoner was a clerk in the telegraph department of the head post office at Manchester. On the day in question he sent a telegram 'Three pounds Lord of Dale' to certain bookmakers with whom he was in the habit of betting. Lord of Dale was a horse running in a race that was timed to start at 2.45 P.M. that day. The telegram purported to have been handed in at a branch office in Manchester at 2.40 P.M. and to have been received at the head office at 2.51 P.M., from which office it was transmitted to the bookmakers. The bookmakers believing the telegram had been sent off before the race was run accepted the bet at the current odds of 3 to 1 against Lord of Dale. The telegram had not in fact been handed in at the branch office at all, but was dispatched by the prisoner from the head office after he had heard that Lord of Dale had won. The prisoner pleaded guilty to an indictment under this section for obtaining the money by means of 'a certain forged instrument to wit a forged telegram,' and upon a case reserved it was held that the telegram was a forged instrument within this section (*c*).

(*a*) Framed in part from 38 Geo. III. c. 53, s. 2 (I), which provided against demanding money on forged banknotes, and 11 Geo. IV. c. 20, s. 85, which related to obtaining money under forged wills, or probates fraudulently obtained. This section is intended to embrace every case of demanding, &c., any property whatsoever upon forged instruments. It is intended to include bringing an action on any forged bill of exchange, note, or other security for money. The words, 'procure to be delivered or paid to any person,' &c., were inserted in order to include cases where one person by means of a forged instrument causes money to be paid to another person, and to avoid the difficulty which had arisen in *R. v.* Wavell, 1 Mood. 224 and *R. v.* Garrett, Dears. 232, *ante*, p. 1587, as to obtaining money by false pretences.

(*b*) The omitted parts were repealed S. L. R. 1893. For other punishments see *ante*, Vol. i. pp. 211, 212.

(*c*) *R. v.* Riley [1896], 1 Q.B. 309: 65 L. J. M. C. 74.

CANADIAN NOTES.

Demanding Property upon Forged Instruments.—See Code sec. 475.

Sending Telegrams in False Names.—See Code sec. 475.

CHAPTER THE FORTY-FIRST.

OF FALSE PERSONATION.

At Common Law.—The bare fact of personating another, for the purpose of fraud, is no more than a cheat or misdemeanor at common law, and punishable as such (*a*): and the principal cases in which it has been considered as indictable have been laid as cases of conspiracy, where the prisoner had been acquitted on an indictment preferred against him for forgery, upon its appearing that he had merely passed himself off for the person whose real signature appeared on the instrument, in concert with that person (*b*), he was indicted again for the misdemeanor; but the second indictment did not turn simply on the fact of such false personation for a fraudulent purpose, but was framed against him and his associates for the conspiracy as well as the cheat (*c*). And where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnise a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master; the gist of the indictment was for the conspiracy, and the conviction proceeded upon that ground (*d*). However in R. *v.* Dupee (*e*), where the indictment only charged that the defendant personated a clerk to a justice of the peace, with intent to extort money from several persons, for procuring their discharge from misdemeanors for which they stood committed, the Court refused to quash it upon motion, and put the defendant to demur to it. The Court may have considered that this was something more than a bare endeavour to commit a fraud by means of falsely personating another; viz. an attempt to pollute and render odious the public justice of the kingdom, by making it a handle and pretence for corrupt practices (*f*).

By Statute (*g*).—By the False Personation Act, 1874 (37 & 38 Vict. c. 36), s. 1, 'If any person shall falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next of kin,

(*a*) 2 East, P. C. 1010. 3 Chit. Cr. L. 1081.

(*b*) R. *v.* Hevey, *ante*, Vol. i. p. 168.

(*c*) 2 East, P. C. 1010.

(*d*) R. *v.* Robinson, 1 Leach, 37; 2 East, P. C. 1010. R. *v.* Mackarty, *ante*, Vol. i. p. 155.

(*e*) 2 Sess. Cas. 11; 2 East, P. C. 1010.

(*f*) 2 East, P. C. 1011.

(*g*) Falsely personating another for purposes of fraud is so nearly allied to forgery, and so often blended with it, that these offences have been frequently included by the Legislature in the same enactments, and made felonies alike subject to the same punishment. Many of the statutes which relate to false personation, with a few cases determined upon their construction, have necessarily been introduced in the preceding chapters; as those concerning the personating the proprietors of public stocks, &c., *ante*, pp. 1691 *et seq.*, or India Stocks, *ante*, pp. 1706 *et seq.*, and the personating of soldiers and seamen, and their widows, &c., in order to obtain wages, pensions, prize-money, &c., *ante*, pp. 1726 *et seq.* As to the personation of voters, see *ante*, Vol. i. p. 642.

or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property, he shall be guilty of felony, and upon conviction shall be liable . . . to be kept in penal servitude for life. . . .' (*h*).

Sect. 2. 'Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act, or at common law, in respect of an offence (if any) punishable as well under this Act as under any other Act, or at common law' (*i*).

Army and Navy.—By the Army Prize Money Act, 1832 (*k*) (2 & 3 Will. IV. c. 53), s. 49, 'if any person shall knowingly and willingly personate or falsely assume the name or character, or procure any other person to personate or falsely assume the name or character, of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any prize money, grant, bounty money, share, or other allowance of money, due or payable or supposed to be due or payable for or on account of any service performed or supposed to have been performed by any officer, non-commissioned officer, soldier, or other person who shall have really served or be supposed to have served in His Majesty's army or in any other military service, or shall personate or falsely assume, or act, aid or assist in personating or falsely assuming the name or character, or procure any other person to personate or falsely assume the name or character, of the executor or administrator, wife, widow, next of kin, relation, or creditor of any such officer, non-commissioned officer, soldier, or other person as aforesaid, in order to receive or enable any other person to receive any prize money, grant, bounty money, share, or other allowance of money due or payable or supposed to be due or payable for or on account of any service performed or supposed to have been performed by any such officer, non-commissioned officer, soldier, or other person as aforesaid (*l*); . . . all and every person so offending, being thereof lawfully convicted, shall be and are and is hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life, or for any term not less than seven years (*m*), as the Court before whom such person or persons shall be convicted shall adjudge.'

Two prisoners, Bird and Lake, were indicted under this section, Bird as having falsely personated a soldier entitled to prize money, and Lake as an accessory before the fact. It appeared that Bird, at the instigation of Lake, had personated a soldier who was in fact entitled to prize money. The defence was that Lake had purchased the soldier's prize money, that he had induced Bird to believe he was entitled to it and had the soldier's authority to receive it, and that he might use the soldier's name for that purpose, and might authorize Bird to do so. There was no express evidence to disprove this defence. Lush, J., in summing up said: 'If you believe that Lake procured Bird . . . to represent himself as Campbell (the soldier) . . . in order to receive the money

(*h*) The omitted words are repealed. (S. L. R.) (No. 2.) 1893. For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*i*) *Vide ante*, Vol. i. p. 6.

(*k*) See also 7 Geo. IV. c. 16, s. 38, *ante*, p. 1727.

(*l*) The rest of this section is set out on p. 1726, *ante*.

(*m*) See *ante*, Vol. i. pp. 211, 212, as to present punishments.

due to Campbell, and if you believe that Bird knowingly and wilfully represented himself to be Campbell then, whatever his motive may have been, they are equally guilty in point of law. . . . Even if Bird believed Lake to be Campbell, yet if he falsely represented himself as Campbell, though authorized by Lake to do so, he would nevertheless be guilty in law' (*n*).

By the Army Act, 1881 (44 & 45 Vict. c. 58), s. 142, '(2) Any person who falsely represents himself to any military, naval, or civil authority to belong to or to be a particular man in the regular, reserve, or auxiliary forces shall be deemed to be guilty of personation. (3) Any person who is guilty of an offence under the False Personation Act, 1874 (*ante*, p. 1763), in relation to any military pay, reward, pension or allowance, or to any sum payable in respect of military service, or to any money or property in possession of the military authorities, or is guilty of personation under this section shall be liable, on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding £25' (*o*).

By the Seamen's and Soldiers' False Characters Act, 1906 (6 Edw. VII. c. 5), s. 1, '(1) If any person forges the certificate of service or discharge of any seaman or soldier or any certificate purporting to be a certificate of service or discharge of a seaman or soldier,' &c., or 'personates the holder of a certificate of service or discharge' he is liable on summary conviction to imprisonment with hard labour or to fine. (2) 'For the purposes of this section the expression "seaman" means a man who has served in His Majesty's naval forces, and the expression "soldier" means a man who has served in His Majesty's military or marine forces.'

By the Admiralty Powers, &c., Act, 1865 (28 & 29 Vict. c. 124), s. 6, 'If any person, in order to sustain any claim to any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the Compassionate Fund of the Navy, or other money payable by the Admiralty, or to any effects or money in charge of the Admiralty, or in order to procure any person to be admitted a pensioner as the widow of an officer of the navy, does any of the following things, namely, offers or utters to any person in the service of the Crown or of the Admiralty any false affidavit, knowing the same to be false, or makes or subscribes or offers or utters as aforesaid any false written petition, application, statement, answer, certificate, or voucher, or other false writing, knowing the same to be false,—every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding five years . . . (*p*) or on summary conviction before a justice, sheriff, or magistrate shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.'

(*n*) R. *v.* Lake, 11 Cox, 333.

(*o*) By sub-sect. 4, persons may be proceeded against under other enactments or at common law, provided they be not punished twice for the same offence. Sect. 121 imposes summary penalties on any person personating or representing the officer or soldier entitled to billet. As to Yeomanry, see 47 & 48 Vict. c. 55, s. 3.

(*p*) The omitted words were repealed in 1893 (S. L. R.). As to other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

By sect. 7,' The following sections of the Forgery Act, 1861 (*q*), shall be incorporated with this Act, and shall be read as if they were here re-enacted, namely, sections 40 to 42, and 50 to 53 (all inclusive), and for this purpose the expression "this Act," used in the said incorporated sections, shall be construed to include the present Act, and expressions therein used relating to forgery or forged writings shall be construed to apply to any act being a misdemeanor under the last foregoing provision of this Act, and to writings made, subscribed, offered, or uttered in contravention of that provision.'

By sect. 8, ' If any person, in order to receive any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the Compassionate Fund of the Navy, payable or supposed to be payable by the Admiralty, or any other money so payable or supposed to be payable, or any effects or money in charge or supposed to be in charge of the Admiralty, falsely and deceitfully personates any person entitled or supposed to be entitled to receive the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding five years . . . (*qq*) or on summary conviction before a justice, sheriff, or magistrate shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.'

By sect. 9, ' Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act or at common law in respect of an offence (if any) punishable as well under this Act as under any other Act or at common law ' (*r*).

Upon some of the former statutes relating to the personation of seamen, it was decided, that as the false personation must be done in order to receive the wages, &c., of some seamen, &c., *entitled or supposed to be entitled thereto*, there must be some evidence to shew that there was such a person of the name and character assumed, who was either entitled, or might *prima facie* at least be supposed to be entitled, to receive the wages, &c., attempted to be acquired (*s*).

On an indictment under 54 Geo. III. c. 93, s. 82 (rep.), for personating and falsely assuming the name and character of one J. B., a seaman entitled to certain prize money ; and it was proved that the prisoner applied at Greenwich Hospital for prize money in the name of B. ; but it appeared that he did not obtain the money, and that B. was then dead. On a case reserved, the judges were of opinion that the conviction was right, and that the statute applied, though the seaman personated was dead (*t*). So where the prisoner personated one C., who was dead, and whose prize-money had been paid to his mother, the judges were of opinion that a conviction upon the same statute was right (*u*).

In a case upon 57 Geo. III. c. 127, s. 4 (rep.) the indictment charged the prisoner with wilfully and knowingly personating and falsely assuming the name and character of P. M'Cann, a person entitled to prize

(*q*) *Vide ante*, p. 1677.
(*qq*) *Vide* note (*p*), *ante*, p. 1765.
(*r*) Cf. 52 & 53 Vict. c. 63, s. 33, *ante*, Vol. i. pp. 4, 6.
(*s*) R. *v.* Brown, 2 East, P. C. 1007. R. *v.* M'Annelly, ibid. 1009.
(*t*) R. *v.* Martin, R. & R. 324.
(*u*) R. *v.* Cramp, R. & R. 327.

money for and in respect of his services performed on board H.M.S. T., in order to receive such prize money, with intent to defraud the commissioners and governors of the Greenwich Hospital; and a second count described P. M'Cann as a person supposed to be entitled, &c., for services supposed to have been performed. It appeared by the prize-list and muster-book of the T., produced by the proper officer from Greenwich Hospital, that there was a person of the name of P. M'Carn entitled to prize money, but no person of the name of P. M'Cann. The learned judge by whom the prisoner was tried ultimately left the case to the jury, directing them to say whether the prisoner intended to personate P. M'Carn. The jury found that he did so intend, and returned a verdict of guilty; but, upon a case reserved, the judges were of opinion that the 'personating' must apply to some person who had belonged to the ship, and that the indictment must charge a personating of some such person; and as that was not the case here, they held the conviction wrong (*v*).

Companies.—By the Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 38 (*w*), '(1) If any person . . . (ii) falsely and deceitfully personates any owner of any share or interest in any company, or of any share warrant or coupon issued in pursuance of this Act, and thereby obtains or endeavours to obtain any such share or interest or share warrant or coupon or receives or endeavours to receive any money due to any such owner, as if such offender were the true and lawful owner, he shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life, or for any term not less than three years.'

Recognizances, &c.—By the Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 34 (*x*), 'Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused), shall, in the name of any other person acknowledge any recognizance or bail, or any *cognovit actionem*, or judgment, or any deed *or other instrument*, before any court, judge, or other person lawfully authorized in that behalf, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . .' (*y*).

In the construction of 21 Jac. I. c. 26, s. 2 (rep.), it was held that the bare personating of bail before a judge at chambers, or the acknowledging thereof in another name, was no felony, but only a misdemeanor, unless the bail was filed (*z*). But yet it appears in one case that the offence was considered as complete by the personation; as, though the bail-piece was filed at Westminster, the trial was had

(*v*) R. *v.* Tannet, R. & R. 351. See R. *v.* Pringle, 2 Mood. 127; 9 C. & P. 408.

(*w*) A re-enactment of 30 & 31 Vict. c. 131, s. 35. As to other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*x*) Framed from 1 Will. IV. c. 66, s. 11. There was a similar clause in 10 Car. I. sess. 3, c. 20, s. 1 (I).

(*y*) The omitted words were repealed in 1893. (S. L. R.) As to other punishments, see *ante*, Vol. i. pp. 211, 212.

(*z*) 1 Hale, 696. Timberley's case, 2 Sid. 90; 2 Hale, 90. 1 Hawk. c. 47, s. 5. 2 East, P. C. 1009. The words of 21 Jac. I. c. 26, s. 2, were 'That all and every person and persons which shall acknowledge or procure to be acknowledged any fine or fines, recovery or recoveries, deed or deeds enrolled, statute or statutes, recognisance or recognisances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or consenting to the same,' shall be adjudged felons. 'The words of the new clause render it unnecessary for the recognisance or bail to be filed.' C. S. G.

in London, the county where the bail was personated (*a*). It seems that if bail were put in under feigned names of persons who had no existence, the offender could not be prosecuted upon the repealed statute for felony (*b*).

Police Officers.—The County Police Act, 1839 (2 & 3 Vict. c. 93), s. 15, imposes a summary penalty of £10 in addition to any other punishment to which he may be liable on any person unlawfully in the possession of police accoutrements, &c., or assuming the dress, &c., of constables for any unlawful purpose (*c*).

By the Police Act, 1890 (53 & 54 Vict. c. 45), s. 9, 'If a person obtains or attempts to obtain for himself or for any other person any penison, gratuity, or allowance under this Act, or any payment on account of such pension, gratuity, or allowance by means of any false declaration, false certificate, false representation, false evidence or personation, or by malingering or feigning disease or infirmity, or by maiming or injuring himself, or by causing himself to be maimed or injured, or otherwise producing disease or infirmity, or by any other fraudulent conduct, he shall be liable on summary conviction to imprisonment with or without hard labour for a term not exceeding four months, or to a fine not exceeding £25, to be paid (notwithstanding anything in any charter or in any other Act, whether relating to municipal corporations or otherwise) to the pension fund of the force from which he obtained or attempted to obtain the pension, gratuity, or allowance, and on conviction by a jury, to imprisonment, with or without hard labour, for a term not exceeding two years, and also in either case to forfeit any pension, gratuity, or allowance so obtained.'

Inland Revenue Officers.—By the Inland Revenue Act, 1890 (53 & 54 Vict. c. 21), s. 12, 'If any person not being an officer takes or assumes the name, designation, or character of an officer for the purpose of thereby obtaining admission into any house or other place, or of doing or procuring to be done any act which he would not be entitled to do or procure to be done of his own authority, or for any other unlawful purpose, he shall be guilty of a misdemeanor, and shall, in addition to any other punishment to which he may be liable for the offence, be liable on summary conviction to be imprisoned with or without hard labour for any term not exceeding three months.'

Board of Trade Agents.—Sect. 354 (a) of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), enacts that, 'If any person falsely represents himself to be, or falsely assumes to act as, agent of the Board of Trade in assisting persons who desire to emigrate; . . . that person shall for each offence be liable to a fine not exceeding £50.'

Personation of any person named in a certificate under the Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), is punishable summarily under sect. 139 (e) of that Act.

(*a*) R. *v.* Beesley, T. Jones, 64; 1 Hawk. c. 47, s. 4. But in 2 East, P. C. 1010, it is observed that according to the report of the same case in Ventris (1 Vent. 301), Twisden, J., said that it must be tried in Middlesex, where the bail-piece was filed; the entry being *venit coram domino rege*, &c.

(*b*) Anon. 1 Str. 384. 1 Hawk. c. 47, s. 6. The Court in this case ordered the bail and the attorney to be set in the pillory.

(*c*) The Metropolitan Police Act 1839, (2 & 3 Vict. c. 47), s. 17 contains similar provisions.

By the Elementary School Teachers (Superannuation) Act, 1898 (61 & 62 Vict. c. 57), s. 10, 'If any person (a) for the purpose of obtaining for himself or any other person any annuity or allowance under this act, personates any person, or makes any false certificate,' &c., &c.; or (b) by '. . . any personation obtains or attempts to obtain for himself or any other person any annuity or allowance under this act' he is liable on indictment to two years' imprisonment with hard labour, or on summary conviction to three months' imprisonment with hard labour, or to a fine of £25 and loss of allowance (*d*). 'For the purposes of this section the obtaining of an annuity or allowance includes the increase of any annuity or allowance, and the prevention or rescission of any cessation or suspension of an annuity or allowance, and the obtaining of any sum in respect of any annuity or allowance.'

(*d*) This section is not set out in full. The Act applies to England and Scotland and has been extended to the Isle of Man (63 & 64 Vict. c. 38) and to Jersey (63 & 64 Vict. c. 40).

CANADIAN NOTES.

FALSE PERSONATION.

Personation of any Person, Fraudulently, an Indictable Offence.—See Code sec. 408.

Personation at Examinations.—See Code sec. 409.

Personating Owner of Government Stock, of Company Stock, of Dividends, of Land Grant, Scrip, etc.—See Code sec. 410.

Acknowledging Instrument in False Name.—See Code sec. 411.

CHAPTER THE FORTY-SECOND.

OF MALICIOUS DAMAGE TO PROPERTY.

INJURIES to property which proceed rather from malicious or wanton motives than from any proposed gain to the offender were at common law in most cases dealt with as actionable trespasses but have been made criminally punishable by different statutes passed from time to time, as they appeared to be required for the protection of the community. Most of the provisions contained in these statutes were amended and consolidated by the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), and the general provisions of this Act will now be stated.

By sect. 54 (*a*), 'Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing (*b*), or any machine, engine, instrument, or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour . . . (*c*) and, if a male under the age of sixteen years, with or without whipping.'

Sect. 56 provides for the punishment of principals in the second degree and accessories (*d*).

By sect. 58, 'Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise' (*e*).

At common law if the thing attempted to be done would, if successful, have prejudiced a particular individual, it would be intended that such prejudice was meant, without any proof of *actual* malice against such individual (*f*), and under 43 Geo. III. c. 58 (rep.), it was held

(*a*) Taken from 9 & 10 Vict. c. 25, s. 8, and extended to all the felonies against this Act.

By sec. 55, justices of the peace may issue warrants for searching houses, &c., for gunpowder, &c., &c.

(*b*) As to the use of explosives to commit offences *vide ante*, Vol. i. p. 865.

(*c*) For other punishments, see 54 & 55, Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted were repealed in 1893 (S. L. R. No. 2).

(*d*) See *ante*, Vol. i. pp. 130 *et seq.*

(*e*) Taken from 7 & 8 Geo. IV. c. 30, s. 25 (E.); 9 Geo. IV. c. 56, s. 32 (I.); and 8 & 9 Vict. c. 44, s. 2.

(*f*) R. *v.* Philp, 1 Mood. 263. R. *v.* Foster, 6 Cox, 25. At the Bristol special Commission, in his charge to the grand jury in 1832, Tindal, C.J., said that 'where a statute directs that to complete an offence it must have been done with the intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious

that 'intent to injure' must be inferred where injury necessarily followed from the setting on fire (*g*).

On an indictment for setting fire to a hovel it appeared that the prisoner had been in a low state of mind, and doubts as to his sanity had been entertained, and there was no evidence of ill-will against any one. Crompton, J., told the jury that it was not necessary for the prosecution to prove *express* malice in the prisoner; malice did not mean that he had a particular spite against the prosecutor. If a man, being in his right mind, burnt property belonging to another, a jury ought to infer malice from the act itself. And the question was then left to the jury whether the prisoner knew right from wrong. The jury at first found the prisoner not guilty on the ground of insanity; but, in answer to the judge, they said they thought that the prisoner was in such a state of mind that he did not know that the effect of burning the hovel would be to injure any other person. Crompton, J., 'That is a verdict of not guilty' (*h*).

B. was the owner of a house and demesne. The house had been burnt down except the kitchen, where some furniture and two mirrors were stored. Some boys from a neighbouring camp who had been brought, with leave, to the demesne for a day's holiday, from curiosity to see what was in the building broke open the door and windows and entered. In trying to get out one of them broke the two mirrors. It was held that the acts were malicious and punishable as a crime under this act (*i*).

Where a thief, for the purpose of committing a larceny, for which he was afterwards convicted, broke a window belonging to the owner of the stolen property, the Court held that this was a malicious breaking of the window within the act (*j*).

By sect. 59. 'Every provision of this Act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts hereinbefore made penal, although the

act in contemplation of law when a man wilfully does that which is illegal, and which, in its necessary consequence, must injure his neighbour, and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner or a person against whom he had a former grudge, must be equally injurious to him.' *The Bristol Riots*, 3 St. Tr. (N. S.) 1, 8; 5 C. & P. 266 (*n*). 'Malice, in the legal acceptation of the term, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another.' Campbell, C.J., in Ferguson *v.* Earl of Kinnoull, 9 Cl. & F. 321. In R. *v.* Martin, 8 Q.B.D. 54, a prosecution under 24 & 25 Vict. c. 100, s. 20, Coleridge, C.J., at p. 58, said: 'He (the prisoner) acted unlawfully and maliciously, not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured.' Stephen, J., said: 'Now it seems to me that if the prisoner did that which he did as a mere piece of foolish mischief unlawfully and without excuse he did it "wilfully," that is "maliciously," within the meaning of the statute . . . Lord Blackburn, in the cases of R. *v.* Ward, L. R. 1 C. C. R. 356, 360, and R. *v.* Pembliton L. R. 2 C. C. R. 119, 122, lays it down that a man acts 'maliciously' when he wilfully and without lawful excuse does that which he knows will injure another. See also R. *v.* James 8 C. & P. 131, *post*, p. 1807. R. *v.* Newill, 1 Mood. 458, *post*, p. 1800. Roper *v.* Knott [1898], 1 Q.B. 868 and Miles *v.* Hutchings [1903], 2 K.B. 714, *post*, p. 1828.

(*g*) R. *v.* Farrington R. & R. 207 and M. S. Bayley, J.

(*h*) R. *v.* Davies 1 F. & F. 69.

(*i*) In *re* Borrowes [1900], 2 Ir. R. 593.

(*j*) M'Dowell *v.* Dublin Corporation [1903], 2 Ir. R. 541.

offender shall be in possession of the property against or in respect of which such act shall be done' (*k*).

By sect. 60. 'It shall be sufficient in any indictment for any offence against this Act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be)' (*l*).

On an indictment for arson of a house with intent to defraud, it was suggested that the motive might have been the desire to realise the sum insured upon the furniture, &c.; and Pollock, C.B., held that evidence was admissible that the prisoner was in easy circumstances, and had a comfortable income (*m*).

By sect. 61. 'Any person found committing any offence against this Act, whether the same be punishable upon indictment, or upon summary conviction may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law (*n*).

By sect. 72. 'All indictable offences mentioned in this Act, which shall be committed within the jurisdiction of the Admiralty of England or Ireland, shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any country or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas:" Provided that nothing herein contained shall alter or affect any of the laws relating to the government of [His] Majesty's land or naval forces' (*o*).

By sect. 73. 'Whenever any person shall be convicted of any

(*k*) This section was new in 1861. It extends every section of the Act not already so extended to persons in possession of the property injured, provided they intend to injure or to defraud any other person. It, therefore, brings tenants within the provisions of the Act, whenever they injure the demised premises or anything growing on or annexed to them, with intent to injure their landlords, and gets rid of the doubt entertained in Mills *v.* Collett, 6 Bing. 85, whether a tenant who maliciously cut down a tree on the demised premises was within the former Act.

(*l*) Framed from 14 & 15 Vict. c. 100, s. 8, and rendering it unnecessary to allege in an indictment for any offence against this Act, or to prove on the trial an intent to injure or defraud any particular person. It places the law on these points in the same position as in cases of forgery and false pretences. See R. *v.* Newboult, *post*, p. 1780.

(*m*) R. *v.* Grant, 4 F. & F. 322.

(*n*) Taken from 7 & 8 Geo. IV. c. 30, s. 28. Persons loitering at night and suspected of having committed or being about to commit any felony against the Act may be arrested by a constable (s. 57).

(*o*) Framed from 7 & 8 Geo. IV. c. 30, s. 43; 9 Geo. IV. c. 56, s. 55; 7 Will. IV. and 1 Vict. c. 89, s. 14, and 7 & 8 Vict. c. 2. *Vide ante*, Vol. i. p. 40.

indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year' (*p*).

By sect. 75, 'Whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped; *and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence*' (*q*).

The statute contains various regulations as to the summary proceedings by conviction before magistrates, which are authorised by its provisions for the punishment of minor offences. By sect. 67 a summary conviction is a bar to any other proceeding for the same cause.

(*p*) This was new law in 1861. *Vide ante*, Vol. i. p. 218.

(*q*) Sect. 77, as to costs, is repealed as to England by 8 Edw. VII. c. 15. *Vide post*, p. 2046.

CANADIAN NOTES.

MALICIOUS DAMAGE TO PROPERTY.

General Damage to Property.—See Code secs. 509 and 510.

CHAPTER THE FORTY-THIRD.

OF MALICIOUS DAMAGE TO BUILDINGS (*a*).

SECT. I.—ARSON AT COMMON LAW.

ARSON is a felony at common law; and has been described as *the malicious and voluntary burning the house of another* (*b*). For it is not arson at common law to burn one's own house; but burning one's own house in a town, or so near to other houses as to create danger to them, is a misdemeanor at common law (*c*). To burn barns, with corn or hay within them, though distant from a house, and no part of the mansion, is felony at common law (*d*).

Burning.—The burning necessary to constitute arson at common law, must be an *actual ignition* of the whole or some part of the house. Neither a bare intention, nor even an actual attempt to burn a house by putting fire into or towards it, will amount to the offence, if no part of it be burned; but it is not necessary that any part of the house should be *wholly* consumed, or that the fire should have any continuance; and the offence will be complete, though the fire is put out, or goes out of itself (*e*).

9 Geo. I. c. 22 (rep.), did not alter the nature of the crime, nor create any new offence, but only excluded the principal more clearly from his clergy (*f*). The words 'set fire to' in that statute did not, therefore, appear to admit of a larger construction than prevailed at common law (*g*).

So where an indictment for setting fire to a paper-mill, it appeared that the prisoner had set fire to a large quantity of paper, which was drying in a loft annexed, and belonging to the mill, but no part of the mill itself was consumed, the case was held not to be within the statute (*h*). Setting fire to a parcel of unthreshed wheat was held not to be felony within that statute (*i*).

Upon an indictment under 7 & 8 Geo. IV. c. 30, s. 2 (rep.) for setting fire to an outhouse, it appeared that the roof of the outhouse was made of pieces of wood with straw put upon them, and that smoke was seen to issue out of the bottom of the roof; there was a good deal

(*a*) As to damage to buildings by rioters, see *ante*, Vol. i. p. 418.

(*b*) 3 Co. Inst. 66. 1 Hale, 566. 1 Hawk. c. 39. 4 Bl. Com. 220. 2 East, P. C. 1015.

(*c*) 1 Hale, 568. 1 Hawk. c. 39, s. 15. 4 Bl. Com. 221. 2 East, P. C. 1027.

(*d*) 3 Co. Inst. 67. Barham's case, 4 Co. Rep. 20 a. Sum. 86. 1 Hawk. c. 39, s. 1. 4 Bl. Com. 221.

(*e*) 3 Co. Inst. 66. Dalt. 506. 1 Hale, 568, 569. 1 Hawk. c. 39, ss. 16, 17. 2 East, P. C. 1020.

(*f*) 1 Leach, 220. 2 East, P. C. 1026.

(*g*) 2 East, P. C. 1020.

(*h*) R. *v.* Taylor, 1 Leach, 49; 2 East, P. C. 1020. See 24 & 25 Vict. c. 99, s. 7, *post*, p. 1781.

(*i*) R. *v.* Judd, 2 T. R. 255.

of smoke in the straw; some handfuls of straw were pulled out, and there were sparks in the straw when on the ground, but no sparks were seen in the straw when on the roof; no flame was seen; a ball of linen was pulled out of the roof with the straw; smoke and sparks came from the ball; the ball was trodden out; the ball was burnt right through on one side; the fire on the roof was extinguished by throwing some water upon it. On the following day, two half matches were found in the straw on the ground, which was pulled from the roof, but there was no appearance of burning in these. On the same day, several handfuls of straw were taken out of the roof, and there was burnt straw in some of these handfuls; and on the same day, on examining the straw lying on the ground down by the building, there were some burnt ashes, and the ends of some of the straws were burnt, and the ends of some of them dropped off like a powder, and the ends of some of the straws had been reduced to ashes; no part of the wood, either in the pieces on which the straw was laid, or in the posts of the building, was burnt. Upon a case reserved upon the question whether this was a setting on fire, the judges held the conviction right (*k*).

So where, on an indictment, under 7 Will. IV. and 1 Vict. c. 89, s. 3 (rep.), for setting fire to a house, it appeared that the floor near the hearth had been scorched, and was charred in a trifling way, and had been at a red heat, but not at a blaze; it was held that this was a sufficient burning (*l*).

On an indictment for setting fire to a house, it appeared that a small faggot was found lighted and burning on the boarded floor of the kitchen; it was taken up and put in the grate; a part of the boards was scorched black, but not burnt; the faggot was nearly consumed; but no part of the wood of the floor was consumed. It was urged that as wood might be scorched without ever being actually on fire, there was not sufficient to constitute the offence. Cresswell, J., said: 'I have conferred with my brother Patteson, and he concurs with me in thinking that, as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn, and entirely consume, without blazing at all' (*m*).

Malice and Intention.—The burning must also be *malicious and wilful*; otherwise it is only a trespass. No negligence or mischance, therefore, will constitute arson (*n*), nor will burning under a *bonâ fide* claim of right (*o*). Hale gives as examples of the rule as to malice that it would not be arson if a man happened to set fire to a house by unlawfully shooting at poultry (*p*). It has been observed, that in such case it would seem to be understood that the party did not intend to steal the poultry,

(*k*) R. *v.* Stallion, 1 Mood. 398. See R. *v.* Salmon, R. & R. 26.

(*l*) R. *v.* Parker, 9 C. & P. 45, Parke, B., and Bosanquet, J.

(*m*) R. *v.* Russell, C. & M. 541, Cresswell, J.

(*n*) 3 Co. Inst. 67. 4 Bl. Com. 222.

(*o*) R. *v.* Twose, 14 Cox, 327, Lopes, J.

(*p*) 1 Hale, 39. He also suggests that a fire accidentally caused by an unqualified person shooting at game would not be arson (1 Hale, 169). Dalton, c. 105, p. 508, is of a contrary opinion.

but merely to commit a trespass; for otherwise, the first intent being felonious, the party must abide all the consequences (*s*).

This doctrine is not now fully accepted (*t*), and in R. *v.* Faulkner (*u*), it was held in Ireland that a sailor was not indictable for feloniously setting fire to a ship which he set on fire accidentally in stealing some rum.

If A. has a malicious intent to burn the house of B., and in setting fire to it burns the house of C. also, or if the house of B. escapes by some accident, and the fire takes in the house of C. and burns it, this is, in law, the malicious and wilful burning of the house of C., though A. did not intend to burn that house (*v*). And accordingly it has been said, that if one man commands another to burn the house of J. S., and he does so, and the fire thereof burns another house, the commander is accessory to the burning the other house (*w*). So if a person sets fire to a stack, the fire from which is likely to communicate to a barn, and it does so, and the barn is burnt, he is in point of law indictable for setting fire to the barn (*x*). And where the prisoners set fire to a summer-house in a wood, and some of the trees overhanging it, and their branches were burnt by the fire, which consumed the summer-house and also burnt some of the trees, it was held that the prisoners might be convicted under 7 & 8 Geo. IV. c. 30, s. 17 (rep.), of setting fire to the wood (*y*).

Malicious and wilful burning of the house of another may be committed by means of setting fire to the party's own house; even though the primary intention of the party was only to burn his own house. If in fact other houses were burnt being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequences immediately and necessarily following from the original act done, the offence will be felony (*z*). Thus where the defendant was indicted for a misdemeanor, in burning a house in his own occupation, such house being alleged to be contiguous and adjoining to certain dwelling-houses of divers liege subjects, &c.; it appeared that the defendant set fire to his own house, in order to defraud an insurance office, and that in consequence several houses of other persons, adjoining to his own, were burnt down; Buller, J., said that if other persons' houses were in fact burnt, although the defendant

(*s*) 2 East, P. C. 1019.

(*t*) *Vide ante*, Vol. i. p. 757.

(*u*) 13 Cox, 550, *post*, p. 1795.

(*v*) 1 Hale, 569. 3 Co. Inst. 67. 1 Hawk. c. 39, s. 19; 2 East, P. C. 1019. And the indictment may charge it accordingly.

(*w*) Plowd. 475. 2 East, P. C. 1019.

(*x*) R. *v.* Cooper, 5 C. & P. 535, Parke, J. Tindal, C.J., in his charge to the Bristol grand jury, 1832, said, 'Nor will it be necessary to prove that the house, the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence if he is shewn to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief which he committed was wider in its consequences than he originally intended.' 'The Bristol Riots,' 3 St. Tr. (N. S.) 1, 8, 5 C. & P. 266 (*n*). See Curtis *v.* Hundred of Godley, 3 B. & C. 248. But in R. *v.* Turner, 1 Lew. 9, it is said that Parke, J., left it to the jury whether the prisoner intended by setting fire to a stack of haulm to set fire to a building close adjoining, and that the judges were of opinion this direction was right. In 1 Mood. 239, this point is not noticed, and it is at variance with all the other authorities.

(*y*) R. *v.* Price, 9 C. & P. 729, Gurney, B. The summer-house in this case was not a building the burning whereof was then a felony.

(*z*) 2 East, P. C. 1031.

might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony (the misdemeanor being merged) and could not be convicted on this indictment; and, therefore, directed an acquittal (*a*). And in a similar case, Grose, J., said, that if it had so happened that neighbouring houses had been set on fire in consequence of the defendant's wilful and malicious act in setting fire to his own house (which was proved to have been done in order to cheat the insurance office), it would clearly have amounted to a felony (*b*).

Ownership of the House.—In accordance with the common law definition of arson in burning the house of another it was held not to be a felony in a party to burn a house, whereof he was in possession under a lease for years (*c*).

In a case before the Married Women's Property Act, 1883 (46 & 47 Vict. c. 75), it was held that a married woman was not guilty of felony by setting fire to her husband's house, the judges thinking that, to constitute the offence, it was essential that there should be an intent to injure or defraud some third person, not one identified with herself (*d*).

But if a landlord, or reversioner, set fire to his own house which was in the possession of another, under a lease from himself, or from those whose estate he had, it was accounted arson; for, during the lease, the house was the property of the tenant (*e*). A widow entitled to dower, but not having it assigned, from a house, the equity of redemption of which had descended from her husband to his eldest son, for whose benefit she had let it and received the rent, was held guilty of arson, by burning it while in the possession of her tenant (*f*).

Mere residence in a house, without any interest therein, would not prevent it from being considered as the house of *another* (*g*).

House.—The word *house*, for the purposes of the common law definition, extended not only to the dwelling-house, but to all outhouses, which were *parcel* thereof, though not adjoining thereto, or under the same roof (*h*). It appears that the indictment need not have charged the burning to be of a *mansion* house, but only of a *house* (*i*).

Sect. II.—Setting Fire to Buildings and Goods therein.

Churches, &c.—By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 1 (*j*), 'Whosoever shall unlawfully and maliciously set

(*a*) R. *v.* Isaac, 2 East, P. C. 1031, Buller, J. See now 14 & 15 Vict. c. 100, s. 12, *post*, p. 1965.

(*b*) R. *v.* Proberts, 2 East, P. C. 1030.

(*c*) Holmes's case, Cro. Car. 376: W. Jones, 351. R. *v.* Spalding, 1 Leach, 218; 2 East, P. C. 1025. R. *v.* Breeme, 1 Leach, 220; 2 East, P. C. 1026. See s. 59 of 24 & 25 Vict. c. 97, *ante*, p. 1772, and R. *v.* Newboult, L. R. 1 C. C. R. 344, *post*, p. 1780.

(*d*) R. *v.* March, 1 Mood. 182, decided on 7 & 8 Geo. IV. c. 30, s. 2, which contained the words, 'whether the same or any of them respectively shall then be in the possession of the offender,' which are also found in 24 & 25 Vict. c. 97, s. 3; but see s. 59, *ante*, p. 1772.

(*e*) Fost. 115. 4 Bl. Com. 221.

(*f*) R. *v.* Harris, Fost. 113. 2 East, P. C. 1023.

(*g*) R. *v.* Gowen, 2 East, P. C. 1027. R. *v.* Rickman, ibid. 1034.

(*h*) 3 Co. Inst. 67. 1 Hale, 570. 1 Hawk. c. 39, s. 1. Sum. 86. 4 Bl. Com. 221. 2 East, P. C. 1020.

(*i*) 3 Co. Inst. 67. Sum. 86. 1 Hawk. c. 39, s. 1. 1 Hale, 567.

(*j*) Taken from 7 Will. IV. and 1 Vict. c. 89, s. 3, and 9 & 10 Vict. c. 25, s. 9.

The words 'church, chapel, meeting-house, or other place of divine worship,' are taken from 9 Geo. IV. c. 55, s. 10 (I.), and thus the terms of this section are made the same as those in s. 11, and in s. 50

fire to (*k*) any church, chapel, meeting-house, or other place of divine worship shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping (*l*).'

Dwelling-house, any person being therein.—Sect. 2 (*m*), 'Whosoever shall unlawfully and maliciously set fire to (*k*) any dwelling-house, any person being therein (*n*), shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of 16 years with or without whipping' (*l*).

The prisoner set fire to an outhouse adjoining to and under the same roof, but not communicating with a dwelling-house, and the fire spread to the house, which was burnt (*o*). When the prisoner set fire to the outhouse M. T. was in the dwelling-house, but before the fire extended to the house she had left it. Patteson, J., said: 'Although there can be no doubt that setting fire to an outhouse, which afterwards extends to an adjoining dwelling-house, is setting fire to the dwelling-house, yet unless some person is in the dwelling-house at the moment the fire reaches it, the capital part of the charge cannot be sustained. And as there is no allegation in this indictment that the object of the prisoner was to defraud or injure any one, she cannot be found guilty of the minor offence under s. 3' (*p*). So where a prisoner was indicted for setting fire to a house, certain persons being therein, and it appeared that there was a stable immediately adjoining the house, and that the family, being alarmed by the cry of fire, rushed into the yard, and the stable was then in flames, and these flames communicated to the house, but the evidence was not precise as to the time when the house took fire, Alderson, B., directed the jury to find whether the house took fire before the family got in the yard or after. If they were of opinion

of the Larceny Act, 1861, as to breaking into and stealing in churches, &c. The words in 7 Will. IV. and 1 Vict. c. 89, s. 3, were 'church or chapel, or chapel for the religious worship of persons dissenting from the United Church of England and Ireland.' 7 & 8 Geo. IV. c. 30, s. 8, had these words also, with the addition of 'duly registered or recorded.'

(*k*) See pp. 1775 *et seq.*

(*l*) The omitted words were repealed (S. L. R.) 1892 and (No. 2) 1893. As to other punishments, see Vol. i. p. 211, 212.

(*m*) Taken from 7 Will. IV. and 1 Vict. c. 89, s. 2. This offence was previously capital.

(*n*) This section is silent about the intent with which the act is done. In R. *v.* Jeans, Gloucester Spr. Ass. 1842, M. S. S., C. S. G., the prisoner was convicted under this section before Cresswell, J., although there was no evidence to shew that he knew that any person was in the house at the time when he set fire to it. In R. *v.* Pardoe, 17 Cox, 715, Coleridge, C.J., held that a charge under this section could be supported, though the 'person therein' was the prisoner himself. In R. *v.* Paice, 1 C. & K. 73, the indictment (on 7 Will. IV. and 1 Vict. c. 89, s. 2, rep.) alleged that the prisoner set fire to the dwelling-house of J. S., the said J. S. and his wife then being therein. The evidence failed to shew that either J. S. or his wife were in the house at the time of the fire; and Wightman, J., held that as there was no such proof, the case could not be sustained on s. 2, and as there was no allegation of an intent to defraud or injure any person, the case could not be sustained on the third section.

(*o*) The indictment was under 7 Will. IV. and 1 Vict. c. 89, s. 2 (rep.), which corresponded to 24 & 25 Vict. c. 97, s. 2, *supra*.

(*p*) R. *v.* Fletcher, 2 C. & K. 215. As the outhouse was under the same roof as the house, it would seem that for the purpose of arson it was parcel of the dwelling-house. C. S. G.

that it was after the family was in the yard, he thought they ought to acquit the prisoner of the capital part of the charge, as to sustain that, in his opinion, it was necessary that the parties named in the indictment should be in the house at the very time the fire was communicated to it (*q*).

Houses, &c., with intent to Injure or Defraud.—By sect. 3, 'Whosoever shall unlawfully and maliciously set fire to any house (*r*), stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed, or fold, or to any farm-building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person (*s*) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*t*).

Two prisoners were indicted under this section for maliciously and feloniously setting fire to a shop 'of and belonging to' one of the prisoners. Upon a case reserved it was held that the averment of property in the prisoner was an immaterial averment under the statute and need not be proved and that the intent to injure another person as owner might be proved in support of the indictment (*u*).

Railway Stations, &c.—Sect. 4. 'Whosoever shall unlawfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, *port*, dock, *or harbour, or to any* canal or other navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . (*v*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*w*).

Public Buildings.—Sect. 5. 'Whosoever shall unlawfully and maliciously set fire to any building (*r*) other than such as are in this Act before mentioned, belonging to the [King], or to any county, riding, division, city, borough, poor-law union, parish, or place, or belonging

(*q*) R. *v.* Warren, 1 Cox, 68. The jury acquitted, or the point would have been reserved. See R. *v.* Serne, 16 Cox, 311, as to death resulting from a dwelling-house being set on fire.

(*r*) The cases as to the meaning of the words in this section are referred to *post*, p. 1783.

(*s*) These words are peculiar to this section. Where the intent alleged is to defraud an insurance office, notice to produce the policy must be given, and the insurance company cannot otherwise give evidence from their books. R. *v.* Doran, 1 Esp. 126. R. *v.* Kitson, Dears. 187; 22 L. J. M. C. 118. But in R. *v.* Newboult, *infra*, a notice to produce a policy of insurance effected by the prisoner was served on the prisoner too late to be complied with and was held therefore to be insufficient, but Pigott, B., admitted evidence from the insurance company to prove that the prisoner came to the insurance office and said he wished to 'renew' his policy. The Court, on a case reserved, overruled the objection that there was no sufficient evidence of the existence of a policy to support the finding of the jury of an intent to defraud the insurance company.

(*t*) Framed from 7 Will. IV. and 1 Vict. c. 89, s. 3; 7 & 8 Vict. c. 62, s. 1; and 9 & 10 Vict. c. 25, s. 9. R. *v.* Child, *post*, p. 1781.

(*u*) R. *v.* Newboult, L. R. 1 C. C. R. 344; 41 L. J. M. C. 63.

(*v*) The omitted words were repealed in 1892 (S. L. R.). For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*w*) Taken from 14 & 15 Vict. c. 19, s. 8, and extended to buildings belonging to ports and harbours.

to any university or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony, and being convicted thereof shall be liable,' as in s. 4 (*x*).

Other Buildings.—Sect. 6. 'Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this Act before mentioned shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court (*y*) to be kept in penal servitude for any term not exceeding fourteen years . . . (*y*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*z*).

Goods in Buildings.—Sect. 7. 'Whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, *under such circumstances* (*a*) *that if the building were thereby set fire to the offence would amount to felony*, shall be guilty of felony, and being convicted thereof shall be liable,' as in s. 6 (*b*).

In R. *v.* Child (*c*) the prisoner was indicted for unlawfully, maliciously, and feloniously setting fire to divers goods and chattels, the property of G.; (1) then and there being in a dwelling-house, with intent thereby to injure; (2) under such circumstances that if the building had been thereby set fire to, the offence would have amounted to felony. It appeared that the prisoner, from ill will and malice against the prosecutrix, a lodger in the house, broke up her furniture, made a pile of it and her clothes on the stone floor of her kitchen, and lit the pile so as to make a bonfire. The house would almost certainly have been burned had not the police succeeded in extinguishing the bonfire before the house was actually ignited. Blackburn, J., at the trial, held that section 7 did not make it felony maliciously to set fire to goods in a

(*x*) This section was new in 1861. Before that date there was no statute applicable to the burning of any public building, however important, unless it could be held to fall within the term 'house.' See R. *v.* Donnavan, 1 Leach, 69, *post*, p. 1783.

(*y*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted words were repealed in 1892 (S. L. R.).

(*z*) This section was new in 1861. It will include every building not falling within any of the previous sections of the Act. It will include ornamental buildings in parks and pleasure-grounds, hot-houses, pineries, and all those buildings which, not being within the curtilage of a dwelling-house, and not falling within any term previously mentioned, were unprotected before this Act passed.

The term 'building' is no doubt very indefinite, but it was used in 9 & 10 Vict. c. 25, s. 2; and it was thought much better to adopt this term, and leave it to be interpreted as each case might arise, than to attempt to define it; as any such attempt would probably have failed in producing any expression more certain than the term 'building' itself. See R. *v.* Manning, *post*, p. 1785.

(*a*) It is not necessary in an indictment under this section to set out the particular circumstances relied on as constituting the offence, nor is it necessary to allege an intent to defraud. R. *v.* Heseltine, 12 Cox, 404, Pollock, B.

(*b*) Framed from 7 & 8 Vict. c. 62, s. 2, and 14 & 15 Vict. c. 19, s. 8, but extended to every kind of building previously mentioned in this Act. 14 & 15 Vict. c. 19, s. 8, ran as follows: 'If any person shall wilfully and maliciously set fire to any goods or chattels being in any building, to setting fire to which is made felony by this or any other Act of Parliament, every such offender shall be guilty of felony.' The present section was framed with the object of getting rid of the doubts expressed in R. *v.* Lyons, Bell, 38; 28 L. J. M. C. 33. But the section of the former Act seems to be wider in its scope than the present section. See R. *v.* Child, L. R. 1 C. C. R. 307, 310, Blackburn, J.

(*c*) L. R. 1 C. C. R. 307; 40 L. J. M. C. 127. See R. *v.* Lyons, *ubi supra*, decided on 14 & 15 Vict. c. 19, s. 8 (rep.).

dwelling-house, *per se*, and that therefore the first count, though it was proved, was not good in law. As to the second count, he told the jury that, if the dwelling-house in which the goods were had caught fire from the burning goods, the question whether the offence would have amounted to felony depended upon the question whether such a setting fire to the dwelling house would have been malicious and with intent to injure so as to bring the case within section 3 (*supra*), and that if the jury thought that the prisoner was aware that what he was doing would probably set the building on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that if the building had caught fire from the setting fire to the goods, the offence would have been felony. The jury found that the prisoner was guilty, 'but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious'; and upon a case reserved it was held that the conviction could not be sustained. Bovill, C.J., said: 'By that finding (of the jury) I think they negatived the whole of what the learned judge left to them, and found in effect that the prisoner was not aware that what he was doing would probably set fire to the house, and so injure the owner, and was not reckless whether it did so or not. The only finding of the jury, therefore, is that the goods were set on fire with intent to injure the owner of the goods. Now there is no section in the Act which makes the wilful and malicious setting fire to goods felony. The only section which could be applicable to the case is section 7, and if we were to hold the case to be within that section we should be rejecting the words "under such circumstances that if the building were thereby set fire to the offence would amount to felony." I think that to come within those words, the facts must have some relation to the house, and that they point to circumstances under which, if the house caught fire, the offence would fall within some of the earlier sections of the Act.'

If a person maliciously, with intent to injure another by merely burning his goods, sets fire to such goods in his house, that does not amount to a felony under this section, even although the house catch fire, unless the circumstances shew that the person setting fire to the goods knew that by so doing he would probably cause the house to catch fire, and was reckless whether it did so or not; in which case there would be abundant evidence that he intended to bring about the probable consequence of his Act, namely the burning of the house (*d*).

Wilfully throwing a light into a post-office letter box in a house with the intention of burning the letters but not the house is not a felony within this or the following section (*e*).

(*d*) R. *v.* Nattrass, 15 Cox 73. Hawkins, J. So where the prisoner was indicted for setting fire (1) to a dwelling-house and (2) to a picture frame in a house under such circumstances that if the house were thereby set fire to the offence would amount to felony, and the jury found that the prisoner did not set fire to the house apart from the frame, that he did set fire to the frame, that the probable result would be setting fire to the floor and that he did not intend to set fire to the house and that he was not aware that what he did would probably set fire to the house and so injure the owner thereof and that he was not reckless and indifferent whether the house was set fire to or not, Hawkins, J., directed a verdict of not guilty. R. *v.* Harris, 15 Cox 75.

(*e*) R. *v.* Batstone, 10 Cox 20, Williams, J.

Sect. 8. 'Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any building or any matter or thing in the last preceding section mentioned, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen . . . years—or to be imprisoned (*f*) . . . and, if a male under the age of sixteen years, with or without whipping' (*g*).

House.—It is to be observed that in section 2 'dwelling house' and section 3 'house' is mentioned. Under former acts a question arose whether a gaol could be considered as a house or dwelling house (*h*). It is clearly a public building under section 5, *supra*, p. 1780.

There is no statutory provision as to what constitutes a house in the case of arson (*i*).

In R. *v.* Allison (*j*), where the house burned was one of a number of houses mortgaged by the prisoner to W. and T., and had been taken possession of on behalf of the mortgagees, but when burnt was locked up and uninhabited; Maule, J., held it not to be a dwelling house.

In R. *v.* Kimbrey (*k*), B. resided in a cottage as tenant to W. at a rent paid quarterly. In order that the cottage might be repaired by the landlord B. removed his furniture. The house was burnt before he returned. Crompton, J., held that it was the dwelling house of B.

In R. *v.* England (*l*), upon an indictment for setting fire to a house, it appeared that a small building had been erected at the prosecutor's for his workpeople at the kiln to eat their meals in and dry their clothes. This building was seven feet high, and had four walls of stones without mortar, the roof consisting of broom, turf, straw, and being supported by two pieces of timber; the door had neither lock nor bolt, and there was no window in the building, which had not been erected as a habitation; and none of the prosecutor's men had ever slept there. One W. had been sleeping in the building without the prosecutor's consent, but he was aware of his having done so for three weeks previous to the fire, he working on the roads, and having no cottage of his own. The building was called a shed, an outhouse, and cabin, and was erected for the use of the lime works. Tindal, C.J., said: 'This place, not having been built for the habitation of man, and the person who slept there

(*f*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The words omitted were repealed in 1892 (S. L. R.).

(*g*) Taken from 9 & 10 Vict. c. 25, s. 7. The words 'or any other matter or thing in the last preceding section mentioned.' were introduced by the Committee of the Lords in order to refer to the words 'any hay, straw, wood, or other vegetable produce, coal, turf, or other matter or thing,' which were then in the preceding section; but the Select Committee of the Commons struck out all those words except 'matter or thing.' The words of reference in this section must, therefore, now be read 'any matter or thing in, against, or under any building.' See R. *v.* Batstone, *ante*, p. 1783.

(*h*) R. *v.* Donnavan, 1 Leach 69; 2 East, P. C. 1020; 2 W. Bl. 682. 2 Stark. Cr. Pl. 444, where Liverpool prison was held the house of the corporation of L. 9 Geo. I. c. 22 (*rep.*) R. *v.* Connor, 2 Cox, 65, when Parke, B., doubted whether the gaol of a liberty then used only as a lock-up could be described as a house at all.

(*i*) See R. *v.* Macdonald, 2 Lew. 46, Alderson B. As to burglary, see 24 & 25 Vict. c. 95, s. 53, *ante*, p. 1076.

(*j*) 1 Cox, 24.

(*k*) 6 Cox, 464.

(*l*) 1 C. & K. 533.

doing so without the leave of the owner, I think that it was not a house within the statute, although a cottage, however mean and wretched, used as the habitation of man, would be protected by its enactments.'

The first count of an indictment for arson, for setting fire to a cellar, described it as the dwelling-house of a constable; the second count described it as an outhouse, parcel of a cottage. Under a cottage was a cellar, which was hired by the constable of B. as a lock-up house. The cellar and cottage were independent of each other in all respects. The cellar was six or seven feet below the surface of the ground. Hullock, B., ruled that it was neither a house nor an outhouse, and therefore improperly described in both counts (*m*).

On an action against a hundred to recover for the malicious burning of a house, outhouse, or barn (*n*) Bayley, J., in delivering the judgment of the Court, after time taken to consider, said 'the question is whether the building which was set fire to comes within the description of a house, outhouse, or barn. It appeared to have been built for the purpose of being used as a dwelling house, but it was in an unfinished state, and never was inhabited. It was conceded in argument, that it was not a house within the meaning of 9 Geo. I., c. 22 (rep.). It has been decided that that statute does not alter the nature of the crime, or make any new offence, but merely excludes the principal from clergy more clearly than he was before. There cannot be any doubt that the building, in this case, was not a house, in respect of which burglary or arson could be committed. It was a house intended for residence, but it was not inhabited. It was not, therefore, a dwelling house, though it was intended to be one. It was not an outhouse, because it was not parcel of a dwelling house. But it was contended that it was a barn, because it had been used for those purposes for which a barn is used. The building had three stories, chimneys, a staircase, and windows. The plaintiff had deposited in it a quantity of straw and agricultural implements. On consideration, we are of opinion that this building was not a barn within the meaning of that word as it is used in this statute. It was a house applied to those purposes to which a barn might be applied. 9 Geo. I. c. 22 (rep.), though remedial in some respects, is in others capitally penal. The hundred are liable to make satisfaction to the party injured by the burning of a house, outhouse, or barn, provided a capital offence be committed against that statute by such burning. The statute, therefore, with reference to a case like the present, must be construed strictly; and, so construing it, we are of opinion that the building consumed by fire in this case was not a house, outhouse, or barn within the meaning of this Act of Parliament, and in this opinion Lord Tenterden, with whom we have conferred upon this case, concurs' (*o*).

In R. *v.* Edgell (*p*) the prisoners were charged in one set of counts with setting fire to a house, and in another set it was described as a

(*m*) Anon. 1 Lew. 8.

(*n*) Under 9 Geo. I. c. 22, s. 7 (rep.).

(*o*) Elsmore *v.* Hundred of St. Briavels, 8 B. & C. 461. See also Hiles *v.* Hundred of Shrewsbury, 3 East, 457.

(*p*) 11 Cox 132, Lush, J. The prisoners were acquitted, otherwise the question as to whether the structure was a 'building' would have been reserved.

building. The prisoners had made a fire in several places on the floor of an unfinished building, which was intended to be used, when finished, as a dwelling-house. Lush, J., held this building was not a house within 24 & 25 Vict. c. 97, s. 3.

But in R. v. Manning (*q*) it was held, on a case reserved, that an unfinished house, brick built, of which all the walls external and internal were built and finished, the roof on and finished, the flooring of a considerable part laid, and the internal walls and ceilings prepared for plastering, was a building within the meaning of 24 & 25 Vict. c. 97, s. 6. Kelly, C.B. said, 'I think therefore the ruling of the learned judge and the finding of the jury were right; this was a building fairly and substantially within the Act of Parliament. I say nothing as to what extent of partial completion in an unfinished building may be necessary to bring it within the section. I do not say that two or three yards of wall would be a building. But where a house is in the state in which this was, I think it is within the Act.' Piggott, C.B. said, 'This was not, I think, a house, but it was a building.' And Hannen, J., 'It is very likely that a house can only mean a structure designed and sufficiently advanced for the habitation of man. But I think the structure in the present case was a building other than a house and therefore within sect. 6.'

Outhouse.—Setting fire to an 'outhouse' is within the express words of sect. 3, and may in certain cases fall within sect. 2, if the outhouse can be treated as part of a dwelling-house. An outhouse is 'something annexed to an "inhouse"' (*r*). On indictments under former Acts the following buildings have been held to have been properly described as 'outhouses' (*s*):—

A. A stable with a chamber over it occupied by the prosecutor, who kept a public-house and also carried on business as a flax dresser. The chamber was used as a shop for keeping and dressing flax. The buildings were situate in a yard at the back of the public-house, four or five yards distant from it, the yard being enclosed on all sides: on one part by the house, on another by a wall, on a third by a railing, on the fourth by a field (*t*).

B. A schoolroom, situated very near to the house in which R. lived, and separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school, with a garden and other premises, together with a court which surrounded the whole, were rented by R. of the parish at a yearly rent. There was a continued fence round all the premises, and nobody but R. and his family had a right to come within it (*u*).

C. A pigsty, thatched at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor;

(*q*) L. R. 1 C. C. R. 338: 41 L. J. M. C. 11.

(*r*) R. *v.* North, 2 East, P. C. 1021. The judges considered that the building might be described correctly either as a outhouse or as part of the dwelling-house.

(*s*) It seems enough to describe them as outhouses without specifying their denomination. R. *v.* Glandfield, 2 East, P. C. 1033.

(*t*) R. *v.* Hammond, 1 Cox 60, Alderson, B.

(*u*) R. *v.* Winter, R. & R. 295. It was also held that it might be correctly described as 'part of the dwelling-house.'

the back of the pigsty forming part of the fence between the prosecutor's and the adjoining property (*v*).

D. A building in the prosecutor's farm-yard, three or four poles from his dwelling-house, and visible from the house. The prosecutor used it to keep a cart in, which he used in his business of poulterer, and also to keep his cows in at night. There was a barn adjoining the dwelling-house, then a gateway, and then another range of buildings which did not adjoin the dwelling-house or barn; the first of which from the dwelling-house was a pigsty, and adjoining that was another pigsty, and adjoining that was a turkey-house, and adjoining the turkey-house was the building in question. The dwelling-house and barn formed one side of the farm-yard, and the three other sides were formed by a fence enclosing these buildings. The building was formed by six upright posts, nearly seven feet high—three in the front and three at the back—one post being at each corner, and the other two in the middle of the front and back, these posts supporting the roof; there were pieces of wood laid from one side to the other. Straw was put upon these pieces of wood, laid wide at the bottom, and drawn up to a ridge at the top; the straw was packed up as close as it could be packed; the pieces of wood and straw made the roof. The front of the building to the farm-yard was entirely open between the posts; one side of the building adjoined the turkey-house, which covered that side all the way up to the roof, and that side was nailed to the turkey-house. The back adjoined a field, and was a rail-fence, the rails being six inches wide; these came four or five feet from the ground, within two feet of the roof, and this back formed part of the fence before mentioned. The side opposite the turkey-shed adjoined the road, and was a pale fence, but not quite up to the top. One of the witnesses for the prosecution, a considerable farmer, said that he should call the building in question an outhouse. The only part burnt was some of the straw on the roof (*w*).

But buildings or structures wholly unconnected with a dwelling-house do not fall within the term 'outhouse.' The following buildings have been held not to be correctly described as outhouses:—

A. A kind of cart-hovel, consisting of a stubble roof, supported by uprights, and situate by itself in a field, some distance from any other buildings (*x*).

B. A place formerly used as an oven to bake bricks. The prosecutor had made a doorway (with a door) into it, and had put boards and turf over the vent-hole at the top. Two poles had been fixed across it at about half its height, on which boards had been laid so as to make a loft floor. In this place the prosecutor kept a

(*v*) R. *v.* Jones, 2 Mood. 308. R. *v.* Janes, 1 C. & K. 303.

(*w*) R. *v.* Stallion, 1 Mood 398, Tindal, C.J., dissented. The building might equally well have been described as a building used in carrying on the prosecutor's trade.

(*x*) R. *v.* Parrott, 6 C. & P. 402, Vaughan, B. See R. *v.* Woodward, 1 Mood. 323. R. *v.* Newill, ibid. 458, where questions arose but were not decided whether certain buildings were outhouses.

cow; and adjoining to it, but not under the same roof, was a lean-to, in which one Cope kept a horse; but this latter building was not injured by the fire. The building was about a hundred yards from any dwelling-house, and the owner of the nearest dwelling-house had no interest in it, and no dwelling-house or farm-yard of the prosecutor was near it, and there was no wall to connect it with any dwelling-house (*y*).

C. A building standing in an enclosed field (a furlong from the dwelling-house, and not in sight thereof), and usually described as the cowstalls. It had originally been divided into stalls capable of holding eight beasts, and partly open and partly thatched; afterwards it was boarded all round, the stalls taken away, and an opening left for cattle which might be in the field, to go in and out of their own accord. There were no windows or door, and the opening was sixteen feet wide, so that even a waggon might be drawn through it under cover. The back part of the roof was supported by posts, to which the side boards were nailed: part of the building was boarded internally and locked up (*z*).

Shed.—The following building has been held to fall within the word 'shed' (*a*) in 7 & 8 Vict. c. 62, s. 1 (rep.):—The building standing on premises belonging to a gentleman possessing a considerable freehold, who employed his capital in building houses thereon, of which from twenty to thirty were in the course of erection, himself providing the materials and superintending the work, which was performed by persons sometimes under

(*y*) R. *v.* Haughton [1833], 5 C. & P. 555, Taunton, J. 'This case is entitled to the more weight, as the opinion of the learned judge was not formed with reference to this case alone, but the same question had before been raised and discussed before him in R. *v.* Williams, Gloucester Lent Ass. 1832. In that case the prisoner was indicted for setting fire to a building, which was in one count described as a barn, and in another as an outhouse, and it appeared that there was a barn, which had a sloping roof extending continuously over the barn, and a cow-house adjoining to the barn, the rafters of the roof running the whole length over both buildings; and there was a wall betwen them, and in this wall there was a square aperture for the purpose of admitting air to the cattle; there was no internal communication between the barn and the cow-house; a part of the roof over the cow-house was burnt, but no part of the barn. The buildings were in a field, and at a distance from any house. It was objected, first, that the building burnt was not a barn—it was merely a cow-house, and the use of it as such determined what the building was. Secondly, it was not an outhouse because it was neither within the curtilage, nor had any connection with any dwelling-house; after hearing the points argued, Taunton, J., consulted Littledale, J., and then said, "It is desirable that there should be a better understanding of the term 'outhouse,' and therefore I will reserve the point. I have a very decided opinion myself on both points, which, however, I will not state." The prisoner was acquitted. The case of R. *v.* Ellison (*infra*) came before the judges between this case and R. *v.* Haughton, and, either by that case or by some other means, the learned judge had come to so decided an opinion as to the meaning of the word "outhouse," that he did not reserve the point.' C. S. G.

(*z*) R. *v.* Ellison, 1 Mood. 336, by seven judges against six.

(*a*) The word 'shed' is generally supposed to be derived from the Anglo-Saxon 'scead,' a 'shelter' or 'shade.' The following note appeared in former editions of this work, 'It seems originally to have been a building covered with sheaves. The term is commonly applied to buildings for cattle, *e.g.* cowshed, sheepshed; and Sheepshed in the Forest of Charnwood was anciently spelled Sheepsheved. Potter's "Charnwood Forest," p. 174. And in a note Potter says, "It is remarkable that the most frequent mode of spelling Swineshed (Lincoln) was Swinesheved in old writings; and there can be little doubt that 'shed' is an abbreviation of sheved (sheaved), that is, thatched." SeeYerburgh's "History of Sleaford."' The ending 'heved' is more probably 'head.'

contracts with him, and sometimes directly employed by him, but always with his own materials. His object was to let the premises, or sell and convey them as he could find purchasers. The building had been erected some years before for the convenience of the works. It was twenty-four or twenty-five feet square, its sides of wood, with glass windows, its roof slated, and was commonly called the 'workshop.' It was used as a store-house for seasoned timber, as a place of deposit for tools, and a place where timber was worked up into proper forms and prepared for use. At the time of the fire this building contained timber prepared for use (*b*).

Stables, &c.—One count charged the prisoner with attempting to set fire to 'a building then and there used for the purpose of carrying on the trade of a builder'; another a 'shed'; and others 'a stable,' 'outhouse,' and a 'stack of haulm' respectively. Combustibles were found partly consumed on some haulm, which had been carted from a field into the building, and there stacked under cover. The building itself was originally intended for and used as a stable, but had latterly been divided into three parts by a wall, which only reached up to the eaves; one of these divisions was still used as a stable, and that in which the combustibles were placed was at the other end of the building, and at the time in question contained, besides the haulm, a quantity of tiles, stored for the use of the prosecutor, who was a builder, and stated that he had, not long before, mixed some mortar in it for building purposes, and had been accustomed, from time to time, to keep timber and sand in it. Coleridge, J., held that this building was neither an outhouse, shed, or stable, but was of opinion that it was a building used for the purpose of carrying on the trade of a builder (*c*).

On an indictment for setting fire to a building described in one count as a stable, in another as an outhouse, the evidence was that the building stood in a field, and originally consisted of a stable and cow-house, which were under the same roof, but divided from one another by a partition that ran up to the slant of the roof. The stable had originally been provided with a rack and manger, but not with stalls. About three or four years previously the prosecutor used to keep young horses in the field, and drive them into the stable at night. Since that time it had been used to put hay or straw in. Two calves had been put there to fatten a few months earlier, and the rack had been removed. Alderson, B., held that the building clearly was not an outhouse, for an outhouse meant something annexed to an inhouse, and that whether it was a stable was a question for the jury. If it ever was a stable it was still a stable. The rack was not taken away with the intention of never replacing it. The question was whether it was what the jury, as a matter of plain understanding, and common sense, understood to be a stable (*d*).

Upon an indictment for setting fire to a stable the evidence was that the building was built for and had been used as a stable, but for eight or ten years had been allowed to fall into decay; the manger and racks had been removed, and the roof had partly fallen in, and the building was used

(*b*) R. *v.* Amos, 2 Den. 65; 20 L. J. M. C. 103. There were also counts describing the building as 'a warehouse,' 'an office,' and 'a shop'; but no opinion was expressed as to these. Stuart *v.* Sloper, 4 Ex. 700, was referred to as to the prosecutor being a builder.

(*c*) R. *v.* Munson, 2 Cox, 186, Coleridge, J.

(*d*) R. *v.* Hammond. 1 Cox, 60.

as a shed only. Cresswell, J., said the building in its present state could not be considered a stable. The description in the indictment must be made out by evidence of its present state, whereas now it was merely a shed (*e*).

Indictment.—In an indictment for arson at common law it was necessary to lay the offence to have been done *wilfully* and *maliciously*; and though the words 'wilful and malicious' did not occur in 9 Geo. I. c. 22 (rep.), yet they seem to have been considered as necessary in an indictment upon that statute (*f*).

In indictments under the Act of 1861, in order to warrant the statutory punishment, the words of the relevant enactment should be followed. Where the word 'unlawfully' was omitted in a count for felony under 7 & 8 Geo. IV. c. 30 (rep.), the indictment was held bad (*g*). The word 'unlawfully' occurs in all the sections dealt with in this chapter.

The house, &c., may be described as that of the person in actual possession, whether legally or not (*h*), but the terms of sect. 3 make the fact that the prisoner was in possession immaterial as a defence under that section (*i*).

Evidence.—Where the prisoners were charged with setting fire to a house, the proof adduced of their having been present in the house, and implicated in the fact, was that a bed and blankets, which had been taken out of the house at the time it was fired, and concealed by them from that time, were afterwards found in their possession. Buller, J., doubted at first whether such evidence of another felony could be admitted in support of this charge, but as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, he admitted the evidence (*j*).

A female servant of the prosecutor was indicted for setting fire to his stable. The fire was discovered at an early hour in the morning in the stable, which was not far from the kitchen, where it was the duty of the prisoner to be. In order to prove that it must have originated in the wilful act of some one connected with the house, it was proposed to prove that on two former recent occasions attempts had been made by some one from within the house to fire the warehouse and the shop of the prosecutor, though there was no evidence to shew that the prisoner or any other person was implicated in these attempts. Pollock, C.B., held that this evidence was clearly admissible, and might be used at all events for the purpose of shewing that the present fire could not have been the result of accident (*k*).

One indictment charged the prisoner with setting fire to a rick of one W., another a rick of one A., and a third a rick of one T. On the evening before the fires, which were all in the same night, the prisoner

(*e*) R. *v.* Colley, 2 M. & Rob. 475, Cresswell, J.

(*f*) R. *v.* Minton, 2 East, P. C. 1033.

(*g*) R. *v.* Turner, 1 Mood. 239; 1 Lew. 9, a case reserved by Parke, J. See 2 Hawk. c. 25, s. 96.

(*h*) R. *v.* Wallis, 1 Mood. 344. See R. *v.* Ball, 1 Mood. 30. R. *v.* Glandfield, 2 East, P. C. 1034. R. *v.* Rickman, 2 East, P. C. 1034. These cases are now of little practical value.

(*i*) See R. *v.* Newboult, L. R. 1 C. C. R. 344, *ante*, p. 1780.

(*j*) R. *v.* Rickman, 2 East, P. C. 1034.

(*k*) R. *v.* Bailey, 2 Cox, 311. Pollock, C.B., cited Captain Donellan's case, where it was proved on a trial for poisoning Sir. T. Broughton, that a tree had been sawn nearly in two near a spot where he used to fish, though there was no proof who had sawn it. See *post*, p. 2108.

was at a public-house, and complained that W. had sent a lawyer's letter to his father for a debt, which the prisoner owed him, and he said he 'would be even with him, and would light Badsey from end to end, and burn the whole lot.' He left the public-house about half-past six, saying he was going to E., to do which he would have to pass near both A.'s and W.'s rickyards. At seven a rick in A.'s yard was on fire, but soon put out. At half-past seven a rick in W.'s yard, about half a mile distant, was on fire, and the prisoner was seen to come out of an orchard into the rickyard, and he said he had heard the cry of fire, and in running to the place had jumped into the millpond, and was wet through; but his dress appeared quite dry. He assisted in putting out the fire, and afterwards went into the house, and was there as late as eleven; but in the meantime had been home and changed his clothes, and his smock frock was then very wet. At half-past twelve a rick of the prisoner's uncle, Taylor, was set on fire, and the people at W.'s immediately proceeded towards it, and met the prisoner running towards W.'s. He was told his father's or his uncle's ricks were on fire, and replied, 'Not it,' and proceeded towards W.'s; but afterwards was assisting at putting out the fire at his uncle's. Patteson, J., held that, on the indictment for setting fire to W.'s rick, evidence might be given for the prosecution, of the movements of the prisoner during the whole of that night, including the facts of his presence and demeanor at the other fires, the subject of the two other indictments; but that evidence ought not to be given of threats, statements, and particular acts pointing alone to those other charges, and not tending to implicate or explain the conduct of the prisoner in reference to the fire at W.'s (*l*).

On an indictment for setting fire to a rick of straw it appeared that the rick had been set on fire by the prisoner having fired a gun very near it. It was proposed to prove that the rick had been on fire on the previous day, and that the prisoner was then close to it with a gun in his hand. The defence was that the firing of the rick was accidental. It was contended that the evidence was not admissible. The firing of the rick on the previous day, if wilfully done, was a distinct felony. Maule, J., admitted the evidence, and said: 'Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully' (*m*).

On an indictment for setting fire to a building, Erle, J., held that the mere fact of the prisoner's having given notice of other fires, and claiming the reward usually paid on such occasions at the engine station, was not evidence which could be adduced to found a presumption that he caused the fires in question (*n*). But evidence of other claims

(*l*) R. *v.* Taylor, 5 Cox, 138, Patteson, J. 179; and as to the admissibility generally of evidence of the commission of other offences, *post*, pp. 2108 *et seq.*, 'Evidence.'

(*m*) R. *v.* Dossett, 2 C. & K. 306; 2 Cox, 243. Maule, J., also said, 'If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of another distinct felony.'

(*n*) R. *v.* Regan, 4 Cox, 335, Erle, J.

made by the prisoner on other insurance companies in respect of fires was admitted to shew that the fire in question was not accidental (*o*).

Where, however, the question was as to the identity of the prisoner, evidence was not admitted to shew that a few days before the fire in question the prisoner had been seen laughing at a fire on the same premises and hindering persons who were trying to extinguish it (*p*).

It has been held that evidence of experiments made after a fire is admissible to shew the manner in which the house was set fire to (*q*).

Sect. III.—Damage to Buildings, &c., by Explosives.

Sects. 9, 10, 45, of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), are dealt with *ante*, Book IX. Chapter IV. Vol. I. pp. 866 *et seq.*

Sect. IV.—Damage to Buildings, &c., by Tenants (*r*).

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 13, 'Whosoever, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish (*s*), the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor' (*t*).

(*o*) R. *v.* Gray, 4 F. & F. 1102, Willes, J.

(*p*) R. *v.* Harris, 4 F. &. F. 342, Willes, J.

(*q*) R. *v.* Heseltine, 12 Cox, 404, Pollock, B.

(*r*) As to damage to buildings by rioters, see 'Riot,' *ante*, Vol. i. p. 418.

(*s*) As to what amounts to a beginning to demolish, see R. *v.* Howell, 9 C. & P. 437, Littledale, J.: R. *v.* Price, 5 C. & P. 510.

(*t*) Framed from 9 Geo. IV. c. 56, s. 24 (1), with considerable changes of wording extending the former enactment to any tenant of any part of a dwelling-house or other building. The effect of s. 59, *ante*, p. 1772, is to render a tenant liable for any other malicious injury mentioned in this Act, if done with intent to injure the landlord.

No punishment for the offence created by this section was inserted, because it was thought that the common-law punishment of fine or imprisonment, or both, was the proper punishment. *Vide ante*, Vol. i. p. 249.

CANADIAN NOTES.

ARSON.

Sec. 1.—Arson at Common Law.

Definition of Arson.—See Code sec. 511.

Where Building Belongs to Accused.—Code sec. 541(2).

D. was charged with having set fire to a building, the property of J. H., "with intent to defraud." The case opened by the Crown was that prisoner intended to defraud several insurance companies, but legal proof of the policies was wanting, and an amendment was allowed by striking out the words "with intent to defraud." The evidence shewed that several persons were interested in the premises as mortgagees, and J. H. as owner of the equity of redemption. The jury found prisoner intended to injure those interested. It was held that the amendment was authorized and proper, and the conviction warranted by the evidence. An indictment for arson is good without alleging any intent. R. v. Cronin (1875), 36 U.C.Q.B. 342.

At common law if the house were the prisoner's it was necessary to shew that his attempt to set fire to it was unlawful and malicious. R. v. Greenwood (1864), 23 U.C.Q.B. 250. And this was supplied by proof that the act might or would be an injury to or a fraud upon any person, and that the accused acted with intent to do such injury. R. v. Bryans (1862), 12 U.C.C.P. 166.

The offence must have been committed without legal justification or excuse and without colour of right. Sec. 541.

A man is presumed to intend the natural and probable consequences of his own voluntary act. Therefore, if one kindles a fire in a stack situated so that it is likely to communicate and does communicate in fact to an adjoining building, he is chargeable with burning the building. R. v. Cooper, 5 C. & P. 535.

A wife, called as a witness against her husband on a charge under this section was held incompetent under the Canada Evidence Act to disclose a communication made by her husband in the presence or hearing of herself and a third party which she would not undertake to say was not intended for her to hear. R. v. Wallace (1903), 6 Can. Cr. Cas. 323.

Damaging Property.—See sec. 510 as to the indictable offence of mischief by wilfully destroying or damaging property; and see sec. 539

as to summary conviction for malicious injury to property where the damage is less than $20.

Extradition.—Arson is an indictable offence between the British possessions and the United States of America under the Ashburton treaty of 1842.

Attempt to Commit Arson.—See Code sec. 512.

Attempt to Set Fire.—If B., under A.'s direction, arranges a blanket saturated with oil so that if it is set on fire the flames will be communicated to a building and then lights a match and holds it until it is burning well and then puts it down to within an inch or two of the blanket, when the match goes out; A. is guilty of an attempt to set fire to the building. R. v. Goodman, 22 U.C.C.P. 338.

Sec. 2.—Setting Fire to Buildings, etc.

Setting Fire to Crops, Trees, Dams, etc.—See Code sec. 513.

Attempting to Set Fire to Crops, etc.—See Code sec. 514.

Setting Fire to Forests Recklessly.—See Code sec. 514.

Threats to Burn.—See Code sec. 516.

Threats verbally made to burn the complainant's buildings are not indictable under the Criminal Code, and give rise only to proceedings to force the offender to give security to keep the peace. Ex parte Welsh (1898), 2 Can. Cr. Cas. 35 (Que.).

Binding Over to Keep the Peace.—Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will burn or set fire to his property, the justice before whom such complaint is made may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances or to give security to keep the peace, and to be of good behaviour for a term not exceeding twelve months. Sec. 748(2).

CHAPTER THE FORTY-FOURTH.

OF MALICIOUS DAMAGE TO SHIPS, DOCKYARDS, ETC. (*a*).

SECT. I.—BURNING OR DESTROYING SHIPS, DOCKYARDS, &c.

THE Dockyards, &c., Protection Act, 1772 (12 Geo. III. c. 24), s. 1, enacts '. . . if any person or persons shall, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt, or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning, or otherwise destroying of any of His Majesty's ships or vessels of war, whether the said ships or vessels of war, be on float or building, or begun to be built, in any of His Majesty's dockyards, or building or repairing by contract in any private yards, for the use of His Majesty, or any of His Majesty's arsenals, magazines, dockyards, rope-yards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed for building, repairing, or fitting out of ships or vessels; or any of His Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval, or victualling stores, or other ammunition of war is, are, or shall be kept, placed, or deposited; that then the person or persons guilty of any such offence, being thereof convicted in due form of law, shall be adjudged guilty of felony, and suffer death as in cases of felony . . .' (*b*). By sect. 2, persons committing these offences out of the realm may be indicted and tried for the same either in any county within the realm, or in the place where the offence shall have been actually committed, as His Majesty may deem most expedient for bringing such offender to justice.

The Naval Discipline Act (29 & 30 Vict. c. 109), s. 34, enacts, 'Every person subject to this Act who shall unlawfully set fire to any dockyard, victualling yard, or steam factory yard, arsenal, magazine, building, stores, or to any ship, vessel, hoy, barge, boat, or other craft or furniture thereunto belonging, not being the property of an enemy, pirate, or rebel, shall suffer death or such other punishment as is hereinafter mentioned.'

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 42, 'Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and being convicted thereof

(*a*) See also ss. 4 and 6 of 24 & 25 Vict. c. 97, *ante*, pp. 1780, 1781.

(*b*) The offence is still capital, 7 & 8 Geo. IV. c. 28, ss. 6 and 7. The sentence of death may be recorded, 4 Geo. IV. c. 48, s. 1, *ante*, Vol. i. p. 206. As to accessories, *vide ante*, Vol. i. pp. 106 *et seq.*

shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . (*c*)—or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping ' (*d*).

By sect. 43, ' Whosoever shall unlawfully and maliciously set fire to, or cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable,' as in sect. 42 (*e*).

By sect. 44, ' Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to, *cast away, or destroy* any *ship* or vessel, *under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony*, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen . . . years (*c*)—or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping ' (*f*).

Cast away and destroy.—Upon the construction of 4 Geo. I. c. 12, and 11 Geo. I. c. 29 (both now rep.), it appears to have been ruled that if a ship were only run aground or stranded upon a rock, and were afterwards got off in a condition capable of being easily refitted, she could not be said to be ' cast away or destroyed,' within either of those statutes (*g*).

Vessel.—A question arose twice, but was not expressly decided, as to the meaning of the word ' vessel ' in 7 & 8 Geo. IV. c. 30 (rep.). In the first case the prisoner was indicted for setting fire to a barge, and Alderson, B., would have reserved the question, if the prisoner had been convicted, whether a barge was a vessel within the meaning of that statute (*h*). In the second case the prisoner was indicted for damaging a certain vessel by beating a hole in the bottom of it. The vessel in question was a small pleasure boat, about eighteen feet long, and two men could have carried it; and it was objected that the Legislature meant to apply the terms ' ship or vessel ' only to such vessels as were likely to be underwritten,

(*c*) For present punishment, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted words are repealed.

(*d*) Taken from 7 Will. IV. & 1 Vict. c. 89, ss. 4, 6. Under sect. 4, the offence of setting fire to a ship or vessel whereby life was endangered was capital.

The cross heading ' injuries to ships ' before this section was accidentally omitted in reprinting the Bill after it passed the Select Committee of the Commons.

(*e*) Taken from 7 Will. IV. & 1 Vict. c. 89, s. 6. In R. *v.* Guy, Hants Assizes, July, 1902, the prisoner was indicted under sect. 42 for unlawfully and maliciously setting fire to a yacht of which he was captain. He did this in conjunction with the owner in order, as he knew, to defraud underwriters. Bigham, J., held that though sect. 43 dealt with this offence specifically the prisoner could be convicted under sect. 42. Archb. Cr. Pl. (23rd ed.) 658.

(*f*) Taken from 9 & 10 Vict. c. 25, s. 7. The first words in italics were introduced to make this section include all attempts which, if effectual, would fall within either of the two preceding sections. As to the words ' under such circumstances,' &c., see s. 7, *ante*, p. 1781, and the cases there mentioned.

(*g*) R. *v.* De Londo, 2 East, P. C. 1098.

(*h*) R. *v.* Smith, 4 C. & P. 569. It has been decided that a barge is a ship within the repealed Merchant Shipping Act, 1864 (see 'The Mac,' 7 P. D. 126), and that it is a ship or vessel within the Bills of Sale Acts, 1878 and 1882: Gapp *v.* Bond, 19 Q.B.D. 200.

and not to small boats; and that in 7 & 8 Geo. IV. c. 29, s. 17 (rep.), where it was meant to include boats, the words were, 'vessel, barge, or boat,' clearly making a distinction between a vessel and a boat. Patteson, J.: 'That the term "vessel" would in common parlance include this boat is clear, but whether in this Act of Parliament it was meant to include such boats is the question. I incline to think that this boat is within the clause in the Act of Parliament; but as the word "vessel" must have the same construction in all other Acts of Parliament, it might lead to inconvenience, and therefore if necessary I will take the opinion of the judges upon it' (*i*).

It seems clear that part owners of a vessel may be guilty of an offence under sects. 42, 43, 44 (*j*).

One count alleged that L., a certain vessel on the high seas feloniously did cast away with intent to prejudice H. and another, being part owners of the said vessel, and that the prisoners, within the jurisdiction of the Central Criminal Court, did feloniously incite the said L. to commit the said felony. Other counts varied the intent. H. and A. were owners of one-fourth of the ship, and one of the prisoners of the other three-fourths; the goods, which were put on board by Z. and Co., the charterers of the ship, were insured, and the intent to prejudice the underwriters on that policy was alleged in one of the counts; but in the case of three different policies on goods, which were effected by the prisoners, no part of such goods were ever put on board. The ship was wilfully sunk by L., the captain, on the high seas, and there was a total loss (except a very trifling salvage) of both ship and cargo, and the jury found the prisoners guilty of the whole charge. It was objected (*inter alia*) (*k*), that, as 7 Will. IV. & 1 Vict. c. 89, s. 6 (rep.), described the intent to be 'to prejudice the persons who shall underwrite any policy of insurance upon goods on board the ship,' no evidence was admissible as to the three policies on goods effected by the prisoners, where no goods had been put on board. But, on a case reserved, the judges were of opinion that the words in the statute were a mere description of a policy on goods, and they unanimously held the conviction right (*l*).

The prisoner was indicted under sect. 42 of the Malicious Damage Act, 1861, for feloniously, unlawfully, and maliciously setting fire to a ship with intent thereby to prejudice the owners of the ship and the owners of the goods on board. It appeared that he was a sailor on the ship, and went into the hold where the rum was stored, his object being to steal some rum. He bored a hole in a cask, and some rum ran out whilst he held a lighted match in his hand. The rum caught fire and the ship was destroyed. Upon a case reserved it was held that the conviction could not be sustained (*m*).

(*i*) R. *v.* Bowyer, 4 C. & P. 559. The prisoner was acquitted. Cf. s. 47 of the Act of 1861, *post*, p. 1797. It was also objected that the indictment was bad, because it did not allege that the damage was done 'otherwise than by fire'; but it was held to be sufficient, as it was alleged to be done by beating a hole in the bottom of the boat.

(*j*) So held on 7 & 8 Geo. IV. c. 30, s. 9. R. *v.* Philp, 1 Mood. 263.

(*k*) The other objections, both overruled, related (1) to the form of the indictment which was said not to be proper for a substantive felony under the statute in question, 7 Geo. IV. c. 64, s. 9; (2) to the jurisdiction of the Central Criminal Court over offences on the high seas. See 4 & 5 Will. IV. c. 36, s. 22, *ante*, Vol. i. p. 38.

(*l*) R. *v.* Wallace, 2 Mood. 200.

(*m*) R. *v.* Faulkner, Ir. Rep. 11 C. L. 8; 13 Cox, 550, *ante*, p. 1777.

Sect. II.—Damaging Ships or Wrecks.

By sect. 45, 'Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any *ship or* vessel any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . (*n*), and, if a male under the age of sixteen years, with or without whipping' (*o*).

By sect. 46, 'Whosoever shall unlawfully and maliciously damage, otherwise than by fire, gunpowder, or other explosive substance, any ship or vessel, whether complete, or in an unfinished state, with intent to destroy the same or render the same useless, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . (*n*), and, if a male under the age of sixteen years, with or without whipping' (*p*).

By sect. 49 (*q*), 'Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .' (*n*).

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 220, 'If a master, seaman, or apprentice belonging to a British ship by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, (A) does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of a person belonging to or on board the ship; or (B) refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from immediate danger to life or limb, he shall in respect of each offence be guilty of a misdemeanor' (*r*).

By sect. 607, 'If any pilot, when in charge of a ship, by wilful breach of duty or by neglect of duty, or by reason of drunkenness, either (A) does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of any

(*n*) For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted words are repealed.

(*o*) Taken from 9 & 10 Vict. c. 25, s. 6. *Vide ante*, Vol. i. pp. 865 *et seq.*

(*p*) Taken from 7 & 8 Geo. IV. c. 30, s. 10 (E), and 9 Geo. IV. c. 56. s. 10 (I). The words 'gunpowder or other explosive substance' were introduced to exclude cases which are provided for by the preceding section.

(*q*) Taken from 7 Will. IV. & 1 Viet. c. 89, s. 8. See also sects. 518-537 of the Merchant Shipping Act, 1894, as to dealing with wrecks, and sect. 72 of the Merchant Shipping Act, 1906: (6 Edw. VII. c. 48).

(*r*) By sect. 680, the punishment is fine or imprisonment, not exceeding two years with or without hard labour, or on summary conviction fine not exceeding £100, or imprisonment with or without hard labour not exceeding six months. See R. *v.* Goldberg, 68 J. P. 554, as to the defendant's right to be tried by a jury.

person on board the ship; or (B) refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from danger to life or limb, that pilot shall in respect of each offence be guilty of a misdemeanor, and if a qualified pilot, shall also be liable to suspension or dismissal by the pilotage authority by whom he is licensed' (*rr*).

By sect. 684, 'For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be' (*s*).

On an indictment on sect. 239 of the repealed Merchant Shipping Act, 1854, for doing an act tending to the loss of a ship, it appeared that the prisoner struck a light with a match, and lighted a candle, in a part of the ship forbidden by the ship's regulations, and threw down the match before it was extinguished, but there was no sufficient evidence that a fire which occurred six hours afterwards arose from this act; it was contended that the act charged must be followed by the loss of the ship. Bramwell, B., said, 'I am of opinion that if the act tended to the loss, destruction, or damage of the ship, though neither result followed, it is a misdemeanor within this section; as if a man should stick a lighted candle in an uncovered barrel of gunpowder, though he put it out immediately, I think that would be an act tending to the damage of the ship. The latter part of the section is, I think, open to the same construction, and both would be illustrated by two persons being together in the immediate neighbourhood of an explosive and unprotected material, and one lighting a candle, and the other omitting to put it out; the first would be guilty under the former clause of the section, and the second under the latter.' And the jury were told that 'to convict upon this indictment you must be satisfied that the act done was dangerous, having regard to the place, or the contents of the place in which it was done; for, if not, it would not be an "act tending to the immediate loss, destruction, or serious damage of the ship;" but you need not be of opinion that what afterwards took place was the result of that act' (*t*).

Sect. III.—Exhibiting False Signals, &c.

By sect. 47 of the Malicious Damage Act, 1861, 'Whosoever shall unlawfully mask, alter, or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, *or boat* into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, or boat, and for which no punishment is hereinbefore provided, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of

(*rr*) See note (*r*) *ante*, p. 1796.

(*s*) *Ante*, Vol. i. pp. 43 *et seq.* In R. *v.* Hinde [1902], 22 N. Z. L. R. 436, the Colonial Court asserted its jurisdiction to try an offence committed in London against s. 130, of the Act.

(*t*) R. *v.* Gardner, 1 F. & F. 669.

the Court, to be kept in penal servitude for life . . . or to be imprisoned . . . (*u*) and if a male under the age of sixteen years, with or without whipping' (*v*).

By sect. 48, 'Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy-rope, perch, or mark used or intended for the guidance of seamen or the purpose of navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . (*u*) and if a male under the age of sixteen years, with or without whipping' (*w*).

(*u*) The omitted words are repealed. For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*v*) Taken from 7 Will. IV. & 1 Vict. c. 89, s. 5, and the capital punishment abolished. The section is extended to masking, altering, or removing lights or signals, and to boats. The later clause was confined, in the former enactment, to ships or vessels *in distress*; it is extended to all cases within its terms for which the Act provides no other punishment.

(*w*) Framed from 9 & 10 Vict. c. 99, s. 28. By sect. 666 (1) of the Merchant Shipping Act, 1894, 'A person shall not wilfully or negligently—

(A) Injure any lighthouse or the lights exhibited therein, or any buoy or beacon;

(B) Remove, alter, or destroy any lightship, buoy, or beacon; or

(C) Ride by, make fast to, or run foul of any lightship or buoy.

(2) If any person acts in contravention of this section, he shall, in addition to the expenses of making good any damage so occasioned, be liable for each offence to a fine not exceeding fifty pounds.'

See sect. 667 of that Act for penalties for misleading fires and lights.

CANADIAN NOTES.

MALICIOUS DAMAGE TO SHIPS, DOCKYARDS, ETC.

Damage to Ships, etc.—See Code sec. 510.

Casting Away Ships, etc.—See Code sec. 522.

Attempt to Wreck Ship.—See Code sec. 523.

Preventing or Impeding Rescue of Ships in Distress.—See Code sec. 524.

Injuring Dam, Chain, Raft, etc., or Blocking Channel.—See Code sec. 525.

Interfering with Marine Signals, etc.—See Code sec. 526.

Removing Natural Bars, etc.—See Code sec. 527.

Meaning of Wreck.—See Code sec. 2(41).

CHAPTER THE FORTY-FIFTH.

MALICIOUS DAMAGE TO CROPS, PLANTS, WOODS, TREES, HEATH, STACKS, ETC.

SECT. I.—SETTING FIRE TO CROPS, WOODS, HEATH, AND STACKS, &C.

BY the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 16, 'Whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or *to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern* (*a*), wheresoever the same may be growing, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding fourteen years . . . (*b*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*c*).

By sect. 17, 'Whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life . . . or to be imprisoned . . . (*b*) and, if a male under the age of sixteen years, with or without whipping' (*d*).

By sect. 18, 'Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned, *under such circumstances that if the same were thereby set fire to the offender would be, under either of such sections, guilty of felony*, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . (*b*), and, if a male under the age of sixteen years, with or without whipping' (*e*).

(*a*) The Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22) provides for the summary trial of young persons consenting, and of adults pleading guilty to any of the offences in italics, and in the case of adults consenting, where the damage done to the property the subject of the offence does not, in the opinion of the Court, exceed forty shillings.

(*b*) The omitted words were repealed (S. L. R.) 1892 and (No. 2) 1893. For other punishments see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*c*) Taken from 7 & 8 Geo. IV. c. 30, s. 17 (E), and 9 Geo. IV. c. 56, s. 18 (I), and extended to crops of hay, grass, and of any cultivated vegetable produce. See R. *v.* Price, 9 C. & P. 729, *ante*, p. 1777.

(*d*) Taken from 7 Will. IV. & 1 Vict. c. 89, s. 10, and extended to stacks of any cultivated vegetable produce, gorse and bark.

(*e*) Taken from 9 & 10 Vict. c. 25, s. 7, with the addition of the words in italics. See sect. 7, and cases thereunder, *ante*, p. 1781.

It will be noted that none of the above sections expresses any intent to injure as an element in the offences created (*f*).

A stack consisting partly of cole-seed straw, and partly of wheat stubble, or haulm, was not a stack of straw within 7 & 8 Geo. IV. c. 30, s. 17 (rep.) (*g*). So a stack composed of sedges and rushes, the produce of the fens, was not a stack of straw within 7 Will. IV. & 1 Vict. c. 89, s. 10 (rep.); for straw, in its usual and legal acceptation, meant the straw of wheat, barley, oats, and rye (*h*). But a stack principally composed of wheat straw, with stubble laid on the top to prevent its blowing away, was held to be a stack of straw within 7 & 8 Geo. IV. c. 30, s. 17 (rep.) (*i*). A quantity of straw packed on a lorry, in course of transmission to market, and left for the night in the yard of an inn, is not a stack of straw within the meaning of sect. 17 (*j*); nor is a haycock a stack within the section (*k*).

A stack of the flax plant with the seed in it was held to be a stack of grain within 7 Will. IV. & Vict. 1, c. 89, s. 10 (rep.) (*l*).

In R. *v.* Aris (*m*), upon an indictment for setting fire to a stack of wood, it appeared that between the house of the prosecutor and the house next to it there was an archway, which carts could go under, and that over this archway a sort of loft was made by means of a temporary floor; and that in this place the prosecutor kept wood, straw, and fuel. At the time of the fire, there was in this place about an armful of straw and a score of faggots, which were piled up one upon another. Park, J., was of opinion that this was not a 'stack' of wood within the meaning of 7 & 8 Geo. IV. c. 30, s. 17 (rep.).

In R. *v.* Munson (*n*) Coleridge, J., held that it was not essentially necessary to the character of a stack that it should be erected out of doors. It was enough if the material was collected direct in the field and stacked in the building.

Judges have taken judicial notice that beans are a species of pulse (*o*), and barley a species of corn or grain (*p*).

Where an indictment (*q*) alleged that the prisoner set fire to certain

(*f*) Under 7 & 8 Geo. IV. c. 30, s. 17, these words were held not necessary in the indictment. R. *v.* Newill, 1 Mood. 458. Cf. R. *v.* Turner, 1 Mood. 239.

(*g*) R. *v.* Tottenham, 1 Mood. 461 (cit.); 7 C & P. 237. That section did not contain the words 'haulm' or 'any cultivated vegetable produce.' The word 'haulm' was probably introduced in 7 Will. IV. & 1 Vict. c. 89, s. 10, in consequence of this case. In R. *v.* Turner, 1 Mood. 239, a question was raised whether a stack was a stack of straw within 7 & 8 Geo. IV. c. 30, s. 17 (rep.). The stack was made partly of straw, there being two or three loads of it at the bottom, and the residue of haulm, that is the aftermath of the stubble of rye or wheat, about eighteen inches long; according to one witness the straw and haulm were mixed. This question was not decided by the judges. At the following assizes the prisoners were again indicted, and one count charged them with setting fire to a stack of straw, called haulm; and Vaughan, B., intimated that it would be unsafe to convict them on this count, and they were convicted on counts for setting fire to a barn and a wheat stack, 4 C. & P. 246.

(*h*) R. *v.* Baldock, 2 Cox, 55.

(*i*) R. *v.* Newill, 1 Mood. 458.

(*j*) R. *v.* Satchwell, L. R. 2 C. C. R. 21; 42 L. J. M. C. 63.

(*k*) R. *v.* McKeever, Ir. Rep. 5 C. L. 86.

(*l*) R. *v.* Spencer, Dears & B. 131.

(*m*) 6 C. & P. 348.

(*n*) 2 Cox, 186, Coleridge, J., *ante*, p. 1788.

(*o*) R. *v.* Woodward, 1 Mood. 323, where it was also decided that setting fire to a stack was not an offence of a local nature.

(*p*) R. *v.* Swatkins, 4 C. & P. 548. Patteson, J. The indictment described the stack as of 'barley.'

(*q*) Under 7 & 8 Geo. IV. c. 30, s. 17 (rep.).

wood, to wit, to twenty yards square of wood, situate and growing, &c.; and Alderson, B., after consulting Williams, J., said it was no offence to set fire to a single detached tree; and this indictment was so framed that proof of the prisoner's having set fire to a single detached tree would sustain it in point of fact, and as he should be obliged to arrest the judgment if the prisoner was convicted, it was no use to go on with the case (*r*).

Malice.—The prisoner was indicted under sect. 16 of the Act of 1861 for having set fire to some furze growing on a common. It appeared that persons living near the common had sometimes burnt the furze to improve the growth of the grass, though their right to do so was denied. Lopes, J., said: 'If she set fire to the furze, thinking she had a right to do so, that would not be a criminal offence' (*s*).

Attempt.—The prisoner was indicted (*t*) for attempting to set fire to a stack of corn with a lucifer match. The prisoner applied to the prosecutor for work, and being refused, threatened to burn him up: he was then seen to go to a neighbouring stack, and, kneeling down close to it, to strike a lucifer match, but, discovering that he was watched, he blew out the match, and went away. Pollock, C.B., told the jury that if they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, this was in law a sufficient attempt to set fire to the stack within the meaning of the statute (*u*).

Sect. II.—Of Damaging Trees, Shrubs, or Underwood (*v*).

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 20 (*w*), 'Whosoever shall unlawfully and maliciously (*ww*) cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude . . . —or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*x*).

By sect. 21 (*y*), 'Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing elsewhere than in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling-house (in case the amount of injury done shall exceed the sum of five pounds), shall be guilty of felony, and being convicted thereof shall be liable,' as in sect. 20.

(*r*) R. *v.* Davy, 1 Cox, 60.

(*s*) R. *v.* Twose, 14 Cox, 327, Lopes, J.

(*t*) On 9 & 10 Vict. c. 25, s. 7. Re-enacted as sect. 18, *ante*, p. 1799.

(*u*) R. *v.* Taylor, 1 F. & F. 511.

(*v*) See also *ante*, pp. 1260 *et seq.*

(*w*) Taken from 7 & 8 Geo. IV. c. 30, s. 19 (E.), and extended to Ireland. 9 Geo. IV. c. 56, s. 19 (I.), provided for similar offences.

(*ww*) See R. *v.* Rutter, 73 J.P. 12.

(*x*) For not more than five or less than three years. See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted words are repealed.

(*y*) Taken from 7 & 8 Geo. IV. c. 30, s. 19 (E.). 9 Geo. IV. c. 56, s. 19 (I.), was similar as to the daytime.

By sect. 22, 'Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be growing, the injury done being to the amount of one shilling at the least, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, *either* against this *or any former* Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit (*z*); and whosoever, having been twice convicted of any such offence (*whether both or either of such convictions shall have taken place before or after the passing of this Act*), shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . (*a*), and, if a male under the age of sixteen years, with or without whipping' (*b*).

By sect. 53, the provisions of sect. 52 (*post*, p. 1829) shall 'extend to any person who shall wilfully or maliciously commit any injury to any tree, sapling, shrub, or underwood, for which no punishment is hereinbefore provided' (*c*).

The words of the Malicious Damage Act, 1861, are much larger than the words of 9 Geo. I. c. 22, s. 1 (rep.), which were, 'unlawfully and maliciously cut down or otherwise destroy any trees.' But upon that section it was held that cutting down apple trees was sufficient, although the trees were not thereby totally destroyed (*d*).

On an indictment under 7 & 8 Geo. IV. c. 30, s. 19 (rep.), for feloniously injuring one ash tree, one elm tree, and one hundred thorn shrubs growing in a certain hedge, thereby doing injury to an amount exceeding £5, it appeared that the injury to the trees amounted to £1; but it would be necessary to stub up the old hedge and replant it; and the stubbing, quickwood, setting, and cleaning, and posts and rails to protect the new hedge, would cost £4 14*s*. 6*d*. It was objected that as the injury must be done in respect of growing trees, there was no evidence of such injury beyond one pound; and, upon a case reserved,

(*z*) The accused can elect to be tried by a jury for such second offence. 42 & 43 Vict. c. 49, s. 17, *ante*, Vol. i. p. 17.

(*a*) The omitted words are repealed.

(*b*) Taken from 7 & 8 Geo. IV. c. 30, s. 20, and extended to Ireland. There was a similar section, but confined to damage done between sunrise and sunset, in 14 & 15 Vict. c. 92, s. 3 (I.).

(*c*) This section was introduced in consequence of R. *v.* Dodgson, 9 A. & E. 704, and Chanter *v.* Greame, 13 Q.B. 216. In the former case the Court expressed clear opinion that trees under the value of a shilling were within 7 & 8 Geo. IV. c. 30, s. 44 (rep.); in the latter the Court expressed an almost equally clear opinion that they were not.

(*d*) R. *v.* Taylor, R. & R. 373.

it was held that the conviction was wrong, for it was not sufficient that the *consequential* injury should raise the amount of injury to £5 (*e*).

An indictment for damaging apple trees growing in a garden over the value of £1 should state the damage to be done 'unlawfully and maliciously,' and it is not sufficient to state that it was done feloniously' (*f*).

SECT. III.—DAMAGING PLANTS, ROOTS, FRUITS, AND VEGETABLE PRODUCTS, HOPBINDS, &C.

Hopbinds.—By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 19. 'Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years (*g*) . . .—or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*h*).

Plants, &c., in Gardens.—By sect. 23, 'Whosoever shall unlawfully and maliciously destroy, (*i*) or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude . . . (*j*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*k*).

In Heaven *v.* Crutchley (*l*), the appellants were charged under this section with maliciously damaging plants and vegetables, &c., with

(*e*) R. *v.* Whiteman, Dears. 353; 23 L. J. M. C. 120.

(*f*) R. *v.* Lewis, Gloucester Sum. Ass. 1830, Bosanquet, J., MSS. C. S. G. See R. *v.* Turner, 1 Mood. 239, *ante*, p. 1789.

(*g*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted words are repealed.

(*h*) Taken from 7 & 8 Geo. IV. c. 30, s. 18, and was new in Ireland in 1861. In R. *v.* Boucher, 5 Jur. 709. Taddy, Sergt., held that in order to support a count of an indictment, under this repealed section, for destroying hopbinds, it must be shewn that absolute and positive ruin was inflicted on the hopbinds, and as there was no evidence to shew whether the hopbinds died or not in consequence of the injury they had received there was no evidence on this count.

(*i*) See also *ante*, pp. 1260–1262.

(*j*) For not more than five nor less than three years. See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The accused may claim to be tried by a jury for a first offence. 42 & 43 Vict. c. 49, s. 17, *ante*, Vol. i. p. 17.

(*k*) Taken from 7 & 8 Geo. IV. c. 30, s. 21 (E.). There was a similar section in 14 & 15 Vict. c. 92, s. 3 (I.). As to the meaning of the terms 'plant' and 'vegetable production,' see R. *v.* Hodges, M. & M. 341, *ante*, p. 1261, and R. *v.* Fraser, 1 Mood. 419.

(*l*) 68 J. P. Rep. 53, Alverstone, L.C.J., Wills and Channell, JJ., following R. *v.* Clemens [1898], 1 Q.B. 556: 67 L.J. Q.B. 482

intent to destroy them. The appellants contended that they had acted in the *bonâ fide* and reasonable exercise of their customary right as members of the public to roam over certain lands and of free access thereto for the purpose of recreation. The garden in question had been enclosed some five years before, and prior to that time the land had been unenclosed. The justices found (1) that the right claimed did not and could not legally exist; (2) that the appellants did more damage than they could reasonably suppose was necessary for the assertion of the right claimed by them, and they accordingly convicted the appellants; and the Court held that the conviction was right.

Plants, &c., not in Gardens.—By sect. 24 (*m*), 'Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or enclosed, not being a garden, orchard, or nursery ground, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty shillings as to the justice shall seem meet, and in default of payment thereof, together with the costs, if ordered, shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made; and whosoever, having been convicted of any such offence, either against this *or any former* Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding six months as the convicting justice shall think fit (*n*).

(*m*) Taken from 7 & 8 Geo. IV. c. 30, s. 22 (E.). There was a similar section in 14 & 15 Vict. c. 92, s. 3 (I.).

(*n*) For a second offence the accused may elect to be tried by a jury: *vide ante*, Vol. i. p. 17.

CANADIAN NOTES.

MALICIOUS DAMAGE TO CROPS, PLANTS, WOODS, TREES, HEATH, STACKS, ETC.

Sec. 1.—*Setting Fire to Crops.*—See Code secs. 513, 514.

Sec. 2.—*General Damage to Trees, Crops, etc.*—Code sec. 725.

Compensation to Person Aggrieved.—Where the expression "over and above the amount of injury done," is used, it does not mean that the penalty "over and above, etc.," is to go to the Crown and the sum assessed as "the amount of injury done" is to go to the party aggrieved. It is not intended that there shall be two penalties, but that the amount of the whole penalty shall be arrived at by ascertaining the damages and then adding thereto such sum, not exceeding $50, as the justice may deem proper. By sec. 539 provision is made whereby the justice may award a sum not exceeding $20 in the cases there mentioned, as "compensation" to be paid in the case of private property to the person aggrieved. If it had been intended that the "amount of injury done" mentioned in sec. 533 should be ascertained and paid as compensation to the aggrieved person, it is fair to expect it would have so stated. Why the justice should fix the penalty by first ascertaining the amount of damage done is explained by reference to sec. 729, which authorizes the justice for a first offence to discharge the offender from his conviction upon his paying the aggrieved person the damages and costs, or either, as ascertained by the justice. R. v. Tebo (1889), 1 Terr. L.R. 196.

Destroying Fruit Trees.—Two indictments were preferred against defendants for feloniously destroying the fruit trees respectively of M. and C. The offences charged were proved to have been committed on the same night, and the injury complained of was done in the same manner in both cases. Defendants were put on trial on the charge of destroying the trees of M. and evidence relative to the offence charged in the other indictment was admitted as shewing that the offences had been committed by the same persons. It was held that such evidence was properly received. The Queen v. McDonald, 10 O.R. 553.

Exception Where Colour of Right.—See Code sec. 541.

Sec. 3.—*Damaging Plants, Vegetables, etc.*

Vegetable Productions.—Code sec. 534.

Injury to Roots, Plants, etc., not in Gardens.—Code sec. 535.

CHAPTER THE FORTY-SIXTH.

MALICIOUS DAMAGE TO MINES.

SECT. I.—SETTING FIRE TO MINES.

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 26, 'Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite or other mineral fuel, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for life . . . (*a*) or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping' (*b*).

By sect. 27, 'Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, *under such circumstances that, if the mine were thereby set fire to, the offender would be guilty of felony*, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding fourteen . . . (*a*) years—or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*c*).

SECT. II.—DAMAGING MINES, ETC.

By sect. 28, 'Whosoever shall unlawfully and maliciously cause any water to be conveyed *or run* into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up, or obstruct, *or damage with intent to destroy, obstruct, or render useless*, any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . (*d*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping: Provided that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working' (*e*).

By sect. 29, 'Whosoever shall unlawfully and maliciously pull down and destroy, or damage with intent to destroy or render useless, any

(*a*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted words are repealed.

(*b*) Taken from 7 Will. IV. and 1 Vict. c. 89, s. 9, and 9 & 10 Vict. c. 25, s. 9, and extended so as to include anthracite and other mineral fuel.

(*c*) Taken from 9 & 10 Vict. c. 25, s. 7, the addition of the words in italics. See s. 7, *ante*, p. 1781, and the cases there mentioned.

(*d*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*e*) Taken from 7 & 8 Geo. IV. c. 30, s. 6 (E.), and 9 Geo. IV. c. 56, s. 7 (I.), with the additions in italics.

steam-engine or other engine for sinking, draining, *ventilating*, or working, or for in any wise assisting in *sinking, draining, ventilating, or* working any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggonway, or trunk be completed or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, *or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway, or other way, or other work whatsoever, in any wise belonging or appertaining to or connected with or employed in any mine or the working or business thereof*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . (*ee*) and if a male under the age of sixteen years with or without whipping ' (*f*).

In an indictment under 7 & 8 Geo. IV. c. 30, s. 6 (rep.), it was held that the mine might be laid as the property of the person in possession and working it, though only an agent for others (*g*).

The prisoners were indicted for feloniously and maliciously obstructing an airway belonging to a mine of one A., by building a wall across the airway; the prisoners were in the employ of B., between whom and A. there was a dispute respecting two mines in their respective occupations, lying close together. B., professedly with the view of exerting his supposed right against A., directed the prisoners to effect the obstruction charged in the indictment, and the prisoners accordingly made such obstruction (*h*). The effect of the obstruction would be to drive back the choke damp into A.'s mine, and prevent the working. Abinger, C.B., said: ' If a master, having a doubt or no doubt of his own rights, sets his servants to build a wall in a mine, they would, if he proved to have no right, be all liable to an action of trespass, but it would not be felony in the servants. The rules respecting acts *mala in se* do not apply. If a master told his servant to shoot a man, he would know that that was an order he ought to disobey. But if the servant *bonâ fide* did these acts, I think they do not amount to an offence within this statute. If a man claims a right which he knows not to exist, and he tells his servants to exercise it, and they do so, acting *bonâ fide*, I am of opinion that that is not a felony in them, even if in so doing they obstruct the airway of a mine. What

(*ee*) See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*f*) Framed from 7 & 8 Geo. IV. c 30, s. 7 (E.), 9 Geo. IV. c. 56, s. 8 (I.); and 23 & 24 Vict. c. 29, s. 1, with the additions in italics.

(*g*) R. *v.* Jones, 2 Mood. 293: 1 C. & K. 181. This case does not seem definitely to decide that it is necessary to allege ownership. Jervis, for the prisoner, said: ' It is unnecessary to consider how far the indictment should shew property, but as it does, it must be proved as laid.'

(*h*) This statement is taken from the report of James *v.* Phelps, 11 A. & E. 483.

I feel is this, that if these men acted *bonâ fide* in obedience to the orders of a superior, conceiving that he had the right which he claimed, they are not within this Act of Parliament. But if either of these men knew that it was a malicious act on the part of his master, I think then that he would be guilty of the offence charged' (*i*).

This ruling was confirmed in an action brought by one of the prisoners against A., for malicious prosecution, in which it was contended that the proviso to 7 & 8 Geo. IV. c. 30, s. 24 (rep.), (which authorised justices summarily to convict in cases of malicious injuries to real or personal property), that 'nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of,' raised a strong inference that the Legislature did not intend to except from the operation of sect. 6 acts done in the supposed exercise of a right, as there was no such proviso in sect. 6. But this contention was overruled, and Denman, C.J., said: 'As to the 7 & 8 Geo. IV. c. 30, s. 24, I think it makes strongly against the argument of the defendant's counsel. That section gives a power to convict summarily for malicious mischief; and it contains a proviso that, where there is a *bonâ fide* acting under a supposed right, the party acting shall not be liable to conviction even for the trespass. Now why was there no such provision in the case of felony? For this plain reason, that the principles of the common law prevent the act from being felonious where there is no malice in the intention' (*j*).

The prisoner was indicted under sects. 28 and 29 of the Act of 1861, and after the case for the prosecution had been opened, Butt, J., said: 'I think that the act charged must be done not only wilfully, but maliciously, that is to say, with a wicked mind, and if it is done under a *bonâ fide* claim of right it is not done maliciously according to our criminal law. The evidence to be adduced shews that the prisoner did the act openly, and it is preposterous to say that he did it otherwise than under a *bonâ fide* claim of right' (*k*).

Upon an indictment for maliciously damaging a steam-engine with intent, as charged in one count, 'to destroy,' as charged in another, 'to render it useless,' it appeared that the steam-engine was used to bring up coals from the shaft of one mine, and water from another, and that it was stopped and locked up in the evening, and that the prisoners in the night got into the engine-house and set the engine going, and from its having no machinery attached to it, the engine worked with greater velocity, and the wheels were some of them thrown out of cog, so that the engine was damaged to the amount of £10, and would have been injured to a much greater extent if the mischief had not been discovered and the engine stopped. Gurney, B., left it to the jury to say whether the intent of the prisoners was to destroy the engine or to render it

(*i*) R. *v.* James, 8 C. & P. 131, Abinger, C.B.

(*j*) James *v.* Phelps, *ubi supra*. In this case some judges 'expressed an opinion that an obstruction not wilful or with knowledge could not amount to a felony from the general principles of criminal justice,' per Denman, C.J., in Fletcher *v.* Calthrop, 6 Q.B. 880.

(*k*) R. *v.* Matthews, 14 Cox, 5. Brett, J. Cf. Heaven *v.* Crutchley, *ante*, p. 1803. R. *v.* Clemens, *post*, p. 1831. R. *v.* Phillips, 2 Mood 252, and R. *v.* Rutter, 73 J.P. 12.

useless; and held that if the prisoners had either of those intents the case came within the provisions of the statute (*l*).

Damaging a drum moved by a steam-engine was not damaging the steam-engine within 7 & 8 Geo. IV. c. 30, s. 7 (rep.), but damaging a scaffolding placed across the shaft of a mine, in order to work a level, was damaging an 'erection' 'used in conducting the business of a mine' within that section (*m*).

In an action against a hundred to recover compensation for the felonious demolition by rioters of a certain erection of the plaintiffs, used in conducting the business of a mine, it appeared that the erection question was a wooden trunk, or trough, erected upon piles through which water was conducted to a slag bed half a mile from the mine. The trough did not approach the mine nearer than half a mile. The water supplied through this trough was at first used in washing the slag, and for no other purpose; but subsequently, and up to the time of the injury complained of, it had been regularly used in washing the ore gotten from the mine. The jury found that the trough was used in conducting the business of the mine, and it was held that as the jury had so found, the only question of law was whether such a trunk could be so used. 'The business of a mine was not merely to get the rough ore from the bowels of the mine, but to produce ore itself separate from the earth which is brought up with it' (*n*), and 'includes all that is done about the mine towards preparing the ore in a marketable state; and all erections used for this purpose, or as places of deposit for gunpowder, candles, and other mining materials, are within the protection of the statute (*o*). The ore is not brought up by itself, but together with earth and other matters attached to it, which must be separated from it to make what is brought up ore. This trunk was used in the process of such separation, and that separation is part of the business of a mine, and therefore the trunk was an erection used in conducting the business of a mine within 7 & 8 Geo. IV. c. 31, s 2 (*p*).

(*l*) R. *v.* Norris, 9 C. & P. 241.
(*m*) R. *v.* Whittingham, 9 C. & P. 234, Patteson, J.
(*n*) Per Patteson, J.
(*o*) Per Coleridge, J.
(*p*) Barwell *v.* Hundred of Winterstoke, 14 Q. B. 704. The Court agreed that the question was the same as if it had arisen on an indictment for injuring the trunk.

CANADIAN NOTES.

MALICIOUS DAMAGE TO MINES, RAILWAYS, ETC.

Damage to Railways, Mines, etc.—Sec. 510(*a*) (*d*) and (*e*).

Injuries Affecting Railways, Likely to Endanger Property.—See Code sec. 517.

Obstructing Railways.—See Code sec. 518.

Damaging Goods on Railway, etc.—See Code sec. 519.

Damaging Mines, Oil Wells, Shafts, Tackle, etc.—See Code sec. 520.

Damaging Lines of Communication, etc.—See Code sec. 521.

CHAPTER THE FORTY-SEVENTH

OF MALICIOUS DAMAGE TO ARTICLES IN COURSE OF MANUFACTURE, AND TO IMPLEMENTS AND MACHINERY (*a*).

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 14, 'Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, *or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless*, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . (*b*), or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*c*).

By sect. 15, 'Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine, or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, threshing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . (*b*), or to be imprisoned, . . .

(*a*) As to persons riotously destroying machinery, see *ante*, Vol. i. p. 418.

(*b*) For other punishments, see 54 & 55 Vict. c. 62, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted words are repealed.

(*c*) Taken from 7 & 8 Geo. IV., c. 30, s. 3 (E.), and 9 Geo. IV. c. 56, s. 3 (I.). The former enactments are extended to articles made of hair or alpaca. The words in italics are repeated in order to obviate

and, if a male under the age of sixteen years, with or without whipping' (*d*).

Upon an indictment under 28 Geo. III. c. 55, s. 4 (rep.), for maliciously damaging a frame used for making stockings, it appeared that the prisoner unscrewed, and carried away a part, called the half-jack, from two frames used for the making of stockings. The half-jack was a piece of iron, which was an essential part of the frame, and when taken out the frame was rendered useless; but it might be taken out and again replaced without injury to the frame, and was sometimes so treated when the frame was taken to pieces to be cleaned. Most of the other parts of the frame might in like manner be taken out and replaced. The frames in this case were not otherwise injured than by taking away the half-jacks. Upon a case reserved, the judges were unanimously of opinion that taking out and carrying away the half-jack was 'damaging' the frame within the meaning of 28 Geo. III. as it made the frame imperfect and inoperative (*e*).

The words 'in any stage, process, or progress of manufacture' include manufactures up to the time when they are so complete as to be fit for immediate sale. The first count charged the prisoners with maliciously damaging 100 pieces of worsted stuff, 'in a certain process of manufacture,' with intent to destroy the same. Other counts stated the goods to be in 'a certain stage of manufacture,' and others stated them to be 'in the progress of manufacture.' The prosecutors were dyers, and received the stuffs from the manufacturer after the texture was complete, but while they were still in an unmarketable state. The stuffs which were damaged by the prisoners were, at that time, upon rollers, immersed in liquid, and in the actual process of being dyed; and the injury was done by throwing deleterious ingredients upon the stuffs themselves, and into the liquid in which they were immersed. For the prisoners it was contended, that as the article damaged was at the time of the damage being done in a complete state, so far as the manufacturing and texture were concerned, and only required dyeing to fit it for the market, the case did not come within the words of the Act. For the prosecution it was submitted, that the Legislature could not have intended to withdraw the protection of the Act, until the manufacture was so complete that the articles were fit for immediate sale. Coleridge, J. (after consulting with Parke, B.), said that they were both of opinion that the true construction of the Act was that contended for by the prosecutor; he therefore overruled the objection, and he referred to the provision in the same section relating to goods on 'the rack or tenters,' as shewing that the Act contemplated injuries to goods subsequent to the completion of the texture (*f*).

The prisoner was in the employment of a clothier. One day his

a doubt, which arose in R. *v.* Ashton, 2 B. & Ad. 750, as to whether the words 'prepared for or employed in carding, &c.' referred to the words 'warp or shute of silk' or only to the words 'loom, frame.' The same doubt had also arisen in R. *v.* Clegg, 3 Cox, 295.

(*d*) Taken from 7 & 8 Geo. IV. c. 30, s. 4 (E.) and 9 Geo. IV. c. 56, s. 4 (I.) and extended to all agricultural machines or engines.

(*e*) R. *v.* Tacey, R. & R. 452. Cf. R. *v.* Fisher *post*, p. 1811.

(*f*) R. *v.* Woodhead, 1 M. & Rob. 549. The same objection was taken in R. *v.* Clegg, 3 Cox, 295.

loom was examined, and it was found the cords had been taken from the 'lambs' and 'treadles,' and the slay' (a frame into which a number of steel rods are inserted) disengaged. This was caused by the thrum having been cut. The thrum ought not to be severed when a piece of cloth is taken from the machine. He was charged in one count with maliciously cutting certain tackle, to wit, certain cords prepared for and employed in weaving; and in another count with maliciously damaging the tackle with intent to destroy it. The thrum is the end of the woollen chain or thread left in the working tools or harness to fasten on to the next piece of cloth, and is the connecting link between the fabric and the machine. The fastening of the threads to the thrum was the secret of the work. There was a different mode of tying the cords according to the work; the prisoner had his own tye; other workmen looked on and tried to get the secret. There is a fresh thrum to every piece of work. The old thrum is cut off, and goes with the finished work to the master. The cords are to raise the harness for the shuttle to move to and fro. Williams, J., told the jury that what the prisoner appeared to have done was two things, cutting the thrum and cutting the cords. With reference to the question whether the cutting must have been done with intent to destroy or render useless, if the cords were cut maliciously, it was unnecessary to aver that the act was done with intent to destroy or render useless; for this simple reason, that, if actually cut, then, if done maliciously, it must be done with intent to destroy. If the prisoner committed the act thinking he had a right, or even a notion that he had a right, he would not be guilty; for that was not the offence charged. The question resolved itself into this: did the prisoner do it in anger and revenge to his employer, or from any supposed right to conceal his art? Although cutting the thrum was not the offence charged, it was material, as shewing the object of the prisoner; for if he cut the thrum maliciously, that is a key to the cutting the cords (*g*).

It is not necessary that the damage done should be of a permanent nature. The prisoner was indicted under sect. 15 (*ante*, p. 1809), for damaging, with intent to destroy or render useless, a threshing machine. It was proved that the prisoner had maliciously screwed up parts of the engine so that they would not work, and had reversed the plug of the pump which supplied the engine with water, and that the steam-engine was thus rendered temporarily useless and would have burst if the obstruction had not been discovered and with some difficulty removed. Upon a case reserved it was held, that the prisoner was guilty of damaging the engine with intent to render it useless within the section (*h*).

Upon an indictment for destroying a threshing machine it appeared that the prosecutor, in expectation of a mob coming to destroy his threshing machine, had himself taken it to pieces, and that the prisoners only broke the detached parts of it; but it was held that the offence was committed, although at the time when the machine was broken it had been taken to pieces, and was in different places, only

(*g*) R. *v.* Smith, 6 Cox, 198. L.J. M.C. 57. Cf. R. *v.* Tacey, *ante*, p. 1810.
(*h*) R. *v.* Fisher, L. R. 1 C. C. R. 7: 35

requiring the carpenter to put the pieces together again (*i*). So where the prisoner was indicted for destroying a threshing machine, and it appeared that it had been previously taken to pieces by the owner, by separating the arms and other parts of it, for the purpose of placing it in safety, but with a view to put it together again; and it was destroyed whilst in this disjointed state; it was held, that the offence was within 7 & 8 Geo. IV. c. 30, s. 4 (rep.) (*j*). So where certain side-boards were wanting to the machine at the time it was destroyed, but which did not render it so defective as to prevent it altogether from working, though it would not work effectually as if those boards had been made good; it was held, that it was still a threshing machine within the meaning of the statute (*k*). And where the owner had removed a wooden stage belonging to the machine on which the man who fed the machine was accustomed to stand, and had also taken away the legs; and it appeared, that though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair, or table, or a number of sheaves of corn, would do nearly as well, and that it could also be worked without the legs; it was held, that the machine was an entire one within the Act, notwithstanding the stage and legs were wanting (*l*).

So where on an indictment for destroying a threshing machine it appeared that the machine was worked by water, and that the prosecutor, expecting a mob would come to break it, had had it taken to pieces and had removed the pieces to a barn at the distance of a quarter of a mile, leaving no part of it standing but the water-wheel and its axis and a brass joint, which was joined to the axis of the water-wheel, and that this water-wheel was broken by the prisoners. The water-wheel had been put up for the sole purpose of working the threshing machine, and had never been used for anything else, except sometimes to work a chaff-cutter, which was appended to the threshing machine; it was held that the wheel was part of the threshing machine, and that the damaging it was damaging a threshing machine within the meaning of the statute, and that it made no difference that the threshing machine was sometimes worked by horses when there was a scarcity of water (*m*).

But where the prosecutor had not only taken the machine to pieces, but had broken the wheel before the mob came to destroy it, for fear of having it set on fire and endangering his premises; and it was proved that, without the wheel, the engine could not be worked; in this case it was held, that the remaining parts of the machine, which were destroyed by the mob, did not constitute a threshing machine within the meaning of the statute (*n*).

Where, on an indictment for destroying a threshing machine, it

(*i*) R. *v.* Mackerel, 4 C. & P. 448, Park, J., Bolland, B., and Patteson, J.

(*j*) R. *v.* Hutchins, 2 Deac. Cr. Dig. 1517, Reading Sp. Com., Park, J., Bolland, B., and Patteson, J.

(*k*) R. *v.* Bartlett, 2 Deac. Cr. Dig. 1517, Salisbury Sp. Com., Vaughan, B., Parke and Alderson, JJ.

(*l*) R. *v.* Chubb, 2 Deac. Cr. Dig. 1518, Salisbury Sp. Com., Vaughan, B., and Parke, J.

(*m*) R. *v.* Fidler, 4 C. & P. 449. Park, J., Bolland, B., and Patteson, J.

(*n*) R. *v.* West, 2 Deac. Cr. Dig. 1518, Salisbury Sp. Com., Alderson, J.

appeared that the machine was broken by a mob, Patteson, J., allowed the witnesses to be asked whether many persons had not been compelled to join the mob against their will, and whether the mob did not compel each person to give one blow to each threshing machine they broke; and also whether, at the time when the prisoner and a witness called for the prisoner joined the mob, they did not agree together to run away from the mob on the first opportunity (*o*).

A table with a hole in it for water, used in the manufacture of bricks, was held not to be a machine 'prepared for or employed in any manufacture,' within 7 & 8 Geo. IV. c. 30, sect. 4 (rep.) (*p*).

The prisoner was indicted for damaging a machine employed in the manufacture of iron. The prosecutors were manufacturers of iron, and the prisoner was one of their workmen. He put a sledge-hammer between the jaws of the squeezers, the engine being then in motion. There is a sort of step in the lower jaw of the squeezers between the narrow and the wide part, and the practice is to hold the puddling ball with the tongs in the wider part of the squeezers against the step until it is partially crushed, and then to remove it into the narrower part of the squeezers. By this method the strain on the engine which would result from forcing the balls at once into the angle of the squeezers, is avoided. The prisoner put the hammer into the upper part of the squeezers, and immediately there was a loud report, as of a blow, shaking the building. The engineer examined the carriage of the spur-wheel of the engine and the rests; they were displaced; the silling also of the carriage was displaced. These injuries would not have occurred if the sledge-hammer had not been put in. The connecting-rod was displaced and lifted up, but the engine was not so much displaced as to prevent the work from going on; it continued to roll puddled bars; no part of the machinery was broken. The oak silling and the brickwork under it had given way and sunk, and the carriage went down with it. The actual damage done to the squeezers was three shillings, and the total damage to the machine five shillings. The value of the whole machine was five thousand pounds. The millwright included the silling as part of the machine. If the silling had not given way, the probable damage would have been upwards of one thousand pounds. The sledge-hammer was fourteen or fifteen pounds weight. It was objected, 1st, that express malice must be proved, and there was no evidence that the prisoner knew what the consequences of his act would be; but Platt, B., held that everything wilfully done, if injurious, must be inferred to be done with malice. 2nd, that there was no damage to any part of the machine; for the silling was no part of the machine, but only that part which was in motion. 3rd, that there was no damage or injury done within the statute. But Platt, B., after consulting Wightman, J., held that the silling was to be considered a part of the machine, and that a dislocation or disarrangement of a machine was within the statute (*q*).

(*o*) R. *v.* Crutchley, 5 C. & P. 133.

(*p*) R. *v.* Penny, Archb. Cr. Pl. (23rd ed.) 676, Jervis, C.J., after consulting Campbell, C.J.

(*q*) R. *v.* Foster, 6 Cox, 25. See R. *v.* Tacey, *ante*, p. 1810.

An indictment under sect. 15 must allege that the act was done feloniously (*r*).

Where an indictment contained counts founded on 7 & 8 Geo. IV. c. 30, s. 8 (rep.), for riotously demolishing certain machinery, and also counts founded on sect. 3 for destroying certain looms, and it was objected that the two sets of counts were improperly joined, as the same judgment could not be passed on both; Bayley, J., said: 'I see no difficulty. I do not see that the prisoners will be under any disadvantage; but I will speak to the judges on the subject' (*s*).

(*r*) R. *v.* Gray, L. & C. 365: 33 L.J. M.C. 78. Another question raised in this case, but not determined, was whether either a patent plough of Bastall or an ordinary plough, or a scarifier, each being commonly in use in agriculture, is a machine for ploughing or performing any other agricultural operation, within s. 15 of the Act of 1881.

(*s*) R. *v.* Kershaw, 1 Lew. 218. It is not stated in the report how this case terminated.

CANADIAN NOTES.

MALICIOUS DAMAGE TO ARTICLES IN COURSE OF MANUFACTURE AND TO IMPLEMENTS AND MACHINERY.

Damaging Goods in Process of Manufacture.—See Code sec. 510C (*h*).

Damaging Agricultural or Manufacturing Machines, etc.—See Code sec. 510C(*i*).

Injury to Property Generally.—See Code sec. 539.

CHAPTER THE FORTY-EIGHTH.

OF MALICIOUS DAMAGE TO SEA BANKS, ETC., OR TO THE DAMS, ETC., OF RIVERS, CANALS, FISH-PONDS, ETC., OR TO FISHERIES.

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 30, 'Whosoever shall unlawfully and maliciously break down or cut down *or otherwise damage or destroy* any sea bank or sea wall, or the bank, dam, or wall of *or belonging to* any river, canal, drain reservoir, *pool*, or marsh, whereby any land *or building* shall be or shall be in danger of being overflowed or damaged, or shall unlawfully and maliciously throw, *break, or cut* down, level, undermine, or otherwise destroy, any *quay, wharf, jetty*, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse, or other work *belonging to any port, harbour, dock, or reservoir, or* on *or belonging to* any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . (*a*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*b*).

By sect. 31, 'Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank, *dam*, or wall of any river, canal, *drain, aqueduct*, marsh, *reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock*, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . (*a*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*c*).

By sect. 32, 'Whosoever shall unlawfully and maliciously *cut through*, break down, or otherwise destroy the dam, *floodgate, or sluice* of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously

(*a*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. p. 211, 212. The omitted words are repealed.

(*b*) Framed from 7 & 8 Geo. IV. c. 30, s. 12 (E.) and 9 Geo. IV. c. 56, s. 12 (I.).

The words in italics were new in 1861 and in England the section was new as far as it relates to any 'dam, drain, reservoir, weir, tunnel, towing-path, and watercourse,' which words were taken from 9 Geo. IV. c. 56, s. 12 (I.). These additions include cases where loss of life and great injury to property might ensue from such malicious acts.

(*c*) Taken from 7 & 8 Geo. IV. c. 30, s. 12, and 9 Geo. IV. c. 56, s. 13 (I.), with the additions in italics.

put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish *that may then be or that may thereafter be put* therein, or shall unlawfully and maliciously *cut through*, break down, or otherwise destroy the dam *or floodgate* of any mill-pond, *reservoir, or pool*, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years . . . (*d*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*e*).

7 & 8 Geo. IV. c. 30, s. 15 (rep)., did not apply if a dam of a fish-pond was broken down under a colour of right (*f*).

By the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 13, 'the provisions of sect. 32 of the Malicious Damage Act, 1861, so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words, 'or in any salmon river,' were inserted in the said section, *in lieu of the words 'private rights of fishery'* after the words 'noxious material in any such pond or water' (*g*).

By the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 5, 'Every person who causes or knowingly permits to flow, or puts or knowingly permits to be put, into any waters containing salmon, or into any tributaries thereof, any liquid or solid matter to such an extent as to cause the waters to poison or kill fish' is liable to pecuniary penalties on summary conviction, subject to a proviso in favour of a person for any act done in exercise of any right to which he is by law entitled, if he proves to the satisfaction of the Court that he has used the best practicable means, within a reasonable cost, to render harmless the matter permitted to flow into the waters.

By the Fisheries (Dynamite) Act, 1877 (40 & 41 Vict. c. 65) s. 2, 'Any person who uses dynamite or other explosive substances to catch or destroy fish in a public fishery' is liable on summary conviction to fine or imprisonment with hard labour.

By sect. 3, 'Any offence committed under this Act, on the sea coast or at sea, within one marine league of the coast shall be deemed to be committed in a public fishery, and if beyond the ordinary jurisdiction of any court of summary jurisdiction, shall be deemed either to have been committed on the land abutting on such sea coast, or adjoining such sea, or to have been committed in any place where the offender is found, and may be tried and punished accordingly.'

By the Freshwater Fisheries Act, 1884 (41 & 42 Vict. c. 39), s. 12,

(*d*) For other punishments, see 54 & 55 Vict. c. 69, s. 1 *ante*, Vol. i. pp. 211, 212.

(*e*) Taken from 7 & 8 Geo. IV. c. 30, s. 16 (I.). Under the former enactments if a man had destroyed the floodgate or sluice of a pond, or the dam of a reservoir or pool, he would not have been punishable. These defects are remedied by the words in italics. The present enactment disposes of the question that arose in R. *v.* Ross R. & R. 10 under 9 Geo. I. c. 22 (rep.)

(*f*) Michell *v.* Williams, 11 M. & W. 205. The term 'malice' in its legal sense denotes a wrongful act, done intentionally, without just cause or excuse. See *ante*, p. 1771, and cf. Heaven v. Crutchley, *ante*, p. 1803, and R. *v.* Clemens, *post*, p. 1831.

(*g*) It is impossible to carry out the directions in this section, but in R. *v.* Vasey [1905], 2 K. B. 748, upon a case reserved, it was held that as the intention of the section was quite clear, the Court had power to disregard the words in italics, and give effect to the section as if they had not been inserted.

'The Fisheries (Dynamite) Act, 1877 . . . shall apply to the use of any such substance for the catching or destruction of fish in any water, whether public or private, within the limits of this Act' (*h*).

By the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 9, 'There shall not be manufactured or sold, or exposed for sale at any place within the British Islands, any instrument serving only, or intended to damage or destroy fishing implements, by cutting or otherwise.' By sect. 2, offenders are liable on summary conviction to fine or imprisonment with hard labour and to forfeit the instrument.

(*h*) The Act does not extend to Scotland or Ireland.

CANADIAN NOTES.

MALICIOUS DAMAGE TO SEA-BANKS, ETC., OR TO DAMS, CANALS, FISH-PONDS OR FISHERIES.

Damages to sea-banks.—See Code sec. 510A(*b*).

Damage to Dams, Canals, etc.—See Code sec. 510C(*d*) and (*e*).

Damage to Fish-ponds or Fisheries.—*See* Code sec. 510C(*f*) and (*g*).

Limitation of Liability.—See Code secs. 540 and 541.

A drainage ditch filled with water is not an "artificial inland water" within the meaning of this section (510), making it an indictable offence to wilfully destroy or damage any inland water or canal. R. v. Brown, 8 Can. Cr. Cas. 397.

CHAPTER THE FORTY-NINTH.

OF MALICIOUS DAMAGE TO BRIDGES, TOLL BARS, FENCES, ETC.

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 33, 'Whosoever shall unlawfully and maliciously pull or throw down or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct, or aqueduct, over or under which bridge, viaduct, or aqueduct, any highway, railway, or canal shall pass, or do any injury with intent and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life . . . (*a*) or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping' (*b*).

By sect. 34, 'Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate, or toll-bar, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate or toll-bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act of Parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanor (*c*).

The malicious destruction or damaging of public bridges is said to be punishable as a misdemeanor at common law, being a nuisance to all the King's subjects (*d*).

Fences.—By sect. 25, 'Whosoever shall unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, shall, on conviction thereof before a justice of the peace, for the first offence forfeit and pay, over and above the amount of the injury done,

(*a*) For other punishments, see 54 & 55 Vict. c. 69, s. 1., *ante*, Vol. i. pp. 211, 212. The omitted words are repealed.

(*b*) Taken from 7 & 8 Geo. IV. c. 30, s. 13 (E), and 9 Geo. IV. c. 56, s. 14 (I.). So much doubt had existed as to what was a public bridge, or part of one, which a county was bound to repair, in R. *v.* Oxfordshire, 1 B. & Ad. 289: 35 R. R. 302, R. *v.* Oxfordshire, 1 B. & Ad. 297, and R. *v.* Derbyshire, 2 Q. B. 745, that the words 'whether over any stream of water or not,' were introduced to remove that doubt, and to extend this section to all bridges.

The section is also extended to viaducts and aqueducts.

The former section was in terms confined to 'public bridges:' this section includes every bridge over or under which any highway passes. It is therefore confined to public bridges where no highway passes under them, but includes both public and private bridges where a highway passes under them. But in other cases any injury to a private bridge exceeding the amount of five pounds would bring the case within sect. 51, and if less than that sum, within sect. 52.

(*c*) Taken from 7 & 8 Geo. IV. c. 30, s. 14 (E), and 9 Geo. IV. c. 56, s. 15 (I.). 14 & 15 Vict. c. 92, s. 9 (I.), makes the offences contained in this clause punishable summarily in Ireland.

(*d*) 2 East, P. C. 1081.

such sum of money not exceeding five pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit' (*e*).

Where the prisoner was found ferreting rabbits in a hedge, and he had a dog with him, which had done some slight damage to the hedge in two or three places by breaking through it; Parke, B., held that the injury done to the hedge by the dog was not an offence within 7 & 8 Geo. IV. c. 30, s. 23 (rep.), and said, 'to constitute an offence under that Act, the injury done must be unlawful and malicious; it must be a wanton act of cutting or the like, with the object of doing damage to the thing injured. Here there was no spiteful object in damaging the fence; it was done merely in prosecution of the intention to kill the rabbits' (*f*).

(*e*) Taken from 7 & 8 Geo. IV. c. 30, s. 23. There was a similar clause in 14 & 15 Vict. c. 92, s. 3 (I.). The accused can elect to be tried on indictment for a second offence, 42 & 43 Vict. c. 49, s. 17, *ante*, Vol. i. p. 17. As to damaging fences surrounding statues and monuments, see sect. 39, *post*, p. 1823.

(*f*) R. *v.* Prestney, 3 Cox, 505. A very much sounder ground for this decision would have been that the dog acted on his own impulse, and that there was no evidence that he acted on the instigation of the prisoner, and therefore the act was not wilful, and still less the malicious act of the prisoner. See *ante*, p. 1771, as to the meaning of 'malice.'

CANADIAN NOTES.

MALICIOUS DAMAGE TO BRIDGES, TOLL BARS, FENCES, ETC.

Damage to Bridges, Aqueducts, Viaducts, etc.— See Code sec. 510A(*c*).

Damage to Fences, Wall, Stile or Gate, etc.—See Code sec. 530.

Damage to Boundary Marks.—See Code sec. 531.

Damage by Injury or Removing Boundary Marks.—See Code sec. 532.

Colour of Right.—The "colour of right" on the part of the defendant, which under Cr. Code sec. 541, removes the criminal character of an act of damage to property, means an honest belief in a state of facts, which if it actually existed, would constitute a legal justification or excuse. Proof of such "colour of right," in respect of the destruction of a fence complained of under this section ousts the jurisdiction of the magistrate to summarily try the charge. The King v. Johnson, 8 Can. Cr. Cas. 123, 7 O.L.R. 525.

Where a justice of the peace proceeded with a charge of destroying a line fence although it appeared that the defendant pulled down the fence where it crossed a road long used by the public and that the title to the land was therefore in question and the magistrate's jurisdiction ousted, the right to certiorari is not taken away by an appeal to the County Court being entered under Code sec. 749 for the County Court had no jurisdiction to re-hear a case in which there was no jurisdiction below. The magistrate should have stopped the trial as soon as he found that the title to land was in question whether the dispute was as to the right or estate in the soil or merely as to a right of way or easement thereon. Ex parte Roy (1907), 12 Can. Cr. Cas. 533 (N.B.).

Unregistered Plans as Evidence.—The defendant was convicted under this section for unlawfully and wilfully destroying or damaging a certain fence upon the land of the complainant. It was held that the convicting magistrate erred in disregarding plans of the locus because they were not registered. Where lots are sold in sections pursuant to a plan of the whole made by or for the owner of the whole, according to which he sells the parts, the plan is good to establish such a lane among the different sub-owners, whether registered or not. R. v. Johnson (1904), 8 Can. Cr. Cas. 123, 7 O.L.R. 525.

Before the Code it was held that the misdemeanour mentioned in sec. 107 of C.S.C. ch. 77, from which R.S.C. ch. 168, secs. 56 and 57,

afterwards Code secs. 531 and 532 are derived could only be committed in relation to boundaries or landmarks which had been legally placed by a land surveyor or with all the formalities required by that statute to mark the limit or line between two adjoining owners, and did not apply to the boundary marks of an Indian reserve placed on Government property, and removed upon a new survey by the authority of the Government department although the land marks had meanwhile been adopted as a parish boundary for local purposes. Reg. v. Austin (1885), 11 Que. L.R. 76, Tessier, J.

CHAPTER THE FIFTIETH.

MALICIOUS DAMAGE TO TELEGRAPHS, ELECTRIC LINES, ETC.

MALICIOUS damage to Post-office property is dealt with, *ante* pp. 1427 *et seq.*

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 37, 'Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove, any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph (*a*), or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall, on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice (*b*) shall seem meet' (*c*).

Sect. 38. 'Whosoever shall unlawfully and maliciously, by any overt act, attempt to commit any of the offences in the last preceding section mentioned, shall, on conviction thereof before a justice of the peace (*b*), at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding

(*a*) In Att.-Gen. *v.* Edison Telephone Co. 6 Q. B. D. 244, it was held that a telephone was a 'telegraph' within the meaning of the Telegraph Acts, 1863—1869, and sect. 1 of the Telegraph Act, 1892, (55 & 56 Vict. c. 59) speaks of 'that part of the telegraphic system . . . which is called the telephonic system.'

(*b*) The powers of a justice sitting alone are now restricted by the Summary Jurisdiction Act, 1879, sect. 20 (7).

(*c*) This section was new in 1861. The first branch provides against injuries to any battery or other thing used in electric telegraphs. The second provides against the preventing or obstructing communications by such telegraphs: and these offences are made misdemeanors; but as it was foreseen that there may be malicious injuries, which would fall within the first part of this section, of too trifling a character to deserve so severe a punishment, it was thought fit to empower any justice, who is of opinion that it is not expedient to the ends of justice that the offence should be prosecuted by indictment, summarily to convict the offender.

three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet' (*d*).

By the Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49), s. 3, '(1) A person shall not unlawfully and wilfully, or by culpable negligence, break or injure any submarine cable to which the Convention (*e*) for the time being applies, in such manner as might interrupt or obstruct, in whole or in part, telegraphic communication.

'(2) Any person who acts, or attempts to act, in contravention of this section shall be guilty of a misdemeanor, and on conviction,—

'(a) If he acted wilfully shall be liable to penal servitude for a term not exceeding five years, or to imprisonment with or without hard labour for a term not exceeding two years, and to a fine, either in lieu of or in addition to such penal servitude or imprisonment; and

'(b) If he acted by culpable negligence, shall be liable to imprisonment for a term not exceeding three months, without hard labour, and to a fine not exceeding £100, either in lieu of, or in addition to, such imprisonment.

'(3) Where a person does any act with the object of preserving the life or limb of himself or of any other person, or of preserving the vessel to which he belongs, or any other vessel, and takes all reasonable precautions to avoid injury to a submarine cable, such person shall not be deemed to have acted unlawfully and wilfully within the meaning of this section.

'(4) A person shall not be deemed to have unlawfully and wilfully broken or injured any submarine cable where in the *bonâ-fide* attempt to repair another submarine cable injury has been done to such first-mentioned cable, or the same has been broken, but this shall not apply so as to exempt such person from any liability under this Act, or otherwise, to pay the cost of repairing such breakage or injury.

'(5) Any person who within or (being a subject of [His] Majesty) without [His] Majesty's dominions, in any manner procures, counsels, aids, abets, or is accessory to the commission of any offence under this section, shall be guilty of a misdemeanor, and shall be liable to be tried and punished for the offence as if he had been guilty as a principal.'

By the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 22, 'Any person who unlawfully and maliciously cuts or injures any electric line or work with intent to cut off any supply of electricity shall be guilty of felony, and be liable to be kept in penal servitude for any term not exceeding five years or to be imprisoned with or without hard labour for any term not exceeding two years; but nothing in this section shall exempt a person from any proceeding for any offence which is punishable under any other provision of this Act, or under any other act, or at common law, so that no person be punished twice for the same offence.'

(*d*) This section was new in 1861. The Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 8, contains provisions as to compensation and fines in case of injuries, &c. to telegraphic lines of the Postmaster-General.

(*e*) The Submarine Telegraphs Convention, 1884.

CANADIAN NOTES.

MALICIOUS DAMAGE TO TELEGRAPHS, ELECTRIC LINES, ETC.

General Provision for Damage.—See Code sec. 539.

Damaging Telegraph, Telephone or Fire Alarm or Obstructing Communication.—See Code sec. 521.

CHAPTER THE FIFTY-FIRST.

MALICIOUS DAMAGE TO WORKS OF ART, MONUMENTS, ETC., IN MUSEUMS, CHURCHES, PUBLIC PLACES, ETC.

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 39, 'Whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust or vase, or any other article or thing kept for the purposes of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, library, or other repository is either at all times or from time to time open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art, in any church, chapel, meeting-house, or other place of divine worship, or in any building belonging to the [King], or to any county, riding, division, city, borough, poor law union, parish, or place, or to any university, or college or hall of any university, or to any inn of court, or in any street, square, churchyard, burial ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping: Provided that nothing herein contained shall be deemed to affect the right of any person to recover, by action at law, damages for the injury so committed' (*a*).

(*a*) Framed on 8 & 9 Vict. c. 44, ss. 1, 4, and 17 & 18 Vict. c. 33, s. 6. The section is extended to pictures, statues, &c., in public buildings and in buildings belonging to the universities and inns of court, and to statues, monuments, and other memorials of the dead in churchyards, &c.

Coke, 3 Inst. 202, speaking of 'tombs, sepulchres, or monuments in a church, chancel, or churchyard,' expressly lays it down, in general terms and without any limitation whatever, that 'the defacing of them is punishable at common law,' as it appeareth in the book of 9 Edw. IV. 14 (Lady Wyche's case), and as it was agreed by the whole Court in Corven's case, 12 Co. Rep. 105. And this position appears to be clearly correct. In Corven's case it was held that if a nobleman, knight, esquire, &c., be buried in a church, and a gravestone or tomb be made for his monument, although the freehold of the church be in the parson, yet cannot the ordinary, parson, churchwardens, or any other take them or deface them, but he is subject to an action *on the case* by the person who placed them during his life, and after his death by the heir male, lineal or collateral, of the deceased. Co. Litt. 18 b, 27 *a*. Francis *v.* Ley, Cro. Jac. 366. The first branch of this passage is equally general with the passage cited from 3 Co. Inst. 202, and may be considered as explained by it; and, therefore, it ought not to be looked upon as limited by the latter branch to cases where the injury is done by some one other than the person who erected the monument or the heir of the deceased. But even if it were contended that this passage shewed that such person or the heir

could alter or deface a monument, it seems plain that such is not the law. A monument affixed to a church or in a churchyard is just as much in the possession of the incumbent as the church and churchyard, as is shewn by the action by the heir being an action *on the case*; consequently the heir would be guilty of a trespass if he defaced the monument without the leave of the incumbent. But it may be said that the incumbent can give such a consent as will justify the heir in dealing with the monument; it is conceived, however, that he can give no such consent. He is merely tenant for life at the utmost, and cannot lawfully do anything to the detriment of the freehold, or of anything annexed to and parcel of it, and what he cannot lawfully do himself, he cannot lawfully permit another to do. In Francis *v.* Ley, above cited, it was held that 'it is not lawful for any to break or deface any *superstitious* pictures in any church or aisle, but the ordinary only; and if any do so without licence from the ordinary, he shall be bound to his good behaviour, as was done in Prickett's case by Sir C. Wray, chief justice of the King's Bench.' This is a very strong authority to shew that the incumbent cannot break or deface anything annexed to the freehold of the church. If he cannot deface superstitious annexations, *a multo fortiori* he cannot deface monuments lawfully erected.

A little consideration will also prove that the representative of a family for the time being cannot lawfully deface them. When a person erects a monument, he dedicates it *for ever* for every purpose which it may lawfully serve. He intends it to be *in perpetuam memoriam* of every thing stated in it. As soon as it is annexed to the freehold it passes into the possession of the incumbent to be preserved for the purposes for which it was erected. Now, what are those purposes? It becomes *for all future time* legal evidence of all the births, marriages, and deaths mentioned in it in every case where any question may arise relating to any of them. This clearly proves that the representative of the family for the time being can have no right to destroy it; for all other members of the family then living or thereafter to be born have or will have an interest in it. The present representative may be a peer, the last of his branch of the family, and there may be a monument which alone would prove the descent of the next heir to the title; it is impossible to suppose that he can lawfully destroy such a monument, and thereby prevent the next heir from succeeding to the peerage. So it may be that the present representative is tenant for life of an estate entailed on the heir male of the family; can he lawfully destroy a monument which may prove who is entitled to succeed to the estate on his death? A monument may also be evidence for a person wholly a stranger in blood to the person who erected it. Suppose an estate be entailed on the heirs male of A. with remainder to A.'s right heirs; a monument may shew that C., the son of A., died without issue male, and may thus prove that a female descendant of A. was seised in fee of the estate, and so establish the title of a stranger in blood, to whom the female had devised the estate. These instances, which have occurred in the families of two peers, plainly shew that the representative of a family for the time being cannot lawfully alter or destroy any inscription on a monument erected to a member of his family. In fact, his position is extremely like that of a tenant for life of an estate under lease, who may bring an action on the case against anyone who cuts down timber on the estate, but cannot cut it himself, or permit it to be cut by any other person.

It might also be well contended that the public have the same interest in a monument that they have in a register of births, marriages, and deaths, and that an inscription on the one can no more lawfully be defaced by any one than an entry in the other. But amply sufficient has been said to shew that there can be no doubt whatever that no one can lawfully deface any monumental inscription.

Where an aisle in a church belongs to a private individual, it seems clear that he is in the actual possession of it, and of everything in it; and consequently he may maintain an action of trespass against any one who injures any monument in it. See Burn's Eccl. Law, 'Church, IIc.' C. S. G.

CANADIAN NOTES.

MALICIOUS DAMAGE TO WORKS OF ART, MONUMENTS, ETC., IN MUSEUM, CHURCHES, PUBLIC PLACES, ETC.

General Provisions as to Damage to Property—Code sec. 510(*e*).
Damage to Buildings, etc.—Code sec. 529.
Injury to Property not Specially Provided for.—See Code sec. 539.

CHAPTER THE FIFTY-SECOND.

OF KILLING AND MAIMING CATTLE AND OTHER ANIMALS.

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 40, 'Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable . . . (*a*) to be kept in penal servitude for any term not exceeding fourteen years . . .' (*b*).

Proof of personal malice against the owner was not necessary under the former statutes (*c*), and is not necessary under this section (*d*).

By Sect. 41, 'Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird (*e*), beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, shall, on conviction thereof before a justice of the peace (*f*), at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice (*g*) shall think fit' (*h*).

It has been held that no indictment lies at common law for unlawfully maiming a horse (*i*).

Cattle.—In an indictment under sect. 40, *supra*, it appears not to be

(*a*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*b*) Taken from 7 & 8 Geo. IV. c. 30, s. 16 (E), and 9 Geo. IV. c. 56, s. 17 (I.), the punishment being altered by several subsequent Acts.

(*c*) *Vide ante*, p. 1771, and sect. 59, *ante*, p. 1772.

(*d*) R. *v.* Wilson, 1 Lew. 226. R. *v.* Tivey, 1 Den. xvii., 63; 1 C. & K. 704.

(*e*) Wild birds are protected by the Wild Birds Protection Acts, 1880 to 1908.

(*f*) The powers of a Justice sitting alone are now restricted by the Summary Jurisdiction Act, 1879 (sect. 20). The accused can elect to be tried on indictment, ibid., s. 17, *ante*, Vol. i. p. 17.

(*g*) *Vide* s. 58, *ante*, p. 1771.

(*h*) This section was new in 1861. It includes any beast or animal, not being cattle, which is the subject of larceny at common law. It also includes birds which are the subject of larceny at common law, such are all kinds of poultry, and, under certain circumstances, swans and pigeons. So also it includes any bird, beast, or other animal ordinarily kept in a state of confinement, though not the subject of larceny, such as parrots and ferrets; and it is to be observed that the words 'ordinarily kept in a state of confinement' are a description of the mode in which the animal is usually kept, and do not render it necessary to prove that the bird or animal was confined at the time when it was injured. Lastly, it included any bird or animal kept 'for domestic purpose,' which clearly embraces cats. *Vide ante*, pp. 1275 *et seq.*

(*i*) R. *v.* Ranger, 2 East, P. C. 1074.

enough to charge killing certain cattle without specifying what they are (*j*).

Sect. 40 does not enumerate any of the kinds of cattle. The term appears to include not only horned cattle and sheep, but also horses, mares, and colts (*k*), asses (*l*), and pigs (*m*).

Maliciously.—The prisoner was indicted under sect. 40, *supra*, for (1) killing, (2) maiming, and (3) wounding a mare. It was proved that the mare died from injuries caused by the prisoner inserting the handle of a stable fork into her vagina. There was no evidence to show that the prisoner was actuated by any ill will towards the owner of the mare, or by any spite against the mare, nor in fact by any motive except the gratification of his own depraved tastes. The jury found that the prisoner did not in fact intend to kill, maim, or wound the mare, but that he knew that what he was doing would or might kill, maim, or wound her, and nevertheless he did what he did recklessly, not caring whether the mare was injured or not. Upon a case reserved it was held that the conviction was proper (*n*).

If a prisoner were indicted for maliciously killing cattle by poison, other acts of administering poison would be admissible in order to shew the intent. The prisoner was indicted for a misdemeanor in administering sulphuric acid to six horses, with intent maliciously to kill them, and it appeared that the prisoner mixed sulphuric acid with a quantity of corn, and that, having done so, he gave each horse his feed, all the horses being in the same stable. Sulphuric acid was sometimes given to horses by grooms, under an idea that it would make their coats shine. Park, J., held that several acts of administering sulphuric acid were admissible, as they might go to shew whether it was done with the intent charged in the indictment; and he left it to the jury to say, whether the prisoner had administered the poison with the intent imputed in the indictment, or whether he had done it under the impression that it would improve the appearance of the horses; for that in the latter case they ought to acquit him (*o*).

In R. *v.* Parry (*p*), Russell, C.J., after consulting Grantham, J., held that a man could be convicted under this section for maliciously injuring an animal of his own.

Kill.—Maliciously setting fire to a building in which a cow was, with the result that the cow was burnt to death, was held to be killing within 7 Geo. IV. c. 30, s. 16 (*q*).

(*j*) R. *v.* Chalkley, R. & R. 258. Maliciously killing certain cattle, viz. a mare. Evidence of the sex of the animal was not given, and the conviction was quashed, on the ground that the general description was too wide and the particular description was not proved.

(*k*) See R. *v.* Patey, 2 W. Bl. 721; 1 Leach, 72; 2 East, P. C. 1074. R. *v.* Mott, 1 Leach, 73 n; 2 East, P. C. 1073, Hotham, B. R. *v.* Moyle, 2 East, P. C. 1076, Buller, J.

(*l*) R. *v.* Whitney, 1 Mood. 3, and MS. Bayley, J.

(*m*) R. *v.* Chapple, MS. Bayley, J., and R. & R. 77.

(*n*) R. *v.* Welch, 1 Q.B.D. 23: 45 L. J. M. C. 17. If a person acts for his own preservation and fairly to protect himself he does not act maliciously. Hanway *v.* Boultbee, 4 C. & P. 350.

(*o*) R. *v.* Mogg, 4 C. & P. 364. He also held that the evidence proved a joint administration to all the horses. As to evidence of intent, *vide ante*, p. 1773, and *post*, p. 2108.

(*p*) 35 L. J. (Newsp.) 456. Times, July 27, 1900, *sed quære*.

(*q*) R. *v.* Haughton, 5 C. & P. 559, Taunton, J.

Maim or Wound.—To constitute a maiming a permanent injury must be inflicted on the animal, but to constitute a wounding the injury need not be permanent.

Driving a nail into the frog of a horse's foot whereby the horse was rendered for a time useless to the owner, but was likely soon to recover and be perfectly sound, was held to be wounding (*r*).

The prisoner had laid hold of the tongue of a horse which had thrown and dragged him. The point of the tongue was left in his hand and he threw it away. The wound had healed and the horse could work as well as before, the only injury resulting from the loss of the point of the tongue being that it could not eat its corn quite so fast as before. This injury was held not to be 'maiming' (*s*).

Upon an indictment under sect. 40, *supra*, for wounding a gelding, the prisoner was convicted upon evidence which shewed that the gelding had suffered a laceration of the roots of the tongue, which protruded, and a tearing of the mouth, which injuries might have been caused by a pull of the tongue by the hand, but there was no evidence to shew that any other instrument than the hand had been used:—It was held upon a case reserved that there was sufficient evidence of a wounding; and the conviction was affirmed. Cockburn, C.J., said: 'It has been satisfactorily shewn that no instrument need be used to inflict the wound. Under this statute the word "wound" must be taken in the ordinary sense; for the mischief is just as great where manual power is used as if it were inflicted by an instrument' (*t*).

In R. *v.* Hughes (*tt*), where the prisoner had set a dog at a sheep, and the dog, by biting it, inflicted several severe wounds; Park, J., said: 'This is not an offence at common law, and is only made so by statute; and I am of opinion that injuring a sheep by setting a dog to worry it is not a maiming or wounding within the meaning of the statute' (*u*). But it is submitted that this case is inconsistent with first principles and that the dog is to be regarded as an instrument (*v*).

The prisoner poured a quantity of nitrous acid, which he had shortly before purchased, into the left ear of a mare, and either also poured some of it into the left eye, or, more probably some of the acid, which he had poured into the ear, had run along a furrow which it had made from her left ear upon her left temple, and so into her left eye, and he had thereby occasioned the immediate blindness of that eye. The mare continued to live, in extreme pain, about ten days, when, in order to put her out of her misery, she was stuck with a knife, and bled to death. Two surgeons stated that the injuries done to the ear (which was produced) were not wounds but ulcers, though such ulcers would have

(*r*) R. *v.* Haywood, R. & R. 16; 2 East, P. C. 1076, decided on 9 Geo. I. c. 22 (rep.).

(*s*) R. *v.* Jeans, 1 C. & K. 539, Patteson, J. A count for wounding failed, on the ground that no instrument was used. But see R. *v.* Bullock, *infra*.

(*t*) R. *v.* Bullock, L. R. 1 C. C. R. 115; 37 L. J. M. C. 47. In the L. J. report, at p. 48, Cockburn, C.J., says: 'The case last referred to (R. *v.* Jennings, 2 Lew. 130) gives the reason for putting the construction on the old statute, namely, that the word "wound" was used in conjunction with the other words "stab" and "cut."'

(*tt*) 2 C. & P. 420.

(*u*) 4 Geo. IV. c. 54, s. 2 (rep.).

(*v*) See R. *v.* Elmsley, 2 Lew. 126, where Alderson, J., thought a wound inflicted by the bite of a dog was a wound within 9 Geo. IV. c. 31 (rep.), but intended to reserve the point if it became necessary. C. S. G.

turned to wounds. Upon this state of facts, the nitrous acid not having been the proximate and immediate cause of the death of the mare, and the surgeons having deposed that the nitrous acid had not produced what they could technically call wounds, the Court recommended the jury, if they were satisfied of the guilt of the prisoner, to find their verdict against him on the third count of the indictment, which charged maiming, and to acquit him on the other counts; on a case reserved upon the question it was held, that the injury done to the eye of the mare in the manner and by the means above stated was a maiming within the meaning of 7 & 8 Geo. IV. c. 30, s. 16 (rep.) (*w*).

The placing of poisoned flesh in a garden for the purpose of killing a trespassing dog is not an offence within sect. 41 (*x*), and it has been held that the section does not apply to the shooting of trespassing fowls (*y*). But where an information under this section was laid against a gamekeeper for unlawfully and maliciously killing a dog, the dog was at the time near an aviary, in which pheasants, the property of the gamekeeper's master, were at the time confined for breeding purposes, the Court held that the test of the gamekeeper's liability under this section was whether he acted under the *bonâ fide* belief that what he was doing was necessary for the protection of his master's property and that it was the only way in which the property could be protected (*z*).

The Cruelty to Animals Acts of 1849 (12 & 13 Vict. c. 92), and 1854 (17 & 18 Vict. c. 60) and 1876 (39 & 40 Vict. c. 77), make cruelly beating, ill-treating, overdriving, abusing, or torturing animals, offences punishable on summary conviction (*a*). The Drugging of Animals Act, 1876 (39 & 40 Vict. c. 13), renders any person other than the owner or his agent administering injurious drugs to cattle, &c., liable to penalties on summary conviction.

(*w*) R. *v.* Owens, 1 Mood. 205. Daniel *v.* Janes, 2 C. P. D. 351; 41 J. P. 712. The Poisoned Flesh Prohibition Act, 1864 (27 & 28 Vict. c. 115), renders persons laying poisoned flesh upon land liable to penalties recoverable on summary conviction.

(*x*) *Ante*, p. 1825.

(*y*) Smith *v.* Williams, 56 J. P. 840.

(*z*) Miles *v.* Hutchings [1903], 2 K.B. 714. Daniel *v.* Janes, (*supra*), was considered by the Court. See Armstrong *v.* Mitchell, 67 J. P. Rep. 329.

(*a*) See also the Dogs Act, 1906 (6 Edw. VII. c. 32).

CANADIAN NOTES.

KILLING AND MAIMING CATTLE AND OTHER ANIMALS.

Killing, Maiming, Poisoning or Wounding Cattle, etc.—See Code sec. 510B(*b*).

Attempt to Injure or Poison Cattle.—See Code sec. 536.

Injury to Animals not Included in Term "Cattle."—See Code sec. 537.

Award of Costs and Damages to Owner.—Where separate convictions have been irregularly made upon one information for killing two dogs, the magistrate may return to a certiorari a single amended conviction conforming to the minute of adjudication and apportioning the fine and damages for the killing of each dog. The award of costs to the owner of the dog on whose behalf his wife had laid the information, instead of to the informant is a mere irregularity which is cured by sec. 1124 of the Code. Ex parte Grey (1906), 12 Can. Cr. Cas. 481 (N.B.).

Threats to Injure Cattle.—See Code sec. 538.

Cruelty to Animals.—See Code sec. 542.

Information.—An information and summons thereon both describing the offence as "unlawfully abusing a mare contrary to sec. 542 of the Criminal Code," sufficiently describe an offence under this section without specific mention of any of the words "wantonly," "cruelly," or "unnecessarily," which are used in that section. The King v. Cornell, 8 Can. Cr. Cas. 416.

Appeal.—Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no *locus standi* to appeal from the justices' order dismissing the charge; the notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed. Canadian Society, etc. v. Lauzon (1899), 4 Can. Cr. Cas. 354 (Que.).

Limitation of Time.—See Code sec. 1140.

Keeping Cockpit, etc.—See Code sec. 543.

The prosecution must be commenced within three months from the commission of the offence. Sec. 1140.

Conveyance of Cattle by Railways Without Proper Care.—See Code sec. 544.

By sec. 1140 it is provided that no prosecution for this offence or action for penalties or forfeitures shall be commenced after the expiration of three months from the commission of the offence.

Search of Premises by Peace Officer.—See Code sec. 545.

Limitation of Time.—The prosecution must be commenced within three months from the commission of the offence. Sec. 1140.

Killing Cattle.—On a charge of unlawfully and maliciously killing cattle it appeared that the animal was killed by the prisoners, when it was in a helpless and dying condition, and that the prisoners thought it was an act of mercy to kill it. It was held that the killing was not malicious; that the implication of malice was rebuttable, and had been in fact rebutted, a *mens rea* on the part of the prisoners being disproved. The Queen v. Mennel, 1 Terr. L.R. 487.

CHAPTER THE FIFTY-THIRD.

OF MALICIOUS OR WILFUL DAMAGE TO REAL OR PERSONAL PROPERTY NOT OTHERWISE PROVIDED FOR.

By the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 51, 'Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock of the evening and six of the clock in the next morning, shall be liable . . . (*a*) to be kept in penal servitude . . . ' (*b*).

Sect. 52. 'Whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace (*c*), at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding two months, or else shall forfeit and pay such sum of money not exceeding five pounds as to the justice shall seem meet, and also such further sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which last mentioned sum of money shall, in the case of private property, be paid to the party aggrieved, and in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in the same manner as every penalty imposed by a justice of the peace under this Act; and if such sums of money, together with costs

(*a*) For other punishments, see 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212. The omitted words were repealed in 1893 (S. L. R.).

(*b*) This section was new in 1861, and a very important amendment of the law. 'In the present times there are so many very valuable instruments and machines daily invented, that it is impracticable to specify them particularly in any Act; but this general section will include injuries to all of them, and also any other malicious injuries, exceeding the amount of five pounds, which have not been provided for by the other parts of the Act. There was originally a clause in this Bill providing for malicious injuries to steam and other engines and machines not otherwise provided for; but it was struck out, and the punishment in this clause fixed with reference to those and other like injuries.

'The part of this section giving a greater punishment for offences committed in the night was introduced principally with reference to Ireland, where malicious injuries seem often to be perpetrated in the night.' C. S. G.

(*c*) The powers of a Justice sitting alone are now restricted by the Summary Jurisdiction Act, 1879, s. 20.

(if ordered), shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two months (*cc*), unless such sums and costs be sooner paid: provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of (*d*), nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as if this Act had not passed' (*e*).

The words of sect. 52, 'any real or personal property whatsoever' (*f*) do not apply to a 'right of herbage,' but only to tangible property and not a mere incorporeal right (*g*). Actual damage to the realty itself must be proved, and mere damage to mushrooms growing in a wild state is insufficient to justify a conviction under sect. 52 (*h*). But where a trespasser walked across a grass field, and the justices found as a fact that he did actual damage to the grass to the value of sixpence, the Court upheld the conviction under this section (*i*).

The word 'maliciously,' in sect. 51 requires that an act to be criminal within that section should be done wilfully, or at least recklessly. So upon an indictment under that section, for unlawfully and maliciously committing damage above the value of £5 to a window in a house, and the jury found that the prisoner threw a stone at some people he had been fighting with in the street and that he intended the stone to hit them but did not intend to break the window, and convicted the prisoner, it was held upon a case reserved that upon this finding the conviction must be quashed. Coleridge, C.J., said: 'Without saying that if the case had been left to them in a different way the conviction could not have been supported, if, on these facts the jury had come to a conclusion that the prisoner was reckless of the consequence of his act, and might reasonably have expected that it would result in breaking the window, it is sufficient to say that the jury have expressly found the contrary.' And Blackburn, J.: 'The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break

(*cc*) But see section 5 of 42 & 43 Vict. c. 49, as to scale of imprisonment in case of default.

(*d*) See R. *v.* Richmond Justices, 8 Cox, 314, and R. *v.* Dodson, 9 A. & E. 704, that it is a question for the magistrates under all the circumstances, whether the party acted under such fair and reasonable supposition that he had a right to do the act. The right claimed must be such as can exist in law. See Hamilton *v.* Bone, 16 Cox, 437. Brooks *v.* Hamlyn, 19 Cox, 231.

(*e*) Taken from 7 & 8 Geo. IV. c. 30, s. 24 (E.). There was a similar clause in 14 & 15 Vict. c. 92, s. 3 (I.).

The former Act was defective in neither giving the power to award any fine in addition to the amount of the injury done, nor any imprisonment; the latter Act did both, and this section authorises the justice either to commit the offender or to fine him, in addition to the amount of the injury done.

This section is altered in accordance with 18 & 19 Vict. c. 126, s. 22, so that where the owner of the property injured is examined as a witness, he may receive compensation for the injury.

(*f*) The language of sect. 51 is the same.

(*g*) Laws *v.* Eltringham, 8 Q.B.D. 283: 51 L. J. M. C. 13.

(*h*) Gardner *v.* Mansbridge, 19 Q.B.D. 217.

(*i*) Gayford *v.* Chouler [1898], 1 Q.B. 316: 67 L. J. Q. B. 404.

the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have not so found and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do' (*j*).

The words in sect. 51 are 'unlawfully and maliciously,' but the words in sects. 52 and 53 are 'wilfully *or* maliciously,' so that an offence is created 'if a person wilfully commits the act though he has no malice, or, in other words, if he does the act complained of intentionally and on purpose' (*k*). 'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it' (*l*). But where a surveyor of highways in the *bonâ fide* course of his duty did some damage to a drain, it was held that he could not be convicted under sect. 52, (*m*), although a private person doing the same act *bonâ fide* would be liable (*n*).

A milk carrier damaged his employer's milk by adding water to it. He did this, not with any intention of injuring his employer, but in order to make a profit for himself by increasing the bulk of the milk. The Court held that he was guilty of wilfully damaging the milk within the meaning of sect. 52 (*o*).

Where the defence set up to an indictment under sect. 51 is a claim of right, the proper direction to the jury is, 'Did the defendant do what he did in the *bonâ fide* exercise of a supposed right?' adding that if the jury come to the conclusion that the defendant did more damage than he could reasonably suppose to be necessary for the assistance or protection of that right, the jury ought to find the defendant guilty of malicious damage (*p*).

In an indictment under sect. 51, for maliciously damaging personal property, the damage exceeding £5, it is not necessary to allege the value of each article injured, but only that the amount of the damage done to the several articles exceeded £5 in the aggregate (*q*).

On indictment under sect. 51, alleging that the prisoner committed damage to the amount of five pounds on real and personal property; it appeared that the damage, exceeding five pounds, was done on two following days, but the damage on either day did not amount to five pounds. On a case reserved, it was held that this evidence did not prove an offence within that section (*r*).

(*j*) R. *v.* Pembliton, L. R. 2 C. C. R. 119: 43 L. J. M. C. 91. In R. *v.* Latimer, 17 Q.B.D. 359, a case where the prisoner in striking at a man struck and wounded a woman beside him. R. *v.* Pembliton was considered and explained. Esher, M.R., said: 'On examination, R. *v.* Pembliton is found to have been decided on this ground, viz. that there was no intention to injure any property at all. It was not a case of attempting to injure one man's property and injuring another's, which would have been wholly different.' See also R. *v.* Welch, *ante*, p. 1826, and s. 58, and the cases cited, *ante*, p. 1771.

(*k*) Gardner *v.* Mansbridge, 19 Q.B.D. 217, 219, A. L. Smith and Wills, JJ. See also Hamilton *v.* Bone, 16 Cox, 437.

(*l*) Per Russell, C.J., in R. *v.* Senior [1899], 1 Q.B. 283, 290, a case reserved upon the Prevention of Cruelty to Children Act, 1894 (rep.). See also R. *v.* Martin, 8 Q.B.D. 54, *ante*, p. 1772, *n.*

(*m*) Lenny *v.* Thwaites, 2 Ex. D. 21.

(*n*) White *v.* Feast, L. R. 7 Q.B. 353. See also Brooks *v.* Hamlyn, 19 Cox, 231.

(*o*) Roper *v.* Knott [1898], 1 Q.B. 868. Russell, L.C.J., Day, Wills, Grantham, Wright, Kennedy, and Channell, JJ. Hall *v.* Richardson, 54 J. P. 345, was disapproved.

(*p*) R. *v.* Clemens [1898], 1 Q.B. 556: 67 L. J. Q. B. 482. See Heaven *v.* Crutchley, *ante*, p. 1803.

(*q*) R. *v.* Thoman, 12 Cox 54.

(*r*) R. *v.* Williams, 9 Cox, 338 (Ir).

CANADIAN NOTES.

OF MALICIOUS OR WILFUL DAMAGE TO REAL OR PERSONAL PROPERTY NOT OTHERWISE PROVIDED FOR.

Railways.—See Code secs. 510A(*a*), 518, 519, 520, 521.

Damage to Railways.—Code sec. 510A(*d*).

Obstructing Railways.—Code sec. 518.

Damaging Goods on Railway.—Code sec. 519.

Damaging Tackle, Apparatus, etc.—Code sec. 520.

Interfering with Lines of Communication.—Code sec. 521.

Letters, Letter Boxes, Mailable Matter, etc.—See Code sec. 510D (*b*), (*c*) and (*d*).

Election Documents.—See Code sec. 528.

Wilful Making of Erasures in Voters' List.—When a returning officer, appointed to hold a Dominion election in an electoral district, selects one of the copies of lists of voters sent to him by the Clerk of the Crown in Chancery pursuant to the Dominion Elections Act, as the one which he will certify and forward to the deputy returning officer, for use at one of the polling sub-divisions, the copy so selected becomes a voters' list within the meaning of sec. 528, and it is an indictable offence for the returning officer wilfully to erase names of voters from it either before or after he certifies it and forwards it to the deputy. R. v. Duggan (1906), 12 Can. Cr. Cas. 147.

Buildings, Fixtures, etc.—See Code sec. 529.

General Provision for Damage not Already Specified.—Code sec. 539.

Railway Property.—See the Railway Act and Code secs. 510, 517 and 518.

Uncertainty in Conviction.—Upon a summary conviction under Code sec. 539 for wilful injury to property it is necessary that the conviction should specify the particular act done and the nature of the property damaged, otherwise the conviction will be void for uncertainty and will not support a commitment in similar terms. The King v. Leary, 8 Can. Cr. Cas. 141.

But see Code secs. 723 and 725.

A conviction which alleged that the defendant unlawfully and maliciously committed damage, injury and spoil to and upon the real and personal property of the prosecutor, but did not allege the par-

ticular act done and the nature and quality of the property damaged, was held bad for uncertainty. Re Donelly, 20 U.C.C.P. 165; R. v. Spain (1889), 18 Ont. R. 385; R. v. Coulson (1893), 1 Can. Cr. Cas. 114.

A conviction under this section should clearly shew whether the damage, injury or spoil complained of, is done to real or personal property, stating what property, and what is the amount which the justice has ascertained to be reasonable compensation. R. v. Caswell (1870), 20 U.C.C.P. 275.

Justification or Excuse for Damages.—Under sec. 540 the magistrate's jurisdiction in respect of a charge of wilful injury to property is not ousted unless the act was done under a fair and reasonable supposition of right, and the magistrate has jurisdiction to summarily try the charge, notwithstanding the mere belief of the accused that he had a right to do the act complained of. R. v. Davy (1900), 4 Can. Cr. Cas. 28 (Ont. C.A.).

The "colour of right" on the part of the defendant, which under this section (541) removes the criminal character of an act of damage to property, means an honest belief in a state of facts, which if it actually existed, would constitute a legal justification or excuse. R. v. Johnson, 8 Can. Cr. Cas. 123, 7 O.L.R. 525.

BOOK THE ELEVENTH.

OF PUBLIC NUISANCES AND OFFENCES RELATING TO TRADE.

CHAPTER THE FIRST.

OF PUBLIC NUISANCES IN GENERAL.

NUISANCE (*nocumentum*), or annoyance (*a*), means anything which works hurt, inconvenience, or damage (*b*). Nuisances are of two kinds: *public* or *common* nuisance, which materially affects the public, and is a substantial annoyance to *all* the King's subjects (*c*); and *private* nuisance, which may be defined as anything which causes material discomfort and annoyance, for the ordinary purposes of life, to a man's house or his property (*d*). Public or common nuisances, as they affect the whole community in general, and not merely an individual, form the subject of public remedies (*e*) and do not give a cause for private suit; for it would be unreasonable to multiply suits by giving every man a separate remedy for what damnifies him in common only with the rest of the lieges (*f*).

Public nuisances may be considered as offences against the public, by either doing a thing which tends to the annoyance of all the King's

(*a*) In the Statute of Bridges (22 Hen. VIII. c. 5) 'anoysance' is the word used.

(*b*) Nuisance is distinct from trespass, *vide post*, p. 1838.

(*c*) See Walter *v.* Selfe, 4 De G. & S. 315, 326, approved in Fleming *v.* Hislop [1886], 11 A. C. 686, 691, Lord Selborne. The indictment must allege a nuisance to the public, R. *v.* Byers, 71 J. P. 205. Bamford *v.* Turnley, 3 B. & S. 82, ; 31 L. J. C. P. 104: approved 11 A. C. at 697, Ld. Halsbury.

(*d*) 3 Bl. Com. 216. 2 Co. Inst. 406. Stockport W. W. *v.* Potter, 7 H. & N. 160. Colwell *v.* St. Pancras Borough Council [1904], 1 Ch. 707 (noise and vibration).

(*e*) *Post*, p. 1834.

(*f*) 4 Bl. Com. 166. Except in cases of nuisance by non-repair of highways an individual injured by a public nuisance is allowed to sue civilly, where he has sustained some extraordinary damage by it beyond the rest of the King's subjects. Thus if a man or his horse suffer injury by falling into a ditch dug across a public way, which is a common nuisance, an action lies for this particular damage. Co. Litt. 56. 3 Bl. Com. 219. Williams' case, 5 Co. Rep. 73. Winterbottom *v.* Ld. Derby, L. R. 2 Ex. 316. Fowler *v.* Sanders, Cro. Jac. 446. But the damage must be direct, and not consequential, *e.g.* by delay on a journey. Bull (N. P.) 26. In R. *v.* Dewsnap, 16 East, 196, Ellenborough, C.J., said, 'I did not expect that it would have been disputed at this day that though a nuisance may be public, yet that there may be a special grievance, arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influence of it. In the case of stopping a common highway which may affect all the subjects, yet if a particular person sustain a special injury from it, he has an action.' And in Duncan *v.* Thwaites, 3 B. & C. 584, Abbott, C.J., said, 'I take it to be a general rule, that a party who sustains a special and particular injury, by an act which is unlawful on the ground of public injury, may maintain an action for his own special injury.' Rose *v.* Miles, 4 M. & S. 101. Butterfield *v.* Forester, 11 East, 60. Benjamin *v.* Storr, 43 L. J. C. P. 163. St. Helens Smelting Co. *v.* Tipping, 11 H. L. C. 642; 35 L. J. Q. B. 67. Metropolitan Board of Works *v.* M'Carthy, L. R. 7 H. L. 243; 43 L. J. C. P. 385.

subjects, or by neglecting to do a thing which the common good requires (*g*).

Most of the public nuisances to be mentioned in this chapter are so by the common law. But some offences are declared nuisances by particular statutes, *e.g.*, lotteries (*h*). Where a statute declares a particular thing to be a common nuisance, it is indictable as such. An Act of Parliament prohibited the erection of any building within ten feet of a road, and declared that if any such building should be erected, it should be deemed a common nuisance. By another clause, justices were empowered to convict the proprietor and occupier of such building; it was held that the party who erected a building contrary to the Act might be indicted for a nuisance (*i*).

The rule laid down in this case appears to apply to sect. 667, subsect. 3 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which declares a person guilty of common nuisance who fails without reasonable cause to comply with a notice to extinguish or screen a fire or light, burnt or exhibited in such a place or manner as to be liable to be mistaken for a light proceeding from a lighthouse (*j*).

The remedies for public nuisance are (1) indictment (*jj*), or, in exceptional cases, criminal information, at the instance of the Attorney-General, or by leave of the High Court (K.B.D.): (*vide post*, Book XII. c. i.).

(2) Action by the Attorney-General (*k*), where an injunction is desired to put an end to a public nuisance, when the proceeding is on behalf of the Crown or those who enjoy its prerogative or for a public wrong (*l*). The Attorney-General may sue *ex officio* or *ex relatione*, the relator being made co-plaintiff where practicable. Such proceedings are usually taken in the Chancery Division, but occasionally in the King's Bench Division of the High Court of Justice.

(3) Summary proceedings, where a statute defines the nuisance, or prescribes or allows a summary remedy.

Indictment.—Where the proceeding, is by *indictment*, the nuisance should be described according to the circumstances. An indictment for carrying on offensive works may state them to be carried on at such a parish. It is not necessary to state that they were carried on in a town or village (*m*); and it is sufficient to describe them as being carried on *near* a common King's highway, and *near* the dwelling-houses of several persons, to the common nuisance of passengers and of the inhabitants, without stating how near the highway or houses they were carried on (*n*). The offence is usually charged to be done *ad commune*

(*g*) 1 Hawk. c. 75, s. 1; Anon. 3 Atk. 750, Lord Hardwicke. 2 Bl. Com. 166; Rolle, Abr. 83.

(*h*) *Post*, p. 1905.

(*i*) R. *v.* Gregory, 5 B. & Ad. 555. *Vide ante*, Vol. i. p. 10, *et seq.*

(*j*) By the sub-section in addition to any other punishment, a fine not exceeding £100 may be imposed.

(*jj*) The old remedies in Courts leet have fallen into disuse and the sheriff's tourn is abolished.

(*k*) Before the Judicature Acts the proceeding was by information in Chancery. The form of proceeding is changed by R. S. C. Order 1, r. 1.

(*l*) Att.-Gen. *v.* Logan [1891], 2 Q.B. 100. Att.-Gen. *v.* Hanwell U.D.C. [1900], 2 Ch. 377. London County Council *v.* Att.-Gen. [1902], A. C. 165.

(*m*) R. *v.* White, 1 Burr. 333, 337, Lord Mansfield.

(*n*) Id. ibid.

nocumentum, ' to the common nuisance of all the liege subjects,' &c. (*o*). But the absence of these words does not now vitiate the indictment (*p*).

Particulars.—If the indictment is framed in terms so general as not to give the defendant information to enable him to prepare his defence, the Court will order the prosecutor to give the defendant particulars of the several acts of nuisance relied upon (*q*).

A nuisance is often ' continuing,' and it is expedient to aver continuance as indicating the gravity of the grievance and to qualify an order for abatement in the event of a conviction (*r*).

Person Liable for Nuisance.—As a general rule the proceedings must be against the occupier of the premises on which the nuisance is created, subject to the powers given by the Public Health Acts or other Acts of proceeding summarily against the owner. A landlord cannot be made liable for a nuisance on premises devised by him merely because having power to terminate the tenancy he has not done so after discovering the existence of the nuisance (*s*).

In R. *v.* Pedley (*t*), it was ruled that if the owner of land erects a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to indictment for such nuisance being continued or created during the term. . . . Where the defendant was in receipt of the rents of some dwelling-houses, let for short periods to tenants, and two privies and a sink belonging to them were used in common by the occupiers of the houses. It did not appear whether any of the present tenants commenced occupying the houses before the defendant began to receive the rents; but the privies and sink were used by the tenants of those premises before his time. There was no distinct proof of any actual demise of the privies and sink, but they had regularly been cleansed by the persons occupying the houses, until the time of the nuisance, when the cleansing had been neglected. The nuisance had arisen since the defendant began to receive the rents; it was held that the defendant was liable to be indicted for the nuisance (*u*). In Rich *v.* Basterfield (*v*) the Court said: ' If R. *v.* Pedley is to be

(*o*) Vin. Abr. *tit.* ' Indictment ' (Q.), ' Nuisance,' 13. Pratt *v.* Stearn, Cro. Jac. 382. R. *v.* Hayward, Cro. Eliz. 148. Anon. 1 Ventr. 26. 2 Rolle Abr. 83. 1 Hawk. c. 75, ss. 3, 4. 5. And see Bac. Abr. *tit.* ' Nuisance ' (B.). In R. *v.* Reynell, 6 East, 315, the parson of a parish was indicted for non-repair of the fences of the parish churchyard, whereby the swine and cattle broke in and rooted up the tombstones, &c., ' to the nuisance of the inhabitants of the parish.' The defendant was acquitted.

(*p*) R. *v.* Holmes, Dears. 207; 22 L. J. M. C. 123. See 14 & 15 Vict. c. 100, s. 24, *post*, p. 1935.

(*q*) R. *v.* Curwood, 3 A. & E. 813. As to highway indictments, see R. *v.* Marquis of Downshire, 4 A. & E. 698. R. *v.* Pembridge (Inhabs.), June 26, 1841, Patteson, J., at chambers. R. *v.* Probert, Dears. 32, (*a*). R. *v.* Flower, 7 Dowl. Pr. Cas. 665.

(*r*) R. *v.* Stead, 8 T. R. 142. See *post*, p. 1839.

(*s*) Gandy *v.* Jubber, 5 B. & S. 78; 9 B. & S. 15. As to special provisions in the case of disorderly houses, see *post*, p. 1902. The duty of cleansing and repairing privies, drains and sewers is *prima facie* that of the occupier and does not devolve on the owner merely as such. Russell *v.* Shenton, 3 Q.B. 449.

(*t*) 1 A. & E. 822.

(*u*) Id. ibid.

(*v*) 4 C. B. 783, where it was held that a landlord, who let a shop with a chimney in it to a tenant who made fires, the smoke from which issued from the chimney, and caused a nuisance, was not responsible for it. In Todd *v.* Flight, 7 C. B. N. S. 377, it was held that an action lies against a person who lets premises with a ruinous chimney upon them, which afterwards falls and injures an adjoining building, on the ground that if the wrong causing the injury arises from the nonfeasance or misfeasance

considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had re-let them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing and had not performed it; we think the judgment right. But if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised; we think it goes beyond the principle to be found in any previously decided case, and cannot assent to it;' for 'if a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord cannot be made responsible for the acts of the tenant; and *à fortiori* he would not be liable if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving a right to enter and abate a nuisance if created.'

Prescription.—A public nuisance is indictable however long it has existed (*w*).

of the lessor, the party suffering the injury may sue him. In Harris *v.* James, 45 L. J. Q. B. 345, A. let to B. a field for the purpose of its being worked as a lime quarry. The ordinary way of getting the limestone was by means of blasting, and A. authorised the quarrying of the stone and the erection of lime kilns in the field. A nuisance was caused to the adjoining occupier by the blasting and by the smoke from the kilns, and he brought an action against both A. and B. On demurrer by A.:—Held, that he, the landlord, was liable although the nuisance was actually created by the act of his tenant, because the terms of the demise were an authority from him to B. to create the nuisance, which was therefore the necessary consequence of the mode of occupation contemplated in the demisee. Blackburn, J., said: 'As I understand the averments, the field was let for the very purpose and object of being worked as a lime quarry, and for erecting lime kilns and burning lime. When, then, it is stated as a fact that the injury complained of arose from the natural and necessary consequence of carrying out this object, and as the result of lime getting and lime burning, then I think we must say that the landlord authorized the lime burning and the nuisance arising from it as being the necessary consequence of letting the field in the manner and with the objects described. In Rich *v.* Basterfield, 4 C. B. 483, the Court of Common Pleas came to a conclusion of fact which authorised their conclusion upon the case. There, a former occupier of the premises where the chimney was used to burn coke in the fire, and caused no smoke which could be at all injurious to the plaintiff; and the judgment proceeded on that ground, as is evident from the following passage:—'It being therefore quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance, it seems impossible to say that the tenant was in any sense the servant or agent of the defendant, in doing the acts complained of. The utmost that can be imputed to the defendant is, that he enabled the tenant to make fires if he pleased.' Assuming that the evidence really did establish the facts which the Common Pleas thought it did, and if it was not the necessary consequence of burning fires in the chimney that there should be smoke, I have no fault to find with the decision, but then, this case is not the same, because the fifth paragraph finds that the injury arising from the smoke and vapour is the natural and necessary consequence of the use of the land, and the plaintiff must therefore have judgment upon the demurrer to that paragraph.'

(*w*) Weld *v.* Hornby, 7 East 195. Fowler *v.* Sanders, Cro. Jac. 446. In Dewell *v.* Sanders, Cro. Jac. 490, the Court referred to this case as deciding that 'none can prescribe to make a common nuisance, for it cannot have a lawful beginning by licence or otherwise, being an offence at common law;' and per Montague C.J., 'Neither the King nor the lord of a manor can give any liberty to erect a common nuisance.' See Simpson *v.* Wells, L. R. 7 Q.B. 214; 41 L. J. M. C. 105, and Foster *v.* Warblington District

In R. *v.* Cross (*x*), Ellenborough, C.J., said: 'It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance. A stell fishery across a river had been established for a vast number of years, but Buller, J., held that it continued unlawful, and gave judgment that it should be abated.' It is said, however, that length of time may concur with other circumstances in preventing an obstruction from having the character of a nuisance (*y*). If a public nuisance is proved, it is generally useless to set up counterbalancing benefits (*z*); nor in deciding whether a thing is or is not a public nuisance can the good it does be weighed against the public annoyance which it causes (*a*).

It is of course an answer to an indictment for a public nuisance that the acts or omissions on which the indictment is based are authorized by statute (*b*). This defence has been much discussed in many cases of public and private proceedings for nuisance. The decisions frequently turn on the particular wording of the statutes involved, *i.e.*, on the questions whether what is complained of was specifically authorized or whether the terms of the statute preserve the common law liability in the case of negligence or nuisance (*c*).

Statutory Undertakings.—When the use of locomotives on railways is expressly authorized, proceedings cannot be taken for public nuisance caused by their mere use (*d*). Though the use of locomotives on highways is now lawful under certain conditions it is expressly provided that the liability for public nuisance continues (*e*). As to nuisances caused by gas works, *vide post*, p. 1853. Nuisances caused by electrical undertakings have no statutory protection (*f*).

Council [1906] 1 K.B. 665. These decisions are inconsistent with the ruling or dicta in R. *v.* Neville, Peake, (3rd ed.) 91, that a person could not be indicted for continuing a noxious trade which had been carried on in the same place for nearly fifty years.

(*x*) 3 Camp. 227. See also Weld *v.* Hornby, 7 East, 195, 199 for reference to the same case.

(*y*) R. *v.* Smith (the Rag Fair Case), 4 Esp. 111. See Bliss *v.* Hall, 4 Bing (N.C.) 183. R. *v.* Montague, 4 B. & C. 598.

(*z*) In Att. Gen. *v.* Manchester Corporation (1893), 2 Ch. 87, it was suggested by Chitty, J., that perhaps weight might be given to evidence shewing that the danger to public health caused by maintaining a small pox hospital was more than counterbalanced by the benefit to the public health gained by removing the small-pox patients from their homes. But this is admittedly only a tentative suggestion, and, where a misdemeanor is committed by neglecting a statutory obligation it is certainly no defence that the public benefits more by the breach than the observance of the obligation. Att.-Gen. *v.* L. & N. W. R. (1900), 1 Q.B. 78, 83. And the same rule appears to apply as to common law obligations. Att.-Gen. *v.* Terry, L. R. 9 Ch. App. 423, 426. R. *v.* Train 2 B. & S. 640; 31 L. J. M. C. 169.

(*a*) In R. *v.* Ward, 4 A. & E. 584, it was held no answer to an indictment for obstructing a harbour by an embankment to prove that though the work impeded navigation to some extent it was in a greater degree advantageous for other users of the harbour. This case overrules R. *v.* Russell, 6 B. & C. 566. See too R. *v.* Morris, 1 B. & Ad. 441. R. *v.* Tindall, 6 A. & E. 243.

(*b*) L. B. & S. C. R. *v.* Truman (1885), 11 A. C. 45.

(*c*) See the decisions collected in Hardcastle on Statutes (4th ed. by Craies) 245. 247.

(*d*) R. *v.* Pease, 4 B. & Ad. 30. Vaughan *v.* Taff Vale Rail. Co. 5 H. & N. 679; 29 L.J. Ex. 247.

(*e*) Locomotives Act, 1861 (24 & 25 Vict. c. 70), sect. 13. Locomotives Act, 1865 (28 & 29 Vict. c. 83), sect. 12. Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36, sched.). Motor Car Act, 1903 (3 Edw. VII. c. 36), sect. 15. R. *v.* Chittenden, 15 Cox, 725.

(*f*) Midwood *v.* Manchester Corporation (1905) 2 K.B. 597. Shelfer *v.* London Electric Lighting Co. (1895) 1 Ch. 287. Colwell *v.* St. Pancras Borough Council (1904) 1 Ch. 207. Cf. Eastern, &c. Telegraph Co. *v.* Cape Town Tramways Co. (1902), A. C. 381. Dumphy *v.* Montreal Light, &c. Co., (1908) A. C. 454. Price's

A canal company were empowered by statute to take the water in certain brooks and use it for the purposes of their canal. When the Act passed the water in one of the brooks was pure, but it afterwards became polluted by drains, &c., before reaching the canal, and was then penned back in the canal, and became a public nuisance. Held, that the company were liable to be indicted for the nuisance, as there was nothing in the Act compelling them to take the water, or authorizing them to use it so as to create a nuisance (*g*).

Gist of the Offence.—Nuisance is distinct from trespass and negligence, and, as a general rule, in cases of public nuisance the grievance lies in the inconvenience in fact caused (*h*), and not in the intent or knowledge of the person responsible as occupier of the premises on which the nuisance is created, or of the owner, if the premises are, in fact, unoccupied (*i*).

It is no defence to an indictment for nuisance against a master or employer that the nuisance was caused by acts of his servants, if they were done in the course of their employment (*j*).

Punishment.—The punishment on conviction on indictment, for a public nuisance, is by fine and (or) imprisonment (*k*).

Abatement.—In some of the older authorities it is said that anyone may abate a public nuisance (*l*). Thus, a passenger has been held entitled not merely to open but to throw down a gate wrongfully placed across a highway (*m*).

But in Dimes *v.* Petley (*n*) it was held that a private individual cannot of his own authority abate a nuisance in a highway, unless it does him special injury, and can only interfere with it as far as is necessary to exercise his right of passing along the highway, and cannot justify doing any damage to the property of the person who has improperly placed the obstacle in the highway, if, by avoiding it, he might have passed on with reasonable convenience (*n*). And if unreasonable damage to private property is done in exercise of what was reasonably supposed to be a public right, the persons doing it are liable to conviction under 24 & 25 Vict, c. 97, s. 51 (*nn*).

There is a broad distinction between removing an obstruction wrongfully placed in a highway, and abating a nuisance created by the

Patent Candle Co. *v.* London County Council (1908), 2 Ch. 526, 543. And cf. Liverpool and N. Wales S.S. Co *v.* Mersey Trading Co. (1909), 1 Ch. 209.

(*g*) R. *v.* Bradford Navigation, 34 L.J. Q.B. 191.

(*h*) See Barber *v.* Penley (1893) 2 Ch. 447. R. *v.* Moore, 3 B. & Ad. 184. R. *v.* Carlisle, 6 C. & P. 636.

(*i*) Att. Gen. *v.* Tod Heatley (1897) 1 Ch. 560.

(*j*) R. *v.* Stephens, L. R. 1 Q.B. 702: 35 L.J.Q.B. 251, a case of obstruction of a navigable river by acts and defaults of the defendant's servants. Cf. R. *v.* Medley, 6 C. & P. 292, a case of pollution of water. In summary proceedings for acts or omissions in the nature of nuisance the question has been much discussed how far the master is liable for the negligence of his servant. The master's liability depends on the terms of the statute; see Chisholm *v.* Doulton, 22 Q.B.D. 736, where smoke was not consumed owing to the neglect of a servant. Police Commissioner *v.* Cartman (1896) 1 Q.B. 655.

(*k*) Without hard labour except in the cases specified *ante*, Vol. i. pp. 212, 213.

(*l*) 1 Hawk. c. 75, s. 12. Bac. Abr. *tit.* 'Nuisance' (C).

(*m*) Cro. Car. 185. And see Mayor of Colchester *v.* Brooke, 7 Q.B. 377, Denman, C.J.

(*n*) 15 Q.B. 276, see Mayor of Colchester *v.* Brooke, *ubi sup.* Bateman *v.* Buck, 18 Q.B. 870. And see Ellis *v.* L. and S. W. R. 2 H. & N. 424. Arnold *v.* Holbrook, 42 L.J.Q.B. 80.

(*nn*) R. *v.* Clemens (1898) 1 Q.B. 556 *ante*, p. 1831.

non-feasance of persons charged with the duty of repairing a highway or public bridge (*o*). There seems to be no instances in which an individual has been held entitled to abate a public nuisance by omission except perhaps by cutting trees allowed to obstruct a highway (*p*).

At the present time save in exceptional circumstances the only lawful mode of abating a public nuisance is by obtaining an order of a competent Court.

Judgments of abatement or prostration are limited to that which actually causes a public nuisance. Thus, if a house is built too high, only so much of it as is too high should be pulled down; and on a conviction for keeping a dye-house, or carrying on any other stinking trade, the judgment would not be to pull down the building where the trade was carried on (*q*). So in the case of a glass-house, the judgment was to abate the nuisance, not by pulling the house down, but only by preventing the defendant from using it again as a glass-house (*r*). In R. *v.* Stead (*s*), Kenyon, C.J., said: 'When a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it was so stated in R. *v.* Pappineau, '*et adhuc existit*'; and in such cases the judgment should be that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in existence; and it would be absurd to give judgment to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, the defendant may be again indicted for continuing it.'

Sect. 18 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), by which any order of Quarter Sessions may be removed into the High Court (K.B.D.), and enforced as a rule of Court, does not apply to an order of Quarter Sessions to abate a nuisance, made after the trial of an indictment for the nuisance (*t*).

The Steam Engine Furnaces Act, 1821 (1 & 2 Geo. IV. c. 41), s. 1, after reciting the great inconvenience and injury sustained from the improper construction and negligent use of furnaces employed in the working of engines by steam, and that though such nuisance being of a public nature, is abateable as such by indictment, the expense had deterred parties suffering thereby from seeking the remedy given by law, enacts that 'it shall and may be lawful for the Court by which judgment ought to be pronounced in case of conviction on any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid: such award to be made either before or at the time of pronouncing final judgment, as to the Court may seem fit' (*u*).

(*o*) Campbell Davys *v.* Lloyd [1901] 2 Ch. 518, 523, 525, Collins, L.J., a case in which the defendant had gone on the land of another to re-erect a bridge alleged to be public which had fallen into decay. It was held that this proceeding could not properly be described as abatement.

(*p*) Earl of Lonsdale *v.* Nelson, 2 B. & C. 302. Lemmon *v.* Webb [1895] A. C. 1. In the latter case are discussed the rights of individuals to abate private nuisances caused by the growth of trees.

(*q*) R. *v.* Pappineau, 1 Str. 686. 9 Co. Rep. 53: 3. Godb. 221.

(*r*) Co. Ent. 92 *b*.

(*s*) 8 T. R. 142. Cf. R. *v.* Yorkshire JJ., 7. T. R. 468.

(*t*) R. *v.* Bateman, 8 E. & B. 584; 27 L. J. M. C. 95.

(*u*) This enactment is not specifically repealed by 8 Edw. VII. c. 15, *post*, p. 2039.

By sect. 2, 'If it shall appear to the Court by which judgment ought to be pronounced that the grievance may be remedied by altering the construction of the furnace, it shall be lawful for the Court, without the consent of the prosecutor, to make such orders as shall be by the Court thought expedient for preventing the nuisance in future, before passing final sentence on the defendant.'

By sect. 3, 'The provisions relating to the payment of costs and the alteration of furnaces, shall not extend to the owners or occupiers of any furnaces of steam-engines, erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing the produce of ores or minerals, on or immediately adjoining the premises where they are raised.'

When proceedings are taken by indictment to remove a nuisance which is stated and found to be continuing, the defendant may be commanded to remove it at his own expense (*v*). In the case of a nuisance by obstruction the order is termed a judgment of prostration (*w*).

It seems to have been considered that at common law the Court of King's Bench might, by a mandatory writ, *prohibit* a nuisance, and order its abatement: and that disobedience might be punished by attachment (*x*). Such writs appear to have been granted in some cases; and the proceedings in one case was that the judges, upon view, ordered a record to be made of the nuisance, and sending for the offender, ordered him to enter into a recognizance not to proceed; but he refusing to comply, the Court committed him for the contempt, issuing a writ to the sheriff on the record made, to abate the building, and ordered the offender to be indicted for the nuisance (*y*). There are no modern proceedings of the issue of writs of this kind; but the High Court can obtain the same result by issuing an injunction, mandatory or otherwise, in an action at the instance of the attorney-general.

Costs.—Where an indictment for public nuisance is removed into the High Court at the instance of the defendant he is put under recognizance to pay the costs of the prosecution in the event of conviction (*z*). As to costs generally, see *post*, pp. 2039 *et seq.*

(*v*) 2 Rolle Abr. 84: 1 Hawk. c. 75, s. 14: R. *v.* Pappineau, 1 Str. 686.

(*w*). R. *v.* Incledon, 13 East, 464.

(*x*) Bac. Abr. *tit.* 'Nuisance' (C.).

(*y*) R. *v.* Hall, 1 Mod. 76: 1 Vent. 169, where Hale, C.J., mentioned another case in 8 Car. I. of a writ to prohibit a bowling-alley erected near St. Dunstan's Church.

(*z*) See R. *v.* Berger (1894), 1 Q.B.823: 63 L.J.Q.B. 529. Crown Office Rules 1906, rr. 13, 14, which took the place of 5 Will. & Mary, c. 11, s. 3, rep. And see R. *v.* Dewsnap, 16 East, 194.

CANADIAN NOTES.

PUBLIC NUISANCES IN GENERAL.

Common Nuisance Defined.—See Code sec. 221.

Section 221 of the Code is a statement of the common law in regard to indictable nuisances.

The omission of an electric railway company operating their cars upon a highway to use reasonable precautions so as to avoid endangering the lives of the public using the highway in common with the company, is a breach of legal duty constituting a common nuisance for which an indictment will lie. R. v. Toronto Ry. Co. (1900), 4 Can. Cr. Cas. 4, 10 Can. Cr. Cas. 106.

Criminal Common Nuisances.—See Code sec. 222.

Common Law Indictment.—An indictment for a nuisance in obstructing a public highway is insufficient to charge a criminal offence under this section if it does not allege danger to the public or injury to the person of some one; and personal injury is not to be inferred from a count which states "actual" injury to a person named. Obstruction of a highway is indictable at common law, although injury to the person has not resulted, if it constitutes a common nuisance to His Majesty's subjects passing along the same; but since the Criminal Code the procedure by indictment where there has been no personal injury, remains only for the purpose of abatement or remedy of the nuisance.

An indictment at common law for a nuisance in obstructing a highway must contain the words "to the common nuisance of all His Majesty's subjects passing, etc., along such highway," and must particularize the highway and the nature of the obstruction. The King v. Reynolds (1906), 11 Can. Cr. Cas. 312.

See also sec. 284 as to negligently causing bodily injury.

Non-Criminal Common Nuisances.—See Code sec. 223.

In a recent Nova Scotia case, Judge Graham said:—

"After the Parliament of Canada has divided nuisances into those which constitute criminal offences and those which do not, one cannot probably look in the Statutes of Canada for further provisions on the subject of those nuisances which are not criminal offences. We have to look to the proceedings which, before the existence of the Criminal Code, might be taken to abate or remedy the mischief, that is, to the common law." R. v. Reynolds (1906), 11 Can. Cr. Cas. 312.

As to the power of a local Legislature to declare an offence a "nuisance" and to provide the punishment when it would not *per se* be indictable at common law, see Pillow v. City of Montreal (1885), Mont. L.R. 1 Q.B. 401.

A railroad company was found guilty on an indictment for a nuisance by obstructing a public highway, by lowering the same at a point of intersection and thereby making the highway dangerous. Time having elapsed, and nothing having been done to abate the nuisance, a motion was made for judgment on the verdict, and it was held that the proper sentence was that defendants should pay a fine, and that the nuisance complained of be abated. R. v. Grand Trunk Railway Co. (1858), 17 U.C.Q.B. 165.

It is the duty of a municipality, in whom a highway is vested, to see that obstructions on the highway are removed. R. v. Cooper (1876), 40 U.C.Q.B. 294.

Where a county council is liable to repair a bridge, the proper remedy is indictment, not mandamus. Re Jamieson and County of Lanark (1876), 38 U.C.Q.B. 647.

Where land, which was part of the lands reserved to the Hudson's Bay Company was sold in a state of nature to a purchaser, who obtained a certificate of ownership therefor under the Territories Real Property Act, and cultivated and enclosed it, thus preventing the use of an old trail, which subsequently, was surveyed and transferred to the Lieutenant-Governor for the use of the Territories. Held, that the purchaser was rightly convicted of obstructing a public highway. The Queen v. Nimmons (1892), 1 Terr. L.R. 415.

Costs.—If a municipality found guilty of maintaining a nuisance by not repairing a highway, makes default under the judgment ordering abatement thereof, but repairs the highway pending a motion for a writ of *de nocumento*, the Court may in its discretion order the costs of the motion to be paid by the defendant. The King v. Portage la Prairie, 10 Can. Cr. Cas. 125.

Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor into the Court of Queen's Bench and defendant was acquitted, it was held that the Court had no power to impose payment of costs on such prosecutor, except as a condition of any indulgence granted in such a case, such as a postponement of the trial, or a new trial. R. v. Hart (1880), 45 U.C.Q.B. 1.

CHAPTER THE SECOND.

OF EAVESDROPPERS, COMMON SCOLDS, AND NIGHT-WALKERS.

THE offences under this title are referred to in ancient books as forms of public nuisance. They were dealt with in Courts Leet (*a*) and the Sheriffs' Tourn (*b*), but there is no modern precedent of indictment for any of them in England.

Eavesdroppers,[1] or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, indictable at the sessions, and punishable by fine and finding sureties for their good behaviour (*c*).

A *common scold*, *communis rixatrix*,[2] is a public nuisance to her neighbourhood, and may be indicted for the offence; and, upon conviction punished by fine and imprisonment, or by being placed in a certain engine of correction called the trebucket (*d*), or cucking stool (*e*), or ducking stool (*f*), or ducking tumbrel, or scolding cart. She may be convicted without setting forth the particulars in the indictment (*g*); though the offence must be set forth in technical words, and with convenient certainty (*h*). It is not necessary to give in evidence the particular expressions used; it is sufficient to prove generally that the defendant is always scolding (*i*).

Night walkers (*communes noctivagi*) are said to have been indictable

(*a*) See Selden Soc. Publ. vol. 5.

(*b*) Abolished in 1887 (50 & 51 Vict. c. 55, s. 19 (2)).

(*c*) 4 Bl. Com. 167, 169. 1 Hawk. c. 61, s. 4. Burn's Justice (30th ed.) *tit.* 'Eavesdroppers.' Dalton's Country Justice, c. 124. For instances of a presentment for this offence, see 5 Selden Soc. Publ. p. 70.

(*d*) Fr. *trébuchet*. See Century Dict. s. v. for a model of the military engine from which it was adapted, and for its form see Andrews 5, 15.

(*e*) 1 Hawk. c. 75, s. 14. 4 Bl. Com. 168. The stool was a chair often in the form of a close stool (*cathedra stercoris*), in which the offender was exposed to public view or ducked, 3 Co. Nest. 219. It is sometimes called the cock-queane stool (Fr. *coquine*), and was also used for punishing strumpets. See Oxford Dict. Eng. Lang. s. v. 2 Pike Hist. Cr. 255. Andrew's Old Time Punishments (1890), 10, 24, 25. In parts of England and in Scotland the branks or scold's bridle was used for scolds, Andrews, 38.

(*f*) See Oxford Dict. s. v. ducking stool. Andrews, p. 31.

(*g*) 2 Hawk. c. 25, s. 59.

(*h*) R. *v.* Cooper, 2 Str. 1246, where the indictment is set out.

(*i*) I'Anson *v.* Stuart, 1 T. R. 748, 754, Buller, J.

AMERICAN NOTES.

[1] In America it has been held that a person who hangs about the Grand Jury Room in order to overhear the remarks of the Grand Jury is indictable for eaves-dropping. S. *v.* Pennington, 3 Head, 299; 75 Am. Dec. 771.

[2] The law as to common scolds was carried to New England, and scolds have been punished in the U. S. much later than in England, see James *v.* Commonwealth, 12 Serg. & R. (Pa.) 220, and Brooks' 'Strange and Curious Punishments' (1886).

in the sheriffs' tourn (*j*). Such persons if suspected of crime may now be arrested under 14 & 15 Vict. c. 19, s. 11, *ante*, p. 1339, or dealt with under the Acts relating to the particular offence of which they are suspected (*k*). The old law as to night-walking seems to have been connected with the curfew, and power to arrest strangers passing in the night was given by the statute of Wynton, 13 Edw. I. st. 2, c. 4, repealed in 1827 (7 & 8 Geo. IV. c. 27) (*l*).

(*j*) 2 Hawke. c. 10, s. 58.
(*k*) See report of Metropolitan Police Commission (Parl. Pap. 1908, c. 4156).
(*l*) See R. *v.* Tooley, 2 Hale, 79 n. And see 5 Selden Soc. Publ. p. 10.

CHAPTER THE THIRD.

NUISANCES TO PUBLIC HEALTH.

SECT. I.—GENERAL.

THE earlier authorities deal mainly with nuisances by trades offensive to the senses; but later authorities include in the definition of nuisance matters which cause danger of injury to the public health or give reasonable ground for apprehending such danger.

Thus it has been held a public nuisance to expose in a public place a human being (*a*), or an animal (*b*), suffering from disease communicable to man, and it would seem to be a public nuisance to erect near a town or highway, a hospital for infectious diseases so as to cause serious risk of infection to persons working or passing near (*c*). But on application to restrain the erection of such hospitals for fear of danger the Courts, having regard to the public convenience of hospitals, will not grant injunctions except in a very clear case: and statutory authority for selection of the particular site would be an answer to an indictment for erection or maintenance of such hospital (*d*).

It may be a public nuisance to pollute water by trade refuse (*e*), or by sewage (*f*), or to allow land to be made a shooting ground for filth (*g*).

SECT. II.—INTRODUCING OR SPREADING INFECTIOUS DISEASE.

Quarantine.—The performance of *quarantine*, or forty days' probation, when ships arrive from countries infected with dangerous diseases, has, in the interests of public health, been enforced from time to time by legislation. That in force prior to 1825 was repealed by the Quarantine Act, 1825 (6 Geo. IV. c. 78), which substituted in most cases pecuniary penalties for the severer punishments imposed by earlier statutes. Power was given in the Nuisances Removal Act, 1866 (29 & 30 Vict. c. 90), s. 51, and by the Public Health Act, 1875 (38 & 39 Vict. c. 55, sched. 4, pt. 3), to mitigate the penalties under the Act of 1825. By the Public Health Act, 1896 (59 & 60 Vict. c. 19), the Act of 1825 and certain other

(*a*) R. *v.* Vantandillo, 4 M. & S. 73. Small pox. Metropolitan Asylum District Managers *v.* Hill, 6 App. Cas. 193, 204 (any infectious disease).

(*b*) R. *v.* Henson, Dears, 24. (Horse suffering from glanders.)

(*c*) Metrop. Asylum District Managers *v.* Hill, 6 App. Cas. 193: Bendelow *v.* Wortley Guardians. 57 L. J. Ch. 762.

(*d*) Att. Gen *v.* Manchester Corporation (1893) 2 Ch. 87. Att.-Gen. *v.* Nottingham Corpn. (1904) 1 Ch. 673 (which see as to the evidence admissible to prove the danger).

(*e*) Crossley *v.* Lightowler, 2 Ch. App. 478. Bamford *v.* Turnley, 31 L.J.Q.B. 286; 3 B. & S. 82.

(*f*) Foster *v.* Warblington District Council (1906) 1 K.B. 665. Hobart *v.* Mayor, &c., of Southend (1906) 75 L. J. K.B. 305.

(*g*) Att. Gen. *v.* Tod Heatley (1897) 1 Ch. 560.

minor enactments as to quarantine were repealed as to the whole of the British Islands, and *quarantine*, where now imposed in England or Ireland, is regulated by order of the Local Government Board of each country (*h*).

In England the regulations are made under sects. 130 and 134 of the Public Health Act, 1875, and sect. 113 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), as amended by sect. 1 of the Act of 1896.

In a case under the Quarantine Act, 1753 (26 Geo. II. c. 69, rep.), which enacted that all persons going on board ships coming from infected places should obey such orders as the King in Council should make, but did not award any particular punishment, nor contain a clause as to the jurisdiction of the justices of the peace, it was held that disobedience by a pilot of such an Order of Council (which forbade access to a named ship while she was performing quarantine) was an indictable offence, and punishable as a misdemeanor at common law (*i*).

The Public Health Act, 1896 (59 & 60 Vict. c. 19), provides by sect. 1, sub-sect. 3, penalties for wilfully neglecting or refusing to obey or carry out or obstructing any regulation made under the powers given, by or referred to in the Act, but directs that they shall be recoverable under the Public Health Acts or by action on behalf of the Crown in the High Court. This specific provision appears to exclude proceedings by indictment.

Spreading Contagious Disorders.—By an Act of 1604 (*j*), persons were declared guilty of felony who, being infected with the plague, went abroad and into company, with infectious sores upon them, after being commanded by the magistrates to stay at home. This statute was repealed in 1837 (*k*). Hale discusses the question, whether if a person infected with the plague should go abroad *with intent* to infect another, and another be thereby infected and die, it would not be murder by the common law (*l*), and seems to consider it as clear, that though where no such intent appears it cannot be murder, yet, if another should be infected by the action of such a person it would be a misdemeanor (*l*).

The rule with respect to infectious disease is thus laid down by Lord Blackburn (*m*). 'Those who have the charge of a sick person if he is helpless (whether the disease be infectious or not) are at common law under a legal obligation to do, to the best of their ability, what is necessary for the preservation of the sick person (*n*), and the sick person if not helpless is bound to do so for his own sake. Where the disease is infectious, there is a legal obligation on the sick person, and on those who have the custody of him, not to do anything that can be avoided, which shall tend to spread the infection: and if either do so, as by bringing

(*h*) Published as statutory rules and orders. See the current Index of such orders.

(*i*) R. *v.* Harris, 4 T. R. 202; 2 Leach, 549. This decision is discussed in R. v. Hall [1891], 1 Q.B. 747, 766, and explained as resting on the fact that the Act provided no specific remedy for disobedience to the O. in C. *Ante*, bk. i. pp. 11, 13.

(*j*) 1 Jac. I, c. 31, s. 7. 1 Hale, 432, 695. 3 Co. Inst. 90.

(*k*) 7 Will. IV. and 1 Vict. c. 91.

(*l*) 1 Hale, 432.

(*m*) Metropolitan Asylum District Managers *v.* Hill, 6 App. Cas. 193, 204.

(*n*) See R. *v.* Instan [1893], 1 Q.B. 450, *ante*, Vol. i. p. 907. R. *v.* Senior [1899], 1 Q.B. 283.

the infected person into a public thoroughfare, it is an indictable offence, though it will be a defence to an indictment if it can be shewn that there was a sufficient cause to excuse what is *primâ facie* wrong: R. *v.* Burnett' (*o*).

In R. *v.* Vantandillo (*p*), the defendant was indicted for carrying her child, while infected with the small-pox, along a public highway, in which persons were passing, and near to the habitations of the King's subjects; and having suffered judgment to go by default, it was moved, in arrest of judgment, that it was consistent with the indictment that the child might have caught the disease, and that it was not shewn that the act was unlawful, as the mother might have carried it through the street in order to procure medical advice; and that the indictment ought to have alleged, that there was some sore upon the child at the time when it was so carried. It was also urged that the only offences against the public health of which Hawkins speaks are spreading the plague and neglecting quarantine (*q*); and that it appeared that Lord Hardwicke thought the building of a house for the reception of patients inoculated (*r*) with the small-pox was not a public nuisance, and mentioned that upon an indictment of that kind there had been an acquittal (*s*). But Ellenborough, C.J., said that if there had been any such necessity as was supposed for the conduct of the defendant, it might have been given in evidence as matter of defence: but there was no such evidence: and as the indictment alleged that the act was done *unlawfully* and *injuriously*, it precluded the presumption that there was any such necessity. Le Blanc, J., in passing sentence, observed, that although the Court had not found upon its records any prosecution for this specific offence, yet there could be no doubt, in point of law, that if any one unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects and indictable as such. He added that the Court did not pronounce that every person who inoculated (*t*) for this disease was guilty of an offence, provided it was done in a proper manner, and the patient was kept from the society of others, so as not to endanger a communication of the disease (*t*). But no person, having a disorder of this description upon him, ought to be publicly exposed, to the endangering the health and lives of the rest of the King's subjects.

In R. *v.* Burnett (*u*), the indictment was against an apothecary for unlawfully and injuriously inoculating children with the small-pox, and while they were sick of it, *unlawfully* and *injuriously* causing them to be carried along the public street. On motion in arrest of judgment it

(*o*) 4 M. & S. 272.

(*p*) 4 M. & S. 73.

(*q*) As to which, *vide ante*, p. 1843.

(*r*) 1 Hawk. cc. 52, 53.

(*s*) Baines *v.* Baker, 1752, 1 Ambl. 158 S. C. Anon. 3 Atk. 750. In 2 Chit. Cr. L. 656, there is an indictment against an apothecary for keeping a common inoculating house near the church in a town; and the Cro. Circ. A. 365, is referred to.

Metropolitan Asylum District Managers *v.* Hill [1881], 6 A. C. 193; 50 L. J. Q. B. 353.

(*t*) Inoculation is forbidden by sect. 32 of the Vaccination Act, 1867 (30 & 31 Vict. c. 84). As to its legal history see Metropolitan Asylum District Managers *v.* Hill [1881], 6 A. C. 193, 207. Lord Blackburn.

(*u*) [1815] 4 M. & S. 272.

was argued that this was not any offence ; that the case differed materially from R. *v.* Vantandillo, as the defendant was by profession a person qualified to inoculate with this disease, if it were lawful for any person to inoculate. That as to its being alleged that the defendant caused the children to be carried along the street, it was no more than this, that he directed the patients to attend him for advice instead of visiting them, or that he prescribed what he might deem essential for their recovery, air, and exercise. And it was observed that in R. *v.* Sutton (*v*), an indictment for keeping an inoculating-house, which was much more likely to spread infection than what had been done here, the Court did not consider the indictment so defective that it should be quashed on motion, and said that the defendant might demur. But Lord Ellenborough, C.J., said that the indictment laid the act to be done *unlawfully* and *injuriously ;* and that in order to support this statement it must be shewn that what was done was in the manner of doing it incautious and likely to affect the health of others.

In addition to the common law obligation with respect to infectious disease, elaborate provisions are made under the Public Health Acts, 1875 and 1908, and the Infectious Diseases Act, 1890, and the Public Health (London) Act, 1891, for preventing the spread of certain specified infectious diseases, and for punishing on summary conviction persons who disobey the provisions of the Acts or of regulations made under them. The offences created not being indictable do not fall within the scope of this work (*x*).

The question of criminal liability for communicating venereal diseases is discussed at length in R. *v.* Clarence (*y*).

Animals.—It is an indictable misdemeanor at common law to bring a horse infected with glanders into a public place to the danger of infecting the people there : and an indictment, which alleges that the defendant knew that a horse was infected with a contagious and infectious disease called the glanders, and that he brought it into a public place among divers subjects of the King to the great danger of infecting the said subjects with the said disease (*z*), has been held sufficient, after verdict, though it did not allege that the defendant knew that the disease was communicable to man (*a*).

Under the Diseases of Animals Acts, 1894 (57 & 58 Vict. c. 57), s. 22 (xxxvi), and 1903 (3 Edw. VII. c. 43), the Board of Agriculture has power to extend the definition of animals for the purposes of the Acts, so as to include any quadruped.

In the exercise of this power an Order was made Oct. 29, 1894, dealing with glanders and farcy in horses.

Breaches of the regulations contained in the Order are punishable on summary conviction under the Act of 1894 (ss. 51–57).

The summary remedies are no bar to proceedings at common law.

(*v*) [1767] 4 Burr. 2116.

(*x*) See Lumley, Public Health Acts (7th ed.). Glen, Public Health Acts (13th ed.). MacMorran, Public Health London Act.

(*y*) 22 Q. B. D. 23.

(*z*) Which is dangerous to human life. See Baird *v.* Graham [1852], 14 Dunlop, (Sc.) 615.

(*a*) R. *v.* Henson, Dears. 24.

Sect. III.—Of Unwholesome Food or Drink.

It is an indictable misdemeanor knowingly to sell food unfit for human consumption, or to mix unwholesome ingredients in anything made and supplied for the food of man (*b*). The offence may be classified either on a public nuisance (*c*) or as a common law cheat (*d*). The common law remedy by indictment is not affected by the provision of the Sale of Food and Drugs Acts (*e*) or the Public Health Acts (*f*). Summary proceedings in respect of most of the nuisances above described are authorised by the statutes mentioned above, but without prejudice to the right to resort to the common law remedies (*f*).

If a master knows that his servant puts into bread what the law has prohibited, and the servant from the quantity he puts in makes the bread unwholesome, the master is answerable criminally, for he should have taken care that more than is wholesome was not inserted (*g*). A contract baker for a military asylum was convicted of delivering for the use of the children belonging to the asylum loaves containing crude lumps of alum, an unwholesome ingredient. The defendant's foreman made the loaves; but the jury found that the defendant knew the foreman used alum. Upon a motion for a new trial the Court thought that if the master suffered the use of a prohibited article, it was his duty to take care that it was not used to a noxious extent, and that he was answerable if it was. A motion was then made in arrest of judgment, on the ground that the indictment did not specify what the noxious ingredients were, or state that the loaves were delivered to be eaten by the children:

(*b*) R. *v.* Dixon, 3 M. & S. 11, (sale by a baker of bread into which he knew alum had been put). R. *v.* Mackarty, 2 Ld. Raym. 1169; 3 Ld. Raym. 487; 6 East, 133, cit., (unwholesome port wine). R. *v.* Haynes, 4 M. & S. 214. Shillito *v.* Thompson, 1 Q.B.D. 12, *vide ante*, pp. 1504, 1512.

(*c*) *Ante*, p. 1833.

(*d*) *Ante*, p. 1503.

(*e*) 38 & 39 Vict. c. 63, s. 28.

(*f*) Most of the offences within these Acts are acts or omissions dangerous or injurious to health; but many are described as nuisances, though not all would be indictable as public nuisances. The Public Health Act, 1875 (38 & 39 Vict. c. 55 (E.)), makes certain provisions for the summary punishment of nuisances or acts dangerous or injurious to health. By sect. 111, the provisions of the Act relating to nuisances shall be deemed to be in addition to, and not to abridge or affect any right, remedy, or proceeding under any other provisions of this Act, or under any other Act, or at law, or in equity. Provided that no person shall be punished for the same offence, both under the provisions of this Act relating to nuisances, and under any other law or enactment. Att.-Gen. *v.* Logan [1891], 2 Q.B. 100. See also sect. 341, and the Public Health Acts 1890 (53 & 54 Vict. c. 59), and 1907 (7 Edw. VII. c. 53), The Public Health London Act, 1891 (54 & 55 Vict. c. 76), after specifying a number of nuisances, &c., may be summarily dealt with in the administrative County of London, provides (sect. 138), that all powers, rights, and remedies given by this Act shall be in addition to and not in derogation of any other powers, rights, and remedies conferred by any Act of Parliament, law or custom, and all such other powers, rights and remedies may be exercised and put in force in the same manner and by the same authority as if this Act had not passed. The proviso added to sect. 111 of the Act of 1875, is not inserted in the London Act, being incorporated in sect. 33 of the Interpretation Act, 1889.

(*g*) As to the responsibility of a master for the criminal acts of his servant, see Att.-Gen. *v.* Siddon, 1 Tyrw. 41. Chisholm *v.* Doulton, 22 Q.B.D. 736. Att.-Gen. *v.* Riddell, 2 Tyrw. 523. Hardcastle on Statutes (4th ed. by Craies), p. 439. In the case of public nuisance or breach of statutes relating to the sale of goods, there is a disposition to treat the master as liable for the acts of his agents, and see R. *v.* Stephens L. R. 1 Q. B. 702, *ante*, p. 1838. Police Commissioner *v.* Cartman [1896], 1 Q.B. 655. Coppen *v.* Moore (No. 2) [1898], 1 Q.B. 306, and *ante*, Vol. i. pp. 101, 102. As to liability of a husband for the acts of his wife, see Lyons *v.* Martin, 8 A. & E. 512.

but the Court held statement of the said ingredients unnecessary, because they were in the defendant's knowledge; and that the allegation that the loaves were delivered for the use and supply of the children, must mean that they were delivered for their eating; and the motion was refused (*h*).

'Victuallers, butchers, and other common dealers in victuals, are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances that they are, so that if an order be sent to them to be executed they are presumed to undertake to supply a good and merchantable article (*i*); but they are also liable to punishment for selling corrupt victuals by virtue of an ancient statute (*j*), certainly if they do so *knowingly*, and probably if they do not' (*k*). The earlier cases on the subject treat the offence as in the nature of a cheat at common law (*l*) and not as a public nuisance (*m*).

If a person publicly exposes or causes to be exposed for sale in a market meat unfit for human food as and for meat that is fit for human food, knowing it not to be so, he is indictable at common law (*n*). If the sale was deliberate or grossly careless and death follows from eating the food, the seller is indictable for manslaughter (*nn*). But a person is not indictable at common law for sending meat unfit for human food to a salesman in a market, unless he intend it to be sold for human food (*o*). On an indictment (*p*) under sect. 47 of the Public Health Act (London), 1891 (*q*) which provides for the punishment of persons in whose possession are found articles intended for the food of man, but unsound, unwholesome, or unfit for the food of man, it was proved that the prisoner was a wholesale fruit dealer, and received for sale a large consignment of foreign nuts, a large proportion of which proved to be bad. He, without examining their condition, sold a quantity of them to retail dealers, who were, however, warned by him to examine the nuts, and destroy such (if any) as were bad, before offering them for sale to the public. It was held that he could not be convicted, since it was not shown that he intended to sell the bad nuts for human food (*r*).

(*h*) R. *v.* Dixon, 3 M. & S. 11.

(*i*) This presumption is applied by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), to the sale of goods by description, sect. 14 (2), and a condition of reasonable fitness is also implied in cases where the buyer relies on the statement or judgment of the seller, sect. 14 (1). Frost *v.* Aylesbury Dairy, Co. [1905], 1 K.B. 610.

(*j*) 51 H. III., st. 6, repealed by 7 & 8 Vict. c. 24, which also repeals an Act for 'the punishment of a butcher selling unwholesome flesh.' Ruffheads' St. p. 187, Vol. i. either of Hen. III., Edw. I., or Edw. II.

(*k*) Burnby *v.* Bollett, 16 M. & W. 644, Parke, B., and see 4 Co. Inst. 261.

(*l*) See R. *v.* Mackarty and Fordenbourgh, 2 Ld. Raym. 1179, 3 do. 487; discussed 2 East, P. C. and in R. *v.* Southerton, 6 East, 126 at pp. 123, 141. The case related to the exchange of wine unfit for man to drink.

(*m*) *Ante*, Vol. i. p. 1503.

(*n*) R. *v.* Stevenson, 3 F. & F. 106. R. *v.* Jarvis, 3 F. & F. 108. Shillito *v.* Thompson, 1 Q.B.D. 12. As to summary conviction for this offence, see 38 & 39 Vict. c. 55, ss. 116, 117; 54 & 55 Vict. c. 76, s. 47 (2) (London).

(*nn*) R. *v.* Stevenson, 3 F. & F. 106. R. *v.* Kempson, Oxford circuit, 1893, 28 L. J. Newsp. 477. Archb. Cr. Pl. (23rd ed.) 798, 1163.

(*o*) R. *v.* Crawley, 3 F. & F. 109.

(*p*) The defendant elected to be tried by a jury under 42 & 43 Vict. c. 49, s. 17, the maximum punishment being six months' imprisonment. See *ante*, Vol. i. p. 17.

(*q*) 54 & 55 Vict. c. 76. The judgments turned chiefly on the language of the section, which is not here set out, as it relates to summary proceedings.

(*r*) R. *v.* Dennis [1894], 2 Q.B. 458 (per Hawkins, Cave, Grantham, Charles, Vaughan-Williams, Lawrance, Wright, Collins, Bruce, and Kennedy, JJ.; Mathew, J., dissenting). This decision was criticised in Grivell *v.* Malpas [1906], 2 K.B. 32.

CANADIAN NOTES.

NUISANCES TO PUBLIC HEALTH.

Unwholesome Food or Drink.—See Code sec. 224.

Procedure.—It is not competent for magistrates where an information charges an offence under this section which they have no jurisdiction to try summarily, to convert the charge into one under a municipal by-law which they have jurisdiction to try summarily, and to so try it on the original information. R. v. Dungey (1901), 5 Can. Cr. Cas. 38.

Adulterated Foods and Drugs.—Other provisions regarding the adulteration of foods and drugs and the sale or exposure for sale of the adulterated article are contained in the Adulteration Act.

CHAPTER THE FOURTH.

NUISANCE BY TRADE OR BUSINESS.

SECT. I.—NUISANCE BY NOISE AND VIBRATION.

NOISE alone may constitute a nuisance (*a*). A noisy trade can be dealt with as a public nuisance: but most of the decisions as to nuisance by noise or vibration are in actions for nuisance caused to individuals suffering particularly therefrom (*b*) or under byelaws made by local authorities (*c*).

An indictment will not lie for a nuisance only to a few inhabitants of a particular place. Upon an indictment against a tinman for the noise made by him in carrying on his trade, it appeared, that the noise only affected the inhabitants of three numbers of the chambers in Clifford's Inn, and that by shutting the windows the noise was in a great measure prevented, and Ellenborough, C.J., held that the indictment could not be sustained, as the annoyance was if anything a private nuisance (*d*). It was held a public nuisance to make great *noises* in the night with a speaking trumpet, to the disturbance of the neighbourhood (*e*). As to cases where the noise and obstruction are caused not by the trade or performance itself but by the persons attracted by it, see *post*, pp. 1888, 1889.

Claims for nuisance by vibration have been common since the introduction of electrical and other machinery: but the proceedings taken have been for private nuisance, and unless the vibration is only of a temporary character injunctions have been granted (*f*).

(*a*) Crump *v.* Lambert [1867], L. R. 3, Eq. 409, and cases there collected.

(*b*) See Christie *v.* Davey [1893], 1 Ch. 316: noise deliberately made to drown a neighbour's music. Inchbald *v.* Robinson, L. R. 4 Ch. App. 388: noise from a circus. Bellamy *v.* Wells, 60 L. J. Ch. 156: a club which drew noisy crowds and created further noise by late whistling for cabs. Bartlett *v.* Marshall, 44 W. R. 251: noise of carts and shouting. Ball *v.* Ray, L. R. 8 Ch. App. 467, and Broder *v.* Saillard, 2 Ch. D. 692: noise from stables. Rapier *v.* London Tramways Co. [1893], 1 Ch. 588: intermittent but considerable noise in tramway stables.

(*c*) Kruse *v.* Johnson [1898], 2 Q.B. 91: 'musical or noisy instruments or singing in highways.' Mayor, &c., of Southend-on-Sea *v.* Dairs [1900], 16 T. L. R. 167 (steam organs). Steam whistles in factories are regulated by an Act of 1872 (35 & 36 Vict. c. 61); and street music, in London by Bass' Act (27 & 28 Vict. c. 55), and by byelaws elsewhere.

(*d*) R. *v.* Lloyd [1803], 4 Esp. 200.

(*e*) R. *v.* Smith [1725], 2 Str. 704. And see a precedent of an indictment for keeping dogs which made noises in the night, 2 Chit. Cr. L. 647. Nuisances by noisy animals are now dealt with summarily by byelaws.

(*f*) Colwell *v.* St. Pancras Borough Council [1904], 1 Ch. 707. Shelfer *v.* City of London Electric Lighting Co. [1895], 1 Ch. 287. Knight *v.* Isle of Wight Electric Co. [1906], 75 L. J. K.B. 305. Demerara Electric Co. *v.* White [1907], A. C. 330: all cases of vibration caused by electric works. Sturges *v.* Bridgman [1879], 11 Ch. D. 852: noise and vibration by use of a pestle and mortar.

Sect. II.—Nuisance by Stench, Smoke, etc.

A public nuisance may be caused by smoke, stench, or effluvia, if either singly or in combination (*g*) they create serious public discomfort or injury to health.

Offensive *trades* and *manufactures* may be public nuisances (*h*), if they be so carried on as to destroy the comfort (*i*) or endanger the health of the neighbourhood (*j*). A *brewhouse*, erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance; and so may a *glasshouse* (*k*), or *swineyard* (*l*), or a *tallow furnace* (*m*). By convenient is meant a place where a nuisance will not be caused, not a place convenient for the person carrying on the trade (*n*). An indictment for a nuisance, by steeping stinking skins in water, laying it to be committed near the highway, and also near several dwelling-houses, has been held sufficient; for if a man causes a nuisance *near* the highway by which the air thereabouts is corrupted, it must, in its nature, be a nuisance to those who are in the highway (*o*). And an indictment was held good for a nuisance in making fires which sent forth noisome, offensive, and stinking smokes, and making great quantities of noisome, offensive, and stinking liquors, near to the King's common highway, and near to the dwelling-houses of several of the inhabitants, whereby the air was impregnated with noisome and offensive stinks and smells (*p*). Upon the evidence it appeared that the smell was not only intolerably offensive, but also obnoxious and hurtful, and made many persons sick, and gave them headaches; and it was held that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable; and further, that the existence of the nuisance depended upon the number of the houses and concourse of people, and was a matter of fact to be judged of by the jury (*q*). If there be smells offensive to the senses,

(*g*) See Crump *v.* Lambert, L. R. 3 Eq. 409, and cases there collected.

(*h*) Certain offensive trades may be dealt with summarily, in London under 54 & 55 Vict. c. 76, s. 19, and elsewhere in England and Wales under 38 & 39 Vict. c. 55, ss. 112-114, without prejudice to the right to proceed by indictment (1875, s. 119; 1891, s. 138). For cases thereon see 4 Encycl. Loc. Govt. Law, 636, Lumley Public Health (7th ed.). Att.-Gen. *v.* Logan [1891], 2 Q.B. 100.

(*i*) Banbury, U.S.A. *v.* Page, 8 Q.B.D. 97.

(*j*) R. *v.* Davey, 5 Esp. 217, and see cases in note (*c*), p. 1833.

(*k*) R. *v.* Wilcox, 2 Salk. 458. Anon., 1 Ventr. 26. R. *v.* Morris, 2 Kelb. 500.

(*l*) R. *v.* Wigg, 2 Salk. 460. In Att.-Gen. *v.* Squire [1906], 5 Loc. Govt. Rep. 99, it was held to be a public nuisance to keep pigs in a farmstead near a village street in such numbers, and to feed them with such food, as to inconvenience the neighbourhood. See 2 Ld. Raym. 1169, 1 Hawk. 75, s. 10, and other old writers examined in Bamford *v.* Turnley, 31 L. J. Q.B. 286, 290. In Bac. Abr. *tit.* 'Nuisance' (A), it is said, 'It seems the better opinion that a brewhouse, glasshouse, chandler's shop, and sty for swine, set up in such "inconvenient" parts of a town that they cannot but greatly incommodate the neighbourhood, are common nuisances'; and see 2 Rolle, Abr. 139.

(*m*) Morley *v.* Pragnell, Cro. Car. 510. Att.-Gen. *v.* Cole [1901], 1 Ch. 205.

(*n*) Jones *v.* Powell, Palm. 536, 539, Hutton 135, as explained by Ld. Halsbury in Fleming *v.* Hislop, 11 A. C. 683, 697.

(*o*) R. *v.* Pappineau [1726], 2 Str. 686.

(*p*) R. *v.* White, 1 Burr. 333.

(*q*) Id. ibid.

that is enough, as the neighbourhood has a right to fresh and pure air (*r*).

With respect to nuisances created by noisy or offensive trades, there has been much discussion as to whether the law is the same for towns as for mining and manufacturing districts and for rural districts. So far as concerns public nuisances the law appears to be the same for all places (*s*). The old doctrine that persons coming to the nuisance cannot complain (*t*) is exploded (*u*), and it is now settled that 'whether the man comes to the nuisance or the nuisance comes to the man the rights are the same' (*v*), and that the convenience of the place in which the trade is carried on is no defence (*vv*). But the nature of the neighbourhood does to a certain extent affect the question whether the acts complained of should or should not be dealt with as a nuisance to the neighbourhood. The law of nuisance is said to be elastic in the sense that 'a dweller in a town cannot expect to have as pure air, as free from smoke, smell and noise as if he lived in the country and distant from other dwellings, and yet an excess of smoke, smell, or noise may give a cause of action: but in each of such cases it becomes a question of degree' (*w*). It follows that to justify proceedings for nuisance by a noisy trade, it is necessary to know that the noise, after taking account of the nature and habits of the neighbourhood and pre-existing noise, amounts to a serious addition to the noise already prevailing (*x*). These propositions were made with reference to private nuisances. They have some, but not full application to public nuisances, inasmuch as in the case of private nuisances injury to property is more considered than personal discomfort or inconvenience, especially in the case of trades in towns (*y*); whereas in the case of public nuisance it is the general discomfort and inconvenience alone that is important.

Where a locality is devoted to a particular trade or manufacture carried on by traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be

(*r*) The word noxious does not merely mean hurtful and offensive to the smell, but includes also the complex idea of insalubrity and offensiveness, id. ibid. p. 337. Cf. Bishop Auckland L. B. *v.* Bishop Auckland Iron, &c., Co., 10 Q.B.D. 138.

(*s*) In the case of a private nuisance questions of easement or prescription may arise. Sturges *v.* Bridgman [1879], 11 Ch. D. 852, 859. St. Helen's Smelting Co. *v.* Tipping, *ubi sup.*, which cannot arise in the case of public nuisance.

(*t*) In R. *v.* Cross [1826], 2 C. & P. 483, Abbott, C.J., said, that if a certain noxious trade is already established in a place remote from habitations and public roads, and persons thereafter build within reach of its noxious effects or a public road is made so near that the trade becomes a nuisance to the passengers, the party is entitled to continue the trade. This ruling is consistent with the rule that public nuisance cannot be created by prescription. See Hole *v.* Barlow, 27 L. J. C. P. 207, Byles, J.

(*u*) Bamford *v.* Turnley, 3 B. & S. 62; 31 L. J. Q.B. 286 (Ex. Ch.), overruling Hole *v.* Barlow, 4 C. B. N. S. 334, a case of brick burning.

(*v*) Fleming *v.* Hislop, 11 A. C. 683, 697, Ld. Halsbury. Cf. Att.-Gen. *v.* Cole [1901], 1 Ch. 205, old fat-melting works in a district newly covered with houses.

(*vv*) Cavey *v.* Ledbitter, 13 C. B. N. S. 470. Salvin *v.* Brancepeth Coal Co., L. R. 9 Ch. App. 705. And see Shotts Iron Co. *v.* Inglis, 7 A. C. 518, 528.

(*w*) Colls *v.* Home and Colonial Stores [1904], A. C. 178, 185, Ld. Halsbury, quoted and adopted in Polsue *v.* Rushmer [1907], A. C. 121, 123, Loreburn, C.

(*x*) Polsue *v.* Rushmer, *ubi sup.* Nuisance by noise from night printing works in a district full of printers' works.

(*y*) St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642, a case of private nuisance to trees and shrubs by fumes from copper smelting works.

justified in finding, and may be trusted to find, that the trade or manufacture so carried on is not a private or actionable wrong (*z*). But on proceedings for public nuisance, whether by noise or effluvia or unwholesomeness, the time during which the business has been carried on or the reasonableness of the steps taken to avoid noise or smell do not afford any criterion for deciding whether the trade is or is not a public nuisance (*a*). An injunction was granted at the suit of the Attorney-General to restrain the defendant from carrying on the business of a fat melter so as to create a public nuisance by the emanation of noxious gas from the works. The business had been carried on for thirty years, but round the site, which was formerly in open country, many buildings had been recently erected: and the fact that the business had been properly carried on and precautions taken to avoid offensive emanation was held to be no defence (*b*).

The existence of one public nuisance is not justified or excused by the presence of other nuisances in the same neighbourhood (*c*); though the fact of their presence may create a difficulty imposing that the particular business attached is in itself sufficiently offensive to be a public nuisance. Upon an indictment for a nuisance in carrying on the trade of a varnish-maker, it was proved that offensive smells proceeded from the defendant's manufactory, to the annoyance of persons travelling along a public road; the defence was, first, that the smells were not injurious to health; and, secondly, that there were in the immediate neighbourhood a number of other offensive trades; and that although the accumulation of all the smells was offensive, yet that the defendant's alone would not have been so, and therefore was no nuisance; but Abbot, C.J., said, 'It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighbourhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, knackers, melters of kitchen stuff, &c.; but the presence of other nuisances will not justify any one of them; or the more nuisances there were the more fixed they would be; however, one is not the less subject to prosecution because others are culpable. The only question, therefore, is this: is the business, as carried on by the defendant, productive of smells offensive to persons passing along the public highway?' (*d*). The fact that a trade cannot be carried on without a licence does not excuse a person licensed to carry on the trade in creating a public nuisance in carrying it on. Thus a licence under the Knackers Act, 1776 (26 Geo. III. c. 71), s. 1, authorising a person to keep a house for the slaughtering of

(*z*) Sturges *v.* Bridgman, 11 Ch. D. 852, 865, Thesiger, L.J.: quoted and approved in Polsue *v.* Rushmer [1906], 1 Ch. 234, 247, V. Williams, L.J.; affirmed [1907], A. C. 121.

(*a*) Att.-Gen. *v.* Cole [1901], 1 Ch. 205. A case of public nuisance from fat-melting works long established in open country, but gradually surrounded by new habitations. There Kekewich, J., discusses the effect of Bamford *v.* Turnley (*ante*, p. 1851), and Ball *v.* Ray, L. R. 8 Ch. App. 467, and Reinhard *v.* Mentasti, 42 Ch. D. 685.

(*b*) Att.-Gen. *v.* Cole, *ubi sup.* Cf. St. Helen's Smelting Co. *v.* Tipping, 11 H. L. C. 642; 35 L. J. Q. B. 66.

(*c*) R. *v.* Neil, 2 C. & P. 485, Abbott, C.J. R. *v.* Watts, ib. 486. Crossley *v.* Lightowler, 2 Ch. App. 478; 36 L. J. Ch. 584.

(*d*) R. *v.* Neil, *ubi sup.* R. *v.* Neville, Peake (3rd ed.), 91. R. *v.* Watts [1826], M. & M. 281.

horses, has been held no defence, if the business is a public nuisance to the neighbourhood (*e*).

If a trade is alleged to be noxious by producing unwholesome smells, it may be proved that the smells are frequently perceived, and are not only offensive to the senses but have an injurious effect on those who smell them (*f*).

Upon an indictment for burning arsenic whereby divers unwholesome smells arose, so that the air was greatly corrupted, evidence is admissible that particles of arsenic were carried off in the vapour, and deposited in the adjoining fields, and thereby the cattle and trees were poisoned, and that several cattle had died (*g*).

Where the alleged nuisance was at Liverpool, and certain effects there produced were, by the prosecution, attributed to the fumes from the defendant's manufacture, and the defence was that those effects were attributable to other local causes; Coleridge, J., admitted evidence that the same effects were found in the neighbourhood of the defendant's similar manufacture carried on in the country, where these local causes did not exist, and that the defendant had paid compensation for them; for this was clearly good evidence of the tendency of the manufacture to produce such effects (*h*). But on an indictment in 1857 for a nuisance in carrying on an offensive trade, a conviction in 1855 of the defendant before justices of the peace for carrying on the same trade upon the same premises so as to occasion noxious and offensive effluvia without using the best practicable means for preventing the same, contrary to 16 & 17 Vict. c. 128, s. 1 (rep.), but before the period comprised in the indictment, was held inadmissible, though the manufacture appeared to have been carried on for some years in the same manner (*i*).

Where a trade is carried on under the authority of a special Act, it is necessary to examine the terms of the statute to see whether the actual nuisance created is authorised expressly or by necessary implication.

Gas.—By sect. 29 of the Gas Works Clauses Act, 1847 (10 & 11 Vict. c. 15), 'nothing in this or the special Act contained shall prevent the undertakers from being liable to an indictment for nuisance or to any other proceedings to which they may be liable in consequence of making or supplying gas.' And by sect. 9 of the Gas Works Clauses Act, 1871 (34 & 35 Vict. c. 41), 'nothing in this Act shall exonerate the

(*e*) R. *v.* Cross, 2 C. & P. 483, 468, Abbott, C.J., where it was unsuccessfully pleaded that the only remedy was under a local Act prohibiting the keeper of slaughter houses within a specified distance from a workhouse. Cf. R. *v.* Watts, M. & M. 281.

(*f*) Brown *v.* Eastern and Midlands Rail. Co., 22 Q.B.D. 391, 393, Stephen, J. R. *v.* White, 1 Burr. 333, *ante*, p. 1850. Cf. Malton, U.S.A. *v.* Malton Farmers' Manure Co., 4 Ex. D. 302, where evidence was given that sick people suffered temporarily from the effluvia of bone-boiling works. As to nuisance by deposit of house refuse, see A. G. *v.* Keymer Brick and Tile Co., 67 J. P. 431.

(*g*) R. *v.* Garland, 5 Cox, 165. For a full discussion of evidence as to the effect on trees of fumes from iron calcining works see Shotts Iron Co. *v.* Inglis [1882], 7 A. C. 518.

(*h*) Anon., cited in R. *v.* Fairie, 8 E. & B. 486.

(*i*) R. *v.* Fairie, *supra*. It was so held on the ground, 1st, that the offence of which the defendant had been convicted was not necessarily a nuisance; 2nd, that even if it had been an offence precisely similar, except that it was anterior, it would not have been admissible; but Wightman, J., did not concur on this latter point.

undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.'

One or other of these clauses is incorporated in special gas Acts. They appear to rebut any inference in favour of statutory authority to create a nuisance, which might otherwise be drawn from the other clauses of such Acts. Thus a company is not justified in creating a nuisance alleged to be necessary to ensure the purification of its gas up to the standard prescribed by its special Act (*j*).

The terms being general, apply to all public nuisances, whether by noise, stench, or pollution of water. For the latter form of nuisance stringent penalties are provided by the Gas Works Clauses Acts (*k*), the Waterworks Clauses Acts, and the Public Health Acts. A gas company cannot raise as a defence to proceedings for nuisance by contamination of water that their pipes are laid as well as can be, or that the contamination of water by diffusion of gas is unavoidable (*l*).

It is an indictable misdemeanor (*m*) to convey the refuse of gas into a public river, and thereby to render the water corrupt, insalubrious, and unfit for the use of man, and the directors of a gas company are responsible for the acts done by their superintendent and engineer under a general authority to manage the works, though they are personally ignorant of the plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose was discontinued: for if persons for their own advantage employ servants to conduct works, they are answerable for what is done by those servants (*n*).

Electricity.—The Electric Lighting Clauses Act, 1899 (62 & 63 Vict. c. 19), contains a clause (sect. 81) usually incorporated in Electric Lighting Orders, and providing that nothing in the order 'shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them.' On a similar clause in an order made in 1890 under the Electric Lighting Acts, 1882 and 1888 (*o*), the undertakers were held liable, apart from any question of negligence, for a nuisance, say an explosion caused by the fusing of one of their mains which volatilised its bituminous covering into an inflammable gas (*p*).

Railways.—Proceedings for nuisance cannot be taken in the case of railways authorised by general or special Acts in respect of the use of locomotives on railways, or vibration caused by the working of the line (*q*), or in respect of cattle-yards or the like, where the statute

(*j*) Att.-Gen. *v.* Gas Light and Coke Co., 7 Ch. D. 217.

(*k*) 10 & 11 Vict. c. 15, s. 21: 34 & 35 Vict. c. 41.

(*l*) Jordeson *v.* Sutton, &c., Gas Co. [1899], 2 Ch. 217 (C. A.). Att.-Gen. *v.* Gas Light and Coke Co., 7 Ch. D. 217. Batcheller *v.* Tunbridge Wells Gas Co. [1901], 65 J. P. 680, Farwell, J.

(*m*) The offence is also summarily punishable, 38 & 39 Vict. c. 55, s. 68: 54 & 55 Vict. c. 76, s. 52, London.

(*n*) R. *v.* Medley, 6 C. & P. 792, Denman, C.J.

(*o*) 45 & 46 Vict. c. 56: 51 & 52 Vict. c. 12. See Demerara Electric Co. *v.* White [1907], A. C. 330, decided on a similar clause in a colonial Ordinance.

(*p*) Midwood & Co. *v.* Manchester Corporation [1905], 2 K.B. 597. The action was for particular injury. As to nuisance by vibration due to electric lighting works, see Colwell *v.* St. Pancras Borough Council [1904], 1 Ch. 707, Joyce, J., and cases, *ante*, p. 1849.

(*q*) Hammersmith Rail. Co. *v.* Brand, L. R. 4 H. L. 171.

specifically authorises the running of the engines (*r*) and trains, or the establishment of the yard (*s*).

Sect. III.—Acts or Omissions causing Public Danger.

A public nuisance may be caused by acts or omissions causing terror or danger to the public in general.

It is said that a *mastiff* going in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to his Majesty's subjects, seems to be a common nuisance; and that, consequently, the owner may be indicted for suffering him to go at large (*t*), and it is said to be a public nuisance to keep 'a ferocious dog and noisy dog so near a highway as to be likely to frighten horses owing to its barking' (*u*).

Negligently blasting stone in a quarry and thereby projecting large pieces of stone, so as to endanger the safety of persons in houses and on highways adjoining the quarry, is a misdemeanor indictable at common law (*v*).

So is allowing a house near a highway to become a dangerous building (*w*): and while a man who burns down his own house is not guilty of arson at common law, he commits a public nuisance if the house is so situate that its burning causes danger to others (*x*).

Explosives and Inflammable Substances.—Erecting *gunpowder* mills, or keeping *gunpowder* magazines near a town, is a public nuisance at common law (*y*).

Where a count stated that the defendants unlawfully did deposit in a warehouse belonging to them near the divers streets, highways, and dwelling-houses, divers large and excessive quantities of a dangerous, ignitable, and explosive fluid, called wood naphtha, and unlawfully did keep in the said warehouse, and near to the said streets, highways,

(*r*) R. *v.* Pease [1832], 4 B. & Ad. 30. Vaughan *v.* Taff Vale Rail. Co. [1860], 29 L. J. Ex. 247: 5 H. & N. 679.

(*s*) L. B. & S. C. R. *v.* Truman [1885], 11 A. C. 45. Canadian Pacific Rail. Co. *v.* Parke [1899], A. C. 535, 546.

(*t*) Burn's Justice (30th ed.), *tit.* 'Nuisance,' 1. And see a precedent of an indictment for this offence, 3 Chit. Cr. L. 643. The offence seems to be stated too generally in the authority from which the text is taken. To permit a *furious* mastiff or bull-dog to go at large and unmuzzled may be a nuisance; but those dogs are frequently quiet and gentle in their habits, and it can hardly be said to be a nuisance to permit them to go at large and unmuzzled, because some of their breed are ferocious. The Dogs Acts, 1871 (34 & 35 Vict. c. 56) and 1906 (6 Edw. VII. c. 32), give summary jurisdiction in cases where dogs are dangerous, &c. In Archbold, Cr. Pl. (23rd ed.) 1186, reference is given to old indictments for keeping a fierce bull in a field traversed by a public footpath.

(*u*) Brown *v.* Eastern and Midlands Rail. Co., 22 Q.B.D. 391, 393, Stephen, J.

(*v*) R. *v.* Mutters, 34 L. J. M. C. 22: L. & C. 491. The indictment charged that the highway was obstructed and rendered dangerous to life as well as the fear and danger of the inhabitants and passengers. Cf. R. *v.* Clerk of Assize of Oxford Circuit [1897], 1 Q.B. 370.

(*w*) R. *v.* Watts, 1 Salk. 357. R. *v.* Watson, 2 Ld. Raym. 856.

(*x*) R. *v.* Probert, 2 East. P. C. 1050.

(*y*) R. *v.* Williams [1700], an indictment against Roger Williams for keeping 400 barrels of gunpowder near the town of Bradford, and he was convicted. And in R. *v.* Taylor, 2 Str. 1167, the Court granted an information against the defendant for a nuisance, on affidavits of his keeping great quantities of gunpowder near Malden in Surrey, to the endangering of the church and houses where he lived. See R. *v.* Lister, *infra*. Burn's Just. (30th ed.) *tit.* 'Gunpowder,' where it is said, 'or rather it should have been expressed to the endangering of the lives of His Majesty's subjects.'

the persons passing by and living there, was declared to be a common nuisance by 9 & 10 Will. III. c. 7 (rep.) (*aa*). This offence is also covered by the Explosives Act, 1875 (*b*).

At common law it is a misdemeanor to put on board a ship an article of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it (*c*). The case below cited did not come before the Court of King's Bench directly upon its criminal nature: but that Court, in adverting to the conduct imputed to the defendants, declared it to be criminal; and said, 'in order to make the putting on board *wrongful* the defendants must be cognisant of the dangerous quality of the article put on board; and if, being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanor at least' (*c*).

The common law as to the keeping of explosives is supplemented but not superseded by the Explosives Act, 1875 (38 & 39 Vict. c. 17), which applies to the whole of the United Kingdom (*d*), and regulates the making, keeping, carriage, sale, importation, and exportation of gunpowder . . . and other explosives (*e*).

The following sections alone are material for the purposes of the treatise; sect. 73 gives power to search for explosives (*f*).

By sect. 78, 'Any person who is found committing any act for which he is liable to a penalty under this Act, and which tends to cause explosion or fire in or about any factory, magazine, store, railway, canal, harbour, or wharf, or any carriage, ship, or boat, may be apprehended without a warrant by a constable, or an officer of the local authority, or by the occupier of or the agent or servant of or other person authorized by the occupier of such factory, magazine, store, or wharf, or by any agent or servant of or other person authorized by the railway or canal company or harbour authority, and be removed from the place at which he is arrested, and conveyed as soon as conveniently may be before a court of summary jurisdiction' (*g*).

Sect. 89. 'Where any explosive, or ingredient of an explosive, is

(*aa*) R. *v.* Lister, *supra*.

(*b*) See R. *v.* Bennett, Bell, 1, *ante*, Vol. i. p. 792. 9 & 10 Will. III. c. 7 was repealed by 23 & 24 Vict. c. 139, s. 1: but penalties (recoverable summarily) are imposed by sect. 80 of the Explosives Act, 1875, for throwing fireworks in streets.

(*c*) Williams *v.* East India Co., 3 East, 192, 201. See Explosives Act, 1875 (38 & 39 Vict. c. 17), ss. 45, 101; Explosive Substances Act, 1883 (46 & 47 Vict. c. 3, s. 8), *ante*, Vol. i. p. 870; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 301, 446).

(*d*) The administration of the Act has been modified in consequence of changes in local government. See 51 & 52 Vict. c. 41, ss. 3, 7, 38, 39 (E): 52 & 53 Vict. c. 50, s. 11 (8): 61 & 62 Vict. c. 37, ss. 6, 21 (I).

(*e*) The definition of explosive may be extended by order in Council, 38 & 39 Vict. c. 17, ss. 104, 106. A list of the orders issued is given in the Index to the Statutory Rules and Orders (5th ed. 1907), p. 232.

(*f*) This power is cumulative on the power of search for explosives knowingly possessed for the purpose of committing offences, 24 & 25 Vict. c. 97, s. 55 (malicious damage), 24 & 25 Vict. c. 100, s. 65 (offences against the person): *ante*, Vol. i. p. 868.

(*g*) Sect. 87, which permits the occupier of a factory or other defendant when charged in respect of any offence against the Act by another person if he thinks fit to be sworn as an ordinary witness, is superseded as to England by the Criminal Evidence Act, 1898: *post*, p. 2271.

lleged to be liable under this Act to be forfeited, any indictment, information, or complaint may be laid against the owner of such explosive or ingredient, for the purpose only of enforcing such forfeiture, and where the owner is unknown, or cannot be found, a court may cause a notice to be advertised, stating that unless cause is shown to the contrary at the time and place named in the notice, such explosive will be forfeited, and at such time and place the court, after hearing the owner or any person on his behalf (who may be present), may order all or any part of such explosive or ingredient to be forfeited' (*h*).

Sect. 90. 'For all the purposes of this Act (1) Any harbour, tidal water (*i*) or inland water (*i*) which runs between or abuts on or forms the boundary of the jurisdiction of two or more courts shall be deemed to be wholly within the jurisdiction of each of such courts; and (2) Any tidal water not included in the foregoing descriptions, and within the territorial jurisdiction of [His] Majesty, and adjacent to or surrounding any part of the shore of the United Kingdom, and any pier, jetty, mole, or work extending into the same, shall be deemed to form part of the shore to which such water or part of the sea is adjacent, or which it surrounds' (*j*).

Sect. 91. 'Every offence under this Act may be prosecuted, and every penalty under this Act may be recovered, and all explosives and ingredients liable to be forfeited under this Act may be forfeited either on indictment or before a court of summary jurisdiction, in manner directed by the Summary Jurisdiction Acts (*k*). Provided that the penalty imposed by a court of summary jurisdiction shall not exceed one hundred pounds exclusive of costs, and exclusive of any forfeiture or penalty in lieu of forfeiture, and the term of imprisonment imposed by any such court shall not exceed one month.'

By Sect. 92, 'Where a person is accused before a court of summary jurisdiction of any offence under this Act, the penalty for which offence as assigned by this Act, exclusive of forfeiture, exceeds one hundred pounds, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly' (*l*).

Sect. 102. '. . . This Act shall not exempt any person from any indictment or other proceeding for a nuisance, or for an offence which is indictable at common law or by any Act of Parliament other than this Act, so that no person be punished twice for the same offence.

(*h*) Sect. 89 is made applicable to offences under the Explosive Substances Act, 1883. See 46 Vict. c. 3, s. 8, *ante*, Vol. i. pp. 865 *et seq.*

(*i*) By sect. 107, the expression 'tidal water' means any part of the sea or of a river within the ebb and flow of the tides at ordinary spring tides. The expression 'inland water' means any canal, river, navigation, lake, or water which is not tidal water.

(*j*) Sect. 90 is, for purposes of summary jurisdiction, overlapped by 42 & 43 Vict. c. 49, s. 42.

(*k*) 11 & 12 Vict. c. 42; 42 & 43 Vict. c. 49, and 47 & 48 Vict. c. 43 (E). See Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 33), *ante*, Vol. i. pp. 3, 4.

(*l*) Cf. 42 & 43 Vict. c. 49, s. 17, *ante*, Vol. i. p. 17.

'When proceedings are taken before any Court against any person in respect of any offence under this Act, which is also an offence indictable at common law or by some Act of Parliament other than this Act, the Court may direct that, instead of such proceedings being continued, proceedings shall be taken for indicting such person at common law or under some Act of Parliament other than this Act . . .' (*m*).

(*m*) Cf. Interpretation Act, 1889, s. 33, *ante*, Vol. i. pp. 4, 6.

See notes

CANADIAN NOTES.

NUISANCES BY NOISE AND VIBRATION.

See notes to Chapter 1, General Nuisances.

CHAPTER THE FIFTH.

OF OFFENCES RELATING TO DEAD BODIES.

Removing Dead Bodies.—A corpse once buried cannot lawfully be disinterred without (1) the licence of a secretary of state (*a*), (2) the order of a coroner made within a reasonable time after burial for the purpose of an inquest (*b*), (3) the order of the High Court of Justice when a *melius inquirendum* is necessary (*c*), and (4) when the interment is in consecrated ground, the faculty granted by the ordinary or his chancellor (*d*).

In cases (1) and (4) the consent of the owners of the grave and of the burial ground is also necessary (*e*) : and a faculty under (4) is not operative unless a licence under (1) is also obtained, unless the faculty is merely for removal from one consecrated place of burial to another (*d*). In case (2) it is now usual if not essential also to obtain a Home Office licence.

It is not larceny to steal a corpse (*f*) ; but a disinterment without lawful authority is a misdemeanor. Upon an indictment for this offence it was moved in arrest of judgment, that if it were any crime, it was one of ecclesiastical cognisance only ; that it was not made penal by any statute ; and that the silence of Staundforde, Hale, and Hawkins, upon this subject, afforded a very strong argument to shew that there was no such offence cognisable in the criminal courts. But the Court said, ' that common decency required that the practice should be put a stop to ; that the offence was cognizable in a criminal Court, as being highly indecent, and *contra bonos mores ;* at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissection did not make it less an indictable offence : and that, as it had been the

(*a*) 20 & 21 Vict. c. 81, s. 25. There is a penalty recoverable summarily, but proceedings may be taken by indictment at common law. Such a licence if obtained by fraud does not legalise the exhumation. Williams *v.* Williams, 20 Ch. D. 659.

(*b*) R. *v.* Bonny, Carthew, 72. 2 Hawk. c. 9, s. 23. 2 Hale, 58. It does not seem proper to take up the body for a fresh inquest unless the first inquest has been quashed. R. *v.* White, 29 L. J. Q.B. 257.

(*c*) R. *v.* Clark [1702], cas. temp. Holt, 167. R. *v.* Bond [1716], 1 Str. 22, 533. 50 & 51 Vict. c. 71, s. 6. See R. *v.* Coulson [1891], 55 J. P. 262, where it is stated that the Home Secretary directed an exhumation on the request of the Director of Public Prosecutions and that a *melius inquirendum* was applied for but refused by the High Court. The form of the order is to give leave to hold a fresh inquest on view of the said body. R. *v.* Carter [1876], 13 Cox, 220.

(*d*) R. *v.* Tristram, No. 1 [1898], 2 Q.B. 371 ; No. 2 [1899], 80 L. T. (N. S.) 414. Druce *v.* Young [1899], P. 84. *Re* Talbot [1900], P. 1. This rule applies to the consecrated portion of cemeteries as well as to parish churchyards, Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), s. 26, which is incorporated in the special Acts of cemetery companies and in the Public Health Interments Act, 1879 (42 & 43 Vict. c. 31).

(*e*) Druce *v.* Young, *ubi supra*.

(*f*) 3 Co. Inst. 45, 203. 2 East, P. C. 652. See Doodeward *v.* Spence [1907], 7 N. S. W. State Rep. 727 ; 6 Australia C. L. R. 406, for a full discussion of the law as to property in the body of a still-born infant preserved in spirits. Special leave to appeal was refused by the Privy Council, 16 Dec. 1908. As to larceny of property of a deceased person, *v. ante*, p. 1293. Under 1 Jac. I. c. 12 (rep.) it was felony to steal dead bodies for purposes of witchcraft.

regular practice at the Old Bailey, in modern times, to try charges of this nature, many of which had induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgments was a strong proof of the universal opinion of the profession upon this subject; and they, therefore, refused even to grant a rule to show cause, lest that alone should convey to the public, an idea that they entertained a doubt respecting the crime alleged' (*g*).

It is an indictable misdemeanor to expose a naked corpse in a place where many persons were certain to pass and repass, and where the exposure is calculated to disgust and shock the passers-by, and to outrage public decency (*h*). To sell the dead body of an executed convict for the purposes of dissection, where dissection was not part of the sentence, was held to be a misdemeanor indictable at common law (*i*). This decision was given on an indictment against an undertaker employed and paid to bury the body of a prisoner executed for felony, who had clandestinely gone through the ceremony of burying a coffin filled with rubbish and had disposed of the body to a surgeon.

It is immaterial whether the body was interred in consecrated or in unconsecrated ground; and it is immaterial whether the object of disinterment was with intent to sell the body or to dissect it (*j*) or was pious and laudable. An indictment charged (*inter alia*) that the prisoner a certain dead body of a person unknown lately before deceased wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit; and it being evident that the prisoner had taken the body from some burial ground, though from what particular place was uncertain, he was found guilty upon this count. And it was considered that this was so clearly an indictable offence, that no case was reserved (*k*).

An indictment charged the defendant with unlawfully entering a burial-ground belonging to a congregation of Protestant dissenters, and unlawfully and indecently opening the grave of L. S., and unlawfully and indecently carrying away her body. The defendant's father had recently died, and the defendant prevailed on the wife of the person who had the key of the burying-ground to allow him to cause the said grave to be opened, upon the pretext that he wished to bury his father in that grave, and in order to examine whether the size of the grave would admit his father's coffin. He caused the coffins of his stepmother and two children to be taken out, and so came to the coffin of his mother, which was under theirs, and was much decomposed, and caused the remains of this coffin, with the corpse therein, to be placed in a shell and carried to a cart and driven some miles away towards a churchyard where he intended to bury his father's corpse with the remains of his mother. These acts were done without the consent of the congregation

(*g*) R. *v.* Lynn, 2 T. R. 733; 1 Leach, 497. In 4 Bl. Com. 236, 237, the law of the Franks is mentioned (as in Montesquieu Sp. L. bk. 30, ch. 19), which directed that a person who had dug a corpse out of the ground in order to strip it should be banished from society, and no one suffered to relieve his wants till the relations of the deceased consented to his readmission.

(*h*) R. *v.* Clark, 15 Cox, 171, Denman, J., where the exposure was of the naked mutilated body of a newly born infant.

(*i*) R. *v.* Cundick [1822]. Dowl. & Ry. (N.P.) 13, Graham, B.

(*j*) See the Anatomy Act, 1832, *post*, p. 1868, and the observations of Willes, J., in R. *v.* Feist, D. & B. 598.

(*k*) R. *v.* Gilles, Bayley, J., MS. Bayley, J., R. & R. 366, note (*b*). And see R. *v.* Duffin, R. & R. 365.

or the trustees having the legal estate in the ground ; and the jury found that the statement of the defendant that he intended to bury his father there was only a pretext, and that his real intention from the beginning was to remove his mother's corpse ; but that he acted throughout without intentional disrespect to anyone, being actuated by motives of affection to his mother and of religious duty. Upon a case reserved, Erle, J., on delivering the judgment of the Court, said, ' We are of opinion that the conviction ought to be affirmed. The defendant was wrongfully in the burial-ground, and wrongfully opened the grave, and took out several corpses, and carried away one. We say he did this wrongfully, that is to say, by trespass ; for the licence which he obtained to enter and open from the person who had the care of the place, was not given or intended for the purpose to which he applied it, and was, as to that purpose, no licence at all. The evidence for the prosecution proved the misdemeanor, unless there was a defence. We have considered the grounds relied on in that behalf, and, although we are fully sensible of the estimable motives on which the defendant acted, namely, filial affection and religious duty, still neither authority nor principle would justify the position that the wrongful removal of a corpse was no misdemeanor if the motive for the act deserved approbation. A purpose of anatomical science would fall within that category. Neither does our law recognize the right of any one child to the corpse of its parent as claimed by the defendant. Our law recognizes no property in a corpse, and the protection of the grave at common law, as contradistinguished from ecclesiastical protection to consecrated ground, depends upon this form of indictment, and there is no authority for saying that relationship will justify the taking a corpse away from the grave where it has been buried ' (*l*).

It is a misdemeanor to bury any person in a burial-ground closed by order in Council or statute (*m*). The offence is also summarily punishable (*n*). Upon an indictment for unlawfully, wilfully, and indecently digging open graves in a disused Nonconformist burial-ground, it was proved that the ground had been sold under an order of the Court of Chancery, and bought by the defendant, who ultimately employed a contractor to excavate the ground for building purposes. In the course of the excavations human remains were dug up, but were not disturbed in an improper, indecent manner (*o*).

By sect. 3 of the Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), it is unlawful to erect any buildings on a disused burial-ground, except for the purpose of enlarging a place of worship. The word building includes temporary and moveable structures.

The expression burial-ground includes any churchyard, cemetery, or

(*l*) R. *v.* Sharpe, D. & B. 160; 26 L. J. M. C. 41.

(*m*) 16 & 17 Vict. c. 134, s. 3.

(*n*) 18 & 19 Vict. c. 128, s. 2.

(*o*) R. *v.* Jacobson [1880], 14 Cox, 522, Cockburn, C.J., Field and Manisty, JJ. No licence from the Home Secretary had been obtained. Manisty, J., said, that in his opinion the freeholder in disposing of the ground for burials was bound to see that it was preserved for interments only, and that the bodies of persons there buried should not be disturbed, and that his successors in title were under the same obligation. Cf. R. *v.* Kenyon [1901], 34 Law Jour. Newsp. 571, a case of a closed Roman Catholic burial ground.

other ground, whether consecrated or unconsecrated, which has been at any time set apart for the purposes of interment (*p*). A disused burial-ground means a burial-ground which is no longer used for interment whether or not the ground has been partially or wholly closed for burials under the provisions of a statute or order in Council (*q*). Contravention of sect. 3 of the Act of 1884 appears to be an indictable misdemeanor (*r*).

Neglect or Refusal to bury Dead Body.—'It is the duty of the executors of the deceased to bury him if there are funds (*s*). It is the duty of a husband to bury his wife (*t*). A man is bound to give "Christian" (*u*) burial to his deceased child, if he has the means of doing so; but he is not liable to be indicted for a nuisance for not burying his child, if he has not the means of providing burial for it. He cannot sell the body, put it into a hole, or throw it into a river; but unless he has the means of giving the body "Christian" burial, he is not liable to be indicted, even though a nuisance may be occasioned by leaving the body unburied, for which the parish officer would probably be liable' (*v*). The prisoner was indicted for having neglected and refused to bury the body of his deceased child, whereby a nuisance was created. The prisoner, at the time of the death of his child, was a pauper receiving parochial relief, and soon after the death of the child he applied to the relieving officer for assistance to bury the child. The relieving officer required the prisoner to sign an undertaking, on demand, to repay the guardians of the union the sum advanced by way of loan in payment for the coffin and ground for the child (*w*). This was refused by the prisoner, and the relieving officer refused to render him any assistance in the burial of the child, and the body in consequence remained unburied and occasioned a nuisance. The jury were directed that the prisoner was bound to provide for the burial of his deceased child, if he could by any lawful way procure the means of doing so; and that as the prisoner had been offered relief by way of loan for the purpose of burial, he was bound to receive it, and that consequently he was not excused from his liability to provide for the interment of the deceased, and was liable to be convicted for the nuisance. But, upon a case reserved, the judges were unanimously of opinion that this direction was wrong; for although it was perfectly true that the prisoner, if he had the means, was bound to provide for the burial of his child, yet he was not bound to incur a debt for that purpose, and consequently he was not bound to accept the loan on the terms proposed to him (*x*).

Refusal or neglect to bury dead bodies by those whose duty it is to perform the office appears to be a misdemeanor. Abney, J., in delivering

(*p*) See Boyce *v.* Paddington Borough Council [1906], A. C. 1.

(*q*) 50 & 51 Vict. c. 32, s. 4. 6 Edw. VII. c. 25, s. 20.

(*r*) R. *v.* Kenyon, *ubi sup.* Phillimore, J. The ground in question had been closed by order in Council.

(*s*) Williams *v.* Williams, 20 Ch. D. 659.

(*t*) Bradshaw *v.* Beard, 12 C. B. (N.S.) 344.

(*u*) This would now be read as meaning a mode of burial, or cremation, recognised or permitted by law, not necessarily involving the use of any Christian ceremony. See 43 & 44 Vict. c. 41.

(*v*) R. *v.* Vann, 2 Den. 325, 330; 21 L. J. M. C. 20, Campbell, C.J. See 7 & 8 Vict. c. 101, s. 31, *post*, p. 1866.

(*w*) This was done under an order of the poor law commissioners and an order of the guardians of the poor.

(*x*) R. *v.* Vann, *supra*.

the opinion of the Court of Common Pleas, said: 'The burial of the dead is (as I apprehend) the duty of every parochial priest and minister; and if he neglect or refuse to perform the office, he may, by the express words of Canon 86, be suspended by the Ordinary for three months. And if any temporal inconvenience arise, as a nuisance, from the neglect of the interment of the dead corpse, he is punishable also by the temporal Courts, by indictment or information' (*y*).

A person who has received the outward and visible form of baptism by a dissenting minister who is not a lawful minister of the Church of England, nor episcopally ordained, is to be considered as baptized within the meaning of the Canons of that Church, and is entitled to have the burial service read at his interment by the clergyman of the parish in which he dies; and the refusal to read the service over a person so baptized brings the minister so refusing within the provisions of the Canons of 1603 (No. 86), and the ecclesiastical Court is bound to pronounce that he is liable to suspension for three months, and to pay the costs of the proceedings (*z*).

The right of burial in the parish churchyard is a common-law right; but the mode of burial a subject of ecclesiastical cognizance alone, subject to the provisions of the Burial Laws Amendment Act, 1880 (*a*). If therefore a clergyman absolutely refused to permit the burial of a dead parishioner brought for interment in the usual way, it seems that the High Court would grant a *mandamus* to compel him to inter the body; but not to compel him to bury a body in an unusual and extraordinary manner, *e.g.* in an iron coffin (*b*).

Every person dying in England and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial; and that implies the right to be carried from the place where his body lies to the parish burial ground (*c*). The common law casts on some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose (*d*). The person under whose roof a poor person dies is bound to carry the body, decently covered, to the place of burial; he cannot keep him unburied, nor do anything which prevents Christian burial: he cannot therefore, cast him out, so as to expose the body to violation, or to offend the feelings, or endanger the health of the living;

(*y*) Andrews *v.* Cawthorne [1744], Willes, 537, note (*a*). Abney, J., cited a case in 1719 (H. 7 G. I. K. B.), where that Court made a rule upon the Rector of Daventry, in Northamptonshire, to shew cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish. It appears from Mastin *v.* Escott, 2 Curteis (Eccl.), 692, 696, that the rule was discharged on proof that the objection made was not to burying in the churchyard, but to reading the burial service on the ground that the child was unbaptized.

(*z*) Mastin *v.* Escott, 2 Curteis (Eccl.), 692. Sir H. Jenner: affirmed 4 Moore, P. C. 104. The ground of this decision was that a child baptized by a layman was validly baptized, and a Wesleyan minister by whom the child was baptized could be considered, with reference to this question, in no other light than as a layman. In Kemp *v.* Wickes [1809], 3 Phill. Rep. 264, a similar decision had been made with reference to a person baptized by a minister of the Calvinistic Independents.

(*a*) 43 & 44 Vict. c. 41, which makes provision for the burial of persons in churchyards or graveyards without the rites of the Church of England, on notice being given to the parson.

(*b*) R. *v.* Coleridge [1819], 2 B. & Ald. 806.

(*c*) R. *v.* Stewart [1840], 12 A. & E. 773, 777, Denman, C.J.

(*d*) Ibid. 778.

and, for the same reason, he cannot carry him uncovered to the grave (*e*).

Where a pauper dies in a poor-house, that circumstance casts on the poor law authority an obligation to bury the body; by virtue not of the Poor Law Act, 1601 (43 Eliz. c. 2), but of the common law (*f*). But the duty is not cast upon the poor law authorities, where the death does not take place under the roof of any poor-house, or house which, under the circumstances, may be considered as such. A married woman residing with her husband in a parish was admitted as an inpatient in a hospital in that parish, and died in it, and the husband was unable from poverty to take the body away and bury it; he was receiving weekly relief from the parish, and he believed that he was settled in it. The parish officers had been requested to bury the body, but had refused. The Court held that the burial of a pauper receiving relief, but not dying in any parish house, was not within the expressed or implied objects of the Poor Law Act, 1601; and, after laying down the principles above stated, held that those principles would rather cast the burden on the hospital than on the parish, and formed an additional, though not a necessary reason for holding that the parish was not bound to bury the body (*g*).

Burial by Public Authorities.—By the Poor Law Act, 1844 (7 & 8 Vict. c. 101), sect. 31, it is lawful for guardians, or where there are no guardians for overseers, to bury the body of any poor person which may be within their parish or union, and to charge the expense to any parish within their control to which such person may have been chargeable, or in which he may have died, or otherwise in which such body may be; and unless the guardians, in compliance with the desire of such person expressed in his lifetime, or by any of his relations, or for any other cause, direct the body to be buried in the churchyard or burial ground of the parish to which such person has been chargeable (which they are authorised to do), every dead body which the guardians or any of their officers duly authorised shall direct to be buried at the expense of the poor-rates shall (unless the deceased person or the husband or wife or next of kin of such deceased person have otherwise desired) be buried in the churchyard or other consecrated burial ground in or belonging to the parish, division of parish, chapelry or place in which the death may have occurred (*h*); and, after providing for the burial fees, the section forbids any officer connected with the relief of the poor to receive any money for the burial of the body of any poor person, or to act as undertaker for personal gain or reward, or to receive any money from any dissecting school or school of anatomy or hospital or from any person to whom any such body may be delivered, or to derive any personal emolument for or in respect of the burial or disposal of any such body, under a penalty recoverable before two justices of the peace (*i*). The cost may be recovered from the estate of the deceased

(*e*) 12 A. & E. 778, citing Gilbert *v.* Buzzard, 2 Hagg. (Consist.), 333, 344, Lord Stowell.

(*f*) R. *v.* Stewart, p. 779.

(*g*) R. *v.* Stewart, *supra*.

(*h*) It may be buried without the rites of the Church of England. See 43 & 44 Vict. c. 41, s. 2.

(*i*) Where the burial ground of a parish is closed or overcrowded, the guardians may bury the poor in a neighbouring parish (18 & 19 Vict. c. 79, s. 1). Sect. 2 empowers

(12 & 13 Vict. c. 103, sect. 13). The expense of burials under the above section was in 1865 (28 & 29 Vict. c. 79, s. 1) placed upon the common fund of the poor law union, and not upon the parish before liable.

Provision is made by the Public Health Acts for ensuring speedy burial in the interests of the public health. Under the Public Health Act, 1875, local sanitary authorities provide mortuaries for the reception of dead bodies before interment and may provide for the decent and economical interment, at charges to be fixed by byelaws, of bodies so received, sect. 141 (*j*). They may order removal to the mortuary of the body of any person who has died of infectious disease, if it is retained in a room in which persons live or sleep, or any dead body is retained in a house or room, which is in such a state as to endanger the health of the inmates of the house or room. The removal is effected at the cost of the sanitary authority, and unless the friends or relatives of the deceased undertake to bury the body within a time limited by order of the sanitary authority, it is the duty of the relieving officer to bury it at the expense of the poor rate, but subject to recourse against the person legally liable to pay the expense of the burial (sect. 142) (*k*).

By sect. 8 of the Infectious Diseases Act, 1890 (53 & 54 Vict. c. 34), it is unlawful 'without the sanction in writing of the Medical Officer of Health or of a registered medical practitioner to retain unburied elsewhere than in a public mortuary or in a room not used at the time as a dwelling place, sleeping place, or work room for more than 48 hours the body of a person who has died of any infectious disease (*l*). Disobedience to the section is punishable by fine on summary conviction (sect. 16).

Cremation.—To burn a dead body instead of burying it is not indictable at common law, unless it is so done as to amount to a public nuisance (*m*), or unless it is done to prevent the holding of an inquest upon it in a case where an inquest ought to be held (*n*).

The burning of corpses is now regulated under the Cremation Act, 1902 (2 Edw. VII. c. 8) (*o*), which empowers burial authorities to provide and maintain crematoria (sect. 4), and regulates their situation (sect. 5) and empowers the Secretary of State to make regulations as to their

them to enter into agreements with cemetery companies and burial boards for the burial of the poor. As to burial of paupers receiving relief from a parish, but dying outside the parish, see 12 & 13 Vict. c. 103, s. 16. As to burial of idiots or lunatics dying in asylums, see 31 & 32 Vict. c. 112, s. 13; 53 & 54 Vict. c. 5, s. 297.

(*j*) As to London, see 54 & 55 Vict. c. 76, s. 88. Under s. 143 bodies are removed to mortuaries (distinct from those mentioned under s. 141), for the purpose of Coroner's inquests, at the cost of the fund chargeable with the fees of post mortem examinations made by order of the Coroner (s. 143); 50 & 51 Vict. c. 71, s. 24; 54 & 55 Vict. c. 76, ss. 90 92 (London).

(*k*) As to London see 54 & 55 Vict. c. 76, s. 89.

(*l*) Sect. 9 forbids the removal of such a body from a hospital except for burial, and s. 10 gives power to a justice to enforce the removal of dead bodies where the death was from infectious disease or its retention is dangerous to the inmates of the house, or the neighbours. Under the section the justice may order immediate burial. If the burial is not undertaken and effected by the friends or relations it devolves on the relieving officer of the district whence the body came, at the cost of the rates, but subject to recourse against the persons liable by law. As to London see 54 & 55 Vict. c. 76, ss. 72, 89.

(*m*) R. *v.* Price, 12 Q.B.D. 247. Cf. R. *v.* Byers, 71 J. P. 205, where certain counts in an indictment were quashed for not alleging that the burning created a public nuisance.

(*n*) R. *v.* Stephenson, 13 Q.B.D. 331 Steph. Dig. Cr. L. (6th ed.) Art. 196.

(*o*) The Act applies to Great Britain, but not to Ireland (s. 16).

maintenance and inspection, and prescribing in what cases and under what conditions the burning of any human remains may take place, &c. (sect. 7) (*p*).

By sect. 8, '(1) Every person who shall contravene any such regulations as aforesaid, or shall knowingly carry out or procure or take part in the burning of any human remains except in accordance with such regulations and the provision of this Act, shall (in addition to any liability or penalty which he may otherwise incur) be liable on summary conviction to a penalty not exceeding £50. Provided that a person aggrieved by any conviction may appeal therefrom to Quarter Sessions.

'(2) Every person who shall wilfully make any false declaration or representation or sign or utter any false certificate with a view to procuring the burning of any human remains, shall in addition to any penalty or liability which he may otherwise incur, be liable to imprisonment with or without hard labour not exceeding two years.

'(3) Every person who with intent to conceal the commission or impede the prosecution of any offence, procures or attempts to procure the cremation (*q*) of any body, or with such intent makes any declaration or gives any certificate under this Act, shall be liable on conviction on indictment to penal servitude for a term not exceeding five years.'

Sect 10. 'Nothing in this Act shall interfere with the jurisdiction of any Coroner under the Coroners Act, 1887 (50 & 51 Vict. c. 71), or any Act amending the same, and nothing in this Act shall authorize the burial authority to create or permit a nuisance' (*r*).

Anatomical Examination of Dead Bodies.—The Anatomy Act, 1832 (2 & 3 Will. IV. c. 75), authorizes the Secretary of State for the Home Department (*s*) in Great Britain and for the Chief Secretary for Ireland in Ireland to grant a licence to practise anatomy to any fellow or member of any college of physicians or surgeons, or to any graduate or licentiate in medicine, or to any person lawfully qualified to practise medicine in any part of the United Kingdom, or to any professor or teacher of anatomy, medicine, or surgery, or to any student attending any school of anatomy, on application from such party for such purpose, countersigned by two of his Majesty's justices of the peace acting for the county, city, borough, or place wherein such party resides, certifying that, to their knowledge or belief, such party so applying is about to carry on the practice of anatomy.

By sect. 2, the Secretary of State in England and the Chief Secretary in Ireland may appoint inspectors of places where anatomy is carried on; and by sect. 3, may direct what district such inspectors shall superintend. By sect. 4, every inspector is to make a quarterly return to the Secretary of State of every body that, during the preceding quarter, has been removed for examination to every separate place in his district where anatomy is carried on, distinguishing the sex, and, as far as is known

(*p*) The regulations in force were made March 31, 1903. St. R. & O. [1903], No. 286.

(*q*) This means cremation under the Act and regulations, and not merely burning. R. *v.* Byers [1907], 71 J. P. 205, Kennedy, J. Where the burning is otherwise than by 'cremation' the common law applies as laid down in R. *v.* Stephenson, *ubi supra*.

(*r*) *Vide ante*, p. 1837.

(*s*) In Scotland licences are now granted, and the Act administered by the Secretary for Scotland. 50 & 51 Vict. c. 52, ss. 2, 3.

at the time, the name and age of each person whose body was so removed. By sect. 5 inspectors may visit and inspect, at any time, any place, within their district, notice of which place has been given, that it is therein intended to practise anatomy. Sect. 6 provides for the salaries and expenses of the inspectors.

Sect. 7. 'It shall be lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination.'

Sect. 8. 'If any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body after death be examined anatomically, or shall nominate any party by this Act authorized to examine bodies anatomically to make such examination, and if, before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and, in case of any such nomination as aforesaid, shall request and permit any party so authorized and nominated as aforesaid to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination.'

By sect. 9, no body is to be removed for anatomical examination from the place where such person died until after forty-eight hours from the death, nor unless a certificate, stating in what manner such person came by his death, shall have been given by the medical man who attended such person, or who examined the body after death.

Sect. 10. 'It shall be lawful for any member or fellow of any college of physicians or surgeons, or any graduate or licentiate in medicine, or any person lawfully qualified to practise medicine in any part of the United Kingdom, or any professor, teacher, or student of anatomy, medicine, or surgery, having a licence from His Majesty's principal Secretary of State or Chief Secretary as aforesaid, to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted or directed so to do by a party who had at the time of giving such permission or direction lawful possession of the body, and who had power, in pursuance of the provisions of this Act, to permit or cause the body to be so examined, and provided such certificate as aforesaid were delivered by such party together with the body.'

By sect. 11, such persons are to receive a certificate with the body, and transmit it and a return of the time the body was received, and other

matters, to the inspector of the district; and by sect. 12, notice is to be given to the Secretary of State of places where anatomy is intended to be practised.

By sect. 13, bodies are to be removed in a decent coffin or shell, and after undergoing anatomical examination are to be decently interred in consecrated ground, or in some public burial ground, in use for persons of that religious persuasion to which the person whose body was so removed belonged; and certificates of the interment are to be transmitted to the inspector of the district within six weeks after the day when the body was received, unless the time is varied by the Secretary of State (*t*).

Sect. 14. 'No member or fellow of any college of physicians or surgeons, nor any graduate or licentiate in medicine, nor any person lawfully qualified to practise medicine in any part of the United Kingdom, nor any professor, teacher, or student of anatomy, medicine, or surgery, having a licence from His Majesty's principal Secretary of State or Chief Secretary as aforesaid, shall be liable to any prosecution, penalty, forfeiture, or punishment for receiving or having in his possession for anatomical examination, or for examining anatomically, any dead human body, according to the provisions of this Act.'

By sect. 15, the Act is not to prohibit any *post mortem* examination directed by competent authority.

Sect. 18. 'Any person offending against the provisions of this Act in England or Ireland shall be deemed and taken to be guilty of a misdemeanor, and, being duly convicted thereof, shall be punished by imprisonment for a term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the Court before which he shall be tried; and any person offending against the provisions of this Act in Scotland shall, upon being duly convicted of such offence, be punished by imprisonment for a term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the Court before which he shall be tried'; sect. 19 defines person and party as including any number of persons or any society chartered or otherwise (*u*).

The master of a workhouse was indicted for disposing of the dead bodies of paupers who had died in the workhouse, for the purpose of dissection, and for gain and profit to himself. He had in collusion with an undertaker caused the bodies of several paupers to be shewn to their relatives in coffins, and every appearance of regular funerals to be gone through, and the relatives followed to the cemetery what they supposed to be the body of the deceased, when in reality just before the funeral left the workhouse, other coffins were substituted for those the relatives had seen, and the bodies were in the evening taken to Guy's Hospital for dissection, all the necessary formalities required by the Anatomy Act, 1832, having been duly complied with. In no case did the relatives of the deceased persons in terms require that their bodies

(*t*) Under 34 & 35 Vict. c. 16, s. 2. This power was exercised as to England on 28 April, 1900 (St. R. & O. 1900, No 318). A like order was made for Ireland, 16 April, 1890, and for Scotland, June 14th, 1900 (St. R. & O. 1900, No. 470).

(*u*) Sect. 16 was repealed in 1891 (54 & 55 Vict. c. 67). Sects. 20 and 21 were repealed in 1874 (37 & 38 Vict. c. 35).

should be buried without anatomical examination; and indeed they appeared to have believed that the bodies were buried without any such examination. It did not appear that the prisoner made any regular charge to the hospital or surgeons in respect of the bodies supplied to them; but in 1856 he received £19 10*s.*, and in 1857, £26 from Guy's Hospital, as gratuities for his trouble in going through the formalities, giving the notices, and obtaining the certificates required by the Anatomy Act, and the amount paid him was in proportion to the number of bodies supplied. These payments were in contravention of sect. 31 of the Poor Law Act, 1844 (*ante*, p. 1866). The jury found that the prisoner caused the dead bodies of four paupers to be delivered to the undertaker, and that he delayed the burial of them for an unreasonable length of time, in order that they might be dissected in the meantime, and that he did so for gain and profit for himself; and that he caused the appearance of a funeral of dead bodies to be gone through, with a view to prevent their relatives requiring the bodies to be interred without being subject to anatomical examination, and that, but for such supposed funeral, the relatives would have required the bodies to be buried without anatomical examination. It was objected that the prisoner having lawful possession of the bodies as master of the workhouse, might lawfully do what he had done, as no relative had required the bodies to be buried without anatomical examination; and upon a case reserved it was held that this objection was valid, as all that was done by the prisoner was done according to law, for he had legal possession of the bodies, and he did with them that which the law authorised him to do. And though he fraudulently prevented the relatives from requiring the bodies to be buried without anatomical examination, yet that did not take away the protection given to him by the statute (*v*).

Bodies Cast Ashore.—The Burial of Drowned Persons Act, 1808 (48 Geo. III. c. 75), enacts, that the churchwardens and overseers of any parish in England, in which any dead human body shall be found thrown in, or cast on shore from the sea by wreck or otherwise, shall upon notice of the body lying within their parish, cause the same to be forthwith removed to some convenient place; and with all convenient speed to be decently interred in the churchyard or burial ground of such parish; and if the body be thrown in, or cast on shore in any extra-parochial place, where there is no churchwarden or overseer, a similar duty is imposed upon the constable or headborough of such place (sect. 1).

(*v*) R. *v.* Feist, D. & B. 590: 27 L. J. M. C. 164. The indictment did not aver that the defendant was under any duty to bury the bodies nor that any nuisance had been caused by failure to bury them. 'This decision seems clearly wrong, as the master of a workhouse is plainly merely the servant of the poor law authority, and the possession of the workhouse is in them.' Governors of the Poor of Bristol *v.* Wait, 5 A. & E. 1. 'And the master of a workhouse has no more possession of the things in the workhouse than any servant of the things in his master's house. The dealing with the dead bodies by the prisoner was, therefore, a wholly illegal act. The Court intimated that possibly the prisoner and undertaker might have been indicted for a conspiracy to prevent the relatives making the requisition; or that the prisoner might be indicted for preventing the requisition being made. *Quære*, whether an indictment would have lain for causing the funeral service to be performed over the empty coffins?' C. S. G.

Every minister, parish clerk, and sexton, of the parish, shall perform their duties as is customary in other funerals, and admit of such dead body being interred, without any improper loss of time, receiving such sums as in cases of burials made at the expense of the parish (sect. 2). The statute provides also as to the proper and necessary expenses of such burials and their payment by the county treasurer (sects. 5, 6) (*w*). It gives a reward to the person first giving notice to the parish officers, or to the constable or headborough of an extra-parochial place, of any dead body or bodies being cast on shore; and imposes a penalty of five pounds on persons finding dead bodies and not giving notice, and on parish officers neglecting to execute the Act (*x*). An appeal to quarter sessions is given to any person thinking himself aggrieved by anything done in pursuance of the Act (*y*).

The Act was extended in 1886 (49 & 50 Vict. c. 20) (*z*) to dead bodies found in or cast ashore from any tidal or navigable waters, or found floating or sunken in any such waters, and brought to the shore or bank thereof, and notice to a police constable was made sufficient.

Preventing Burial.—To prevent the burial of a dead body is an indictable misdemeanor. Thus, the master of a workhouse, a surgeon, and another person, were indicted for a conspiracy to prevent the burial of a person who had died in a workhouse (*a*). Hyde, C.J., upon a question how far the forbearance to sue one who fears to be sued, is a good consideration for a promise (*b*), cited a case where a woman who feared that the dead body of her son would be arrested for debt was held liable, upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix (*c*). But the other judges are said to have doubted of this (*d*); and Ellenborough, C.J., has said that it would be impossible to contend that such a forbearance could be a good consideration for an assumpsit (*e*). He added that 'to seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion upon the relatives.' He also said: 'As to the case cited by Hyde, C.J., of a mother who promised to pay on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do, it is contrary to every principle of law and moral feeling: such an act is revolting to humanity, and illegal.'

A gaoler has no right to detain the body of a person who died in prison for any debts due to himself (*f*), and if he does so he may be indicted (*g*).

An indictment will lie for wilfully obstructing and interrupting a clergyman in reading the burial service, and interring a corpse; but

(*w*) See R. *v.* Treasurer of Kent, 22 Q.B.D. 603, as to the form of the order on the county treasurer.

(*x*) Ibid. ss. 1, 3, 4, 5, 6, 7, 8, 12, 13, 14.

(*y*) Id. sect. 10.

(*z*) Passed in consequence of the decision in Woolwich Overseers *v.* Robertson, 6 Q.B.D. 654, arising out of the great loss of life by a collision in the Thames near Woolwich.

(*a*) R. *v.* Young, cited in R. *v.* Lynn, 2 T. R. 734.

(*b*) Quick *v.* Coppleton, 1 Vent. 161.

(*c*) Anon., cited by Hyde, C.J., as having occurred in the Court of Common Pleas when he sat there.

(*d*) Quick *v.* Coppleton, 1 Ventr. 161.

(*e*) Jones *v.* Ashburnham, 4 East, 460.

(*f*) R. *v.* Fox, 2 Q.B. 246.

(*g*) R. *v.* Scott, 2 Q.B. 248 *n.*

such an indictment must allege that the person obstructed was a clergyman, and that he was in the execution of his office, and lawfully burying the corpse; and it must also shew how the party was obstructed, as by setting out the threats and menaces used. And it is not sufficient to allege that the party did unlawfully, by threats and menaces, prevent the burial (*h*).

Preventing Coroner's Inquest.—The too speedy interment of a dead body may be an indictable offence, where it is the body of a person who has died a violent death. In such case, according to Holt, C.J., the coroner need not go *ex officio* to take the inquest, but ought to be sent for, when the body is fresh; and to bury the body before he is sent for, or without sending for him, is a misdemeanor (*i*). If a dead body, in prison, or other place, on which an inquest ought to be taken, is interred or suffered to lie so long that it putrefies before the coroner has viewed it, the gaoler or township is liable to amercement (*j*). It is a misdemeanor to burn or otherwise dispose of a dead body with intent thereby to prevent the holding upon such body of an intended coroner's inquest in a case where the coroner has jurisdiction to hold an inquest (*k*). A coroner has jurisdiction to hold an inquest if he honestly believes information which has been given to him to be true, which if true, would make it his duty to hold such inquest (*l*). In the case of deaths in lunatic asylums (*m*), or prisons (*n*), or of nurse children (*o*), or habitual drunkards retained in retreats (*p*), on which an inquest must be held, it appears to be a misdemeanor to bury without notifying the coroner.

(*h*) R. *v.* Cheere, 4 B. & C. 902. See R. *v.* How, 2 Str. 699. See 24 & 25 Vict. c. 100, s. 36, *ante*, Vol. i. p. 407, and 43 & 44 Vict. c. 41, s. 7, *ante*, Vol. i. p. 408.

(*i*) R. *v.* Clark, 1 Salk. 377. Anon., 7 Mod. 10. 2 Hawk. c. 9, s. 23, note 4.

(*j*) 2 Hawk. c. 9, s. 23. And see an indictment against a township for a misdemeanor, in burying a body without notice to the coroner, 2 Chit. Cr. L. 256.

(*k*) R. *v.* Stephenson, 13 Q.B.D. 331. Steph. Dig. Cr. Law (6th ed.) Art. 196. See R. *v.* Byers, 71 J. P. 205, *ante*, p. 1868.

(*l*) Ibid.

(*m*) 53 & 54 Vict. c. 5, ss. 84, 319.

(*n*) 31 & 32 Vict. c. 24, s. 5; 50 & 51 Vict. c. 71, s. 3 (1).

(*o*) 8 Edw. VI. c. 67, s. 6.

(*p*) 42 & 43 Vict. c. 19, s. 27.

CANADIAN NOTES.

OFFENCES RELATING TO DEAD BODIES.

(See Code sec. 237.)

The neglect to decently bury a dead human body by a person who has undertaken to do so and has removed the body with that expressed intent is an indictable offence under this section, although such person was, apart from such undertaking, under no legal obligation in respect of the burial. R. v. Newcomb (1898), 2 Can. Cr. Cas. 255.

CHAPTER THE SIXTH.

OF OBSCENITY AND INDECENCY (*a*).

GENERAL.

THE offence described as obscene libel, which in former editions of this work was placed in collocation with blasphemous, seditious, and defamatory libel, seems more properly to belong to the law of public nuisance (*b*).

In general all open lewdness, grossly scandalous, and whatever openly outrages decency or is offensive and disgusting (*c*), or is injurious to public morals by tending to corrupt the mind and destroy the love of decency, morality, and good order (*d*), is a misdemeanor indictable at common law (*e*).

The acts which fall within the general definition may be classified as (i) obscene publications, (ii) obscene or indecent exhibitions, (iii) indecent exposure of the human body.

SECT. I.—OBSCENE LIBELS.

The publication of obscene or indecent matter is an indictable misdemeanor, whether such matter is or is not also blasphemous or defamatory. It is immaterial whether the publication is in writing or in print, or by a sign, picture (*f*), or effigy.

The principles laid down in the cases upon this subject seem to cover oral communications, made before a large assembly, and having a clear *tendency* to produce immorality, as in the case of the performance of an obscene play (*g*).

Jurisdiction.—The theory at one time suggested that the offences in this chapter fell within the sole cognizance of ecclesiastical (*h*) and not of temporal Courts has long been exploded (*i*), and the jurisdiction of the ordinary Courts over these offences is specifically recognized by

(*a*) See the report of the Joint Committee of Lords and Commons (Parl. Pap. 1908, 275).

(*b*) See R. *v.* Grey, 4 F. & F. 73.

(*c*) Ibid. p. 75.

(*d*) See Starkie on Libel, 155. Odgers on Libel (4th ed.) 446.

(*e*) 1 Hawk. c. 5. Burn's Just. *tit.* 'Lewdness.' 4 Bl. Com. 65 *n.* 1 East, P. C. 1.

(*f*) 'The circulation of indecent prints which contaminate public morals is a misdemeanor.' Dugdale *v.* R., 22 L. J. M. C. 50, 51, Coleridge, J. The publication of such prints is forbidden by the law of England, ibid., Campbell, L.C.J.

(*g*) 2 Starkie on Libel, 159. Odgers on Libel (4th ed.), 473. In R. *v.* Curl, 17 St. Tr. 153; 2 Str. 788, a prosecution for publishing a pamphlet entitled, 'The Nun in her Smock,' containing obscene expressions, it was stated that there had been many prosecutions against players for obscene plays, but that they had interest enough to get the proceedings stayed before judgment. Tremayne Entries, 209, 213, 214.

(*h*) R. *v.* Read, 11 Mod. 142. 1 Hawk. c. 73, s. 9. Fortescue, 89, 100. The reporter here criticises R. *v.* Curl (*ubi sup.*). See R. *v.* Hicklin, L. R. 3 Q.B. 360, 369.

(*i*) R. *v.* Curl, 17 St. Tr. 155, 157, 160.

the statutes presently to be stated. On the abolition of the Court of Star Chamber in 1640 (*j*) the Court of King's Bench came to be considered as the *custos morum*, having cognizance of all offences against public morals (*k*); including representations whether by writing, picture, sign, or substitute, tending to vitiate and corrupt the minds and morals of the people (*l*).

Publication.—Publication is an essential element in the offence. The indictment charges the publication to be 'unlawful.' The publication is proved in the same manner as in the case of defamatory libel (*m*) and a *primâ facie* case of publication may be rebutted under 6 & 7 Vict. c. 96, sect. 7 (*ante*, Vol. I., p. 1046). The defendant is not liable for dissemination, without knowledge or notice of the character of the matter published.

It is not criminal to *keep* obscene prints with intent to utter, publish, sell, or disseminate them; but it is an offence to *procure* such prints with intent to publish them. The distinction drawn between the two cases is that the first does not involve the doing of any act, but rests in bare intention, and the second is an overt act done towards the misdemeanor of publication (*n*). Shewing an obscene print in private to another at his request who seeks to see and buy it for the purpose of prosecution has been held a publication (*o*). It seems to be no defence in law to prove that the obscene libel is a foreign language (*p*), although the language may, in fact, limit the mischief of the publication.

Obscenity.—The accepted definition of obscenity (*q*) with reference to publications is that 'the test of obscenity is whether the tendency of the matter published is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands the publication might fall' (*r*). Language may be so foul as to repel most readers, but is obscene if it immorally affects the susceptible (*s*). Considerable difficulty might arise in applying this definition to standard ancient and modern works of high repute, containing passages of an immodest or immoral character or tendency, and in such cases the jury are directed to consider the whole of the work as well as the selected extracts and

(*j*) By 16 Car. I. c. 10.

(*k*) Sir C. Sedley's case [1663], 1 Keb. 620; 1 Sid. 168, and see R. *v.* Davies [1906], 1 K.B. 32, Wills, J.

(*l*) See Holt on Libel, 73. Odgers on Libel (4th ed.) 473 *et seq.*

(*m*) *Ante*, Vol. i. pp. 1021 *et seq.* In R. *v.* Rosenstein, 2 C. & P. 414, Parke, B., directed an acquittal on failure to identify a snuff box produced, and alleged to contain an indecent picture, with the box charged in the indictment to have been exhibited to the prosecutor.

(*n*) Dugdale *v.* R., 1 E. & B. 35; 22 L. J. M. C. 50. As to attempts to commit crime, *vide ante*, Vol. i. p. 140. R. *v.* Rosenstein, *ubi sup.*

(*o*) R. *v.* Alfred Carlile [1845], 1 Cox, 229, Recorder of London, after consulting the judges.

(*p*) R. *v.* Hirsch [1899], 34 L. J. (Newsp.) 132.

(*q*) See Parl. Pap., 1908, 275. 'Obscene' is defined in the Oxford Dictionary, s.v., as 'offensive to modesty, expressing or suggesting unchaste or lustful ideas, impure, indecent, lewd.' See R. *v.* Beaver [1905], 9 Canada Cr. Cas. 415, 421, Osler, J.A. It has also been defined as 'offensive to chastity and delicacy, impure, expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be expressed.' See Bremner *v.* Walker [1885], 6 New South Wales Rep. Law 276, 281, Martin, C.J. Cf. *Re* Besant, 11 Ch. D. 508.

(*r*) R. *v.* Hicklin, L. R. 3 Q.B. 360, 371, Cockburn, C.J. R. *v.* Barraclough [1906], 1 K.B. 201, 211, Alverstone, C.J.

(*s*) See R. *v.* Beaver [1905], 9 Canada Crim. Cas. 415, 423, McLennan, J.A.

to consider the business of the defendant and the mode of publication before deciding that there is an intent to corrupt public morals (*t*). The tendency of judicial opinion is to hold that the liability to prosecution must depend on the circumstances of publication. Thus a medical treatise with illustrations necessary for the information of students or practitioners would probably not be treated as obscene if published so as to reach such persons, though it might be indictable if exhibited in a shop window for any passer-by to see (*u*). And to exhibit a picture of the nude in a public gallery is regarded as different from setting photographs of it in the street (*v*).

The publication of obscene matter being unlawful, on proof of publication, an intent to break the law is to be inferred: and it is for the defence to justify or excuse it. Where the indictment properly charges an intent to corrupt public morals, evidence of the sale of other matter of an obscene character is admissible as bearing on the question whether the sale of the incriminated book was deliberate or accidental (*w*).

A Society known as the Protestant Electoral Union exposed for sale at their office a pamphlet entitled, 'The Confessional Unmasked, showing the depravity of the Romish priesthood, the iniquity of the confessional, and the questions put to females in confession.' This pamphlet consisted of extracts from the works of theologians on the doctrines and discipline of the Church of Rome, and particularly on the practice of auricular confession. On the side of the page were printed passages in the original Latin, correctly extracted from the works of these writers, and opposite each extract was placed a free translation of it into English. The pamphlet also contained a preface and notes condemnatory of the tenets and principles of the authors of the works from which the extracts were made. About one half of the pamphlet related to casuistical and controversial questions which were not obscene, but the remainder of the pamphlet was obscene, relating to impure and filthy acts, words, and ideas. A member of the society kept and sold these pamphlets with the purpose of promoting the objects of the society, and exposing what he deemed to be the errors of the Church of Rome. Two magistrates, purporting to act under the above-mentioned statute, ordered a number of these pamphlets while in his possession to be seized and destroyed. It was held that, notwithstanding the object of the defendant was not to injure public morals, but to attack the religion and practice of the Roman Catholic Church, this did not justify his act nor prevent it from being a misdemeanor proper to be prosecuted, as the inevitable effect of the publication must be to injure public morality; and although he might have had another object in view, he must be taken to have intended what was the natural

(*t*) R. *v.* Thompson, 64 J. P. 456, Bosanquet, Common Serjeant: a prosecution for publishing the 'Heptameron.'

(*u*) R. *v.* Hicklin, L. R. 3 Q.B. 367, Cockburn, C.J. The exhibition of diagrams which would be necessary to instruct medical or scientific classes may be indictable if made to a general and prurient audience. See Bremner *v.* Walker [1885], 6 New S. Wales Rep. Law, 276.

(*v*) L. R. 3 Q.B. 365, Lush, J.

(*w*) R. *v.* Thompson, 64 J. P. 456, Bosanquet, Common Serjeant: approved in R. *v.* Barraclough [1906], 1 K.B. 201, 212, Darling, J.

consequence of his act, and that the publication was an indictable misdemeanor (*x*).

Privilege, &c.—The provisions relating to privilege, fair comment, and justification (*xx*) which apply to defamatory libel, do not extend to obscene libel. Consequently the publication of indecent matter is not protected by proof that it is a fair and accurate report of the proceedings of a Court of Justice (*y*) or a public meeting (*z*), nor by a suggestion that it is fair comment on a matter of public interest.

On proceedings for the destruction under 20 & 21 Vict. c. 83 (*post*, p. 1879), of a pamphlet alleged to be obscene, it was proved that the pamphlet was a report substantially correct of the trial of an indictment for a misdemeanor in selling an obscene work, 'The Confessional Unmasked' (*a*) but set out the work in full, though part only was referred to in the trial. It was held that the pamphlet was not privileged as a report of a judicial proceeding.

'The law would be self-contradictory if it made the publication of an indecent work an indictable offence and yet sanctioned the re-publication of such a work under cover of its being part of proceedings in a Court of justice' (*b*).

It is suggested by Sir James Stephen that a publication of obscene matter may be justified as for the public good by being necessary or advantageous to religion or morality (*c*). This view has not yet been judicially accepted in England (*d*). But in dealing with scientific, medical, or religious works the judge and jury would undoubtedly hesitate to convict, unless the manner of publication created a general mischief or real danger to public morals.

By the Post Office Act, 1908 (8 Edw. VII. c. 48), sect. 63 (1), 'A person shall not send or attempt to send a postal packet (*e*) which either . . .

(b) encloses any indecent or obscene print, painting, photograph, lithograph, engraving, book, or card, or any indecent or obscene article, whether similar to the above or not; or

(c) has on the packet, or on the cover thereof, any words, marks, or designs of an indecent, obscene, or grossly offensive character (*f*).

(2) If any person acts in contravention of this section he shall be guilty of a misdemeanor, and shall be liable, on summary conviction

(*x*) R. *v.* Hicklin, L. R. 3 Q.B. 360; 37 L. J. M. C. 89. The Court had further to decide that the publication was fit to be prosecuted as such to justify the seizure and destruction of the pamphlets under 20 & 21 Vict. c. 83, *post*, p. 1879.

(*xx*) *Ante*, Vol. i. pp. 1041, 1055, 1057.

(*y*) Steele *v.* Brannan, L. R. 7 C.P. 261: 41 L. J. M. C. 85. R. *v.* Carlile, 3 B. & Ad. 167, Bayley, J. R. *v.* Creevey, 1 M. & S. 273. 51 & 52 Vict. c. 64, s. 3, *ante*, Vol. i. p. 1047.

(*z*) 51 & 52 Vict. c. 64, s. 4, *ante*, Vol. i. p. 1049.

(*a*) The edition made the subject of prosecution differed in some details from the edition dealt with in R. *v.* Hicklin, L. R. 3 Q.B. 360. See L. R. 7 C.P. 267, Bovill, C.J.

(*b*) L. R. 7 C.P. 270, Keating, J.

(*c*) Steph. Dig. Cr. L. (6th ed.), p. 134. The references there made to the dictum of Keating, J., in Steele *v.* Brannan, L. R. 7 C.P. 269, 270, do not seem to justify Sir J. Stephen's conclusions as matter of law.

(*d*) As to British Colonies, see Bremner *v.* Walker [1885], 6 New S. Wales Rep. Law 276, 281.

(*e*) *i.e.* a letter, post card, reply post card, newspaper, book packet, pattern or sample packet or parcel, and every packet or article transmissible by post, and telegram, s. 89, *ante*, p. 1432.

(*f*) The omitted portion relates to posting inflammable or explosive matter.

to a fine not exceeding ten pounds, and on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding twelve months.

(3) The detention in the Post Office of any postal packet on the ground of its being in contravention of this section shall not exempt the sender thereof from any proceedings which might have been taken if the packet had been delivered in due course of post' (*g*).

Proof that any article which has been accepted on behalf of the Postmaster General, for transmission by post, is sufficient evidence in prosecution under this section that it is a postal packet. 8 Edw. VII. c. 48, sect. 74 (*ante*, p. 1431).

The question whether the print, &c., is indecent or obscene is a question of fact for the jury (*h*). As to venue see sect. 72 of the Act, *ante*, p. 1430. As to regulations for preventing the sending of such articles by post, see sect. 16 of the Act.

Prosecutions may be undertaken by persons other than the postal authorities (*i*). The proprietor of a newspaper has been summarily prosecuted under the section for sending by post issues of the paper containing indecent or obscene matter (*j*).

In R. *v.* De Marny (*k*) it was held that the defendant had been properly convicted of causing and procuring, or aiding and abetting the commission of an offence under the corresponding section of the Act of 1884 on evidence (i) that he had published in a newspaper of which he was editor, advertisements, which though not in themselves obscene, related as he knew to the sale of obscene books and photographs, (ii) that a police officer had answered the advertisement and had obtained by post from the advertiser who resided abroad obscene books and photographs.

Search for and Destruction of Obscene Matter.—By the Obscene Publications Act, 1857 (20 & 21 Vict. c. 83), sect. 1 (*l*), it is enacted that 'It shall be lawful for any metropolitan police magistrate or stipendiary magistrate or for any two justices of the peace upon complaint made before him or them upon oath that the complainant has reason to believe and does believe that any obscene books, papers, prints, pictures, drawings, or other representations, are kept in any house, room, shop, or other place within the jurisdiction of any such magistrate or justices for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain (*m*), which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid at or in communion

(*g*) A re-enactment of 47 & 48 Vict. c. 76, s. 4. For the effect of the repealed enactment see magisterial ruling, 43 Law Journal (Newsp.) 771, on a prosecution for posting indecent photographs to a British colony.

(*h*) R. *v.* Key [1908], 1 Cr. App. R. 135, decided on 47 & 48 Vict. c. 76, s. 4, where the liability of the employer for offences under the section committed by the acts of his servant is considered.

(*i*) 38 Law Journ. (Newsp.) 382.

(*j*) R. *v.* Sievier [1908], 43 Law Journ. (Newsp.) 174.

(*k*) [1907] 1 K.B. 388, and *vide ante*, Vol. i. pp. 56, 139.

(*l*) Sometimes referred to as Lord Campbell's Act.

(*m*) As to these words see Bremner *v.* Walker [1885], 6 New S. Wales Rep. Law 226, a case relating to diagrams exhibited to illustrate the Fruits of Philosophy. The case was decided on 43 Vict. No. 24, an adaptation of 20 & 21 Vict. c. 83.

with such place, so as to satisfy such magistrate or justices that the belief of such complainant is well founded and upon such magistrate or justices being also satisfied that any of such articles so kept are of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such to give authority by special warrant to any constable or police officer into such house, shop, room, or other place within such assistance as may be necessary to enter in the day time and if necessary to use force by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police stipendiary magistrate or any two justices in petty sessons for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby required, to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized' (*n*). Proceedings under this enactment are not abated by the death of the complainant (*o*). An order for destruction must state that the publication of the prints, &c., would be a misdemeanor, fit to be prosecuted as such (*p*).

The motives of publication do not exclude the application of this enactment (*q*).

Summary Remedies.—Besides the remedies by indictment or criminal information in the case of the offences already mentioned in this chapter there are also summary remedies.

(a) for wilfully exposing to view in any street, highway, or public place, any obscene print, picture, or other indecent exhibition. The offence is committed by wilfully exposing or causing to be exposed

(*n*) S. 4 gives an appeal to Quarter Sessions, Ss. 2, 3, are superseded by the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61). The appeal does not exclude the right to quash a bad order on certiorari. See *Ex parte* Bradlaugh, 3 Q.B.D. 509.

(*o*) R. *v.* Truelove, 5 Q.B.D. 336.

(*p*) *Ex parte* Bradlaugh, 3 Q.B.D. 509.

(*q*) R. *v.* Hicklin, L. R. 3 Q.B. 360, *ante*, pp. 1877, 1878.

such prints, &c., in the window or other part of any shop or building, situate in a street, highway, or public place (*r*).

(b) for publicly offering for sale or distribution or exhibiting to public view any . . . indecent or obscene book, paper, print, drawing, painting, or representation, or singing any . . . obscene song or ballad to the annoyance of the inhabitants or passengers (*s*).

(c) for writing or drawing any indecent or obscene word, figure, or representation, or using indecent or obscene language to the annoyance of the inhabitants or passengers (*t*).

(d) for affixing, inscribing on buildings, &c., so as to be visible to passengers along streets, &c., or delivering or attempting to deliver or exhibiting to passengers, &c., written or printed matter of an indecent or obscene nature, or giving out such matter for affixing or delivering, *ubi supra* (*u*).

Indictment.—The indictment usually contains words to the following effect: 'devising, contriving and extending the morals as well of youth as of divers other liege subjects of our lord the King, to debauch and corrupt and to raise and create in their minds, inordinate and lustful desires and charges particularly to the manifest corrupt as well of the morals as well of youth as of other liege subjects of our said lord the King,' and an allegation of intention to corrupt public morals is necessary (*v*).

By the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 7, 'It shall not be necessary to set out in any indictment or other judicial proceeding instituted against the publisher of any obscene libel the obscene passages, but it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel together with particulars showing precisely, by reference to pages, columns, and lines, in what part of the book, newspaper, or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record, and all proceedings may be taken thereon as though the passages complained of had been set out in the indictment or judicial proceedings' (*w*).

The incriminated document need not be handed in with the bill of indictment if it has already come into the custody of the clerk of the Court of trial with the depositions taken before committal for trial (*x*). Where the matter alleged to be obscene is in a foreign language a translation should be set out in the indictment or included in the particulars (*y*). All the misdemeanors mentioned in this chapter are within the jurisdiction of a Court of Quarter Sessions. Obscene libel appears

(*r*) Vagrancy Acts, 1824 (5 Geo. IV. c. 83, s. 4), and 1838 (1 & 2 Vict. c. 38, s. 2). As to form of conviction, see R. *v.* Tabrum [1907], 71 J. P. 325.

(*s*) 2 & 3 Vict. c. 47, s. 54 (12), Metropolitan Police District. 10 & 11 Vict. c. 89, s. 28 (Towns Police).

(*t*) 2 & 3 Vict. c. 47, s. 54 (12) (Metropolis).

(*u*) Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18). Advertisements relating to venereal diseases are specifically included in the definition of indecent matter (*s.* 5).

(*v*) R. *v.* Barraclough [1906], 1 K.B. 201; 21 Cox, 91.

(*w*) This section (passed in consequence of Bradlaugh *v.* R., 3 Q.B.D. 607; 48 L. J. M. C. 5), qualifies as to *publishing* obscene libels, the common law rule requiring the tenor of a libel to be set out. It does not in express terms apply to procuring with intent to publish (Parl. Pap., 1908, c. 275).

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

(*y*) R. *v.* Hirsch, 34 L. J. (Newsp.) 132. Cf. R. *v.* Peltier, 28 St. Tr. 589.

to have been brought within the Vexatious Indictments Act, 1859, by sect. 6 of the Newspaper Libel Act, 1881, *vide post*, p. 1927. It would seem also that if it is in a newspaper the leave of a judge of the High Court is necessary to authorise prosecution at common law (*z*).

Punishment.—Obscene libel and misdemeanors under sects. ii. and iii. *post*, are punishable at common law, by fine or imprisonment (*a*).

By 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any public and indecent exposure of the person, or any public selling or exposing for public sale or to public view of any obscene book, print, picture, or other indecent exhibition, the Court may sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment (*aa*).

Sect. II.—Indecent Exhibitions.

Exhibitions of an obscene, indecent, or grossly offensive and disgusting character which do not fall within the definition of obscene libel are nevertheless regarded as indictable misdemeanors (*b*); such as the performance of an obscene or indecent play (*bb*). It was said in former editions of this work (*c*) that to shew for money a human being of unnatural or monstrous shape is a misdemeanor. But this statement is too wide (*d*) and is not fully warranted by the authority cited (*e*).

In R. *v.* Grey (*f*), a herbalist, who had publicly exposed and exhibited in his shop on a highway a picture of a man naked to his waist and covered with eruptive sores, so as to constitute an offensive and disgusting exhibition, was held guilty of a public nuisance, although there was nothing immoral or indecent in the picture, and his motive was innocent.

In R. *v.* Saunders (*g*) the prisoners were convicted on an indictment which charged in the first count the keeping and exhibiting of an indecent exhibition in a certain booth for lucre or gain, the second count charged the exhibiting of the same, the third count charged the exhibition as being in a public place, and the fourth count charged the prisoners with uttering indecent language in the presence and hearing of divers persons. Objection was taken that the first and second counts were bad since they did not allege any indecency in a public place, and that

(*z*) *Vide* s. 8 of that Act, *ante*, Vol. i. p. 1060.

(*a*) R. *v.* Wilkes, 4 Burr. 2527, 2574.

(*aa*) *Vide ante*, Vol. i. p. 212.

(*b*) Punishable in the same way as obscene libel, *vide supra*.

(*bb*) See R. *v.* Curl, 2 Str. 789, *ante*, p. 1875. The provisions of the Theatres Act, 1843 (6 & 7 Vict. c. 68), with respect to the licensing of stage plays (s. 12) reduce greatly the opportunities of representing publicly obscene plays; and objectionable representations in theatres, &c., are restrained by the authority which licenses the use of the building.

(*c*) (6th ed.), Vol. i. p. 751.

(*d*) See R. *v.* West [1848], 2 C. & K. 933, 938, Pollock, C.B.

(*e*) Herring *v.* Walround [1681], 2 Ch. Cas. 110. The Lord Chancellor ordered the burial of the dead bodies of monstrous twins which had been embalmed to be kept for show. The side note to the case is 'a monstrous birth shown for money is a misdemeanor,' but the text only says that the Chancellor 'much disliked these doings.' The action was for an account between the parents of the children and another, in respect of the proceeds of the exhibition.

(*f*) 4 F. & F. 73.

(*g*) 1 Q.B.D. 15: 45 L. J. M. C. 11. The point as to indecent language does not seem to have been noticed by the Court.

the third count was not proved because the public had no right to enter the booth except on payment. To the fourth count it was objected that the mere utterance of indecent language was not an indictable offence. Upon a case reserved the conviction was upheld, and in delivering the judgment of the Court, Lord Coleridge, C.J., said: 'It appears to have been proved that the two prisoners kept on Epsom Downs a booth for the purpose of showing an indecent exhibition, that they invited all persons who came within reach of their solicitations to come in and see it, and that those who paid went in and did see what was grossly indecent; we think that those facts are abundant to prove a common-law offence, and that it is well stated in the indictment.'

Sect. III.—Indecent Exposure.

Any unlawful indecent exposure of the human body in a public place, and in the view of several persons (of either sex) is an indictable misdemeanor (*h*) punishable by fine or imprisonment with or without hard labour (*i*). The offence is in substance only a form of public nuisance (*j*) by indecent exhibition.

Exposing to public view the naked dead body of a newly born infant has been held indictable (*k*). But most of the decisions relate to the exposure of the private parts of an individual in a public place.

Bathing so near a public footway frequented by females that public exposure must occur, is a nuisance, and it is no defence that there has been an usage to bathe at that place time out of mind (*l*).

It has been held to be an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses from which he might be distinctly seen; although the houses had been recently erected, and, until their erection, it had been usual for men to bathe in great numbers at the place in question. M'Donald, C.B., ruled, that whatever place becomes the habitation of civilized men, there the laws of decency must be enforced (*m*). Bathing in or near towns is now usually regulated by local by-laws (*n*).

In R. *v.* Sedley (*o*), the defendant being indicted for shewing himself naked from a balcony in Covent Garden to a great multitude of people, confessed the indictment; and was sentenced to pay a fine of 2000 marks, to be imprisoned a week, and to give security for his good behaviour for three years.

Public Place.—Most of the decided cases turn on the question—what is a public place? A urinal situate in Hyde Park, and open to the public,

(*h*) R. *v.* Sedley, *infra*.

(*i*) 14 & 15 Vict. c. 100, s. 29, *ante*, p. 1882. Under the Vagrancy Act, 1842 (5 Geo. IV. c. 83), s. 4, every male person is punishable as a rogue and a vagabond who wilfully, lewdly, and obscenely exposes his person in any street, road, or public highway, or in the view thereof or in any place of public resort, *with intent to insult any female*. Cf. 10 & 11 Vict. c. 89, s. 28.

(*j*) The formal conclusion 'to the common nuisance' is not now essential. R. *v.* Holmes, Dears. 207, *post*, p. 1937.

(*k*) R. *v.* Clark, 15 Cox, 171.

(*l*) R. *v.* Reed, 12 Cox, 1, Cockburn, C.J.

(*m*) R. *v.* Crunden, 2 Camp. 89. And the Court of King's Bench, when the defendant was brought up for judgment, expressed a clear opinion that the offence imputed to him was a misdemeanor, and that he had been properly convicted. See 10 & 11 Vict. c. 89, s. 69.

(*n*) See 7 Edw. VII. c. 53, s. 92.

(*o*) 1 Sid. 168; 1 Keb. 620; 17 St. Tr. 155 *n*.

was near to a lodge, the window of which in a first floor commanded a view of it. The distance between the lodge and the urinal was 14 ft. 6 in.; the urinal was approached by a gate opening from the public footpath, and there was also access to it by another gate communicating with a small garden belonging to the lodge; it was held that the urinal was a public place (*oo*). Where a man indecently exposed his person upon the roof of a house, where his act could not be seen by persons passing along the highway, but where it was seen by seven persons from the back windows of another house, it was held that he was rightly convicted of exposing his person in a public place (*p*). A passenger in a public omnibus for hire exposed his person whilst the omnibus was passing along a street, in the presence of three or four females who were passengers in the omnibus, and saw such exposure; it was held that this was an exposure in a public place (*q*).

On an indictment for indecent exposure of the person, it appeared that the prisoner was seen from an opposite window by a maid-servant, but there was no evidence that anyone in the street saw him, but only that persons going along the street might have seen him. Parke, B., directed the jury to consider whether the prisoner was in such a situation that the passers-by in the street could have seen him had they happened to look, and if they were of that opinion to find him guilty (*r*).

Where an indictment for indecent exposure alleged the offence to have been committed *on* a public highway, it was held, that evidence that it was committed on a piece of land *near* the highway did not support the indictment. A count having been amended so as to state the offence to have been committed 'on a place in view of a public highway,' but there being no evidence that anyone could have seen the prisoner except one female, it was held that no offence was proved; for an exposure seen by one person only, and being capable of being seen by one person only, is not an offence at common law; but if the prisoner had been seen by one person only, and there had been evidence that others might have seen him, the case would have been different (*s*).

Where the place in question was out of sight of the public footpath but was a place to which persons were in the habit of going without any strict legal right so to do and without being in any way hindered, but the prisoner exposed his person to several little girls, it was held that he was rightly convicted, and a suggestion was thrown out that

(*oo*) R. *v.* Harris, L. R. 1 C. C. R. 282; 40 L. J. M. C. 67.

(*p*) R. *v.* Thallman, L. & C. 336; 33 L. J. M. C. 58.

(*q*) R. *v.* Holmes, Dears. 207; 22 L. J. M. C. 122. On an indictment for indecent exposure in a certain room in a dwelling-house, it appeared that the prisoners had gone into a parlour in a public-house, and committed the acts alleged, and that a maid-servant had witnessed what was done through the window of another room, and had gone for assistance, and in consequence of her representations a policeman and another witness went, and they also saw sufficient to constitute the crime. The servant was not called as a witness; and the Recorder left it to the jury whether this was a place in which such practices occurring they were likely to be witnessed by others, and there was a conviction. R. *v.* Bunyan, 1 Cox, 74. On this case see R. *v.* Madercine [1899], 20 New S. Wales Rep. Law, 36. As to a railway carriage being a public place, see Langrish *v.* Archer, 10 Q.B.D. 44.

(*r*) R. *v.* Rouverard, cited in R. *v.* Webb, 1 Den. 338; 2 C. & K. 933, *infra*.

(*s*) R. *v.* Farrell, 9 Cox, 446 (C. C. R. Ir.). No opinion was expressed as to the propriety of the amendment.

the offence might be indictable if committed before divers subjects of the realm even if the place be not public (*t*).

An indictment charged that the prisoner in a certain public and open place, called Paddington churchyard, in the sight and to the view of L. C., did wilfully expose his private parts. Judgment on conviction was arrested on the ground that the nuisance must be public (*u*). An indictment charged that the prisoner in a certain public place within a certain alehouse indecently did expose his private parts in the presence of M. A., and of divers others the liege subjects of the Queen. The prisoner had conducted himself in an offensive manner in the public passage from the entrance door of the public-house to the bar, but not amounting to an indecent exposure, and whilst so doing several persons passed to and fro, and he then exposed his private parts to M. A., but there was no one in sight but herself at that time. It was held that, assuming the indictment to be sufficient, the averment respecting 'divers others' was material, and was not proved, as the exposure was only proved to have been made in the presence of one person (*v*).

Where an exposure was charged on a public common in the presence and sight of divers persons, the prisoners had committed fornication in open day on the said common; there was no evidence that it was committed within the sight of anyone except the witness; it could have been seen by persons on the common, but the case did not state that there were any other persons on the common; the judges, after argument, differed in opinion, and no judgment was delivered (*w*).

Where an indictment alleged that the two defendants in a certain open and public place, frequented by divers of the liege subjects, unlawfully did meet together for the purpose and with the intent of committing with each other, openly, lewdly and indecently in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices, and then unlawfully, wickedly, openly, lewdly, and indecently did commit with each other, in the sight and view of divers of the liege subjects, in the said public place passing and being, divers such practices as aforesaid, judgment was arrested on the ground that the indictment did not state so distinct and specific a charge as on legal principles was sufficient (*x*). So where a count alleged that A. in a certain public place did lay his hands on the private parts of B., with intent to stir up in his own mind and B.'s mind unnatural desires and inclinations, and to incite B. to the committing with A. divers unnatural acts, and that B. in the said public place did permit A. so to lay his hands, and was then aiding and assisting A. in the said acts, with the like intent; the count was held bad for not describing an incitement to commit a felony in proper terms (*y*).

(*t*) R. *v.* Wellard, 14 Q.B.D. 63: 54 L. J. M. C. 14. Cf. R. *v.* Madercine [1899], 20 New S. Wales Rep. Law, 36, where a conviction was upheld for indecent exposure on the verandah of a private house in the presence of several children.

(*u*) R. *v.* Watson, 2 Cox, 376.

(*v*) R. *v.* Webb, 1 Den. 338: 18 L. J. M. C. 39. No notice was taken of the question whether the place was a public place. The indictment alleged the exposure 'in the presence of M. A. and of divers others,' &c., and the judges doubted whether it was not bad for not adding 'in their view,' and also whether 'divers others' was sufficient.

(*w*) R. *v.* Elliot, L. & C. 103.

(*x*) R. *v.* Rowed, 3 Q.B. 180. The indictment was too general. It did not properly charge any distinct act.

(*y*) R. *v.* Orchard, 3 Cox, 248, Cresswell and Erle, JJ.

CANADIAN NOTES.

OF OBSCENITY AND INDECENCY.

Obscene Libels.

Obscene and Immoral Books and Pictures.—Code sec. 207.

Indecent Shows.—Code sec. 207.

Offering or Advertising Drugs to Produce Abortion.—Code sec. 207.

(NOTE.—Sec. 207 was amended by 8 & 9 Edw. VII. ch. 9.)

Knowingly.—The offence being that a person "knowingly" without lawful justification or excuse sells or distributes the obscene publication, it is obligatory upon the prosecution to prove knowledge of the contents on the part of the accused. The King v. Beaver, 9 Can. Cr. Cas. 415, 9 O.L.R. 418.

Obscenity.—"The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall." R. v. Hicklin, L.R. 3 Q.B. 371, per Cockburn, L.C.J.; R. v. Beaver (1905), 9 Can. Cr. Cas. 415, 9 O.L.R. 418.

A person who openly exposes or exhibits in any way, street, road, highway or public place any indecent exhibition is liable to summary conviction as a "vagrant" under secs. 238 and 239.

Upon a charge of knowingly and without lawful excuse or justification, advertising a drug intended or represented as a means of causing abortion, the trial Judge may withdraw the case from the jury if the advertisement is incapable of such meaning, but if it be held to be capable it is then for the jury to decide whether or not it actually had such meaning having regard to the context of the objectionable words and to the circumstances of the case. The King v. Karn, 5 Can. Cr. Cas. 543, reversed; R. v. Karn, 6 Can. Cr. Cas. 479, 5 O.L.R. 704.

Sec. 2.—Indecent Exhibitions.

Indecent Theatrical Performance.—Code sec. 208.

Municipal By-laws.—A Provincial Legislature has jurisdiction to legislate concerning matters of police regulation of public morals, and to delegate the like authority to municipal councils, but in so far as the same subject is dealt with by the Dominion Parliament, the Dominion legislation will prevail. Ex parte Ashley, 8 Can. Cr. Cas. 328.

Ordinary ballet dancing in the customary costume does not constitute an immoral or indecent play or performance within the meaning of this section. The word "indecent" has no fixed legal meaning, and it devolves upon the prosecution in a charge of presenting an indecent theatrical performance to affirmatively prove that the performance in question was of depraving tendency. R. v. McAuliffe (1904), 8 Can. Cr. Cas. 21.

Sec. 3.—Indecent Exposure.

Indecent Act in Public Places.—Code sec. 205.

Excluding Public from Court Room.—Code sec. 645.

Obscene Song with Indecent Gestures.—A person is guilty of indecent acts within the meaning of this section, who, in a public theatre in the presence of several persons, makes indecent gestures on his person or otherwise, while singing an obscene song. The Queen v. Jourdan, 8 Can. Cr. Cas. 337.

Provincial Legislative Power.—A Provincial Legislature has jurisdiction to legislate concerning matters of police regulation of public morals, but in so far as the same subject is dealt with by the Dominion Parliament, the Dominion legislation will prevail. Ex parte Ashley, 8 Can. Cr. Cas. 328.

The power of enacting such police regulations may be delegated by the Provincial Legislature to municipal councils. *Ibid.*

"Wilfully."—A summary conviction for "unlawfully" committing an act does not sufficiently charge that the act was "wilfully" done to constitute an offence under a statute which makes the latter an essential element of the offence. And a person who is summarily convicted on his plea of guilty upon a charge of "unlawfully" committing an indecent act and who is sentenced to imprisonment, is entitled to be discharged on habeas corpus as the commitment and conviction disclose no offence under the criminal law. The word "wilfully" as applied to the offence declared by this section implies that the act was done with evil intent and without any justifiable excuse, while the word "unlawful" does not necessarily refer to criminal penalty or prohibition. Ex parte O'Shaughnessy, 8 Can. Cr. Cas. 136, 13 Que. K.B. 178; R. v. Tupper, 11 Can. Cr. Cas. 199.

A summary conviction for indecency under this section is bad if it does not state the offence to have been committed wilfully, but a valid conviction correcting the omission may be substituted on a habeas corpus application. The King v. Barre, 11 Can. Cr. Cas. 1.

Place.—A place out of sight of the public footway, where people had no legal right to go, but did habitually go without interference, is included. R. v. Levasseur, 9 Montreal L.N. 386; Ex parte Walter, Ramsay's Cases (Que.) 183.

CHAPTER THE SEVENTH.

NUISANCE BY CAUSING DISORDER.

SECT. I.—GENERAL PRINCIPLES.

IT is a public nuisance at common law to keep a house, room, or other place of such a kind, or in such a manner, as to cause disorder or scandal or so as to obstruct the highways by drawing crowds.

Inns, Public-houses and Refreshment Houses.—The keeper of an inn is at common law indictable for public nuisance (*a*) if he usually harbours thieves or persons of scandalous reputation, (*b*) or suffers frequent disorders in his house. This liability is independent of the statutory liabilities imposed upon created holders of licences to sell exciseable liquors, granted under the Licensing Acts, 1828 to 1904. In London summary provisions are made for punishing disorder in houses where provisions or refreshments are sold or consumed, where drunkenness or disorderly conduct or gaming is allowed, or prostitutes or persons of notoriously bad character are allowed to meet and remain (*c*). There is a similar general provision as to licensed refreshment houses in which intoxicants are not sold (*d*), and as to places licensed for the sale of intoxicants (*e*).

If one who keeps a common inn (*f*) refuses either to receive a traveller as a guest into his house, or to find him victuals or lodging, unless the bedrooms are full (*g*), upon his tendering him a reasonable price for the same (*h*), he is not only liable to render damages to the party in an action, but may also be indicted (*i*). But a traveller is not entitled to select a particular apartment, or to insist upon occupying a bedroom for the purpose of sitting up all night, if the innkeeper offers to furnish him with a proper room for that purpose (*j*). Attached to the defendant's hotel and under the same roof was a bar entered by a separate door. The prosecutor who lived near at hand went into the bar with a dog, and was refused refreshment. He had been told by the defendant not to bring his dog as it was an annoyance to his guests. It was held that the defendant could not be convicted; first, because the refreshment

(*a*) 1 Hawk. c. 78, ss. 1, 52. 4 Bl. Com. 167. Dalton, c. 56. Blackerby, 170. 1 Bac. Abr. *tit.* 'Inns, &c.' (A.) (C.) 2. 3 Chit. Cr. L. 672. Stephen Watson's case, 1 Salk. 45; 3 Salk. 26.

(*b*) By the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 10, penalties are imposed on keepers of lodging-houses, places of public entertainment or places licensed for the sale of intoxicants, who knowingly lodge or harbour thieves or reputed thieves, or knowingly suffer their meeting in the house or the deposit therein of goods which he has any reason to believe have been stolen.

(*c*) 2 & 3 Vict. c. 47, s. 44.

(*d*) 23 & 24 Vict. c. 27, ss. 32, 41; 35 & 36 Vict. c. 94, s. 75.

(*e*) 35 & 36 Vict. c. 94, ss. 13, 14, 15.

(*f*) For definition of common inn, see Thomson *v.* Lacy, 3 B. & Ald. 283. Lamond *v.* Richard [1897], 1 Q.B. 541.

(*g*) Browne *v.* Brandt [1902], 1 K.B. 696.

(*h*) Y. B. 10 Hen. VII. 8. 39 Hen. VI. 18, 19.

(*i*) 1 Hawk. c. 78, s. 2. R. *v.* Sprague, 63 J. P. 233. R. *v.* Smith, 65 J. P. 521.

(*j*) Fell *v.* Knight, 8 M. & W. 269.

bar was not an inn; secondly, because the prosecutor was not a traveller; and thirdly, because the defendant had reasonable grounds for his refusal (*k*). It is no defence to an indictment for not receiving a traveller that he did not tender a reasonable sum for his entertainment, if no objection be made on that ground: nor that the guest was travelling on a Sunday; nor that it was at a late hour of the night after the innkeeper and his family were gone to bed; for an innkeeper is bound to admit a traveller at whatever hour of the night he may arrive; nor that the guest refused to tell his name and abode, as the innkeeper has no right to insist upon knowing them; but if the guest be drunk or behave in an indecent or improper manner, the innkeeper is not bound to receive him (*l*). The right to keep a common inn is quite independent of the statutes regulating the grant of licences for the sale of excisеable liquors (*m*), and licensed premises are not necessarily common inns (*n*). An innkeeper besides his liability above stated is liable to indictment if his house is disorderly (*o*).

An indictment charged the defendant with keeping certain enclosed lands near to the King's highway and to certain houses, for the purpose of persons frequenting such grounds, and meeting therein to practise rifle shooting, and to shoot at pigeons with guns, and that he did unlawfully cause divers persons to meet there for that purpose, and did unlawfully suffer and cause a great number of idle and disorderly persons armed with guns to assemble in the streets and highways and other places near the said premises, discharging firearms and making great noise and disturbance, by means whereof the King's subjects were disturbed and put in peril. It appeared in evidence that the defendant had converted some land, about 100 feet from a public road, into a shooting ground, where persons came to practise with rifles, and to shoot at pigeons; and as the pigeons which were fired at often escaped, it was the custom for idle persons to collect outside the grounds, and in the neighbouring fields to shoot at the birds as they strayed, by which a great noise and disturbance was created. It was objected that the defendant was not responsible, as he neither committed the nuisance in his own person, nor was it his object to induce others to commit it;

(*k*) R. *v.* Rymer, 2 Q.B.D. 136.

(*l*) R. *v.* Ivens, 7 C. & P. 213, Coleridge, J. In Fell *v.* Knight, *ubi sup.*, Abinger, C.B., said, notwithstanding R. *v.* Ivens, 'I am inclined to think that the declaration is bad for want of an allegation of a tender of the amount to which the innkeeper would be reasonably entitled for the entertainment furnished to his guest; it is not sufficient for the plaintiff to allege that he was willing to pay; he should state further that he offered to pay. There may be cases where a tender may be dispensed with; as, for instance, where a man shuts up his doors or windows so that no tender can be made; but I rather think these facts ought to be stated in the indictment or declaration; and I have, therefore, some doubt as to the complete correctness of the judgment in the case cited.' In Y. B. 39 Hen. VI. 19, Danby said an innkeeper is not bound to give provender to the horse of his guest until he is paid in the hand; for the law does not compel him to put trust in his guest for the payment,—which fully supports Lord Abinger's opinion. See Hawthorn *v.* Hammond, 1 C. & K. 404, where the plaintiff had knocked at an inn door for some minutes in the night without obtaining admission: and Parke, B., left it to the jury whether the defendant heard the noise, and if so, whether she ought to have concluded that the person knocking required to be admitted as a guest or was a drunken person, who had come there to make a disturbance.

(*m*) See the authorities collected in Beven on Negligence (3rd ed.) 850.

(*n*) R. *v.* Rymer, *ubi sup.*

(*o*) *Post*, pp. 1891, 1903.

nor was it a necessary and inevitable consequence of any act of his, being done by persons beyond his control: and those persons being themselves amenable to punishment for it. But it was held that the evidence supported the allegation that the defendant caused such persons to assemble, and that the defendant was liable to be indicted for a nuisance; for if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable; and although it may not be his object to create a nuisance, yet if it be the probable consequence of his act, he is answerable as if it were his actual object: if the experience of mankind must lead anyone to expect the result, he will be answerable for it (*p*).

The holding of a regatta has been treated as a nuisance (*q*) in accordance with the principles laid down in the case. And in Ireland, race meetings held on Sundays were held to be a nuisance where it was proved that the quiet and comfort of the neighbourhood was interfered with and the services in the churches interrupted by the shouting and cheering of the crowds collected on the course, and the cries of the bookmakers, and that the thoroughfares leading to the course were obstructed by vehicles carrying passengers to the course or drawn up near the course to wait for fares (*r*). Where a proprietary club was established at which boxing matches took place which caused the collection of large crowds outside the club: the noise of the crowds and the frequency, on all nights and until early in the morning, of whistling from the club for cabs, which also created much noise in driving up when called, interfered with the rest and comfort of neighbouring residents; the owner of the club was held liable for the nuisance thus caused, as the natural and probable consequence of holding and advertising the boxing matches (*s*).

Cock Fights, &c.—At common law an indictment against a defendant for that he did keep a common, ill-governed, and disorderly house, and in the said house for his lucre, &c., certain persons of ill-name, &c., to frequent and come together, did cause and procure, and the said persons in the said house to remain *fighting of cocks, boxing, playing at cudgels,* and *misbehaving themselves,* did permit, has been held good (*t*). And it seems that the keeping of a *cockpit* is not only an indictable offence at common law, but that a cockpit was considered as a gaming-house within 33 Hen. VIII. c. 9, s. 8 (*u*), which imposed a penalty of forty shillings per day upon such houses; and therefore, on a conviction on an indictment at common law, the Court measured the fine by inflicting forty shillings for each day, according to the number of days such cockpit was kept open (*v*).

It is also by statute made illegal to keep or use any place for fighting

(*p*) R. *v.* Moore, 3 B. & Ad. 184. See Barber *v.* Penley [1893], 2 Ch. 447, 451, where the authorities as to liability for collecting crowds are discussed.

(*q*) Bostock *v.* North Staffordshire Rail. Co. [1852], 5 De Gex & Sm. 582, 589.

(*r*) Dewar *v.* City and Suburban Race Course Co. [1899], Ir. Rep. 345.

(*s*) Bellamy *v.* Wells, 60 L. J. Ch. 156, Romer, J.

(*t*) R. *v.* Higginson, 2 Burr. 1232.

(*u*) Repealed by 8 & 9 Vict. c. 109, s. 1, as to games of mere skill, but still in force as to gaming houses. Murphy *v.* Arrow [1897], 2 Q.B. 527. See *post*, p. 1897.

(*v*) R. *v.* Howel, 3 Keb. 510. 1 Hawk. c. 92, s. 29.

or baiting lions, tigers, bulls, bears, badgers, cocks, dogs or other animals whether of a domestic or wild nature (*w*).

Suburban Race-courses.—By 42 & 43 Vict. c. 18, s. 6, 'Any person who shall be the owner or lessee in possession of any open or enclosed land or place for which a licence for horse-racing is required under this Act [i.e. within a radius of ten miles from Charing Cross], and upon which, any horse race shall be held after Mar. 25, 1880, without such licence having been obtained, shall be guilty of a misdemeanor, and on conviction thereof shall be punishable for every such offence with fine or imprisonment at the discretion of the court, such fine not to be less than £5 or more than £25, and such imprisonment not to be less than one month or more than three months.' By sect. 7, every horse race held in contravention of the Act is to be deemed to be a nuisance, and all persons injured or inconvenienced thereby are given all the remedies appropriate to a nuisance at common law.

Theatres.—*Playhouses* are not, in their own nature, nuisances, but may become so if they draw together numbers of people, and coaches, or sharpers, which prove generally inconvenient to the places adjacent (*x*); or, when they pervert their original institution by recommending vicious and loose characters, under beautiful colours, to the imitation of the people, and make a jest of things commendable, serious, and useful (*y*).

Common stages for rope-dancers, &c., are said to be public nuisances, not only because they are great temptations to idleness, but also because they are apt to draw together numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood (*z*).

Theatres which fall within the Theatres Act, 1843 (6 & 7 Vict. c. 68) require licences (*a*). Penalties summarily recoverable are imposed on unlicensed theatres (*b*). The licence is a security against disorder or impropriety, but want of the licence does not render the theatre a public nuisance and possession of a licence is no defence if the theatre is so conducted as to create a public nuisance (*c*), or if it is used for

(*w*) 2 & 3 Vict. c. 47, s. 47 (Metropolis). 12 & 13 Vict. c. 92, s. 3 (Cruelty to Animals). The London Act omits bulls; the general Act omits lions and tigers, and adds the words 'whether domestic or wild.' See Allen *v.* Small [1904], 2 Ir. Rep. 705. Cock-fighting is cruelty within 12 & 13 Vict. c. 92. Budge *v.* Parsons, 3 B. & S. 382.

(*x*) Betterton's case, rep. *temp.* Holt, 538. See Barber *v.* Penley [1893], 2 Ch. 447, 449.

(*y*) Bac. Abr. *tit.* 'Nuisance,' A. 1 Hawk. c. 75, s. 7. As to indecent exhibition, see *ante*, p. 1882.

(*z*) Bac. Abr. *tit.* 'Nuisance,' A. 1 Hawk. c. 75,'s. 6. As to indicting stage players for riot and unlawful assembly, see *ante*, p. 555 *n.*

(*a*) Where the owner of a building allowed it gratuitously to be used for the performance of stage plays, to which the public were admitted on payment, for the benefit of a charity, he was held to have kept a house for the public performance of stage plays without a licence. Shelley *v.* Bethell, 12 Q.B.D. 11.

(*b*) 6 & 7 Vict. c. 68, ss. 2, 11. See R. *v.* Strugnell, L. R. 1 Q. B. 93, as to the persons rendered liable for unlicensed performances. The licence is to the house, not to the individual.

(*c*) The Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 46, gives power to enter unlicensed theatres, and subjects persons letting houses, &c., for the purpose of being used as unlicensed theatres to a penalty of not more than £20, or two months' imprisonment; and subjects persons performing or being therein without lawful excuse, to a penalty of 40*s.*; and a conviction under the Act does not exempt the owner, keeper, or manager of any such house from any penalty for keeping a disorderly house, or for the nuisance thereby occasioned.

entertainments which need a licence under the Disorderly Houses Act, 1751 (*d*).

Sect. II.—Unlicensed Public Entertainments.

By the Disorderly Houses Act, 1751 (*e*), s. 2, 'any house, room, garden or other place kept for public dancing, music (*f*) or other public entertainment of the like kind in the cities of London and Westminster, or within twenty miles thereof, without a licence . . . shall be deemed a disorderly house or place,' and every person keeping the same is punishable as the law directs in the case of disorderly houses, and is also liable to forfeit £100 at the suit of any common informer. The Act since 1893 has ceased to apply to the administrative county of Middlesex (*g*). In the administrative counties of London, and in those of Essex, Kent, and Surrey to which the Act to some extent applies, the licences, formerly issued at the Michaelmas Quarter Sessions, are now issued by the county councils (*h*).

The Act does not apply to theatrical performances or public entertainments carried on under letters patent or licence from the Crown or the Lord Chamberlain (*i*), nor to theatres licensed under the Theatres Act, 1843 (*j*), for the performance of stage plays, nor does it authorise the grant of licences for stage plays as defined in the Theatres Act, 1843. But where at a place licensed as a theatre, entertainments are given falling within the Act of 1751, the persons who are responsible for the performance are liable to indictment under the Act of 1751 (*k*). The provisions of the Act of 1751 are no bar to an indictment of premises licensed under the Act, if they are carried on in a disorderly manner, or otherwise so as to create a public nuisance (*l*).

The common law punishment for keeping a common, ill-governed, and disorderly house is fine or imprisonment or both. The imprisonment may be with hard labour (*m*). The offences under the statute are triable at borough (*n*) as well as at county quarter sessions.

To fall within the Act of 1751, the house or room must be kept with the defendant's knowledge; secondly, it must be kept for the purposes prohibited by the statute; there must be something like an *habitual* keeping of it, which however need not be at stated intervals; thirdly, it must be public, to which all persons have a right to go, whether gratuitously or on payment of money, no matter whether paid to the defendant or not, if he knows of the payment (*o*). Where, therefore, the defendant was a publican, and music, dancing, and masquerades

(*d*) R. *v.* Arthur, 72 J. P. 318.

(*e*) 25 Geo. II. c. 36, made perpetual in 1754 (28 Geo. II. c. 19).

(*f*) As a substantial object and not a mere accessory. Guaglieni *v.* Matthews, 34 L. J. M. C. 116.

(*g*) 56 & 57 Vict. c. 15.

(*h*) 51 & 52 Vict. c. 41, ss. 3 (v), 7 (a).

(*i*) Sect. 3, which excepts by name the Theatres of Covent Garden and Drury Lane and the King's Theatre in the Haymarket.

(*j*) 6 & 7 Vict. c. 68, ss. 2, 3, *ante*, p. 1890.

(*k*) R. *v.* Arthur, London County Sessions, 72 J. P. 318, where the defendants were convicted under sect. 1 of the Act of 1751, for giving, without a County Council licence, a music-hall variety entertainment in a theatre licensed under the Theatres Act, 1843 (6 & 7 Vict. c. 68).

(*l*) R. *v.* Higginson, 2 Burr. 1232. Garrett *v.* Messenger, L. R. 2 C. P. 583.

(*m*) 3 Geo. IV. c. 114, *ante*, Vol. i. p. 212.

(*n*) R. *v.* Charles, L. & C. 90; 31 L. J. M. C. 60.

(*o*) Marks *v.* Benjamin, 5 M. & W. 564, Parke, B.

had occasionally been held at his house, in which, from its vicinity to the Great Synagogue, Jewish marriages were frequently celebrated, but no money was taken at the door or elsewhere by the defendant for admission, and the rooms were let to a dancing-master, and to other persons, who sold tickets, and received money for admission at the door; but there was no direct evidence that the defendant knew of this practice; it was held, that there was evidence for the jury of keeping the house for the purposes mentioned in the Act (*p*). A mere temporary or occasional use of a room for music and dancing is not a keeping it within this Act, but the room need not be kept exclusively for those purposes, nor need money be taken at the door. Where, therefore, the defendant kept a public house, and on repeated occasions, during a space of three or four months, the tap-room was frequented at night by numbers of sailors, soldiers, boys, and prostitutes, who danced there to a violin played by a person on an elevated platform, but no money was taken for admission, it was held that the case was within the Act (*q*). On an indictment for unlawfully keeping a room for public music and dancing within twenty miles of London and Westminster without a licence, it was proved that nightly entertainments were there given when music and dancing took place, the public being admitted on paying money at the door. There were often from 200 to 300 visitors, who conducted themselves in an orderly manner, and no impropriety of conduct was permitted or practised: the Recorder held, that this room required a licence under the Act, and that, after this proof, it lay on the defendant to prove that it was licensed (*r*). The defendant kept a skating rink in which in the evening dance music was played during the skating. It was held that he might be convicted under the Act of keeping a place for public entertainment of a like kind to music and dancing without a licence (*s*).

Sect III.—Bawdy Houses.

A brothel or common bawdy house is a form of disorderly house, the keeping whereof is a public nuisance (*t*), 'not only in respect of its endangering the public peace by drawing together dissolute and debauched persons; but also in respect of its apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness' (*u*). Indeed the offence is now treated as rather depending on immorality than on actual disorder (*v*). The punishment for the offence is fine or imprisonment or both, and the imprisonment may be with hard labour (*w*). The offence is within the Vexatious Indictments Act, 1859 (*x*). This is an offence of which a *feme covert* may be guilty as well as if she were *sole*, and she, together with her husband, may be convicted of it; for the keeping of the house does not necessarily import

(*p*) Id. ibid.

(*q*) Hall *v.* Green, 9 Ex. 247. Gregory *v.* Tuffi, 6 C. & P. 271. Gregory *v.* Tavernor, C. & P. 280. Syers *v.* Conquest, 28 L. T. N. S. 402.

(*r*) R. *v.* Wolf, 3 Cox, 578.

(*s*) R. *v.* Tucker, 2 Q.B.D. 417.

(*t*) *Ante*, p. 1833.

(*u*) 3 Co. Inst. 204. 1 Hawk. cc. 74, 75. Bac. Abr. *tit.* 'Nuisances' (A.). Burn's Just. *tit.* (ed.) 'Lewdness and Nuisance.'

(*v*) R. *v.* Rice, L. R. 1 C. C. R. 21; 35 L. J. M. C. 93, in which a conviction was supported though there was no evidence of any indecency or disorderly conduct being perceptible from outside the house.

(*w*) 3 Geo. IV. c. 114, *ante*, Vol. i. p. 212.

(*x*) *Post*, p. 1927.

property, but may signify that share of government which the wife has in a family as well as the husband; and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex (*y*). If a person be only a lodger, and have but a single room, yet if she make use of it to accommodate people in the way of a bawdy-house, it will be a keeping of a bawdy-house as much as if she had a whole house (*z*).

It has been held that a woman does not commit the offence of keeping a brothel if she lives in a house and uses it for prostitution, if no other woman lives in or frequents the house for purposes of prostitution (*a*). Where the agent of a landlord was prosecuted for being wilfully a party to the continued use of a block of flats as a brothel, it was proved that the premises were under one roof and externally had the appearance of one large house, but were divided into eighteen flats reached by one common staircase. The flats were separately rated and assessed, and could be occupied as separate dwellings. Women who occupied the flats brought men in nightly for purposes of prostitution and after midnight were admitted by the landlord's agent, who had the key of the outer door of the common staircase. The magistrate held that the building as a whole was one set of premises and as a whole was used as a brothel. On appeal the Court held the finding warranted in law by the evidence (*b*).

An indictment does not lie against a person for being a common bawd, and procuring men and women to meet together to commit fornication: the indictment should be for keeping a bawdy-house (*c*): for the bare solicitation of chastity is not indictable (*d*).

The following enactments provide for the summary conviction of persons concerned in keeping brothels.

By the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 11, 'Every person who occupies or keeps a brothel, knowingly lodges, or knowingly harbours, thieves, or reputed thieves, or knowingly permits, or knowingly suffers them to meet or assemble therein, or knowingly allows the deposit of goods therein, having reasonable cause for believing them to be stolen, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding ten pounds, and, in default of payment, to be imprisoned for a period not exceeding four months, with or without hard labour, and the Court before which he is brought, may, if it think fit, in addition to, or in lieu of any penalty, require him to enter into recognizances, with or without sureties, as in this Act described.'

The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13, enacts, that 'Any person who—

(1) keeps or manages or acts, or assists in the management of a brothel; or

(2) being the tenant, lessee, or occupier of any premises, knowingly

(*y*) R. *v.* Williams, 1 Salk. 383, *ante*, Vol. i. p. 97.

(*z*) R. *v.* Pierson, 2 Ld. Raym. 1197; 1 Salk. 382.

(*a*) Singleton *v.* Ellison [1895], 1 Q.B. 607.

(*b*) Durose *v.* Wilson [1907], 92 L.T. 645: 71 J. P. 263. Darling, J., referred to 1 Hawk. c. 74.

(*c*) R. *v.* Pierson, 2 Ld. Raym. 1197; 1 Salk. 382.

(*d*) 1 Hawk. c. 74. Burn's Just. (ed.) *tit.* 'Lewdness.' It was then cognisable in the ecclesiastical courts.

permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution ; or

(3) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is used as a brothel, or is wilfully a party to the continued use of such premises as a brothel,

shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable—

(1) to a penalty not exceeding £20 (*e*), or in the discretion of the Court to imprisonment for any term not exceeding 3 months with or without hard labour ; and

(2) on a second or subsequent conviction to a penalty not exceeding £40 (*e*), or in the discretion of the Court to imprisonment for any term not exceeding four months with or without hard labour,

and in case of a third or subsequent conviction, such person may in addition to such penalty or imprisonment as last aforesaid, be required by the Court to enter into a recognizance with or without sureties, as to the Court seems meet, to be of good behaviour for any period not exceeding twelve months, and in default of entering into such recognizance with or without sureties (as the case may be) such person may be imprisoned for any period not exceeding three months in addition to such term of imprisonment as aforesaid' (*ee*).

On a prosecution under this enactment after a previous conviction, the defendant may elect to be tried upon indictment (*f*). The indictment need not state the fact that the election was made (*g*) but should state the previous conviction. Evidence of the previous conviction may not be laid before the jury until they have convicted of the subsequent offence (*h*), unless the defendant makes the previous conviction admissible, by the line of defence taken (*i*).

Indictment.—The offence of keeping a brothel, &c., is a continuing offence (*j*). The indictment may be proved in general terms and need not go into all the details of the keeping, but particulars can be ordered (*k*).

Upon an indictment for keeping two bawdy-houses, the evidence, in addition to the proof of the nature of the houses, was that the defendant owned the houses, which he let to weekly tenants, and that he had been repeatedly remonstrated with as to the manner in which the houses were conducted, and called upon to interfere so as to abate the nuisance. Of these warnings he took no notice, and some months before the prosecution, he was served with a notice to the like effect ; he, however, took no steps to stop the nuisance, but continued to go to the houses, and receive the rent every week. It was not proved that the defendant obtained any additional rent by reason of the nature of the occupation. It was held that the defendant was not the keeper of the bawdy-houses

(*e*) Or imprisonment with hard labour in default of payment. R. *v.* Tynemouth JJ., 16 Q.B.D. 647.

(*ee*) The rest of the section relates to appeals to Quarter Sessions and incorporates the Disorderly Houses Acts, 1751 (ss. 5, 6 and 7) and 1818, see *post*, p. 1902, and R. *v.* Newton, 17 Cox, 530.

(*f*) *Vide ante*, Vol. i. p. 17.

(*g*) R. *v.* Chambers, 65 L. J. M. C. 14.

(*h*) R. *v.* Huberty [1905], 70 J. P. 6.

(*i*) *Vide post*, p. 2271.

(*j*) See *Ex parte* Burnby [1901], 2 K. B. 458.

(*k*) l'Anson *v.* Stuart, 1 T. R. 748.

in point of law; but was simply the owner of the houses, letting them to other persons who used them for an immoral purpose (*l*).

The owner of a house let out the different apartments in it separately to young women, who, to his knowledge and with his consent, used them for the purposes of prostitution. They were merely weekly tenants. When he let the rooms, he knew of the purposes to which they would apply them, and fully assented thereto, but he received no share of the earnings of the women. He did not live in the house, and he only went there to collect his weekly rents. He had no other control over the tenants than arose from his power as landlord to determine the tenancies. It was held that he could not on this evidence be convicted for keeping a disorderly house (*m*).

SECT. IV.—OF GAMING AND BETTING, AND GAMING AND BETTING HOUSES.

(*a*) *Of Gaming.*

For a proper understanding of the law as to gaming-houses it is necessary to state first the law as to gaming. At common law, the playing at cards, dice, &c., when practised honestly and innocently and as a recreation, is not unlawful, nor punishable (*n*). The old statutes rendering persons liable to indictment for winning or losing over a certain sum at play are repealed (*o*) and excessive gaming is no longer in itself an offence.

By the Vagrancy Act, 1873 (36 & 37 Vict. c. 38), s. 3, every person playing or betting by way of wagering or gaming (*p*) in any street, road, highway or other open and public place, or in any open place to which the public have or are permitted to have access (*q*), at or with any table or instrument of gaming (*r*), or any coin (*s*), card, token or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond within the true intent and meaning of the Vagrancy Act, 1824, and as such may be convicted and punished under the provisions of that Act (*t*), or in the discretion of the justice or justices trying the case in lieu of such punishment by a penalty for the first offence not exceeding 40*s*., and for the second or any subsequent offence not exceeding £5 (*u*).

By the Street Betting Act, 1906 (6 Edw. VII. c. 43), s. 1, 'Any

(*l*) R. *v.* Barrett, 32 L. J. M. C. 86; 9 Cox, 255. *Vide* 48 & 49 Vict. c. 69, s. 13, *supra*.

(*m*) R. *v.* Stannard, L. & C. 349; 34 L. J. M. C. 61.

(*n*) Bac. Abr. *tit.* 'Gaming' (A.). 2 Rolle. Abr. 28. As to cheating at games, see 8 & 9 Vict. c. 109, s. 17, and *ante*, pp. 167, 1501.

(*o*) See 8 & 9 Vict. c. 109, s. 15, repealing this portion of 18 Geo. II. c. 34. See that Act as printed in the Revised Statutes (2nd ed.), vol. ii. p. 186. The Act of 33 Hen. VIII. c. 9, is by 8 & 9 Vict. c. 109, s. 1, limited in its operation to games of chance or of mixed chance and skill.

(*p*) The game must be a game or pretended game of chance. Ridgeway *v.* Farndale [1892], 2 Q.B. 309.

(*q*) A railway carriage on its journey is within the section. Langrish *v.* Archer, 10 Q.B.D. 44. See Airton *v.* Scott, 73 J.P. 148.

(*r*) Betting on a race with a half sovereign is not within the section. Hirst *v.* Molesbury, L. R., 6 Q.B. 130, but an automatic machine for registering the odds is. Tollett *v.* Thomas, L. R. 6 Q.B. 514.

(*s*) Halfpence had been held not to be instruments of gaming under 5 Geo. IV. c. 83, s. 4. Watson *v.* Martin, 10 Cox, 56.

(*t*) The punishment is imprisonment with hard labour for not more than three calendar months.

(*u*) In the Metropolitan Police district penalties are incurred by three or more persons assembling in a street to bet. 30 & 31 Vict. c. 134, s. 23.

person frequenting (*r*) or loitering in streets or public places on behalf either of himself or of any other person for the purpose of book-making or betting, or wagering, or agreeing to bet, or wager, or paying, or receiving, or settling bets shall—

(a) in the case of a first offence be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding £10;

(b) in the case of a second offence be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding £20; and

(c) in the case of a third or subsequent offence, or in any case where it is proved that the person whilst committing the offence had any betting transaction with a person under the age of sixteen years, be liable on conviction on indictment to a fine not exceeding £50, or to imprisonment with or without hard labour, for a term not exceeding six months without the option of a fine, or on conviction under the Summary Jurisdiction Acts to a fine not exceeding £30, or to imprisonment with or without hard labour for a term not exceeding three months without the option of a fine;

and shall in any case be liable to forfeit all books, cards, papers, and other articles relating to betting which may be found in his possession.

'(2) Any constable may take into custody without warrant any person found committing an offence under this Act, and may seize and detain any article liable to be forfeited under this Act.

'(3) Any person who appears to the Court to be under the age of sixteen years shall for the purpose of this section be deemed to be under that age unless the contrary be proved, or unless the person charged shall satisfy the Court that he had reasonable ground for believing otherwise.

'(4) For the purpose of this section the word 'street' shall include any highway and any public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not; and the words 'public place' shall include any public park, garden, or sea-beach, and any unenclosed ground to which the public for the time being have unrestricted access, and shall also include every enclosed place (not being a public park or garden) to which the public have a restricted right of access, whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited by the owners or persons having the control of the place a notice prohibiting betting therein.'

Sect. 2. 'Nothing contained in this Act shall apply to any ground used for the purpose of a racecourse for racing with horses or adjacent thereto on the days on which races take place.'

The statutes relating to contracts by way of gaming have been fully discussed in three very recent cases (*vv*). A series of statutes seek to enumerate unlawful games which are absolutely forbidden (viz.

(*r*) Frequenting means being at a place long enough for the purpose aimed at. Airton *v.* Scott, 73 J.P. 148; Jones *v.* Scott, *cit.* 73 J.P. 148. See Clark *v.* R., 14 Q.B.D. 92.

(*vv*) Moulis *v.* Owen [1907], 1 K.B. 746. Hyams *v.* Stuart King [1908], 2 K.B. 696. Saxby *v.* Fulton [1909], 2 K.B. 208. The statutes now in force as to gaming, and gaming and betting houses are: 33 Hen. VIII. c. 9; 9 Anne, c. 9; 2 Geo. II. c. 28, s. 9; 12 Geo. II. c. 28; 13 Geo. II. c. 19, s. 9; 18 Geo. II. c. 34; 25 Geo. II. c. 36; and 58 Geo. III. c. 70, s. 7 (gaming-houses); 5 & 6 Will. IV. c. 41; 8 & 9 Vict. c. 109; 16 & 17 Vict. c. 119; 17 & 18 Vict. c. 38; 36 & 37 Vict. c. 38; 37 & 38 Vict. c. 15; 55 & 56 Vict. c. 9; 6 Edw. VII. c. 43 (street betting).

ace of hearts, pharaoh (faro), basset, hazard (*w*), roulette (*x*), and passage), and every other game invented or to be invented with dice or any other instrument, engine, or device in the nature of dice, having figures or numbers thereon (*y*), except backgammon and games now (in 1740) played with backgammon tables. These games are still unlawful unless they are games of mere skill (*z*). The definition includes every game of cards which is not a game of mere skill, and any other game of mere chance (*a*), and has been held to include *baccarat* (*b*), and *chemin de fer* (*c*).

The games not absolutely forbidden are styled unlawful by the legislature because the keeping of houses for playing them and the playing them therein is illegal.

Persons found in a gaming house playing at an unlawful game are not liable to conviction for keeping a common gaming house, unless they are found to have assisted in the management (*d*), but may be fined 6*s.* 8*d.* and be bound over, under 33 Hen. VIII. c. 9, not to frequent gaming houses (*e*).

(b) *Of Gaming-Houses.*

Common law.—Common *gaming-houses* are a public nuisance at common law, being detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness and avaricious ways of gaining property persons whose time might otherwise be employed for the good of the community (*f*). The keeping a common gaming-house, and for lucre and gain unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called '*rouge et noir*,' and permitting the said idle and evil-disposed persons to remain playing at the same game for divers large and excessive sums of money, has been held indictable at common law (*g*). It is an offence for which a married woman may be indicted: for, she may be active in promoting gaming, and furnishing the guests with conveniences for that purpose (*h*). As an indictment for keeping a gaming-house is an indictment for a public nuisance, and not for a private injury, if the prosecutor forbears bringing the case to trial, another person may proceed with the indictment (*i*). The common law

(*w*) 12 Geo. II. c. 28, s. 2.
(*x*) 18 Geo. II. c. 34, ss. 1, 2.
(*y*) 13 Geo. II. c. 19, s. 9.
(*z*) 8 & 9 Vict. c. 109, s. 1.
(*a*) Jenks *v.* Turpin, 13 Q.B.D. 505.
(*b*) Id. ibid.
(*c*) Fairtlough *v.* Whitmore, 64 L. J. Ch. 386.
(*d*) Jenks *v.* Turpin, *ubi supra*.
(*e*) Murphy *v.* Arrow [1897], 2 Q.B. 527.
(*f*) Bac. Abr. *tit.* 'Nuisances' (A.). 1 Hawk. c. 75, s. 6. R. *v.* Dixon, 10 Mod. 336. The repeal of 33 Hen. VIII. c. 9, as to games of mere skill, &c., is made with express reservation of penalties for playing at any unlawful game in a common gaming-house. 8 & 9 Vict. c. 109, s. 1. See Murphy *v.* Arrow [1897], 2 Q.B. 527.
(*g*) R. *v.* Rogier, 1 B. & C. 272; 2 D. & R. 431. Holroyd, J., said, that in his opinion it would have been sufficient merely to have alleged, that the defendants kept a common gaming-house. And see R. *v.* Taylor, 3 B. & C. 502.
(*h*) R. *v.* Dixon [1716]: Bac. Abr. *tit.* 'Nuisances' (A.): 10 Mod. 335: 3 Salk. 384. 1 Hawk. c. 92, s. 30, and see *ante*, Vol. i. p. 97.
(*i*) R. *v.* Wood, 3 B. & Ad. 657. See R. *v.* Oldfield, ibid. note (*a*). R. *v.* Fielden, ibid.; R. *v.* Constable, ibid. In the case of summary proceedings, if the prosecutor fails to proceed, the justices may allow others to take up the prosecution, 17 & 18 Vict. c. 38, s. 9.

punishment for keeping a common gaming-house is fine or imprisonment, or both (*j*), and by 3 Geo. IV. c. 114 (*k*), hard labour may be added to any imprisonment which the Court may award.

Statutes against Gaming-Houses.—The common law as to gaming-houses is supplemented by the following statutes :—

The Gaming Act, 1845 (8 & 9 Vict. c. 109) s. 2, declares and enacts that, 'in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house such as is contrary to law, and forbidden to be kept by the said Act of King Henry the Eighth (*l*) and by all other Acts containing any provision against unlawful games or gaming-houses.'

By sect. 4, 'The owner or keeper of any common gaming-house and every person having the care or management thereof, and also every banker, croupier, and other person who shall act in any manner in conducting the business of any common gaming-house, shall, on conviction thereof, by his own confession or by the oath of one or more credible witnesses before any two justices of the peace, beside any penalty or punishment to which he may be liable under the provisions of the said Act of King Henry the Eighth (*l*) be liable to forfeit and pay such penalty not more than £100 as shall be adjudged by the justices before whom he shall be convicted, or in the discretion of the justices before whom he shall be convicted may be committed to the house of correction with or without hard labour, for any time not more than six calendar months: and on non-payment of any penalty so adjudged and of the reasonable costs and charges attending the conviction the same shall be levied by distress and sale of the goods and chattels of the offender by warrant, under the hand and seal of one of the convicting justices.

'Provided always that nothing herein contained shall prevent any proceeding by indictment against the owner or keeper, or other person having the care or management of a common gaming-house (*m*): but no person who shall have been summarily convicted of any such offence shall be liable to be proceeded against by indictment for the same offence.'

This section does not bar an indictment at common law; and where proceedings are taken summarily under the section the defendant is entitled to elect to be tried on indictment (*n*).

Sects. 3, 6, 7, provide for search warrants, and search for and seizure of persons and gaming appliances found on the premises. By 17 & 18

(*j*) 1 Hawk. c. 92, s. 14, *et seq.* As to statutory penalties, *vide infra*.
(*k*) *Ante*, Vol. i. p. 212.
(*l*) 33 Hen. VIII. c. 9.
(*m*) See 25 Geo. II. c. 36, s. 8, *post*, p. 1902.
(*n*) 42 & 43 Vict. c. 49, s. 17, *ante*, Vol. i. pp. 17.

Vict. c. 38, s. 1, penalties are imposed for obstructing the entry of the police. The maximum penalty being six months, the accused may elect to be tried on indictment, 42 & 43 Vict. c. 49, s. 17 (*ante*, Vol. i. p. 17).

By sect. 5, 'It shall not be necessary in support of any information for gaming in or suffering any games or gaming in, or for keeping or using, or being concerned in the management or conduct of a common gaming-house to prove that any person found playing at any game was playing for any money, wager or stake' (*o*).

By sect. 8, 'Where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game (*p*), shall be found in any house, room, or place suspected to be used as a common gaming-house and entered under a warrant or order issued under the provisions of this Act (*q*), or about the person of any of those who shall be found therein, it shall be evidence until the contrary be made to appear, that such house, room, or other place is used as a common gaming-house, and that the persons found in the room or place where such tables or instruments of gaming shall have been found were playing therein, although no play was actually going on in the presence of the superintendent or constable entering the same, under a warrant or order issued under the provisions of this Act, or in the presence of those persons by whom he shall be accompanied as aforesaid: and it shall be lawful for the police magistrate, or justices before whom any person shall be taken by virtue of the warrant or order, to direct all such tables and instruments of gaming to be forthwith destroyed.'

The Gaming House Act, 1854 (17 & 18 Vict. c. 38), s. 1 imposes penalties on persons obstructing the entry of constables into suspected houses.

By sect. 2, 'Where any constable or officer authorized as aforesaid to enter any house, room, or place is wilfully prevented from or obstructed or delayed in entering the same or any part thereof, or where any external or internal door of or means of access to any such house, room, or place so authorized to be entered shall be found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same or any part thereof of any constable or officer authorized as aforesaid, or for giving an alarm in case of such entry, or if any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing, or destroying any instruments of gaming, it shall be evidence, until the contrary be made to appear, that such house, room, or place, is used as a common gaming-house within the meaning of this Act, and of the former Acts relating to gaming and that the persons found therein were unlawfully playing therein' (*r*).

(*o*) This section is in terms framed for summary proceedings, but it is submitted that it is equally applicable where the defendant elects to be tried on indictment.

(*p*) *Ante*, pp. 1895, 1897.

(*q*) Ss. 3, 6, *ante*, p. 1898.

(*r*) S. 3 imposes a penalty on a person arrested who gives a false name or address.

By sect. 4, 'Any person being the owner, or occupier, or having the use of any house, room, or place who shall open, keep, or use the same for the purpose of unlawful (*s*) gaming being carried on therein, and any person who being the owner or occupier of any house or room shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place may, on summary conviction thereof, before any two justices of the peace, be adjudged by such justices to forfeit and pay such penalty not exceeding £500 as to such justices shall seem fit, and may be further adjudged by such justices to pay such costs attending such conviction as to them shall seem reasonable (*t*) and if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding twelve calendar months' (*u*). Offences under this section may be tried on indictment at the election of the accused (*v*).

Sect. 4 does not make it an offence for a man to play an unlawful game for a single evening with friends in his own house (*w*), but has been held to extend to a shop in which automatic machines are kept for gaming (*x*).

The proprietor and four members of the committee of a club were held to have been rightly convicted under sect. 4, for keeping and using the club for the purpose of unlawful gaming, viz. *baccarat banque*. If the club were kept for a double purpose, namely, as a social club as well as a gaming-house, it nevertheless would be a house kept for the purpose of gaming (*y*), and it makes no difference that the use of the club is limited to the members, for it is not a public but a common gaming-house that is prohibited (*z*).

Merely playing at such a house is not assisting in keeping it (*a*). It is not necessary to prove any disorder or nuisance to neighbours in order to convict at common law or under these statutes for keeping a common gaming-house (*b*).

Summary penalties are imposed for allowing gaming or any unlawful game, *i.e.* the playing of any game for money or money's worth (*c*), on premises licensed for the sale of intoxicating liquor (*d*).

(*s*) The unlawfulness is for the Court to determine, not for the jury. R. *v.* Davies [1897], 2 Q.B. 199.

(*t*) The words omitted were repealed as to England in 1884 (47 & 48 Vict. c. 43, s. 4).

(*u*) S. 5 enables justices to require persons apprehended to be sworn and give evidence. S. 6 provides for giving certificates of indemnity against prosecution on persons so examined who make full discovery. Ss. 7 & 8, deal with levy and application of penalties. S. 9 permits the substitution of a new prosecutor for one who makes default; and s. 10 gives an appeal to Quarter Sessions.

(*v*) *Ante*, Vol. i. p. 17. R. *v.* Brown [1895], 1 Q.B. 119.

(*w*) R. *v.* Davies [1897], 2 Q.B. 199.

(*x*) Fielding *v.* Turner [1903], 1 K.B. 867.

(*y*) But see R. *v.* Cook, 13 Q.B.D. 377.

(*z*) Jenks *v.* Turpin, 13 Q.B.D. 505. Cf. R. *v.* Bradley, 1 Cr. App. R. 146, 151.

(*a*) Ibid.

(*b*) 8 & 9 Vict. c. 109, s. 2, *ante*, p. 1898: and cf. R. *v.* Rice, L.R. 1 C. C. R. 21. *ante*, p. 1892.

(*c*) Lockwood *v.* Cooper [1903], 2 K.B. 428.

(*d*) 35 & 36 Vict. c. 94, s. 17.

Betting Houses.—By the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1 (*e*), 'No house, office, room, or other place (*f*) shall be opened, kept, or used (*g*) for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting (*h*) with persons resorting thereto (*i*); or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race (*j*), or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place, opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance (*k*) and contrary to law.'

Sect. 1 creates two distinct offences (1) keeping houses, &c., to bet with persons resorting thither; (2) keeping houses to receive money on the terms and contingencies above stated (*kk*).

By sect. 2, 'Every house, room, office, or place opened, kept or used, for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of the Gaming Act, 1845' (*l*).

Sect. 3 provides for the summary conviction of the owner, occupier, &c., of a house used, &c., for the purposes mentioned in ss. 1 & 2; and for imposing imprisonment not exceeding six months (*m*). The defendant

(*e*) As to the history of this Act, see R. *v.* Cook, 13 Q.B.D. 377. Powell *v.* Kempton Park Race Course Co. [1899], A. C. 143, 191.

(*f*) This section is aimed at houses, &c., kept for ready money betting, not at the assembling of persons to bet with each other, and does not apply when members of a *bonâ fide* club bet with each other in the club. Downes *v.* Johnson [1895], 2 Q.B. 203. R. *v.* Corrie [1908], 68 J. P. 294. As to the meaning of the words 'other place,' see Powell *v.* Kempton Park Race Course Co. [1899], A. C. 143, where all prior decisions were reviewed and it was held that Tattersall's Ring on a race course was not another place within the section. R. *v.* Russell, 69 J. P. 247. McConnell *v.* Brennan [1908], 2 Ir. Rep. 411. Cf. 6 Edw. VII. c. 43, *ante*, p. 1896.

(*g*) Where a book-maker and his clerk were on several days using the bar and taproom of a public-house for the purpose of betting, and the keeper of the house was present and permitted such uses, he was held rightly convicted, although the book-maker and clerk did not occupy any specific place in the bar or taproom. Hornsby *v.* Raggett, 1892, 1 Q.B. 20. Cf. Troman *v.* Hodkinson [1903], 1 K.B. 30. R. *v.* Deaville [1903], 1 K.B. 468. Buxton *v.* Scott, 73 J. P. 133. If a man uses the bar of a public house to meet persons with whom he means to bet, he is guilty of an offence within the section, although the money is handed to him outside the house. R. *v.* Worton [1895], 1 Q.B. 227.

(*h*) *i.e.* entering into a betting contract. Bradford *v.* Dawson [1897], 1 Q.B. 307. It is not necessary to prove the actual making of bets in the house. (R. *v.* Worton, *ubi sup.*): nor that the money is received in the house, nor even in England. Stoddart *v.* Hawke [1902], 1 K.B. 353. A sweepstake is not betting. R. *v.* Hobbs [1898], 2 Q.B. 647.

(*i*) *i.e.* personally resorting, not merely sending letters or telegrams. R. *v.* Brown [1895], 1 Q.B. 119.

(*j*) *Vide* R. *v.* Crawshaw, Bell, 303.

(*k*) And indictable as such. R. *v.* Crawshaw, *ubi sup.*

(*kk*) Bond *v.* Plumb [1894], 1 Q.B. 169.

(*l*) R. *v.* Brown [1895], 1 Q.B. 119.

(*m*) As to s. 3, see R. *v.* Bradley, 1 Cr. App. R. 146; R. *v.* Hitchin, ib. 161. R. *v.* Cook, 13 Q.B.D. 377. S. 4 makes the owner, occupier, &c., of any such house, &c., who receives any money as a deposit on any bet on condition of paying any money on the happening of any event liable to summary conviction. As to sect. 5, see

may elect to be tried on indictment (*n*), and whether he does so or not the prosecutor may indict under sect. 1, as for a nuisance (*o*). The offence is liable at quarter sessions (*p*), and is subject to the Vexatious Indictments Act (*q*).

An offence under sect. 1, may be proved by shewing that the house was opened and advertised as a betting house, although no proof is given that any person actually resorted to it. But when the only evidence offered is that persons did resort to the house for the purpose of betting, it is not enough to shew that letters and telegrams were sent there by persons wishing to bet; and an actual physical resorting must be proved (*r*).

Sect. V.—Special Provisions Facilitating Prosecution of Disorderly Houses.

Prosecutions against persons keeping bawdy-houses, gaming-houses or other disorderly houses are facilitated by the Disorderly Houses Act, 1751 (25 Geo. II. c. 36). By sect. 5, if any two inhabitants of any parish or place, paying scot and bearing lot therein (*rr*), give notice in writing to the constable of the parish (or other peace officer of the like nature if there is no constable) of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable shall go with such inhabitants to a justice, and shall, upon such inhabitants making oath before the justice that they believe the contents of the notice to be true, and entering into a recognizance in twenty pounds each to give material evidence against the person for such offence, enter into a recognizance in the sum of thirty pounds to prosecute with effect at the next sessions or assizes as to the justice shall seem meet. Provision is also made for the payment by the overseers of the charges of prosecution to the constable, and of ten pounds on conviction to each of the two inhabitants (*s*). The person keeping such house, is also to be bound over to appear at the sessions or assizes (*t*).

Sect. 8 recites that 'by reason of the many subtile and crafty contrivances of persons keeping bawdy-houses, gaming-houses and other disorderly houses, it is difficult to prove who is the real owner or keeper thereof,' and enacts, 'that any person who shall appear, act, or behave himself or herself as master or mistress, or as the person having at any time the care, government, or management, of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as

Lennox *v.* Stoddart [1902], 2 K.B. 21. S. 7 imposes a penalty on persons exhibiting placards or advertising betting houses. The Act does not apply to advertisements offering information for the purpose of bets not to be made in any house, &c. Cox *v.* Andrews, 12 Q.B.D. 126; *vide* 37 & 38 Vict. c. 15. S. 11 empowers justices to authorize houses to be searched; and s. 12 empowers commissioners of metropolitan police to do the same.

(*n*) *Vide, ante*, Vol. i. p. 17.

(*o*) R. *v.* Brown [1895], 1 Q.B. 119.

(*p*) R. *v.* Charles, 31 L. J. M. C. 69.

(*q*) *Post*, p. 1926.

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

(*rr*) *i.e.* ratepayers of the parish.

(*s*) See Burgess *v.* Boetefeur, 7 M. & G. 481, an action on this section.

(*t*) By 58 Geo. III. c. 70, s. 7, a copy of the notice served on the constable is also to be served on one of the overseers, and the overseers may enter into a recognizance, and prosecute instead of the constable. In London the borough councils are now the overseers, and the notices are served on the town clerk. 62 & 63 Vict. c. 14.

such, notwithstanding he or she shall not, in fact, be the real owner or keeper thereof.' By sect. 10, no indictment for keeping a bawdy-house, gaming-house, or other disorderly house shall be removed by *certiorari*, but shall be tried at the same general or quarter sessions or assizes where it shall have been preferred (unless the Court shall think proper, upon cause shown, to adjourn the same), notwithstanding any such writ or allowance thereof. This section does not restrain the Crown from removing the indictment by *certiorari*; there being nothing in the Act to show that the legislature intended that the Crown should be bound by it (*u*). Where an indictment for keeping a disorderly house has been removed from the sessions into the Central Criminal Court under 4 & 5 Will. IV. c. 36, s. 16, either by the prosecutor or defendant, the opposite party may remove it into the High Court (*v*). But the power of the High Court to grant a *certiorari* at the defendant's instance to remove an indictment for keeping such a house found at quarter sessions, is taken away by 25 Geo. II. c. 36, s. 10, whether the prosecution be under that Act or in the ordinary course (*w*).

It is said that any number of persons may be included in the same indictment for keeping different disorderly houses, stating that they severally ' kept, &c., such houses (*x*); but it is usual in practice to indict the keeper of each house separately. It seems that in the indictment it is necessary to make a particular statement of the offence, which is the *keeping* of the house (*y*). But particular facts need not be stated; and though the charge is thus general, yet at the trial evidence may be given of particular facts, and of the particular time of doing them (*z*). It is not necessary to prove who frequents the house, for that may be impossible: but if any unknown persons are proved to be there behaving disorderly, it is sufficient to support the indictment (*a*).

Sect. VI.—Betting with and Loans to Infants.

By the Betting and Loans (Infants) Act 1892 (55 Vict. c. 4).

Sect. 1. '(1) If any one, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place, with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to

(*u*) R. *v.* Davies, 5 T. R. 626.

(*v*) R. *v.* Brier, 14 Q.B. 568. Short and Mellor, Cr. Pr. (2nd ed.) 16.

(*w*) R. *v.* Sanders, 9 Q.B. 235: 15 L. J. M.C. 158. Short & Mellor Cr. Pr.(2nd ed.)24.

(*x*) 2 Hale, 174, where it is said: 'It is common experience at this day that twenty persons may be indicted for keeping disorderly houses or bawdy-houses; and they are daily convicted upon such indictments, for the word *separaliter* makes them several indictments.' And in R. *v.* Kingston and others, 8 East, 41, it was held that it was no objection on *demurrer* that several different defendants were charged in different counts of an indictment for offences of the same nature; though it might be a ground for application to the discretion of the Court to quash the indictment.

(*y*) I'Anson *v.* Stuart, 1 T. R. 754, Buller, J.

(*z*) Clarke *v.* Periam, 2 Atk. 339, Lord Hardwicke.

(*a*) I'Anson *v.* Stuart, 1 T. R. 754, Buller, J.

any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

'(2) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned, names or refers to any one as a person to whom any payment may be made, or from whom information may be obtained, for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of, the sending of such document.'

By sect. 2. '(1) If any one, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money, or to enter into any transaction involving the borrowing of money, or to apply to any person or at any place with a view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

'(2) If any such document as above in this section mentioned sent to an infant purports to issue from any address named therein, or indicates any address as the place at which application is to be made with reference to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to and was wholly ignorant of the sending of such document.'

By sect. 3, 'If any such circular, notice, advertisement, letter, telegram, or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education, and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.'

By sect. 5 of the Moneylenders Act, 1900 (63 & 64 Vict. c. 51), 'where

in any proceedings under sect. 2 of the Betting and Loans (Infants) Act, 1892, it is proved that the person to whom the document was sent was an infant, the person charged shall be deemed to have known that the person to whom the document was sent was an infant unless he proves that he had reasonable ground for believing the infant to be of full age.'

By sect. 4 of the Act of 1892, 'If any one, except under the authority of any court, solicits an infant to make an affidavit or statutory declaration for the purpose of or in connexion with any loan, he shall be liable, if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine, and if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds.'

By sect. 5, 'If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.

'For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan.'

By sect. 6, 'In any proceeding against any person for an offence under this Act such person and his wife or husband, as the case may be, may if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case' (*c*).

Sect. VII.—Lotteries (*d*).

By an Act of 1699 (10 Will. III. c. 23) (*e*), all *lotteries* are declared to be public nuisances; and all grants, patents, and licences for such lotteries to be against law (*f*). The Gaming Act, 1802 (42 Geo. III. c. 119) declares all games or lotteries called little-goes to be common and public nuisances and against law (sect. 1). By sect. 2, no person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, shew, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little-go or any other lottery whatsoever not authorized by act of Parliament (*g*), or shall knowingly suffer to be exercised,

(*c*) As to this section, see *post*, pp. 2275, 2276.

(*d*) See Parl. Pap. 1908 (c. 275).

(*e*) 10 & 11 Will. III. c. 17, in Ruffhead.

(*f*) In the 18th century and the early part of the 19th century many State Lottery Acts were passed to regulate offices for lotteries in aid of government funds. See those Acts collected, Burn's Justice, *tit.* 'Gaming.' Of those Acts all that remain unrepealed are 9 Anne, c. 6, s. 57; 8 Geo. I. c. 2, ss. 36, 37; 9 Geo. I. c. 19; 6 Geo. II. c. 35; 12 Geo. II. c. 28 (E.).

(*g*) The Art Union Act, 1846 (9 & 10 Vict. c. 48) is the only statute in force authorizing anything in the nature of a lottery.

kept open, shewn, or exposed to be played, drawn, or thrown at or in, either by cards, etc. (*ut supra*), any such game or lottery, in his or her house, room, or place upon pain of forfeiting for every such offence £500 (*h*) . . . . and every person so offending shall be deemed a rogue and vagabond under 17 Geo. II. c. 5. The use of a place on a single occasion to draw tickets is not an offence within the section (*i*).

The Lotteries Act, 1823 (4 Geo. IV. c. 60) (*j*), makes punishable as rogues and vagabonds persons (*jj*) who sell tickets, &c., in lotteries authorized by foreign potentates or states or to be drawn in a foreign country, or who publish schemes for the sale of tickets or chances in lotteries (sect. 41) (*k*), and defines the meaning of place in 27 Geo. III. c. 1 and 42 Geo. III. c. 119, as 'any place in or out of an enclosed building or premises whether upon land or water, where such illegal practices or anything relating thereto shall be carried on or attempted to be carried on (sect. 60) (*l*).

By the Lotteries Act, 1836 (6 & 7 Will. IV. c. 66) the advertising of foreign and other illegal lotteries entails a penalty of £50, *recoverable by information in the name of the Attorney-General* (*m*).

A lottery in which tickets were drawn by subscribers of a shilling, which entitled them at all events to what was professed to be a shilling's worth of goods, and also to the chance of certain bonuses of goods of greater value than the shilling, is an illegal lottery within the statute (*n*).

An indictment lies under the acts of 1699 and 1802 for keeping a lottery (*o*).

Little-goes are now unknown, but the statutes are continually enforced against persons inventing schemes for the distribution of prizes by lot or chance (*p*) without any exercise of skill or judgment (*q*). The Act of 1802 has been held to apply to a lottery in which tickets were drawn by subscribers of a shilling each which entitled them at all events to

(*h*) Cf. 21 Geo. III. c. 14, s. 60 (1). The £500 may be recovered at the suit of the Attorney-General in the High Court (K.B. D., revenue side). 17 Geo. II. c. 5, was repealed by the Vagrancy Act, 1824, but by s. 21 that Act is applied to 42 Geo. III. c. 119. ss. 3–6 of the Act of 1802 contain further provisions for the 'suppression of such lotteries.'

(*i*) Martin *v.* Benjamin [1907], 1 K.B. 64. It might be an offence within s. 2 of the Act of 1699, ib.

(*j*) This Act authorized a state lottery; but by s. 19 provided that the sections referred to in the text should remain in full force after the determination of other powers in the Act. Most of the Act was repealed in 1873 (36 & 37 Vict. c. 91).

(*jj*) For other punishments, see s. 67. 'Person' in s. 41 does not include a body corporate. Hawke *v.* Hulton Ltd. (1909), 2 K.B. 93. The Court refrained from deciding whether a corporation fell within s. 62 of the Act.

(*k*) See Martin *v.* Benjamin [1907], 1 K. B. 64.

(*l*) S. 61 makes persons employing others in illegal transactions liable as rogues and vagabonds (cf. 42 Geo. III. c. 119, s. 4). S. 67 provides for whipping on a second conviction. Ss. 37, 38 authorize the issue of warrants for search of the premises of 'lottery insurers.'

(*m*) 8 & 9 Vict. c. 74, ss. 3 and 4, amending in this respect the Act of 1836. Foreign lotteries are also dealt with by 9 Geo. I. c. 19, and 6 Geo. II. c. 35.

(*n*) R. *v.* Harris, 10 Cox, 352.

(*o*) R. *v.* Crawshaw, Bell, 303: 30 L. J. M. C. 58.

(*p*) Barclay *v.* Pearson [1893], 2 Ch. 154. The acts do not apply to settling by lot the shares of co-owners (O'Connor *v.* Bradshaw, 5 Cox, 882), nor to a society making certain of its members entitled to particular benefits by the process of periodical drawings. Wallingford *v.* Mutual Society, 5 App. Cox, 685. This mode of distribution by building societies is unlawful (47 & 48 Vict. c. 47, s. 12).

(*q*) Caminada *v.* Hulton, 60 L. J. M. C. 116. Stoddart *v.* Sagar [1895], 2 Q.B. 474. Cox *v.* Hall [1899], 1 Q.B. 198.

what professed to be a shilling's worth of goods, and also to the chance of bonuses of goods worth more than a shilling (*r*).

It has also been held to apply where a man sold packets of tea which were advertised to, and actually did, each contain a coupon entitling the buyer to a prize, but the prizes varied in character and value (*s*). And where the proprietor of a newspaper published a paragraph in which the last word was omitted, and invited the readers of the paper to fill in the missing word and send it to the office of the paper with a shilling for each guess, and promised that the whole of the money received should be divided among the successful competitors (*t*). The Act also applies to sweepstakes on horse races or like events (*u*), to the distribution of coins in packets of sweets (*v*), and to the distribution of medals entitling the holder in certain events to a money prize (*w*), and to dealing in premium bonds issued by foreign states or cities (*x*), and to limerick competitions (*y*). But where a newspaper proprietor published a weekly racing record at the end of which there was a coupon to be cut off by the purchaser, and filled up with the names of horses which the purchaser thought would win the races therein named, and then sent to the newspaper office where prizes were given to the persons who selected the greatest number of winners, it was held that this was not a lottery nor did it amount to illegal betting (*z*).

This last ruling has been explained or justified on the grounds (1) that there was opportunity for the exercise of skill; and (2) that *primâ facie* the consideration paid was for the newspaper and that there was no finding that it was paid for the coupon (*a*).

(*r*) R. *v.* Harris, 10 Cox, 352. Cf. Morris *v.* Blackman, 2 H. & C. 912, 1 (tickets for musical entertainment at which presents were distributed).
(*s*) Taylor *v.* Smetten, 11 Q.B.D. 207.
(*t*) Barclay *v.* Pearson, *ubi sup.*
(*u*) Hardwick *v.* Lane [1904], 1 K.B. 202, cf. Hunt *v.* Williams, 52 J. P. 821.
(*v*) Barrett *v.* Burden, 63 L. J. M. C. 33.
(*w*) Willis *v.* Young [1907], 1 K.B. 448.
(*x*) Re International Securities Co., (1908). 24 T. L. R. 837.
(*y*) Blyth *v.* Hulton, 24 T. L. R. 719.
(*z*) Caminada *v.* Hulton, *ubi sup.*
(*a*) R. *v.* Stoddart [1901], 1 K.B. 177, 184, Alverstone, C.J.

CANADIAN NOTES.

NUISANCES BY CAUSING DISORDER.

Sec. 3(a).—Bawdy Houses.

Common Bawdy House Defined.—See Code sec. 225 (amended 6 & 7 Edw. VII. ch. 8.

The term "house of ill-fame" is synonymous with "bawdy house." Century Dict., *verb*, "house."

The common law punishment was by fine or imprisonment, but without hard labour.'

Bawdy House Defined.—The statutory definition of a "common bawdy house" contained in this section of the Code is intended merely to define the nature of the premises within which a bawdy house may be kept, and not as stating what acts constitute such keeping. R. v. Osberg, 9 Can. Cr. Cas. 180; R. v. Mannix, 10 Can. Cr. Cas. 150, 10 O.L.R. 303.

In The King v. Shepherd (1902), 6 Can. Cr. Cas. 463, Townshend, J., of the Supreme Court of Nova Scotia, held that a conviction by a magistrate on a summary trial for keeping a common bawdy house need not specify the location of the house further than to shew that it was at a place within the jurisdiction of the Court, and that a conviction for keeping a common bawdy house is sufficient without the addition of particulars shewing what part of the statutory definition here given is the basis for the adjudication. But in the same case, upon another writ of habeas corpus, Weatherbe, J., held that this section enlarges the meaning of the term "common bawdy house," and that it is necessary that a conviction for keeping "a disorderly house, that is to say a bawdy house," should shew further particulars of the offence by specifying what was the subject of the keeping for purposes of prostitution, *i.e.*, whether a "house," "room," "set of rooms," or other "place," so as to come within the definition.

A tent, shed or camp, or other place, may be brought within the Act, provided it be used for the purpose as defined by the Act. 9 Am. & Eng. Encyc. of Law (2nd ed.), p. 512; R. v. Shepherd (1902), 6 Can. Cr. Cas. 463.

Keeping Common Bawdy House.—See Code sec. 228.

Bawdy House.—The offence of keeping a common bawdy house may be proceeded with by indictment under sec. 228, which authorizes one

year's imprisonment therefor; or proceedings may be taken under the "summary trials" clauses, secs. 773 and 774, the latter section giving to the magistrate under Part XVI. an absolute jurisdiction in respect of that offence, independently of the consent of the accused. Such magistrate proceeding under sec. 774 may impose imprisonment with or without hard labour for any term not exceeding six months or may impose a fine not exceeding with the costs in the case, $100, or to both fine and imprisonment not exceeding such sum and term; and such fine may be levied by warrant of distress or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed for a further term not exceeding six months unless such fine is sooner paid. Sec. 781. These provisions are in addition to the special powers given by sec. 777 to police and stipendiary magistrates of cities and incorporated towns, and to recorders exercising judicial functions, authorizing them to try any offence for which in Ontario the accused might be tried by a Court of General Sessions and to impose the same punishment as might be imposed by that Court, but where the magistrate has jurisdiction only by virtue of sec. 777 no person shall be summarily tried thereunder without his consent. Section 777(2). The result appears to be that the magistrate having authority under both secs. 773 and 777 may, without the consent of the accused, try the offence of keeping a bawdy house, but is then restricted to the penalty provided by sec. 781; but if the trial be with the consent of the accused, the latter preferring to consent rather than defend a like charge by indictment before a Court and jury, sec. 781 will not then apply, sec. 777(3), and the punishment may be as onerous as could be imposed on indictment under sec. 228. In the Province of Ontario the powers conferred by sec. 777 may also be exercised by a police or stipendiary magistrate "in any county, district or provisional county in such province." Sec. 777(1); Canada Criminal Code (Tremeear) 157.

This jurisdiction of summary trial relates to the keeping of common bawdy houses mentioned in Code sec. 225 which is a criminal and indictable offence. R. v. Bougie, 3 Can. Cr. Cas. 491.

By the vagrancy clauses, Code secs. 238 and 239, a summary conviction is authorized with a fine not exceeding $50 or imprisonment with or without hard labour for any term not exceeding six months, or both fine and imprisonment, for the offence of keeping a bawdy house (sub-sec. (*j*) of sec. 238) or house for the resort of prostitutes.

Where there is nothing upon the face of a conviction for keeping a house of ill-fame to shew whether the police magistrate who tried the case acted under the "summary trials" clauses of the Code, by virtue of which he has an absolute jurisdiction in respect of that offence, or simply as a justice of the peace under the "summary convictions" clauses and of Code secs. 238 and 239, and the conviction is defective in

form, but is amendable if within the "summary conviction" clauses and not amendable if under the "summary trials" clauses, the Court will treat it as a "summary conviction" and correct the same under Code sec. 1124, by reducing the term of imprisonment where the sentence is in excess of that authorized by law. R. v. Spooner (1900), 4 Can. Cr. Cas. 209 (Ont.).

A prosecution against the keeper of a common bawdy house may be brought either by indictment or under the summary trials procedure, or the keeper may be charged as a vagrant under the summary convictions procedure, and neither the provision for summary trial nor that for summary conviction abrogates the right of the Crown to bring an indictment. The different methods of procedure with the varying penalties dependent upon the class of tribunal selected are not inconsistent but are alternative. The King v. Sarah Smith, 9 Can. Cr. Cas. 338 (N.S.).

A charge of "keeping a bawdy house for the resort of prostitutes" charges one offence only, although keeping a bawdy house is in itself an offence, and so also under Code sec. 238(*j*), is the keeping of a house for the resort of prostitutes. R. v. McKenzie, 2 Man. R. 168.

Evidence in Bawdy House Cases.—A conviction should not be made upon a charge of keeping a bawdy house upon evidence of general reputation only, and the prosecution should be required to produce proof of acts or conduct from which the character of the house may be inferred. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont. C.A.).

Though the charge is a general one, yet at the trial evidence may be given of particular facts and the particular time of doing them. Witnesses who speak simply to a general reputation without being able to point to anything particular, may easily attribute the character of a common bawdy house or a house of ill-fame to a house to which the law does not affix that character, however irregular may be the life of its inmates. R. v. St. Clair, *supra*.

The owner of a house who leases it to another person knowing and assenting when the lease was made to the purpose of the latter to maintain it as a common bawdy house, thereby does an act for the purpose of aiding the lessee to commit the indictable offence of keeping a disorderly house, and he may be indicted and convicted as a principal under sec. 69. R. v. Roy (1900), 3 Can. Cr. Cas. 472.

Appearing as the Keeper.—The sub-section as to acting or appearing as the mistress of the house, originated in the English Disorderly Houses Act, 1751, 25 Geo. II. ch. 36. By sec. 8 of that statute it was enacted that any person who shall appear, act or behave himself or herself as master or mistress, or as the person having the care, government, or management of any bawdy house, gaming house, or other disorderly house, shall be deemed and taken to be the keeper thereof,

and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not be in fact the real owner or keeper thereof.

In R. v. Spooner (1900), 4 Can. Cr. Cas. 209, a plea of guilty to the charge of "*appearing* the keeper of a house of ill-fame" was held equivalent to an admission that the accused kept a house of ill-fame. It is submitted, however, that these words used in a charge do not charge an offence known to the law, and while one who appears to have the management of the house is deemed to be the keeper, the offence is the keeping and not appearing to keep.

Appeal from Summary Trial of Bawdy House Case.—When the offence of keeping a disorderly house, house of ill-fame or bawdy house is tried in any of the provinces under the summary trials Part, an appeal shall lie from a conviction for the offence in the same manner as from summary convictions under Part XV., and all provisions of that Part relating to appeals shall apply to every such appeal: Provided that in the Province of Saskatchewan or Alberta there shall be no appeal if the conviction is made by a Judge of a superior Court. Code sec. 797.

Obstructing Entry of Peace Officer.—See Code sec. 230 (amended by 8 & 9 Edw. VII. ch. 9).

Sec. 3(b).—Gaming Houses.

Common Gaming House Defined.—Code sec. 226.

Proof that a game with cards, dice and "chips" was being played by several people seated at tables, each player procuring the "chips" from the accused, the proprietor of the place, and handing over to him the money therefor and that the accused said that the game was "fan tan" and that he was "doing well out of it," is evidence that the game was a game of chance and that the place was being kept by the accused "for gain" under Code secs. 196 and 198. R. v. Mah Kee (1905), 9 Can. Cr. Cas. 47 (N.W.T.).

Proof that persons other than those resident at or belonging to the house, room or place at which the proprietor operates for gain a game of chance or a mixed game of chance and skill, were in attendance there and participated in such game is evidence that such persons "resorted" to such place for the purpose of playing such game, and of the place being a common gaming house under secs. 226 and 228. *Ibid.*

The keeping of a house, room or place for playing a game of chance or mixed game of chance and skill in which the chances of the game are in favour of the player who is the dealer or banker therein for the time being, is an indictable offence under secs. 226 and 228, if the position of dealer or banker passes from one player to another by the

chances of the game and not by rotation. R. v. Petrie (1900), 3 Can. Cr. Cas. 439 (B.C.).

A magistrate might reasonably decide that a room was a common gaming house if it is commonly used or adopted for gaming, frequented by many people promiscuously, especially if by many various persons, by a fortuitous concourse, or without the necessity of any direct or personal invitation from the occupier or other person legally entitled to the sole enjoyment of the room or place, and if thereby a general opportunity of gaming was afforded though without any fixed intention or invitation to do so. Per Begbie, C.J., in R. v. Ah Pow (1880), B.C.R., pt. 1, p. 152.

Such an establishment will be a common gaming house though a large part of the general public are excluded by keys or watch-words, or in any other manner. *Ibid;* R. v. Laird (1894), 3 Rev. de Jur. (Que.) 389.

Euchre is a game of chance, and not a game of mere skill. R. v. Laird (1903), 7 Can. Cr. Cas. 318 (Ont.).

The proprietor of a place in which the game known as "darts" is carried on under conditions which make the chances of the proprietor much more favourable than that of the customers is properly convicted of keeping a gaming house. R. v. Cashen (1906), 11 Can. Cr. Cas. 183 (N.S.).

It is a question of fact and not of law whether the use of a slot machine for selling cigars, whereby customers obtained for the one price a number of cigars varying according to the working of the machine, is or is not a game of chance, a mixed game of chance and skill, or a game of skill only. The King v. Fortier (1903), 7 Can. Cr. Cas. 417 (Que.).

The proprietor of a place in which a cane and ring game is carried on under conditions which make the chances of the proprietor much more favourable than that of the customer is properly convicted of keeping a gaming house. The King v. Russell, 11 Can. Cr. Cas. 180.

In R. v. James (1903), 6 O.L.R. 35, 7 Can. Cr. Cas. 196, the defendant was indicted for keeping a common gaming house. The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing "poker." Out of the stakes on most of the hands a sum of five cents was withdrawn to cover the expenses of refreshments consumed by the players. No charge was made for the use of the room. The "rake-off" did not more than cover a fair price for the refreshments. The proprietor or manager derived an indirect advantage from the sale of cigars to the players, from 50 to 100 being sold to them in the course of a night's play. Held, that "gain" may be derived indirectly as well as directly; that by what the defendant allowed to be done in the room

mentioned, the profits of his usual business were increased more or less owing to the sale of the goods in which he dealt, and so he might be found to have kept the room for gain, though the gain was confined to the profits on the cigars which he sold to the players. The question of what is a keeping for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players. R. v. James (1903), 6 O.L.R. 35, 7 Can. Cr. Cas. 196. And see R. v. Brady (1896), 10 Que. S.C. 539.

The decision in R. v. Saunders (1900), 3 Can. Cr. Cas. 495, must now be considered as overruled by the decision in R. v. James, *supra.*

Even if the Provincial Legislature of Ontario has authority to authorize municipalities to pass by-laws "for suppressing gambling houses," a municipal by-law assuming to prohibit a person from allowing a game of cards to be played for money in his house is invalid as being in excess of the power delegated. R. v. Spegelman (1904), 9 Can. Cr. Cas. 169. The older provinces may still have special laws passed before Confederation and not repealed which as to them are portions of the criminal law.

In Manitoba it has been held that the offence of keeping a common gaming house is an offence against the general criminal law, and that consequently it can be dealt with only by the Parliament of Canada, and cannot be made an offence by a provincial statute or by a municipal by-law passed under the authority of such a statute. Reg. v. Shaw, 7 Man. R. 518.

Common Betting House Defined.—See Code sec. 227.

Opium Joint, Definition of.—See Code sec. 227(*a*).

Opium Joint, Searches in.—See Code sec. 642(*a*).

(Added 8 & 9 Edw. VII. ch. 9.)

A movable booth used on the race course of an incorporated association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in sec. 227, and the bookmaker using it is properly convicted of keeping a common betting house. Sub-sec. 2 of sec. 235, which exempts from the provisions of the main section (dealing with the recording or registering in bets, etc.), bets made on the race course of an incorporated association does not apply to the offence of keeping a common betting house. The King v. Saunders, 12 Can. Cr. Cas. 33, affirmed by Supreme Court of Canada, 12 Can. Cr. Cas. 174, *sub nom.* Saunders v. The King.

It is an offence under the Criminal Code to keep a common betting house whether or not it is kept on the race course of an incorporated association, and is operated only during the actual progress

of a race meeting. R. v. Hanrahan (1902), 5 Can. Cr. Cas. 430, 3 O.L.R. 659; Walsh v. Trebilcock, 23 Can. S.C.R. 695.

In order to constitute a "place" within the meaning of section 227 of the Criminal Code, there must be a measure of fixity, localization and exclusive right of user. The defendants were two of a number of bookmakers who, on payment of the usual entrance fee, were admitted, along with the general public, to a fenced enclosure owned and controlled by the Ontario Jockey Club, an incorporated racing association. These bookmakers laid bets from day to day, through their assistants, with members of the general public attending the races. They did not use any desk, stool, umbrella, tent or booth, or erection of any kind to mark any place where bets were made, and no part of the general enclosure was especially allocated to them, nor did they occupy a fixed position, but during each race stood as much as possible about the same spot within a radius of from five to ten feet. The betting operations were carried on in the same method as in the case of Rex v. Saunders, except that in that case the bookmakers used a wooden box or booth, moved about on castors from one part of the grounds to another during the progress of the race meeting.

Held, that the defendants did not occupy a "house, office, room or other place" within the meaning of section 227 of the Criminal Code, and were, therefore, not guilty of the offence of keeping a "common betting house" under section 228 of the Code. (Powell v. Kempton Park Racecourse Co. (1899), A.C. 143, followed, and Rex v. Saunders (No. 2) (1907), 12 Can. Cr. Cas. 174, 38 S.C.R. 382, distinguished.) R. v. Moylett (1907), 15 O.L.R. 348.

Incorporated Jockey Club.—Mere acquiescence by a director in prohibited acts of a corporation is not such a participation therein as will constitute him an aider or abettor or make him criminally liable as a party under Code sec. 69 for the illegal acts of the corporation. And the lease by an incorporated jockey club of the betting privileges at the race tracks of the club with the knowledge and acquiescence of the club's president in the making of the lease and in the use of the covered betting inclosure by bookmakers exercising its privileges but without his taking part otherwise in the betting or in the management of the enclosure, does not involve the club's president in criminal liability as the keeper of a common betting house under Code secs. 227 and 228. R. v. Hendrie, 10 Can. Cr. Cas. 298, 11 O.L.R. 202.

Betting—Deposit of Post-dated Cheques.—Where two parties enter into a voidable betting or gaming contract, each putting up his own cheque post-dated the day on which the result of the bet would be ascertained, the fact that the loser's cheque was dishonoured because he had no account at the bank will not support a charge that he ob-

tained the execution of the winner's cheque delivered to the stakeholder for a like amount by false pretences with intent to defraud. The giving of a post-dated cheque implies no more than a promise to have sufficient funds in the bank on the date thereof and is not, in itself, a false representation of a fact past or present. Intent to defraud could not be found because the complainant was legally entitled to withdraw from the voidable contract even after the event upon which the bet was placed. R. v. Richard, 11 Can. Cr. Cas. 279.

"In Canada or Elsewhere."—Betting in Canada upon a horse race run in the United States is prohibited by this section. R. v. Giles, 26 O.R. 586.

A bank, a telegraph office, and another office were simultaneously opened in a town. Moneys were deposited in the bank by various persons, who were given receipts therefor in the name of a person in the United States, which receipts were taken to the telegraph office, where information as to horse races being run in the United States was furnished to the holders of the receipts, who telegraphed instructions to the person there for whom the receipts were given to place, and who placed bets equivalent to the amounts deposited on horses running in the races, and on their winning the amounts won were paid to the holders of the receipts at the third office by telegraphic instructions from the persons making the bets in the United States. Held, on the evidence and admission to the above effect, that the defendant, who kept the telegraph office, was properly convicted of keeping a common betting house. R. v. Osborne (1896), 27 O.R. 185.

Keeping Disorderly House, Gaming House or Betting House.—See Code sec. 228.

Playing or Looking on in Gaming House.—See Code sec. 229.

Looking on in Common Gaming House.—A notice of appeal purporting to be from a summary conviction for "looking on" while another person was playing in a common gaming house is not a good notice of appeal from a conviction for "playing" in a common gaming house. R. v. Ah Yin (No. 1), 6 Can. Cr. Cas. 63, 9 B.C.R. 319.

A summary conviction based upon the uncorroborated evidence of an accomplice who is shewn to have received money to testify against the accused is properly set aside on appeal. R. v. Ah Jim, 10 Can. Cr. Cas. 126.

Preventing Search or Entry by Peace Officer.—Code sec. 230.

Gaming in Stocks or Merchandise.—See Code sec. 231.

In Ontario.—Until the passing of the original statute, 51 Vict. ch. 42(D.), "An Act respecting gaming in stocks and merchandise," such transactions were perfectly valid, whether they were simple wagers or not, because they did not come within the Statute of Anne, not being in connection with games or pastimes. They were thus legal

in Ontario, wager or no wager. This was decided in Bank of Toronto v. McDougall, 28 U.C.C.P. 345, an action on a bill of exchange in respect of what was really gambling in differences.

Evidence.—Three essential elements must co-exist in order to constitute an offence under the provisions of this section: (1) having an intent to make gain or profit; (2) making or signing contracts purporting to be for the sale or purchase of certain commodities; (3) absence of a *bonâ fide* intention to make or receive delivery of such commodities. R. v. Dowd, 4 Can. Cr. Cas. 170.

In British Columbia Stock Exchange v. Irving, 8 B.C.R. 186, an action by brokers against a customer, claiming payment for stock transactions, it was held that as no stock was ever delivered or intended to be delivered, and as the intent was to make a profit from the fluctuations of the stock market, the transactions were illegal as being a breach of this section of the Code, and that the plaintiff could not recover.

A person who acts as agent for another in managing a branch office for gambling transactions in stocks within sec. 231, knowing that there was no intention of transferring any property or title to property, is liable to conviction as an accessory under Code sec. 69, although his sole interest in the transactions was in the commissions paid to him for effecting the same. Such agent is also liable under Code sec. 231 as the keeper of a common gaming house, and upon a "speedy trial" is liable to imprisonment for five years under Code sec. 1052. Upon a trial under this section for unlawfully making gaming contracts by conducting bucket shop transactions in stocks, it is open for the jury (or the Judge trying the case without a jury), to find, notwithstanding the form of the papers which passed between the parties, that there was a secret understanding between them that there should be no delivery of the stocks or property, but payment of differences only. But the reception of opinion testimony as to the illegality of the transactions is improper. R. v. Harkness (No. 2), 10 Can. Cr. Cas. 199.

Pearson v. Carpenter (1904), 35 Can. S.C.R. 380, was a civil action in which this section was considered. Pearson speculated on margin in stocks, grain, etc., through C. & Son, brokers in Toronto, and in March, 1901, directed them to buy 30,000 bushels of May wheat at stated prices. The order was placed with a firm in Buffalo and the price going down C. & Son forwarded money to the latter to cover the margins. P. having written the brokers to know how he stood in the transaction received an answer stating that "no doubt the wheat was bought and has been carried, and whether it has or not our good money has gone to protect the deal for you" on which he gave them his note for $1,500 which they represented to be the amount so advanced. Shortly after the Buffalo firm failed and Pearson became

satisfied that they had only conducted a bucket shop and the transaction had no real substance. He accordingly repudiated his liability on the note and C. & Son sued him for the amount of the same. Held (Davies and Killam, JJ., dissenting), that the evidence shewed that the transaction was not one in which the wheat was actually purchased; that C. & Son were acting therein as agents for the Buffalo firm; that the transaction was not completed until the acceptance by the firm in Buffalo was notified to Pearson in Toronto; and being consummated in Toronto it was within the terms of sec. 201 now 231 of the Code and plaintiff could not recover.

Frequenting Bucket Shops.—See Code sec. 233.

Gambling in Public Conveyances.—See Code sec. 234.

Betting and Pool-selling.—Code sec. 235.

A trotting match for fifty pounds between two horses driven in harness in sleighs on the ice was held to be a legal race within previous statutes. Fulton v. James, 5 U.C.C.P. 182.

And where two persons stake money on a bet between themselves on the result of a boat race, the custodian is not criminally liable because of the exemption above stated.

Race Track Betting.—The provisions of the section shall not extend to "bets made on the race course of any incorporated association during the actual progress of a race meeting." It was held that an agreement for the sale of betting and gaming privileges at a race meeting by an incorporated association who were the lessees of an incorporated association owning the race course, was legal. Stratford Turf Association v. Fitch (1897), 28 O.R. 579. If the sale of the betting privileges be taken as a contract to permit the keeping of a common gaming house by operating bookmakers' booths in violation of the law as declared by the Supreme Court of Canada, the decision in Stratford Turf Association v. Fitch must now be considered as overruled by Saunders v. R., 12 Can. Cr. Cas. 174.

It yet remains to be authoritatively decided whether the betting operations known as "bookmaking" can legally be carried on by professional gamblers at a race track during the races gambled upon, if the "booth" is dispensed with and the "bookmaker" keeps moving in the crowd displaying a card containing the odds he offers and recording his bets in a memorandum book, and consequently has not the exclusive use of any part of the enclosure. See R. v. Moylett, 10 O.W.R. 803.

Lawful Race or Game.—In New Brunswick it has been decided that betting on a foot race is not illegal there being no legislation either federal or provincial to make it so and it being lawful at common law. Seely v. Dalton (1904), 36 N.B.R. 442.

Sec. 7.—Lotteries.—See Code sec. 236.

Province Cannot Authorize.—Provincial Legislatures have no power to authorize the running of lotteries; and no action can be maintained for the recovery of money under a contract for the operation of a lottery scheme which would contravene the criminal law. Brault v. St. Jean Baptiste Association (1900), 4 Can. Cr. Cas. 284 (S.C. Can.).

In an Ontario case the complainant went to the defendant's place of business, and having been told by defendant that in certain spaces on two shelves there were in cans of tea, a gold watch, a diamond ring, or $20 in money, he paid $1 and received a can of tea, which, containing an article of small value, he handed the can back, paid an additional 50 cents and received another can, which also contained an article of small value; he handed this can back also, paid another 50 cents and received another can which also contained an article of small value. It was held that the object really sought for, and for the chance of obtaining which the money was paid was one of the three prizes named; and that the transaction constituted an offence. R. v. Freeman (1889), 18 Ont. R. 524.

But the offer of prizes to the nearest guesser of the number of beans contained in a jar exhibited to view is not a lottery, as it is a matter of judgment or skill and not of chance. R. v. Dodds (1884), 4 O.R. 390.

And where a shopkeeper placed in his shop window a jar containing a number of buttons of different sizes, and advertised a prize of a pony and cart, which he exhibited in his window to the person who should guess the number nearest to the number of buttons in the jar, stipulating that the successful one should buy a certain amount of his goods; this was held not to be a "mode of chance" for the disposal of property within the meaning of the Lottery Act, as the approximation of the number of buttons depended upon the exercise of judgment, observation and mental effort. R. v. Jamieson (1884), 7 O.R. 149.

The advertising by a firm of shopkeepers in a newspaper of a prize to be awarded to the one of their customers who could make the nearest guess to the number of their cash sales on a given day, is not a violation of this section. R. v. Fish, 11 Can. Cr. Cas. 201.

Defendant company, as a means of advertising their soap at an exhibition held at St. John, offered a piano as a prize for the person guessing the correct weight or the nearest to the correct weight of a large cake or block of soap exhibited at the said exhibition. The guessing was free and all persons who desired to guess were provided with coupon tickets upon which to mark their guesses. The tickets were deposited, or were supposed to be deposited, in a box, and the corres-

ponding coupons retained by the respective guessers. The plaintiff guessed within a shade of the correct weight, and after the soap had been weighed presented her coupon with her guess marked thereon, but the judges could not find her ticket in the box and awarded the prize to another person whose guess was not so near the correct weight as the plaintiff's. Plaintiff afterwards brought an action for breach of contract. It was held by the Supreme Court of New Brunswick on demurrer to plaintiff's declaration, that the competition was not a lottery within the meaning of the Criminal Code, and that the exercise of judgment required in the guessing was a sufficient consideration to support the contract. Dunham v. St. Croix Soap Co. (1897), 33 Can. Law Jour. 444.

The sale of lottery tickets is an offence, whether made for profit or not. R. v. Parker, 9 Man. R. 203.

A competition for a prize offered for the nearest estimates of the number of votes to be cast at a coming election and the sale of certificates of admission thereto in consideration of money paid or services performed does not constitute a lottery offence under Code sec. 236. R. v. Johnston (1902), 7 Can. Cr. Cas. 525.

Lottery—Proceedings Against Corporation.—In the Province of Alberta which has no grand jury system, a corporation may be compelled to answer to an indictable offence (*ex gr.* conducting a lottery scheme) by a formal written charge in lieu of an indictment, such charge being laid by the Attorney-General or by his direction or with the consent or order of a Judge and notice thereof being served on the corporation under section 918 of the Revised Code. R. v. Standard Soap Co. (1907), 12 Can. Cr. Cas. 290.

Prize Dependent Upon Chance Without Skill—Illusory Condition.—Where tickets for a drawing by lot are sold as part of a scheme for the disposal of goods, and the holder of the winning ticket is required by the conditions of the drawing to shoot a turkey at fifty yards in five shots in order to win the prize, such circumstance does not necessarily take the case outside of the lottery sections of the Criminal Code. It is a question for the jury whether such condition was imposed as a contest of skill, or as a mere pretence in evasion of the lottery law. Where the evidence shews that any person could easily comply with the condition and the jury found the advertiser of the scheme guilty of advertising a lottery, the verdict will be supported as, in effect, finding that there was no real element of skill involved in the condition. R. v. Johnson, 6 Can. Cr. Cas. 48, 14 Man. R. 27.

Search for Gambling Paraphernalia.—The finding of lottery tickets and other paraphernalia of a lottery on the premises entered under a search order for instruments of gaming does not in itself constitute a *primâ facie* case nor shift the onus of proof to the defence. Section

985 which declares that the finding of instruments of gaming upon an order of search under Code sec. 641, shall constitute *primâ facie* evidence that the place is used as a common gaming house and that play was going on has no application to a charge under section 236 for selling lottery tickets. R. v. Hong Guey (1907), 12 Can. Cr. Cas. 366 (B.C.).

CHAPTER THE EIGHTH.

OFFENCES WITH RELATION TO TRADE DISPUTES AND WAGES.

SECT. I.—ACTS IN RESTRAINT OF TRADE.

Common law.—A conspiracy in restraint of trade has been defined as an agreement between two or more persons to do or procure to be done any 'unlawful' act in restraint of trade (*e.g.* violence, threats, fraud, or coercion) (*a*). Such a conspiracy appears to have been a misdemeanor at common law (*b*). The purposes of a trade union are not, by reason *merely* that they are a restraint of trade, unlawful within the above definition, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise (*Vide ante*, Vol. i. p. 177).

SECT. II.—OFFENCES CONNECTED WITH DISPUTES BETWEEN EMPLOYERS AND WORKMEN.

By the Conspiracy and Protection of Property Act, 1875 (*c*), s. 3, 'an agreement or combination by two or more persons to do or to procure to be done any act in contemplation or furtherance of a *trade dispute* . . . (*cc*) shall not be indictable as a conspiracy if such act, committed by one person, would not be punishable as a crime.

'Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament (*d*).

'Nothing in this section shall affect the law relating to riot (*e*), unlawful assembly, breach of the peace (*f*), or sedition (*g*), or any offence against the state or the sovereign.

'A "crime" for the purposes of this section means an offence punishable on indictment or an offence which is punishable on summary conviction, and for the commission of which the offender is liable under the statute making the offence punishable, to be imprisoned either absolutely, or at the discretion of the Court as an alternative to some other punishment.

'Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment the imprisonment shall not exceed three months or such longer time, if any, as may

(*a*) Steph. Dig. Cr. L. (6th ed.) art. 440. 3 Steph. Hist. Cr. L. 202–227. Wright on Conspiracy, 4. *Vide ante*, Vol. i. pp. 171 *et seq.*

(*b*) Hilton *v.* Eckersley, 6 E. & B. 47. Mogul ss. Co. *v.* McGregor, Gow, & Co. [1892], A. C. 25. Quinn *v.* Leathem [1901], A. C. 495, approving R. *v.* Druitt, 10 Cox. 600.

(*c*) 38 & 39 Vict. c. 86, s. 3, as amended by 6 Edw. VII. c. 47. See *ante*, Vol. i. p. 177.

(*cc*) As to the meaning of these words, see Conway *v.* Wade [1909], July 27, H. L., not yet reported.

(*d*) *Ante*, Vol. i. pp. 327, 332.

(*e*) *Ante*, Vol. i. p. 409.

(*f*) *Ante*, Vol. i. p. 422.

(*g*) *Ante*, Vol. i. p. 301.

have been prescribed by the statute for the punishment of the said act when committed by one person.'

'By trade dispute is meant any dispute between employers and workmen, or between workmen (*h*) and workmen, which is connected with the employment or non-employment or the conditions of labour of any person' (*i*).

The statutory provisions above stated, do not apply to disputes between employer and employer, nor between persons not workmen. Consequently, the old definition of conspiracy in restraint of trade may in certain cases be applicable, in the case of competition between rival traders (*j*) or combinations to monopolise or divert trade, and of combinations not falling within the above enactments, and made without legal justification or excuse, to interfere with the liberty of others to deal and contract freely (*k*).

In the United States and Canada the principle of the supposed common-law rule has been invoked against trusts, monopolies, and rings (*l*). In England criminal prosecutions have not been undertaken in respect of any such combinations as being conspiracies in restraint of trade (*m*).

As to interference with seamen, &c., and the trading of ships, *vide post*, p. 1915.

By the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 4, 'Where a person employed by a municipal authority or by any company or contractor upon whom is imposed by act of Parliament the duty, or who have otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously (*n*) breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part, wholly or to a great extent of their supply of gas or water, he shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penlty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour (*o*).

Every such municipal authority, company, or contractor as is mentioned in this section shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority or company or contractor, a printed copy of this section in some conspicuous place where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable despatch.

(*h*) *I.e.* all persons employed in trade or industry whether or not in the employment of the employer with whom the trade dispute arises.

(*i*) 6 Edw. VII. c. 47, s. 5 (3): *ante*, Vol. i. p. 177, and Conway *v.* Wade, [1909], July 27, H. L.

(*j*) See the Mogul case [1892], A. C. 25.

(*k*) See Quinn *v.* Leathem [1901], A. C. 495, which as to trade disputes within the Act of 1906 is overridden by that Act.

(*l*) *Vide post*, p. 1919.

(*m*) Agreements in restraint of trade may be civilly unenforceable. See Mogul case [1892], A. C. 25; Urmston *v.* Whitelegg [1890], 63 L. T. 455; Mineral Water Bottle Exchange *v.* Booth, [1887], 37 Ch. D. 465; Elliman *v.* Carrington [1901], 2 Ch. 275; Swaine *v.* Wilson, 24 Q.B.D. 252, 257.

(*n*) See s. 15, *post*, p. 1911.

(*o*) See R. *v.* Druitt, 10 Cox, 600, *ante*, Vol. i. p. 175.

If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notice as aforesaid, they or he shall incur on summary conviction a penalty not exceeding five pounds for every day during which such default continues, and every person who unlawfully injures, defaces, or covers up any notice so posted up as aforesaid in pursuance of this Act, shall be liable on summary conviction to a penalty not exceeding forty shillings.'

By sect. 14, 'The expression municipal authority in this Act means any of the following authorities, that is to say, *the Metropolitan Board of Works* (*p*), the Common Council of the City of London, *the Commissioners of Sewers of the City of London* (*q*), the Town Council of any borough for the time being subject to the Municipal Corporations Act, 1835 (*r*), and any act amending the same; any commissioners, trustees, or other persons invested by any local Act of Parliament with powers of improving, cleansing, lighting, or paving any town, and any *local board*' (*s*).

'Any municipal authority or company or contractor who has obtained authority by or in pursuance of any general or local act of Parliament, to supply the streets of any city, borough, town, or place, or of any part thereof with gas, or which is required by or in pursuance of any general or local act of Parliament to supply water on demand to the inhabitants of any city, borough, town, or place, or any part thereof, shall for the purpose of this Act be deemed to be a municipal authority, or company, or contractor upon whom is imposed by act of Parliament the duty of supplying such city, borough, town, or place, or part thereof, with gas or water.'

By sect. 5, 'Where any person wilfully and maliciously (*t*) breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property, whether real or personal to destruction or serious injury, he shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour' (*u*).

By sect. 15, 'The word "maliciously" used in reference to any offence under this Act shall be construed in the same manner as it is required by s. 58 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97) (*v*), to be construed in reference to any offence committed under such last-mentioned Act.

By sect 7, 'Every person who, with a view (*w*) to compel (*x*) any other

(*p*) Now the London County Council.

(*q*) Abolished, and their powers, &c., transferred to the Court of Common Council.

(*r*) Repealed, and replaced by the Municipal Corporations Act, 1882.

(*s*) Now Urban or Rural District Council.

(*t*) See s. 15, *infra*.

(*u*) S. 6 deals with cruelty to servants and apprentices: see *ante*, Vol. i. pp. 910, *et seq.*

(*v*) *Ante*, p. 1771.

(*w*) *i.e.* with intent, Lyons *v.* Wilkins (No. 1) [1896], 1 Ch. 811, Chitty, L. J.

(*x*) In R. *v.* Hibbert, 13 Cox, 82, Cleasby, B., ruled that if picketing were carried on with the intention to coerce, and in such a manner and to such an extent as to excite apprehension and annoyance, it was criminal. See R. *v.* Bauld, 13 Cox, 282, Huddleston, B.

person to abstain from doing or to do any act (*y*) which such other person has a legal right to do or abstain from doing, wrongfully (*z*) and without legal authority,—

(1) Uses violence to or intimidates (*a*) such other person or his wife or children, or injures his property (*b*); or,

(2) Persistently follows (*c*) such other person about from place to place; or,

(3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,

(4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place (*d*); or

(5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour' (*e*).

By the Trade Disputes Act, 1906 (6 Edw. VII. c. 47) s. 2, '(1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm, in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works, or carries on business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working' (*f*).

Sect. 7 of the Act of 1875, is not limited to trade disputes or disputes between employers and workmen, and extends to besetting a man's house to prevent his receiving callers (*g*).

By Sect. 8 of the Act of 1875, 'Where in any Act relating to employers or workmen a pecuniary penalty is imposed in respect of any offence under such Act, and no power is given to reduce such penalty, the justices or court having jurisdiction in respect of such offence may, if they think it just so to do, impose by way of penalty in respect of such offence

(*y*) The acts *must* be specified in the indictment. R. *v.* McKenzie [1892], 2 Q. B. 519. *Ex parte* Wilkins, 64 L. J. M. C. 221.

(*z*) Ward *v.* Co-operative Printers' Society [1906], 22 T.L.R. 327.

(*a*) See Gibson *v.* Lawson, and Curran *v.* Treleaven, *post*, p. 1914.

(*b*) The property must be specified in the proceedings. Smith *v.* Moody [1903], 1 K. B. 56.

(*c*) As to what is persistently following, see Smith *v.* Thomasson, 16 Cox, 740.

(*d*) This is what is known as 'picketing.' See R. *v.* Druitt, 10 Cox, 593; R. *v.* Hibbert (*ante*, p. 1911); Farmer *v.* Wilson, 69 L. J. Q.B. 496; Charnock *v.* Court [1899], 2 Ch. 35; Walters *v.* Green [1899], 2 Ch. 696; Lyons *v.* Wilkins, No. 1 [1896], 1 Ch. 811; No. 2, 1899, 1 Ch. 255; R. *v.* Lynch [1898], 1 Q.B. 57. These decisions must now be read subject to 6 Ed. VII. c. 47. s. 2 (1) *infra*.

(*e*) The rest of the section was repealed by 6 Edw. VII. c. 47, s. 2 (2).

(*f*) Lyons *v.* Wilkins (No. 1) [1896], 1 Ch. 811, Chitty, L. J.

(*g*) See R. *v.* Shepherd, 11 Cox, 325. It is lawful for workmen, peacably and in a reasonable and proper manner, to endeavour to persuade other workmen who have not acted with them, to do so. The act of 1906 by the use of the words lawful appears to exclude civil proceedings against pickets for nuisance; but it does not appear to legalise nuisance by obstruction, nor watching private houses. R. *v.* Wall, 21 Cox, 401, Palles, C.B.

any sum not less than one-fourth of the penalty imposed by such Act (*gg*).

By sect. 9, 'Where a person is accused before a Court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the Court of summary jurisdiction, declare that he objects to being tried for such offence by a Court of summary jurisdiction, and thereupon the Court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly' (*h*).

By sect. 11, 'Provided, that upon the hearing and determining of any indictment or information under sections four, five, and six of this Act, the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses' (*i*).

By sect. 16. 'Nothing in this Act shall apply to seamen or to apprentices to the sea service' (*j*).

Sect. 3, set out, *ante*, Vol. i. p. 177, provides for the punishment of conspiracies and combinations to commit offences against the above sections, as well as conspiracies, &c., to commit other offences punishable on summary conviction.

Before the passing of sect. 7 of the Act of 1875, provision was made by 34 & 35 Vict. c. 32 (*k*), for the punishment on summary conviction of persons who, with a view to coerce others, whether masters or workmen, to do or abstain from certain acts, used violence to persons or property, or molested or obstructed any person as there defined, or threatened or intimidated any person in such a manner as would justify a magistrate in binding over the person so threatening or intimidating to keep the peace.

With respect to the word 'intimidated' as used in sect. 7 of the Act of 1875, Coleridge, C.J., said, in Gibson *v.* Lawson (*l*): 'We do not think that the legislature intended, by the change of words in the first subsection of the seventh section of 38 & 39 Vict. c. 86, to send the Courts back to 6 Geo. IV. c. 129, for an interpretation of the word "intimidate," although the later statute did repeal 34 & 35 Vict. c. 32, which limited intimidation to cases which would justify a magistrate in binding over the party to keep the peace. There is indeed much to be said for the view entertained by my learned brother Cave, and acted upon by him in a case tried before him at Liverpool (*m*), namely, that "intimidation" in 38 & 39 Vict. c. 86, must still be limited to threats of personal violence as enacted by 34 & 35 Vict. c. 32. It may

(*gg*) See 42 & 43 Vict. c. 49, s. 4.

(*h*) As to election to be indicted, see *ante*, Vol. i. pp. 17, 18. The indictment need not aver the election to be tried by a jury. R. *v.* Chambers, 65 L. J. M. C. 214.

(*i*) The section does not say whether the husband or wife is compellable or may be called for the prosecution. It seems to be superseded as to England by the Criminal Evidence Act, 1898, *post*, 2271, 'Evidence.'

(*j*) *i.e.* persons actually employed and engaged on a ship. R. *v.* Lynch [1898], 1 Q.B. 61. The section does not exempt non-seamen from prosecution for offences under the Act against seamen, Kennedy *v.* Cowie [1891], 1 Q.B. 771.

(*k*) Repealed by 38 & 39 Vict. c. 86, s. 17.

(*l*) [1891] 2 Q.B. 545.

(*m*) R. *v.* M'Keevit, 16 Dec. 1890 (unreported).

become necessary to decide this point in time to come, it is not now; and we confine ourselves to the negative statement that 6 Geo. IV. c. 129, is not now on this subject the governing statute.'

But in Lyons *v.* Wilkins (*n*), Lindley, L.J., suggested that this might be rather a narrow view to take of the section, and in Quinn *v.* Leathem (*o*) he said that there were many ways short of violence or the threat of it of compelling persons to act in a way in which they do not like, *e.g.* picketing. And in Judge *v.* Bennett (*p*) the word was held to extend to acts or language calculated to cause bodily fear. In that case, a strike arose among the riveters in B.'s employ. They demanded that all the riveters on strike should return together, and threatened that if this demand were not complied with, the riveters would all stay out, that the finishers would be called out, and the shop picketed. Pickets were placed who acted in an orderly manner, but a large crowd was gathered, and B. called in the police to protect her shop, on the ground that she was in fear of personal violence (*q*).

In Gibson *v.* Lawson (*r*) a summons was taken out under 38 & 39 Vict. c. 86, s. 7, for intimidation on the following facts:—The respondent was employed as a fitter in the yard of an iron ship-building company; the appellant was employed in the same capacity in the same yard. The respondent was a member of a society called the Amalgamated Society; the appellant a member of a society called the National Society. On Dec. 3, 1890, a meeting of the Amalgamated Society was held, at which it was resolved that the members of that society would strike unless the appellant left his society and joined theirs. The respondent communicated this resolution to the foreman of the ship-building company, who communicated it to the appellant. Thereupon the appellant had an interview with the respondent. In the result the respondent informed the appellant that the Amalgamated Society were determined to carry their resolution into effect, but gave him till the morning of Saturday, December 6th, to make up his mind. The appellant adhered to his own society, and the shipbuilding company, in order to avoid a strike, dismissed him from their yard. It is expressly found in the case that no violence or threats of violence to person or property were used to the appellant, but he swore that he 'was afraid because of what the respondent had said that he would lose work, and would not get employment anywhere where the Amalgamated Society predominated numerically over his own society.' On these facts the magistrates dismissed the summons.

On an appeal to quarter sessions a special case was stated for the opinion of the High Court. In giving judgment thereon, Coleridge, C.J., said (*s*): '"Intimidate" is not, as has been often said by judges of authority, a term of art; it is a word of common speech and every-day use; and it must receive therefore a reasonable and sensible interpretation, according to the circumstances of the cases as they arise from time

(*n*) No. 1 [1896] 2 Ch. 811. Cf. R. *v.* Lynch [1898], 1 Q.B., 61.

(*o*) [1902], A. C. 495, 541.

(*p*) 36 W. R. 103, Stephen, J., and A. L. Smith, J.

(*q*) This case was commented on in Gibson *v.* Lawson, and Curran *v.* Treleaven [1891], 2 Q.B. 545, by Mathew, J.

(*r*) [1891], 2 Q.B. 545.

(*s*) Ibid. at p. 559.

to time. We do not propose to attempt an exhaustive definition of the word, nor a complete enumeration of the cases to which it may be properly, nor of those to which it may be improperly applied. It is enough for us to say that in this case it appears to us all that there was nothing which, under any reasonable construction of the word "intimidate," could be brought within it' (*t*).

Sect. III.—Hindering the Exportation or Circulation of Corn, or Interfering with the Loading, etc., of Ships.

By the Corn Exportation Act, 1737 (11 Geo. II. c. 22), persons hindering by violence the exportation of corn may be dealt with summarily by two justices of the peace (sect. 2) (*u*).

By sect. 2, 'If . . . any person or persons shall wilfully and maliciously pull, throw down, or otherwise destroy, any storehouse or granary, or other place where corn shall be then kept in order to be exported; or shall unlawfully enter any such storehouse, granary, or other place, and take and carry away any corn, flour, meal, or grain therefrom; or shall throw abroad, or spoil the same, or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and shall wilfully and maliciously take and carry away, cast or throw out therefrom, or otherwise spoil or damage, any meal, flour, wheat, or grain, therein intended for exportation; every such offender, being convicted, shall be adjudged guilty of felony, and transported (*v*) for seven years (*w*), in like manner as other felons are directed to be transported by the laws and statutes of this realm . . .' (*x*).

By the Shipping Offences Act, 1793 (33 Geo. III. c. 67), it is made criminal riotously to prevent the loading, unloading, sailing, or navigation of a ship (*y*).

By the Passage of Grain Act, 1796 (36 Geo. III. c. 9) (*y*), persons using violence to deter others from buying corn within the kingdom, or stopping any corn, breaking waggons, &c., carrying corn, or taking off the horses, or beating the drivers, or scattering or taking corn, may be summarily convicted (S. 1) (*z*).

By sect. 2, '. . . if any person or persons with intent to prevent or hinder any corn, meal, flour, malt, or grain, from being lawfully

(*t*) In other passages of the judgment he had inclined to hold that the word was limited to threats of personal violence. *Vide ante*, p. 1913.

(*u*) By sect. 4, 'No person, who shall be punished for any offence by virtue of this Act, shall be punished for the same offence by any other law or statute. *Vide ante*, Vol. i. p. 6. Sects. 5, 6, 7, and 8 were repealed as to England in 1827, and so much of this statute as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony, was repealed as to England in 1828 (9 Geo. IV. c. 31).

(*v*) Penal servitude, by 20 & 21 Vict. c. 3, s. 2, *ante*, Vol. i. pp. 210, 211.

(*w*) And not less than three years. See 54 & 55 Vict. c. 69, *ante*, Vol. i. p. 211.

(*x*) Rest of section repealed in 1867 (30 & 31 Vict. c. 59, S. L. R.). The preamble of this Act refers to interference with the necessary circulation of grain within the realm.

(*y*) *Vide ante*, Vol. i. p. 417.

(*z*) So much of this section as related to persons beating, wounding, or using violence to any other person or driver, and, as made a second offence felony, was repealed as to England and India in 1828 (9 Geo. IV. c. 31; 9 Geo. IV. c. 74, s. 125). The repealed portion is replaced by 24 & 25 Vict. c. 100, s. 39, *post*, p. 1916.

carried or removed from any place whatsoever, shall wilfully and maliciously pull, throw down, or otherwise destroy any storehouse or granary, or other place, in which corn, meal, flour, malt, or grain, shall be then kept; or shall unlawfully enter any such storehouse, granary, or other place, and take and carry away any corn, flour, meal, malt, or grain, therefrom; or shall throw abroad or spoil the same or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and wilfully and maliciously take and carry away, cast, or throw out therefrom, or otherwise spoil or damage, any corn, flour, meal, malt, or grain therein; every person so offending, and being thereof lawfully convicted, shall be adjudged guilty of felony, and be transported (*a*) for seven years' (*b*).

By sect. 6, it is provided that 'nothing in this Act contained shall be deemed or taken to abridge or take away any provision already made by the law of this realm, or any part thereof, for the suppression or punishment of any offence whatsoever mentioned or described in this Act: Provided also, that no person who shall be punished by virtue of this Act shall be punished for the same offence by virtue of any other law or statute whatsoever' (*c*).

By the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 39, 'Whoever shall beat, or use any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling, or otherwise disposing of, or compel him to buy, sell, or otherwise dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall beat or use any such violence or threat to any person having the care or charge of any wheat or other grain, flour, meal, malt, or potatoes, whilst on the way to or from any city, market-town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three months: Provided that no person who shall be punished for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever' (*c*).

This section does not include all the goods, wares, and merchandize referred to in 7 & 8 Vict. c. 24, s. 4, *post*, p. 1920.

By sect. 40, 'Whosoever shall unlawfully and with force hinder or prevent any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or shall beat or use any violence to any such person with intent to hinder or prevent him from working at or exercising the same, shall, on conviction thereof before two justices of peace, be liable to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three months: Provided that no person who shall be punished for any such

(*a*) Now penal servitude (20 & 21 Vict. c. 3), for not more than seven nor less than three years, or imprisonment, 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*b*) The rest of the section was repealed in 1892 (S. L. R.). Sects. 3, 4, and 5, relating to proceedings against the hundred, &c., were repealed by 7 & 8 Geo. IV. c. 27, and the Stat. Law Rev. Act, 1871.

(*c*) See 52 & 53 Vict. c. 63, s. 33, *ante*, Vol. i. pp. 4, 6.

offence by reason of this section shall be punished for the same offence by virtue of any other law whatsoever' (*d*).

SECT. IV.—OFFENCES AGAINST THE TRUCK ACTS.

By sect. 9 of the Truck Act, 1831 (1 & 2 Will. IV. c. 37), 'any employer of any artificer (*e*) . . . who shall by himself or by the agency of any other person or persons, directly or indirectly enter into any contract or make any payment hereby made illegal (*f*), shall, for the first offence, forfeit a sum not exceeding £10, and for the second offence, forfeit a sum not exceeding £20 nor less than £10, and in case of a third offence any such employer shall be, and be deemed, guilty of a misdemeanor, and being thereof convicted shall be punished by fine only at the discretion of the Court, so that the fines shall not in any case exceed the sum of £100' (*g*).

The operation of this section is extended by the effect of the Truck Acts, 1887 (50 & 51 Vict. c. 46), and 1896 (59 & 60 Vict. c. 44), which are to be construed as one with the Act of 1831.

(*d*) Taken from 9 Geo. IV. c. 31, s. 26. The other law referred to is 33 Geo. III. c. 67, *supra*. The procedure is now regulated by the Summary Jurisdiction Acts. As to the proviso, cf. 52 & 53 Vict. c. 63, s. 33, *ante*, Vol. i. p. 6.

(*e*) Extended in 1887 (50 & 51 Vict. c. 46, s. 2), so as to include every workman as defined by 38 & 39 Vict. c. 90. That definition (sect. 10) excludes domestic or menial servants, but includes any person who, being a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labour (Hunt *v.* G.N.R. [1891], 1 Q.B. 601), whether under or over 21, has entered into or works under a contract with an employer, whether the contract be express or implied or be a contract of service or a contract personally to execute any work or labour. The extended definition does not render it illegal to contract with a servant in husbandry, to give him food and drink (non-intoxicant), a cottage or other allowances or privileges in *addition* to money wages (1887, s. 4).

(*f*) See Hewlett *v.* Allan [1894], A. C. 383.

(*g*) This section appears to be extended to agents, &c., who have in fact committed the offence (1887, s. 12) (1), and the employer may exempt himself by prosecuting the actual offender to conviction, if it is found that the employer had used due diligence and the agent offended without the knowledge, consent, or connivance of the employer, sect. 12 (2).

CANADIAN NOTES.

OFFENCES WITH RELATION TO TRADE DISPUTES AND WAGES.

Conspiracy in Restraint of Trade.—See Code secs. 496, 497, 498.

Definition of Conspiracy.—See Code sec. 496.

Acts in Restraint not Unlawful.—See Code sec. 497.

Trade Union.—The Trade Unions Act, R.S.C. (1906), ch. 125, defines the expression "trade union" to mean (unless the context otherwise requires) such combination whether temporary or permanent for regulating the relations between workmen and masters or for imposing restrictive conditions on the conduct of any trade or business as would, but for that statute, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade. R.S.C. (1906), ch. 125, sec. 2; and see Code sec. 6.

Penalty for Conspiracy in Restraint of Trade—Code sec. 498.

Trade Combines.—A person who organizes an association to restrict and control the business of retail coal dealing to the members of the association and to prevent anyone else from obtaining coal from the foreign shippers at wholesale rates for re-sale in the district in which the association operates is properly convicted under Code sec. 498 of conspiracy to prevent competition in the sale of a commodity which is the subject of trade. R. v. Elliott, 9 Can. Cr. Cas. 505, 9 O.L.R. 648.

Two or more corporations may be indicted for conspiracy in furtherance of a trade combine under sec. 498 without joining a personal defendant. R. v. Central Supply (1907), 12 Can. Cr. Cas. 371.

For the purpose of proving the motive and effect of certain corporate acts, evidence is properly admissible on a charge of conspiracy laid against two corporations, to shew that the formation and operation of an illegal trade combine was the object of the incorporation of each of them, and that the formal agreements whereby the property and assets of unincorporated trade associations were respectively assumed by them, were made in furtherance of that design. And evidence of the nature of the conspiracy alleged may be given before proof of the criminal agreement. *Ibid.*

Undue Limitation and Unreasonable Enhancement.—The prevention of every enhancement of prices or every lessening of competition in the purchase, barter or sale of commodities was not intended to be included in sub-sec. (*b*), for where enhancing, preventing or lessening is specifically referred to it is qualified by the word "unreasonably" or "unduly." Sub-sec. (*b*) cannot well have been intended to embrace every combination to prevent or restrain particular kinds of systems of trading or particular kinds of bargains. At most it includes only combinations for the direct purpose of preventing or materially reducing trade or commerce in a general sense with reference to a commodity or certain commodities, or for purposes designed or likely to produce that effect. Gibbons v. Metcalfe (1905), 15 Man. R. 583.

Trade Unions of Employees.—Sub-section 2 originated with the Code Amendment of 1900. It applies not only to regularly organized trade unions as that term is defined by the Trade Union Act, R.S.C. ch. 125, but to any voluntary organization of labourers. Senate Debates (1900), page 1044. As to trade unions there is a provision in that statute as follows: (Sec. 32): "The purposes of any trade union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, or so as to render void or voidable any agreement or trust." Canada Criminal Code (Tremeear), p. 403.

A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade. Code sec. 496.

But the purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of sec. 496. Code sec. 497.

Option of Trial Without Jury.—See Code sec. 581 and 1012.

Limitation of Prosecution.—Even if Code sec. 1141, which limits certain proceedings for penalties and forfeitures to two years after the offence, could be held to apply to a prosecution by indictment, it does not apply to bar a prosecution where the offence was a continuing one, the association remaining in active operation under the presidency of the defendant up to the commencement of the prosecution. R. v. Elliott, 9 Can. Cr. Cas. 505, 9 O.L.R. 648.

Wilfully Breaking Contract with Danger to Human Life.—See Code sec. 499.

(Amended 7 & 8 Edw. VII. ch. 18.)

Committed from Malice.—"Malice" is a term which is truly "a legal enigma": Harris Cr. Law, p. 13. The terms "malice" and "malicious" are practically eliminated from the Code owing to the confusion of ideas connected with them. "Malice" only appears in

two places; here and in sec. 693 where the expression "mute of malice" is retained. Mr. Hoyles' article on the Criminal Law, 38 C.L.J. 231.

Posting up of Notices.—See Code sec. 500.

Intimidation to Prevent Working at Trade.—No person who is a master, or the father, son or brother of a master in the particular manufacture, trade or business, in or in connection with which any offence under sec. 501 is charged to have been committed, shall act as a magistrate or justice, in any case of complaint or information under that section, or as a member of any Court for hearing any appeal in any such case. Code sec. 578.

Using Violence to Prevent Buying Grain, Vegetables, etc.—See Code sec. 503.

Intimidation to Prevent Bidding on Public Lands.—See Code sec. 504.

CHAPTER THE NINTH.

OF FORESTALLING, REGRATING, INGROSSING, AND MONOPOLIES.[1]

SECT. I.—FORESTALLING, ETC.

EVERY practice or device by act, conspiracy, words, or news, to enhance the price of victuals or other merchandize, was held to be unlawful at common law; as being prejudicial to trade and commerce, and injurious to the public in general (*a*). Practices of this kind came under the notion of forestalling; which meant buying goods on the way to market or inducing persons not to take the goods to market in order to enhance prices or evade tolls (*b*). It was treated as including ingrossing, or buying up standing corn, or corn in sheaf, or victuals wholesale for the purpose of regrating, *i.e.* selling at monopoly prices (*c*), and all other offences of like nature (*d*). Spreading false rumours, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market were treated as offences of this kind (*e*). Also if a person within the realm bought any merchandize in gross, and sold the same again in gross, it was considered an offence of this nature (*f*). So the bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, was an offence at common law (*g*).

The offences of forestalling, regrating, and ingrossing were for a considerable period prohibited by statutes (*h*), which were repealed in 1772 (by 12 Geo. III. c. 71), as being detrimental to the supply of the labouring and manufacturing poor of the kingdom. But forestalling, regrating, and ingrossing continued offences at common law until 1844, when by 7 & 8 Vict. c. 24, s. 1, it was enacted 'that the several offences of

(*a*) 3 Co. Inst. 196. Bac. Abr. *tit.* 'Forestalling.'

(*b*) See 5 Seld. Society Publication, p. 62, 104. 2 Pollock and Maitland, Hist. Eng. Law, 467.

(*c*) See R. *v.* Waddington, 1 East, 143, 167.

(*d*) Bac. Abr. *tit.* 'Forestalling.' 3 Co. Inst. 195.

(*e*) 1 Hawk. c. 80, s. 1.

(*f*) 3 Co. Inst. 196. Bac. Abr. *tit.* 'Forestalling' (A.). 1 Hawk. c. 80, s. 3. But it was held that any merchant, whether subject or foreigner, bringing victuals or any other merchandize into the realm, might sell it in gross. 3 Co. Inst. 196.

(*g*) 1 Hawk. c. 80, s. 3. 3 Co. Inst. 196.

(*h*) 51 Hen. III. St. 6. 5 & 6 Edw. VI. c. 14. For precedents of indictments for these offences, see Burn's 'Justice' (17th ed.), *tit.* 'Forestalling.'

AMERICAN NOTE.

[1] In America it would seem that such offences may be committed in states recognizing the common law. English statutes before the Declaration of Independence are considered as common law generally in America. Bishop i. s. 520. There is much state legislation and some federal legislation against combinations to enhance prices, known in the U.S. as 'trusts' or 'combines.' See Burrows *v.* Interborough Metropolitan Co. [1907], 156 Fed. Rep. 389.

badgering (*i*), ingrossing, forestalling, and regrating be utterly taken away and abolished, and that no information, indictment, suit, or prosecution shall lie either at common law or by virtue of any statute, or be commenced or prosecuted against any person for or by reason of any of the said offences or supposed offences.'

Spreading false rumours to affect prices, or using force or threats to keep goods from markets.—By sect. 4, 'Nothing in this Act contained shall be construed to apply to the offence of knowingly and fraudulently spreading or conspiring to spread, any false rumour, with intent to enhance or decry the price of any goods or merchandize (*j*), or to the offence of preventing, or endeavouring to prevent, by *force or threats*, any goods, wares, or merchandize being brought to any fair or market (*k*), but that every such offence may be inquired of, tried, and punished as if this Act had not been made' (*l*).

The attempt by false reports to enhance or abate the price of vendible commodities is a misdemeanor at common law (*m*). Where certain persons came to Coteswold, and said, in the deceit of the people, that there were such wars beyond the seas that wool could not pass or be carried beyond sea, whereby the price of wools was abated; and presentment thereof being made, the defendants, having appeared, were, upon their confession, put to fine and ransom (*n*).

It would seem from sect. 4 that it is an offence at common law to prevent by force or fear the bringing to market of any goods, wares, or merchandize (*o*).

As to offences committed to prevent the export or passage of grain (*vide ante*, p. 1915).

Sect. II.—Monopolies.

A monopoly is a licence or privilege allowed by the King for the sole buying and selling, making, working, or using of anything whatsoever within the realm, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before (*p*). It differs from engrossing in that it is by patent from the King, whereas engrossing is by the act of the subject between party and party. Monopolies were regarded as equally injurious to trade and to the freedom of the subject (*q*) and the holding of a monopoly was treated as an indictable misdemeanor (*malum in se*) punishable by fine and imprisonment. All grants of this kind, relating to any known trade, are void by the common

(*i*) Buying up corn and commodities and carrying them elsewhere for re-sale. See 5 & 6 Edw. VI. c. 14, s. 7, 5 Eliz. c. 12 (both rep.).

(*j*) *Ante*, Vol. i. pp. 169, 170.

(*k*) See 24 & 25 Vict. c. 100, s. 39, *ante*, p. 1916; and Mogul ss. Co. *v.* MacGregor, Gow & Co. [1892], A. C. 25.

(*l*) This section was repealed in 1892 (S. L. R.), but the repeal does not revive the former law. See 52 & 53 Vict. c. 63, s. 38 (2), *ante*, Vol. i. p. 5.

(*m*) 3 Co. Inst. 196, referring to 23 Edw. III. c. 6; 13 Rich. II. c. 8; *Inter leges Ethelstani*, c. 12. As to conspiracies to commit these offences, see R. *v.* de Berenger, 3 M. & S. 67. Aspinall *v.* R., 2 Q.B.D. 48, 59. Scott *v.* Brown [1892], 2 Q.B. 724, and *ante*, Vol. i. pp. 169, 170.

(*n*) 43 Ass. pl. 38. 3 Co. Inst. 196.

(*o*) *Vide ante*, pp. 1916, 1919.

(*p*) 4 Bl. Com. 158. 3 Co. Inst. 151.

(*q*) Skin. 162.

law (*r*); and it is said that there are precedents of prosecutions of this kind in former days (*s*).

The Statute of Monopolies (21 Jac. I. c. 31) declares monopolies to be contrary to law, and void (except as to patents not exceeding the grant of fourteen years to the authors of new inventions (sect. 6), and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb (*t*). The Act excluded the jurisdiction of the Privy Council and Star Chamber to try the validity of a monopoly (*u*) but did not affect corporate charters, nor ancient franchises (*v*). The grant and effect of patents for inventions is now regulated by the Patents and Designs Act, 1907 (*w*).

The Statute of Monopolies does not apply to the modern practices for the creation of a monopoly by trusts, unions, or combinations, not resting on any grant from the Crown; and such combinations, while they may not be enforceable by civil remedies as between the parties, on the ground that they are in restraint of trade (*x*), are not indictable unless they are formed under circumstances amounting to a criminal conspiracy (*y*) or fall within the offences enumerated in 7 & 8 Vict. c. 24, sect. 4 (*z*).

Sect. III.—Offences Relating to Patents and Trademarks.

Patents and Trademarks.—By sect. 89 (1) of the Patents and Designs Act, 1907 (7 Edw. VII. c. 29), if any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced, or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor (*b*). A provision almost *iisdem verbis* is contained in sect. 66 of the Trade Marks Act, 1905 (5 Edw. VII. c. 15) (*zz*). The other offences created by the Trade Marks Act, 1905 (*a*), and the Patents and Designs Act, 1907 (*b*), are punishable only on summary conviction (*c*). Offences with reference to merchandize marks are dealt with under the title 'Fraud,' *ante*, pp. 1591 *et seq.*

(*r*) 1 Hawk. c. 79, s. 1.
(*s*) 3 Co. Inst. 181. 2 Co. Inst. 47, 61. Bac. Abr. *tit.* 'Monopoly.' A. note (*b*). Case of Monopolies, 11 Co. Rep. 84 *b*.
(*t*) Sect. 4. R. *v.* Prosser [1848], 11 Beav. 306. See Peck *v.* Hindes, 67 L. J. Q.B. 272. Sir Giles Mompesson's case, 2 St. Tr. 1119. East India Co. *v.* Sandys, 10 St. Tr. 373. Ilbert, Govt. of India (2nd ed.), c. 1. And see 1 Hawk. c. 79. Bac. Abr. *tit.* 'Monopoly.'
(*u*) Sect. 2. See 2 Co. Inst. 182.
(*v*) Sect. 9. See Great Eastern Rail. Co. *v.* Goldsmid, 9 App. Cas. 927.
(*w*) 7 Edw. VII. c. 29.
(*x*) *Ante*, p. 1910 (*x*).
(*y*) *Ante*, Vol. i. pp. 171 *et seq.*
(*z*) *Ante*, p. 1920.
(*zz*) See also *ante*, p. 1735.
(*a*) Sect. 67.
(*b*) Sect. 89 (2–5).
(*c*) The offences are analogous (1) to forgery, (2) to perjury.

BOOK XII.

PROCEDURE, APPEAL, COSTS, AND REWARDS.

CHAPTER THE FIRST.

THE PROSECUTION OF INDICTABLE OFFENCES.

SECT. I.—WHO MAY PROSECUTE.

Common Law.—At common law any person may take proceedings by way of indictment in respect of any crime (*a*), subject to the right of the Crown to intervene and take over the prosecution or to stay it by entering a *nolle prosequi* (*b*).

An indictment is an accusation of crime made upon oath by twelve or more of the grand jury of the county or other district in which the crime is alleged to have been committed or to be cognizable. The accusation may be made by the grand jurors on their own knowledge or information, or by finding (*i.e.* endorsing and returning as a true bill) a bill of indictment presented to them by a public or private prosecutor, after examining, in private and on oath, one or more witnesses whose names are endorsed on the bill when sent before them (*c*).

An information is an allegation that a misdemeanor has been committed made by the Attorney-General or other person filing it in Court.

Criminal informations in the High Court may be resorted to in the case of indictable *misdemeanors*, but not in the case of *treason* or *felony*. They are of two kinds (1) *ex officio* filed by the Attorney-General as of right (*d*); (2) filed by the King's Coroner and Attorney under special order of the High Court (K.B.D.) (*e*), giving leave to file it which is made on an application in accordance with the Crown Office Rules, 1906, rr. 35–39 (*f*).

Both indictments and informations are tried before a petty jury, in this respect differing from the summary proceedings for attachment or committal used in cases of criminal contempt of Court (*g*).

Limitations on Common-law Power to Prosecute.—The fiat or sanction or consent of the Attorney-General is necessary for the commencement of a prosecution in the following cases:—

Offences by aliens on the open sea in British territorial waters (*h*).

Fraud by a trustee under an express trust in writing (*i*); fraudulent concealment of documents of title (*j*); offences under the Explosives

(*a*) As to the duty to prosecute or inform in cases of treason and felony, *vide ante*, Vol. i. p. 129, 'Misprision of felony.'

(*b*) See R. *v.* Allen, 1 B. & S. 850. R. *v.* Leatham, 3 E. & E. 658. R. *v.* Comptroller of Patents [1899], 1 Q.B. 909, 914. A. L. Smith, J. Archbold, Cr. Pl. (23rd ed.), 139. Short & Mellor, Cr. Pr. (2nd ed.), 141.

(*c*) Archb. Cr. Pl. (23rd ed.), 1, 98.

(*d*) Short and Mellor Cr. Pr. (2nd ed.), 169. Archb. Cr. Pl. (23rd. ed), 142.

(*e*) Rendered necessary by 4 & 5 Will. III. c. 18.

(*f*) Short and Mellor, Cr. Pr. (2nd ed.), 151. Archb., Cr. Pl. (23rd ed.), 144.

(*g*) *Ante*, Vol. i. p. 537.

(*h*) 41 & 42 Vict. c. 73, s. 3, *ante*, Vol. i. p. 41.

(*i*) 24 & 25 Vict. c. 96, s. 80 (E. I.), *ante*, p. 1411.

Act, 1883 (*k*), and Official Secrets Act, 1889 (*l*); sect. 327 of the Lunacy Act, 1890 (*ll*), and sect. 2 (1) (a) of the Moneylenders Act, 1900 (*m*), and the Public Bodies Corrupt Practices Act, 1889 (*n*), and the Prevention of Corruption Act, 1906 (*o*); and sect. 10, of the Prevention of Crime Act, 1908 (*p*), and under the Punishment of Incest Act, 1908, unless the Director of Public Prosecutions takes action (*q*).

Public Prosecutions.—A director of public prosecutions was first appointed in 1879 (*r*). The duties and powers of the office were in 1884 transferred to the Solicitor of the Treasury (*s*). In 1908 the office was reconstituted and separated from the office of Solicitor to the Treasury (*t*). The duties of the director in England are regulated by and under the Prosecution of Offences Act, 1879 (*u*), 1884 (*v*), and 1908 (*w*).

By the Act of 1879, sect. 2, . . . 'It shall be the duty of the director of public prosecutions, under the superintendence of the attorney general, to institute, undertake, or carry on such criminal proceedings (whether in the court for crown cases reserved (*ww*), before sessions of oyer and terminer or of the peace, before magistrates, or otherwise), and to give such advice and assistance to chief officers of police, clerks to justices, and other persons, whether officers or not, concerned in any criminal proceeding respecting the conduct of that proceeding, as may be for the time being prescribed by regulations (*x*) under this Act, or may be directed in a special case by the Attorney-General' (*y*).

Returns as to Crimes.—By the Act of 1884, sect. 3, 'The chief officer of every police district in England shall, from time to time, give to the director of public prosecutions information with respect to indictable offences alleged to have been committed within the district of such chief officer, and to the dealing with those offences, and the said information shall contain such particulars and be in such form as may be for the time being required by regulations under the principal Act (*z*).

Definitions.—By sect. 4 of that Act, 'the expression "police district means"—

(1) The city of London and the liberties thereof; and
(2) The metropolitan police district; and
(3) Any county or riding, parts, division, or liberty of a county or borough, town, or place maintaining a separate police force:

'The expression "chief officer of police" means—

(1) In the city of London the commissioner of police of the city; and
(2) In the metropolitan police district the commissioner or any

(*j*) 22 & 23 Vict. c. 35, s. 24.
(*k*) 46 & 47 Vict. c. 3, s. 7 (E. I.).
(*l*) 52 & 53 Vict. c. 52, s. 7 (1) (Imp.).
(*ll*) 53 & 54 Vict. c. 5.
(*m*) 63 & 64 Vict. c. 51, s. 2 (3) (E. I.).
(*n*) 52 & 53 Vict. c. 69, s. 4 (1) (U.K.).
(*o*) 6 Edw. VII. c. 34, s. 2 (1).
(*p*) 8 Edw. VII. c. 59, s. 10 (4).
(*q*) 8 Edw. VII. c. 45, s. 6.
(*r*) 42 & 43 Vict. c. 22, s. 2.
(*s*) 47 & 48 Vict. c. 58, s. 2.
(*t*) 8 Edw. VII. c. 3.
(*u*) 42 & 43 Vict. c. 22.
(*v*) 47 & 48 Vict. c. 58.
(*w*) 8 Edw. VII. c. 3.

(*ww*) By sect. 12 of the Criminal Appeal Act, 1907 (*post*, p. 2025), the Director must appear on every appeal, unless the solicitor of a Government Department or the private prosecutor undertakes the defence of the appeal.

(*x*) Under sect. 8 (*post*, p. 1925), and sect. 1 of the Act of 1908.

(*y*) The first paragraph of the section is repealed by 47 & 48 Vict. c. 58, s. 5, and the third paragraph by 8 Edw. VII. c. 3. Sects. 3 and 4 were repealed in 1884 (47 & 48 Vict. c. 58, s. 5).

(*z*) Sect. 2 of the Act of 1884 was repealed by 8 Edw. VII. c. 3.

assistant commissioner of the police of the metropolis or any district superintendent of the metropolitan police force; and

(3) Elsewhere the chief constable, or head constable, or other officer by whatever name called, having the chief command of the police in a police district as defined by this act (*a*).

Delivery of Depositions, &c., to Public Prosecutor—By sect. 5 of the Act of 1879, 'Where the director of public prosecutions gives notice to any justice or coroner that he has constituted or undertaken or is carrying on any criminal proceeding, such justice and coroner shall at the time and in the manner prescribed by the regulations under this act, or directed in any special case by an order of the Attorney-General, transmit to the said director every recognizance, information, certificate, inquisition, deposition, document, and thing which is connected with the said proceeding, and which the justice or coroner is required by law to deliver to the proper officer of the court in which the trial is to be had, and the said director shall, subject to the regulations under this act, cause the same to be delivered to the said proper officer of the Court, and shall be under the same obligation, on the same payment, to deliver to an applicant copies thereof as the said justice, coroner or officer.

'It shall be the duty of every clerk to a justice or to a police court to transmit, in accordance with the regulations under this act, to the director of public prosecutions, a copy of the information and of all depositions and other documents relating to any case in which a prosecution for an offence instituted before such justice or court is withdrawn or is not proceeded with within a reasonable time.

'A failure on the part of any justice or coroner to comply with this section shall be deemed to be a failure to comply with the said requirement to deliver to the proper officer of the court, and any clerk to a justice or to a police court failing to comply with this section shall be liable to the same penalty to which a justice or coroner is liable for such failure as aforesaid' (*b*).

By sect. 7 of the same Act (*c*), 'Where any criminal proceeding is instituted, undertaken, or carried on by the director of public prosecutions, such director shall not be bound over to prosecute or conduct such proceedings, or required to give security for costs, and it shall not be necessary to bind over any person to prosecute or conduct such proceeding, and if any person is so bound over, or has given security for costs, he shall, upon the director of public prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, and the director of public prosecutions shall be liable to costs in lieu of such person' (*d*).

By sect. 8, 'The Attorney-General (*e*) with the approval of the Lord Chancellor and a Secretary of State may from time to time make and when made rescind vary and add to regulations for carrying into effect this Act.

(*a*) Sect. 5 of the Act of 1884 repeals sect. 2 in part, and sects. 3 and 4 of the Act of 1879.

(*b*) See 7 Geo. IV. c. 64, s. 5, as to penalties on justice, and 50 & 51 Vict. c. 71, s. 9, as to penalties on a coroner.

(*c*) The first part of the section is repealed and replaced by 8 Edw. VII. c. 3, s. 2 (3) *post*, p. 1925.

(*d*) See Stubbs *v.* Director of Public Prosecution, 24 Q.B.D. 577. As to costs *vide post*, p. 2039.

(*e*) For England, or, in event of vacancy in that office, the Solicitor-General (sect. 9).

and houses the said fluid in such large, excessive, and dangerous quantities, whereby the King's subjects passing along the said streets and highways and residing in the said houses were in great danger of their lives and property, and were kept in great alarm and terror; it was held that the count was good; for though the count did not state that any noxious effluvia issued from the naphtha, or that the air was corrupted by it, or that any bodily harm was done by it to anyone; yet to deposit and keep such a substance in such quantities in a warehouse so situate, to the danger of the lives and property of the King's subjects, is an indictable offence. The substance must be of such a nature, and kept in such large quantities and under such local circumstances, as to create real danger to life and property. The well-founded apprehension of danger, which would alarm men of steady nerves and reasonable courage, passing through the street in which the house stands, or residing in adjoining houses, is enough to shew that something has been done which the law ought to prevent by pronouncing it a misdemeanor (*z*).

Upon a case reserved upon the point, whether, when the manufacture, as carried on (which was carefully), produced in the opinion of the scientific men no danger, its liability to danger *ab extra* made it a public nuisance, it was held that it did. The supposed safety from within depended on the care of the defendant's servants in not allowing any candles, fire, or gas-light to enter the warehouse, and it was only so long as this care continued that the naphtha could not produce danger; but it was said that the law takes notice that occasional carelessness may be reckoned upon, and forbids that to be done which, on the recurrence of carelessness, will in all probability prove destructive to life and property. As to the question whether such a manufacture is carried on so carefully as in the opinion of scientific men to produce no danger, its liability to danger *ab extra* makes it a public nuisance; there is no doubt that its liability to danger *ab extra* may make it a public nuisance. Upon the trial of such indictments it is a question of fact for the jury whether the keeping and depositing, or the manufacturing of such substances, really does create danger to life and property as alleged; and this must be a question of degree depending upon the circumstances of each particular case. And in this case the jury were properly directed that if the depositing and keeping of the naphtha in the manner described, coupled with its liability to ignition *ab extra*, created danger to life and property to the degree alleged, they might find a verdict of guilty (*a*).

The storage and carriage of mineral oils is regulated by the Petroleum Acts, 1871, 1879, and 1881. By sect. 18 of the Act of 1871 that Act does not exempt from penalties which would otherwise be incurred for nuisance.

To keep a quantity of materials for making fireworks in a building near a street and dwelling-houses, calculated to endanger the life of

(*z*) R. *v.* Lister [1857], D. & B. 209: 20 L. J. M. C. 196.

(*a*) R. *v.* Lister, *supra*. Pollock, C.B., agreed as to the point of law with the other judges; but thought that the defendants were improperly convicted upon evidence of a dangerous use of the article in mixing it with another article to make a very combustible material.

'The draft of all such regulations proposed to be approved as aforesaid shall be laid before both Houses of Parliament, and shall not be finally approved as aforesaid until the draft has lain before each House of Parliament for not less than forty days upon which such house has sat' (*f*).

By sect. 9. 'Person' in the Act includes a body of persons corporate or unincorporate.

By the Act of 1908 (8 Edw. VII. c. 3), s. 2, '(1) The regulations under the Prosecution of Offences Act, 1879 (*g*), shall provide for the director of public prosecutions taking action in cases which appear to him to be of importance or difficulty, or which from any other reason require his intervention.

'(2) Section six of the Prosecution of Offences Act, 1879, which relates to the proceedings on prosecutions which the director of public prosecutions has abandoned, shall cease to have effect.

'(3) Nothing in the Prosecution of Offences Acts, 1879 and 1884 (*h*), or in this Act, shall preclude any person from instituting or carrying on any criminal proceedings, but the director of public prosecutions may undertake at any stage the conduct of those proceedings if he thinks fit.

'(4) It is hereby declared that the provisions of any Act requiring or authorising any court to make an order for the payment to the prosecutor of any expenses of or incidental to the prosecution of any offence, apply with respect to the payment of those costs to the director of public prosecutions as they apply with respect to the payment of those costs to a private prosecutor, *vide post*, p. 2039.

'(5) The director of public prosecutions shall be substituted for the solicitors of His Majesty's Treasury in section forty-two (*i*) of the Coinage (Offences) Act, 1861 (which relates to costs of prosecutions)' (*j*).

By the Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), s. 10, a charge of being a habitual criminal (*k*) within the meaning of that Act may not be included in an indictment without the consent of the director of public prosecutions, and prosecutions under the Punishment of Incest Act, 1908 (8 Edw. VII. c. 45) must be by or on behalf of the director, unless by the sanction of the Attorney-General (sect. 6).

Sect. II.—Vexatious Indictments.

At common law a bill of indictment may be sent before a grand jury or a presentment may be made by a grand jury (in England and Ireland) charging any person with an indictable offence, without any previous inquiry into the charge before a justice of the peace. This power has been limited as to certain offences by the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), and by subsequent legislation. By the Act of 1859, sect. 1, 'No bill of indictment for any of the offences following, viz.:—

(*f*) The regulations in force were made in 1884. They are not subject to the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), s. 1 (4). It is doubtful whether they can be quashed as *ultra vires*. See Institute of Patent Agents *v.* Lockwood [1894], A. C. 347.

(*g*) 42 & 43 Vict. c. 22. See *ante*, p. 1924.

(*h*) 47 & 48 Vict. c. 58. See *ante*, p. 1924.

(*i*) Sect. 42 is repealed by 8 Edw. VII. c. 15, *s.* 10, *post*, p. 2046.

(*j*) Sect. 3 relates to repeals and short collective titles.

(*k*) *Vide ante*, Vol. i. pp. 240 *et seq.*

'Perjury (*l*) and subornation of perjury (*ante*, Vol. i. p. 451), conspiracy (*ante*, Vol. i. p. 146), obtaining money or other property by false pretences (*m*), keeping a gambling house, keeping a disorderly house, (*ante*, pp. 1892 *et seq.*), and any indecent assault (*ante*, Vol. i. pp. 955, 975), shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed (*n*) to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent, in writing, of a judge of one of the superior courts of law at Westminster (*o*), or of His Majesty's Attorney-General, or Solicitor-General for England (*p*), or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent, in writing, of a judge of one of the superior courts of law in Dublin (*q*), or of His Majesty's Attorney-General or Solicitor-General for Ireland, or (in the case of an indictment for perjury) by the direction of any court, judge, or public functionary authorized by the Criminal Proceedure Act, 1851 (14 & 15 Vict. c. 100) (*r*), to direct a prosecution for perjury.'

To the list of offences given in sect. 1, the following offences have been added by subsequent legislation : —

1. Every misdemeanor under the second part of the Debtors Act, 1869 (*s*), as amended by the Bankruptcy Acts of 1883 (46 & 47 Vict. c. 52), and 1890 (53 & 54 Vict. c. 71). 2. Every misdemeanor under Part 2 of the Debtors (Ireland) Act, 1872 (*t*). 3. Every libel or alleged libel and every offence under the Newspaper Libel and Registration Act, 1881 (*u*). 4. Every misdemeanor under the Criminal Law Amendment

(*l*) In R. *v.* Heane, 4 B. & S. 947; 33 L. J. M. C. 115. It was questioned whether the Act of 1859 applied to perjury committed outside England or Ireland, or to perjury committed before a naval Court Martial held under the Naval Discipline Act, 1861 (24 & 25 Vict. c. 115). That Act is superseded by the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), which provides (sect. 67) that where perjury under the Act committed outside England is tried in England all statutes and laws applicable to cases of perjury shall apply to the case.

(*m*) But not to attempts to obtain, &c. R. *v.* Burton, 13 Cox, 71.

(*n*) See R. *v.* Beckley, 20 Q.B.D. 187.

(*o*) Now merged in the High Court of Justice in England. It would seem that an application for consent to prefer the bill may be made to a judge of the K.B.D. in chambers. R. *v.* Bennett [1908], 72 J. P. 362. The word 'direction' applies to cases where an order to prosecute is made; *e.g.*, in perjury cases (14 & 15 Vict. c. 100, s. 19), and bankruptcy cases (32 & 33 Vict. c. 62, s. 16).

(*p*) This consent may be given even after a refusal to commit for trial. R. *v.* Rogers, 66 J. P. 825. The consent is produced to the clerk of the Court of trial, but is not proved at the trial. R. *v.* Dexter, 19 Cox, 360.

(*q*) Now merged in the High Court of Justice in Ireland.

(*r*) *Vide ante*, Vol. i. p. 481.

(*s*) 32 & 33 Vict. c. 62, s. 18, *ante*, p. 1456. When any person is charged with any such offence before any justice, he must take into consideration any evidence adduced before him tending to shew that the act charged was not committed with a guilty intent. See R. *v.* Bell, 12 Cox, 37, as to reading together 22 & 23 Vict. c. 17, and 30 and 31 Vict. c. 35, s. 1.

(*t*) 35 & 36 Vict. c. 57, s. 18.

(*u*) 44 & 45 Vict. c. 60, s. 6, *ante*, Vol. i. p. 1060. The Act is primarily concerned with defamatory libels published in newspapers. But the terms of sect. 6 are wide enough to include all kinds of libel. Criminal prosecution for libel against the owners, &c., of newspapers, cannot be commenced without the leave of a judge

Act, 1885 (*v*). 5. Any offence punishable on indictment under the Merchandise Marks Act, 1887 (*w*). 6. Misdemeanors under the Prevention of Corruption Act, 1906 (*x*). 7. Every misdemeanor under Part II. of the Children Act, 1908 (*y*). 8. Offences under the Punishment of Incest Act, 1908 (*z*).

It was found that delay and inconvenience were caused by the provisions of sect. 1 of the Act of 1859, in cases not within the mischief of that Act. To remedy this, it was provided by sect. 1 of the Criminal Law Amendment Act, 1867 (*a*) but as to England only (*b*), that 'The said provisions of the said first section of the said Act of 1859 shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act (*c*) if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) (*d*) upon the facts or evidence disclosed (*e*) in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or delivered to such court in due course of law; and nothing in the said act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the Court in or before which the same may be preferred.'

It has been held that where K. was committed for trial for conspiring with B., who had not been arrested, the Court could give leave under the above section to prefer an indictment against B. for conspiracy (*f*).

Where a defendant has elected to be tried on indictment in respect of an offence punishable on summary conviction, he may be committed for trial in respect of any indictable offence disclosed by the depositions, as well as for the offence as to which he has elected to be tried on indictment; and in cases in which sect. 1 of the act of 1867 limits the operation of the act of 1859, counts may be added without the leave of the Court

of the High Court (51 & 52 Vict. c. 64, s. 8, *ante*, Vol. i. p. 1060. (But this does not dispense from compliance with the Vexatious Indictments Act, 1859, *post*, p. 1927).

(*v*) 48 & 49 Vict. c. 69, s. 17.

(*w*) 50 & 51 Vict. c. 28, s. 13, *ante*, p. 1591.

(*x*) 6 Edw. VII. c. 34, s. 2 (2). By sub-sect. 1, prosecutions for such offences may not be instituted without the consent in England or Ireland, of the Attorney-General or Solicitor-General. The result of sub-sect. 2 is apparently to nullify the exception to sect. 1 of the Vexatious Indictments Act, 1859.

(*y*) 8 Edw. VII. c. 67, s. 35, *ante*, Vol. i. p. 921.

(*z*) 8 Edw. VII. c. 45, ss. 4 (1), 6, *ante*, Vol. i. p. 974.

(*a*) 30 & 31 Vict. c. 35.

(*b*) See sect. 7 of the Act of 1867.

(*c*) Or to which that Act as amended has been applied. See R. *v.* Bell, 12 Cox, 37, Montague Smith, J., as to a charge under the Debtors Act, 1869.

(*d*) The leave of the Court is not a mere formality, and should not be given until materials are laid before the Court upon which to determine whether its discretion should be exercised. R. *v.* Bradlaugh, 15 Cox, 156.

(*e*) The consent of the Court is not needed for adding counts in respect of facts appearing on the depositions. R. *v.* Clarke, 59 J. P. 248, Collins, J. But if the added counts are embarrassing, the Court may, it would seem, refuse to allow evidence to be given in support of them. R. *v.* Harris, 64 J. P. 360, Grantham, J. Charges dismissed by the justices are, it would seem, not to be added without leave of the Court, unless the prosecutor has been bound over under 22 & 23 Vict. c. 17, s. 2, *post*, p. 1929. See R. *v.* Crabbe, 59 J. P. 247.

(*f*) R. *v.* Kopelewitch [1905], 69 J. P. 216, Fulton, Recorder.

for any indictable offence disclosed by the depositions, although the accused was not summoned for such offence (*g*).

By sect. 2 of the Act of 1859, 'Where any charge or complaint shall be made before any one or more of His Majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit (*h*) or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information, and depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence' (*i*).

In *Ex parte* Reid (*j*) it was held that sect. 2 did not apply where a justice had refused to issue process, and in R. *v.* Battier (*k*) it was held that the Act did not apply till summons or warrant had been granted. If the information is in respect of matters for which no indictment lies, the justices cannot be compelled to take recognizances (*l*).

Where a justice on an information for an offence within the Vexatious Indictments Act refuses to grant process, there are three remedies: (1) application to the Attorney-General; (2) application to a judge of the High Court (K.B.D.) for his consent to preferring a bill of indictment (22 & 23 Vict. c. 17, s. 1); and (3) application to a divisional Court of the K.B.D. for a mandamus to hear and determine according to law. The mandamus will not be granted if the justice has properly exercised his discretion on the application; but where a *prima facie* case has been made of an indictable offence it seems to be his duty to issue process (*m*) without going into questions as to civil remedies available to the informant (*n*).

There seems to be no means of compelling a justice to grant process if he has really judicially heard and determined the application for summons or warrant (*o*), and has in his discretion refused it as being vexatious (*p*).

It is for the judge to whom application is made, under sect. 1 of the Act of 1867, to decide what materials ought to be before him, and it is not necessary to summon the party accused, or to bring him before the judge in any way. Where some time after the trial of an action,

(*g*) R. *v.* Brown [1895], 1 Q.B. 119. An indictment for keeping a gambling house and contravening the Betting House Act, 1853 (16 & 17 Vict. c. 119).

(*h*) Or dismisses the case for want of evidence. R. *v.* Lord Mayor of London, *ex parte* Gostling, 16 Cox, 77. As to what amounts to refusal to commit, see R. *v.* Coyne, 69 J.P. 151, Fulton, Recorder. If a magistrate commits on some charges and refuses to commit on others, counts for the latter offences should not be added, ibid.

(*i*) If a prosecutor bound over under this section fails to send up a bill to the grand jury at the sessions at which he is bound over, the recognizances cannot, it would seem, be enlarged to the next sessions. R. *v.* Eayres, 64 J. P. 217.

(*j*) 49 J. P. 600.

(*k*) 44 J. P. 490. S. C. as R. *v.* Bather, 42 L. T. 532. The offences specified in the Acts are all misdemeanors as to which arrest without warrant is illegal, or lawful only under exceptional circumstances.

(*l*) *Ex parte* Wason, L. R. 4 Q.B. 573; 38 L. J. Q.B. 302.

(*m*) R. *v.* Adamson, 1 Q.B.D. 201; 45 L. J. M. C. 46. R. *v.* Bennett [1908], 72 J. P. 362. R. *v.* Kennedy, 86 L. T. 753, an application for process against Jesuits for being unlawfully in England.

(*n*) R. *v.* Bennett, *ubi sup.* R. *v.* Evans, 54 J. P. 47.

(*o*) R. *v.* MacMahon, 48 J. P. 70. R. *v.* Bros, 66 J. P. 54.

(*p*) R. *v.* Kennedy, *ubi sup.*

upon which perjury was alleged to have been committed, the accusing party appeared before the judge who tried the action, and, producing a newspaper report of the trial, applied for a consent to a prosecution being commenced, and the judge wrote upon the newspaper report, 'I consent to a prosecution in this case,' it was held, that he had rightly exercised the jurisdiction given by the above section (*q*).

Where an indictment contained two counts,—one for obtaining a shawl by false pretences on September 26, and another for obtaining another shawl by false pretences on September 29,—and the prisoner had been only committed for obtaining the shawl on September 26, it was held, on a case reserved, that the second count ought to have been quashed (*r*).

Three defendants were charged before a justice with conspiracy and were committed for trial at the Central Criminal Court for that conspiracy; and the prosecutors and witnesses were bound over to prosecute and give evidence; and at the next session of the court an indictment for conspiracy was found against the defendants. The trial was postponed, and the recognizances respited, till the next session; and before that session the Solicitor-General directed an indictment to be preferred against another person for the same conspiracy; and at that session another indictment was found against all four defendants. It was held that the three first mentioned defendants were rightly tried, and convicted on the second indictment, as the Act of 1859 had been sufficiently complied with, the second indictment being for the same conspiracy, with which those defendants had been charged before the magistrate; and that the indictment need not allege that they had been bound over by the magistrate (*s*).

Sect. III.—Limitations of Time for Prosecution.

Limitation of time for Prosecution.—There is 'no limitation at common law to a criminal prosecution on indictment' (*t*). *Nullum tempus occurrit regi*. The same rule applies with respect to criminal informations filed in the High Court of Justice (*u*). But where leave is asked to file such information it will not be granted unless any delay in making the application is reasonably accounted for (*v*).

Proceedings for any offence punishable on summary conviction, whether it be or be not indictable at the election of the accused, must be commenced within six months of its commission (*w*) unless another time is limited by the statute governing the offence.

(*q*) R. *v.* Bray, 3 B. & S. 255; 32 L. J. M. C. 11.

(*r*) R. *v.* Fuidge, L. & C. 390; 33 L. J. M. C. 74. R. *v.* Davies, ibid. note.

(*s*) Knowlden *v.* R., 5 B. & S. 532; 33 L. J. M. C. 219.

(*t*) Dover *v.* Maestaer [1803], 5 Esp. 92, Ellenborough, C.J. Because of this rule a witness was cautioned in an action of debt for bribery at an election (2 Geo. II. c. 24, *ante*, Vol. i. p. 638), that he was not bound to answer any question which might criminate him. A governor of a British possession was tried, convicted, and executed in 1802 for murder committed in the possession in 1782. R. *v.* Wall 28 St. Tr. 51.

(*u*) R. *v.* Robinson, 1 W. Bl. 541, Lord Mansfield.

(*v*) Crown Office Rules, 1906, v. 37, which embodies and adopts to modern procedure the substance of the common law practice, as to which see R. *v.* Robinson, *ubi sup.* R. *v.* Jollie, 4 B. & Ad. 867. Short and Mellor, Cr. Pr. (2nd ed.), 162.

(*w*) 11 & 12 Vict. c. 43, s. 11. Where the offence is continuing the time is computed from any date within six months of institution of the proceedings on which the offence was continuing.

The commencement of a prosecution appears to be the laying of an information or application for process or the preferring of the indictment, or if the offence be one for which the accused may be arrested without warrant, the arrest (*x*). The day on which the offence was committed is excluded, and the day on which the arrest is made, the information laid, or the indictment preferred, is included (*y*).

The statutory limitations of time for prosecutions on indictment or criminal information are as follows :—

Offence	Limitation	Statute
Blasphemy by words spoken	Information within four days, prosecution within three months	9 Will. III. c. 35 (*ante*, p. 400).
Customs Acts, offences against	Three years next after date of offence committed	39 & 40 Vict. c. 36, s. 257.
Income Tax Acts, proceedings for fines or penalties under	Three years next after the fine or penalty is incurred	7 Edw. VII. c. 13, s. 23 (1).
Offences by officials	Six months after the act, neglect, or default complained of	56 & 57 Vict. c. 61, s. 1.
Riot Act, offences against	'Twelve months' after the offence committed.	1 Geo. I. st. 2, c. 5, s. 1.
Night poaching	'Twelve calendar months' after the commission of the offence	9 Geo. IV. c. 69, s. 4.
Penal statute, information under, unless otherwise specifically provided	If forfeiture limited to the King, two years; if to King and prosecutor, one year by the prosecutor, or in default, two years by King	31 Eliz. c. 5, s. 5. As to informations before justices, see 11 & 12 Vict. c. 43, s. 11 (*supra*).
Treason (except treason by designing, endeavouring, or attempting assassination of the King	Bill to be found within three years next after the offence committed	7 & 8 Will. III. c. 3 & 7 Anne, c. 21. (No limitation if offence committed outside Great Britain).
Corrupt and illegal practices at elections	One year from offence or three months from report of election commission, whichever first occurs	46 & 47 Vict. c. 51, s. 31.
Carnal knowledge of a girl of thirteen and under sixteen	Six months	48 & 49 Vict. c. 69, s. 5. 4 Edw. VII. c. 15, s. 27.
Marriage Acts, offences against : (a) unduly solemnizing marriage	Three years	4 Geo. IV. c. 76, s. 21 (*ante*, p. 1016).

(*x*) See Archb. Cr. Pl. (23rd ed.) 97.
(*y*) Radcliffe *v.* Bartholomew [1892], 1 Q.B. 161 ; 61 L. J. M. C. 63.

Statutory Limitations of Time, continued—

Offence	Limitation	Statute
Marriage Acts, offences against, *continued*—		
(b) offences under Act of 1836	Three years	6 & 7 Will. IV. c. 85, s. 41.
(c) under Marriage Act, 1840	Three years	3 & 4 Vict. c. 72, s. 4.
Births and Deaths Registration Act, 1874, offences against the	Three years	37 & 38 Vict. c. 88, s. 46.
Merchandise Marks Acts, offences against	Three years next after the commission of the offence, or one year after first discovery by the prosecutor, whichever event first happens.	50 & 51 Vict. c. 28, s. 15.
Misdemeanor by officials in India	Six years	24 Geo. III. sess. 2, c. 25. 33 Geo. III. c. 52, s. 140.
Unlawful drilling	Six months	60 Geo. III. & 1 Geo. IV. c. 1, s. 7.

Sect. IV.—Courts in which Indictments may be Preferred.

High Court.—The High Court of Justice (K.B.D.) has jurisdiction to try any indictable offence cognizable in England (*z*). This jurisdiction is for the most part concurrent with that of Courts of Assize and Quarter Sessions, but in a few cases, under particular statutes already mentioned, is exclusive. It is rarely exercised, usually only by the removal in the interests of justice, of indictments found in the other Courts named (*a*): but occasionally in the case of misdemeanor by information filed in the King's Bench Division (*b*).

Courts of Assize.—The Courts created by commissions of assize oyer and terminer and gaol delivery (*c*), including the Central Criminal Court (*d*), are now parts of the High Court of Justice (*e*). These courts have jurisdiction subject to the rules as to venue, &c. (*f*), to try any indictable offence not reserved by statute to the King's Bench Division.

Courts of Quarter Sessions.—Courts of Quarter Sessions in counties and boroughs have jurisdiction to try any indictable offence cognizable within the district for which the Court sits, except the offences in the following list (taken from 5 & 6 Vict. c. 38, except as otherwise stated).

1. *Offences against the State and Religion.*—Treason or misprision of treason: offences against the King's title, prerogative person or government or against either House of Parliament: administering and taking unlawful oaths: offences subject to the penalties of *praemunire:*

(*z*) Short and Mellor, Cr. Pr. (2nd ed.) 84 *et seq.* C. O. R. [1906], *rr.* 32-34.
(*a*) l.c. pp. 15, 90.
(*b*) *Ante*, p. 1923.
(*c*) R. *v.* Dudley, 14 Q.B.D. 275, 560; 54 L. J. M. C. 32.
(*d*) R. *v.* Parke [1903], 2 K.B. 432, 440. As to the history of this Court see 6 St. Tr. (N.S.) 1135.
(*e*) 36 & 37 Vict. c. 66, s. 16 (11).
(*f*) *Ante*, Vol. i. p. 19, *et seq.*; *post*, p. 1937.

offences against the Official Secrets Act, 1889 (*g*): blasphemy and offences against religion (*h*): composing, printing, or publishing blasphemous, seditious, or defamatory libels (*hh*).

2. *Offences against Justice, &c.*—Perjury and subornation of perjury: and making or suborning any other person to make a false oath, affirmation, punishable as perjury or as a misdemeanor (*i*).

3. *Bribery, &c.*—Bribery and undue influence (17 & 18 Vict. c. 102, ss. 2, 3), except bribery within the Municipal Bodies (Corrupt Practices) Act, 1889 (52 & 53 Vict. c. 69), s. 6 (*j*): corrupt practices at elections (*k*): misdemeanors against the Corrupt Practices Prevention Act, 1906 (*l*).

4. *Offences against the Person, &c.*—Murder (*m*), and any capital felony (*n*), endeavouring to conceal the birth of a child (*o*): bigamy and offences against the laws of marriage (*p*): abduction of women and girls (*q*), and indictable offences against the Criminal Law Amendment Act, 1885 (*r*), incest (*s*): composing, printing, or publishing defamatory libels (*t*).

5. *Larceny, &c.*—Stealing or fraudulently taking or injuring records or documents belonging to any court of law or equity, or relating to any proceeding thereon (*u*): stealing or fraudulently destroying or concealing wills, or testamentary papers, or any document or written instrument being or containing evidence of title to any such estate, or any interest in lands, tenements or hereditaments (*v*): misdemeanors against the Larceny Act, 1901, or sects. 77–85 of the Larceny Act, 1861 (*w*): offences against sect. 9 of the Night Poaching Act, 1828 (9 Geo. IV. c. 69) (*x*).

6. *Fraud.*—Forgery (*y*) and offences against the False Personation Act, 1874 (*z*).

7. *Malicious Damage.*—Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern (*a*).

8. *Grave Felony.*—Any felony (except burglary) (*b*), which, when committed by a person not previously convicted of felony, is punishable by penal servitude for life.

9. *Conspiracy.*—Unlawful combinations and conspiracies (*c*) except

(*g*) 52 & 53 Vict. c. 52, s. 6 (3).
(*h*) *Ante*, Vol. i. p. 393.
(*hh*) *Ante*, Vol. i. pp. 301, 393.
(*i*) *Ante*, Vol. i. p. 455 *et seq.*
(*j*) *Ante*, Vol. i. p. 628.
(*k*) 17 & 18 Vict. c. 102, s. 10; 46 & 47 Vict. c. 51, s. 53 (Parliament). 47 & 48 Vict. c. 70, ss. 30, 35, 36 (town councils). 51 & 52 Vict. c. 41, s. 75 (county councils). 56 & 57 Vict. c. 73, s. 48 (district councils). 47 & 48 Vict. c. 70, s. 35; 50 & 51 Vict. c. 13 (City of London). 62 & 63 Vict. c. 14 (Metropolitan borough councils). *Ante*, Vol. i. pp. 633 *et seq.*
(*l*) 6 Edw. VII. c. 34, s. 2 (5), *ante*, Vol. i. p. 629.
(*m*) *Ante*, Vol. i. p. 653.
(*n*) *Ante*, Vol. i. p. 205.
(*o*) *Vide ante*, Vol. i. p. 773.
(*p*) *Ante*, Vol. i. p. 979.
(*q*) *Ante*, Vol. i. p. 959.
(*r*) 48 & 49 Vict. c. 69, s. 17, *ante*, Vol. i. p. 931 *et seq.*
(*s*) 8 Edw. VII. c. 45, s. 4 (2), *ante*, Vol. i. p. 973.
(*t*) *Ante*, Vol. i. p. 1021.
(*u*) See 24 & 25 Vict. c. 96, s. 30, *ante*, p. 1266.
(*v*) See 24 & 25 Vict. c. 96, ss. 28, 29, *ante*, pp. 1264, 1265.
(*w*) 24 & 25 Vict. c. 96, s. 87, *ante*, p. 1414.
(*x*) *Ante*, p. 1333.
(*y*) *Ante*, pp. 1599 *et seq.*
(*z*) 37 & 38 Vict. c. 36, s. 3, *ante*, p. 1763.
(*a*) These offences are punishable under 24 & 25 Vict. c. 97, s. 16, *ante*, p. 1799.
(*b*) 59 & 60 Vict. c. 57, *ante*, p. 1101.
(*c*) See Latham *v.* R., 33 L. J. M. C. 197; 5 B. & S. 535. *Vide ante*, Vol. i. pp. 146 *et seq.*

conspiracies and combinations to commit offences which the court has jurisdiction to try when committed by one person.

10. *Admiralty Jurisdiction.*—Courts of Quarter Sessions have power to try offences (committed within the admiralty jurisdiction) under the Criminal Law Consolidation Acts of 1861 (*d*), but apparently not attempts to commit such offences.

Indictments formed before a Court of Quarter Sessions as to an offence cognizable there may be transmitted by the court to a Court of Assize for trial without *certiorari* (*e*), or may be removed by *certiorari* issued by the King's Bench Division (*f*).

(*d*) *Ante*, p. 40.
(*e*) See Archb. Cr. Pl. (23rd ed.) 128.
(*f*) Short and Mellor, Cr. Pr. (2nd ed.) 15, 90. Archb. Cr. Pl. (23rd ed.) 129.

CANADIAN NOTES.

PROCEDURE, APPEALS, COSTS AND REWARDS.

Summary Procedure.—Part XV. (secs. 705-770 of the Criminal Code), entitled "Summary Convictions," deals with the jurisdiction of magistrates to try and summarily dispose of certain offences for which on summary conviction the accused is liable to imprisonment, fine, penalty or other punishment (Code sec. 706), and to all cases where an order can be made summarily (Code sec. 706(*b*)), and prescribes the procedure to be followed in such cases.

Part XVI. (secs. 771-779 of the Criminal Code), entitled "Summary Trial of Indictable Offences," deals with the jurisdiction of magistrates to try and summarily dispose of certain indictable offences, and prescribes the procedure to be followed therein.

As summary procedure does not fall within the scope of the text of this work, it has not been deemed advisable to append any notes dealing with the subject.

Sec. 1.—*Who May Prosecute.*

Justice may issue summons or warrant against any person, upon the complaint of any person who, on any reasonable or probable grounds believes that any person has committed an indictable offence under the Code. See Code secs. 653, 654, 655.

Information Before Justices for Indictable Offence.—The Sovereign is supposed by law to be the person who is injured by every infraction of the criminal law, and criminal prosecutions which have for their object the well-being of the people, and not merely private redress, are therefore carried on in the name of the King. As the King cannot appear in person to demand the punishment of offences against the good order of the community, he has to be represented before the Courts by a public officer, and that officer is the Attorney-General.

Before the criminal Courts the Sovereign is therefore the prosecutor, and is represented either by the Attorney-General himself, or by Crown prosecutors who are named by the Attorney-General as his substitutes.

But as offences generally affect some private individual in particular, the person so injured or affected usually commenecs the proceedings for bringing the offender to justice, although anyone who has

reasonable or probable ground for believing that any person has been guilty of a crime may take proceedings and put the law in motion against him. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141, 144 (Que.).

The information is the commencement of a criminal proceeding analogous to an indictment; the summons is the act of the magistrate on behalf of the public; the party who begins a criminal proceeding cannot withdraw from it, leaving it pending; the party charged has the right to force it on to a conclusion; and if at the time of concluding the case the informant offers no evidence in support of his charge, it ought to be dismissed, and such dismissal is a hearing. Re Conklin, 31 U.C.Q.B. 160.

The magistrate taking an information under oath ought not to receive from the complainant a mere affidavit made out in the words of the statute creating the offence; but he ought, in the first place, and before making out the formal information, to swear the complainant and his witnesses, if any, and have their statements and answers written down in their own words and have them sign it. This, when so completed, is what is known as a "written information under oath." Ex parte Boyce (1885), 24 N.B.R. 347, 354.

An information should give a concise and legal description of the offence charged, and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence, and the statement of the offence may be in the words of the enactment describing it or declaring the transaction charged to be an indictable offence. R. v. France (1898), 1 Can. Cr. Cas. 321 (Que.).

The absence or the insufficiency of particulars does not vitiate either an indictment or an information; but if it be made to appear that there is a reasonable necessity for more specific information, the Court or magistrate may, on application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the Judge or the magistrate. *Ibid.*

An information may be amended, but if on oath, it must be resworn. Re Conklin (1871), 31 U.C.Q.B. 160.

If a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on certiorari because it is afterwards shewn that the information was not in fact sworn at such time and place. Ex parte Sonier (1896), 2 Can. Cr. Cas. 121 (N.B.).

No irregularity or defect in the substance or form of the summons or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the information, or between either and the evidence adduced on the part of the prosecution

at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing. Code sec. 669.

Although an arrest has been illegally made under an invalid warrant, jurisdiction attaches to the magistrate when the person arrested is brought before him; and the subsequent detention and commitment may be justified under the order then made by the magistrate. McGuiness v. Dafoe (1896), 3 Can. Cr. Cas. 139 (Ont.).

False Accusation.—Where an information for rape or other offence under Code sec. 453 is falsely laid with the sole intent to extort money or property from the person against whom the charge is made, the informant thereby "accuses" such person with intent to extort or gain something from him under Cr. Code sec. 453; and commits an indictable offence thereunder. R. v. Kempel, 3 Can. Cr. Cas. 481 (Ont.).

An application for a mandamus against a magistrate is a civil and not a criminal proceeding, although the act which it is proposed the justice shall be ordered to do is the taking of an information for an offence against the criminal law. R. v. Meehan (No. 1) (1902), 5 Can. Cr. Cas. 307.

By the Interpretation Act, R.S.C. ch. 1, sec. 28, it is provided that "every Act shall be read and construed as if any offence for which the offender may be (*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence; and, (*b*) punishable on summary conviction, were described or referred to as an offence; and, all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence.

"2. Every commission, proclamation, warrant or other document relating to criminal procedure, in which offences which are indictable offences, or offences, as the case may be, are described or referred to by any names whatsoever, shall be read and construed as if such offences were therein described and referred to as indictable offences or offences, as the case may be."

A party applying to a magistrate for a warrant to arrest another for an alleged offence is deemed only to appeal to the magistrate to exercise his jurisdiction, and is not liable in trespass for an arrest under the warrant, but if he goes beyond this and interferes in the exercise of the ministerial powers under the warrant he will be liable. Kingston v. Wallace (1886), 25 N.B.R. 573.

If there was a complaint proved and the person informed against was present, the magistrate might rightly proceed, though such person did not appear on summons or did not require compulsion to make him appear. His actual presence is all that is required; the manner of his getting there is of no consequence to the investigation. R. v. Mason (1869), 29 U.C.Q.B. 431.

The power conferred on a magistrate under sec 665 of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction, to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. A magistrate may hold a preliminary enquiry in respect of an indictable offence committed in the same province outside of his territorial jurisdiction, if the accused is, or is suspected to be, within the limits over which such magistrate has jurisdiction, or resides or is suspected to reside within such limits. Re The Queen v. Burke (1900), 5 Can. Cr. Cas. 29 (Ont.).

1. A police magistrate or stipendiary magistrate may summarily try a prisoner with his consent by virtue of Code secs. 771A(2) and 777, for an offence committed outside of his territorial jurisdiction, but in the same province.

2. The presence of the accused, whether transitory or not, in any part of the province in which the offence was committed will justify the exercise of jurisdiction by the magistrate of the place where the accused is found, to the same extent as if the offence had been there committed, but the magistrate has a discretion to send the prisoner for further preliminary enquiry before the magistrate of the place where the offence was committed. Re Seeley, 14 Can. Cr. Cas. 270.

The issue of a summons, whether in relation to an offence punishable summarily or to an indictable offence, is a judicial act. R. v. Ettinger (1899), 3 Can. Cr. Cas. 387, 32 N.S.R. 176.

A justice of the peace could always issue a warrant on the information of others having cause of suspicion, for the justice was competent to judge of the sufficiency of the evidence when he examined the complainant and his witnesses touching his reasons for the suspicion, it would, if well grounded, become the justice's suspicion as well as that of the complainant. Ex parte Boyce (1885), 24 N.B.R. 347, 353. But the mere statement of a person, even under oath, that he suspects and believes that another person has committed a certain crime was not sufficient at common law to justify a warrant to apprehend, for unless the justice has the facts upon which the informant's belief is founded, he has no proof at all on which he would be justified in founding his own belief. *Ibid*, p. 355, per Palmer, J.

A magistrate is not under a legal obligation to issue a warrant of arrest upon an information in respect of an indictable offence, if on the consideration of the complainant's allegations he is of opinion that a case for so doing is not made out. A magistrate refusing to issue a warrant on an information for an indictable offence, is not bound to state his reason for so doing; he has merely to express his opinion, after a consideration of the complainant's allegations, as to whether a warrant should be issued or not. That a magistrate did not

properly appreciate the evidence submitted upon an application for the issue of a warrant of arrest for an indictable offence is not a ground for a mandamus to compel him to grant a warrant against his opinion in good faith. Thompson v. Desnoyers, 3 Can. Cr. Cas. 68, R.J.Q. 16, S.C. 253 (Que.).

Where a magistrate receives an information, and, after hearing and considering the allegations of the informant, decides that the statute invoked in support of the prosecution does not apply, and that what is charged does not constitute an offence, and therefore refuses to issue either a summons or warrant against the accused, a mandamus does not lie to compel him to do so. Re E. J. Parke, 3 Can. Cr. Cas. 122 (Ont.); Ex parte MacMahon, 48 J.P. 70.

A justice of the peace who issues a warrant of arrest without inquiring into the grounds which the complainant had to suspect the accused, becomes liable towards the latter under the laws of Quebec, when the complaint was not justified by any serious, reasonable or plausible ground. Murfina v. Sauve, 6 Can. Cr. Cas. 275.

Limitations on Power to Prosecute.

The fiat or consent of the Attorney-General is necessary in the following cases:—

(*a*) Disclosing official secrets. See Code sec. 592.

The expression "Attorney-General" means the Attorney-General or Solicitor-General of any province in Canada in which any proceedings are taken under the Code; and with respect to the North-West Territories and the Yukon Territory, the Attorney-General of Canada. Section 2(2).

The indictment need not allege the consent here mentioned. Section 855.

The Minister of Justice is the Attorney-General of Canada, and his consent to a prosecution under this section is effective in any province.

(*b*) Judicial corruption. See Code sec. 593.

Leave of Attorney-General of Canada.—Sections 592 and 594 use the term "consent" while here the word is "leave"; but they are probably interchangeable terms, and sec. 855 would apply as well to this offence as to those referred to in secs. 592 and 594.

British Columbia Crown Rules.—With the exception of *ex-officio* informations filed by the Attorney-General on behalf of the Crown, no criminal information or information in the nature of a *quo warranto* shall be exhibited or received in the Supreme Court without an express order of a Judge of the Supreme Court, nor shall any process be issued upon any information until the person procuring such information to be exhibited, shall have filed in the registry of the Supreme Court a

recognizance in the penalty of $100, effectually to prosecute such information, and to abide by and observe such orders as the Court shall direct; such recognizance to be entered into before some justice of the peace or registrar of the Supreme Court. (Rule 9.)

No application shall be made for a criminal information against a justice of the peace for misconduct in his magisterial capacity unless a notice containing a distinct statement of the grievances or acts of misconduct complained of be served personally on him or left at his residence with some member of his household six days before the time named in it for making the application. (Rule 10.)

The application for a criminal information shall be made to the Court by a motion for an order *nisi* within a reasonable time after the offence complained of, and if the application be made against a justice of the peace for misconduct in his magisterial capacity, the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives, and further, if for an unjust conviction, that the defendant is innocent of the charge. (Rule 11.)

(*c*) Making explosive substances. See Code sec. 594.

(*d*) Criminal breach of trust. See Code sec. 596.

Consent to the prosecution must be obtained before the preliminary proceedings before the magistrate are commenced. R. v. Barnett (1889), 17 O.R. 649. The consent must be given by the Attorney-General himself and his authority cannot be delegated. Abrahams v. The Queen, 6 S.C.R. 10.

(*e*) Fraudulent acts of vendor or mortgagor. See Code sec. 597.

(*f*) Uttering defaced coin. See Code sec. 598.

Consent of Governor-General Required to Prosecute.

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

No count shall be deemed objectionable or insufficient in cases where the consent of any person, official or authority is required before a prosecution can be instituted because it does not state that such consent has been obtained. Sec. 855(*h*).

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

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

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

A sea harbour enclosed within headlands such as the harbour of Halifax, is within the body of the adjacent county, and criminal offences committed in such harbour even upon foreign ships are not within the jurisdiction of the Admiralty except in the special cases provided by statute. R. v. Schwab (1907), 12 Can. Cr. Cas. 540 (N.S.).

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

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

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

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

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

Consent of Minister of Marine and Fisheries to Prosecute.—Sending unseaworthy ship to sea. See Code sec. 595.

Actions Against Persons Administering Criminal Law.—Code sec. 1143.

(*a*) *Notice in Writing of Actions.*—See Code sec. 1144.

Notice of Action.—The tendency of the Courts has been rather to extend than restrict the protection afforded to peace officers professing to act in the execution of their duty by notices of action. White v. Hamm (1903), 36 N.B.R. 237, 240, per Barker, J.,

See also Sinden v. Brown, 17 Ont. App. 173; McGuinness v. Defoe, 3 Can. Cr. Cas. 139, 23 Ont. App. 704; Friel v. Ferguson, 15 U.C.C.P. 584; Neil v. McMillan, 25 U.C.R. 485; Cummins v. Moore, 37 U.C.R. 130; Venning v. Steadman, 9 S.C.R. 206.

(*b*) *Plea of General Issue.*—See Code sec. 1145.

(*c*) *Plea of Tender or Payment into Court.*—See Code sec. 1146.

(*d*) *Judgment if Action not Brought in Time, etc.*—See Code sec. 1147.

(*e*) *Code Does not Affect Other Protecting Acts.*—See Code sec. 1148.

Criminal Proceedings as a Justification.—Where the justices have a general jurisdiction over the subject-matter upon which they have issued a warrant of commitment to a gaoler, the gaoler is not liable to an action, though their proceedings are erroneous; but it is otherwise if the justices were acting wholly out of their jurisdiction. Ferguson v. Adams (1848), 5 U.C.Q.B. 194.

A conviction made by a magistrate protects him from an action of trespass in respect to the enforcement of the same, so long as it has not been set aside. Gates v. Devenish (1849), 6 U.C.Q.B. 260.

In an action against a magistrate for trespass and illegal seizure of goods, in order to shew a good justification it is necessary that the defendant should give in evidence a conviction not illegal on the face of it, and a warrant of distress supported by the conviction, and not on the face of it an illegal warrant. In a case where a magistrate's conviction was for "wilfully damaging, spoiling and taking away six bushels of apples of A. B., whereby C. D. committed an injury to the said goods and chattels of the said A. B." and the warrant recited that "judgment was given against C. D. in a suit of A. B. v. C. D. for a misdemeanour in taking apples by force and violence off and from the presence of A. B.," it was held that the conviction did not support the warrant; and also that neither the conviction nor the warrant contained a statement of an offence for which such a conviction could take place. Eastman v. Reid (1850), 6 U.C.Q.B. 611.

(*f*) *Limitation of Particular Actions.*—See Code secs. 1149, 1150, 1151.

Sec. 3.—Limitations of Time for Prosecution.

OFFENCE.	LIMITATION.	STATUTE.
Riot Act, offences against, and kindred offences.	One year after commission of offence.	Code sec. 1140, sub-secs. (*c*), 1, 2, 3, 4, and secs. 92, 126, 127, 128.
Treason and treasonable offences.	Three years from commission of offence.	Code sec. 1140, sub-secs. (*a*), 1, 2, and Code secs. 74, 78.
Seduction of girl under sixteen.	One year after commission.	Code sec. 1140, sub-sec. (*c*), 5, and sec. 211.
Unlawfully solemnizing marriage.	Two years after commission.	Code sec. 1140, sub-sec. (*b*), 3, and sec. 311.
Offences under trade marks, etc.	Three years after commission.	Code sec. 1140, sub-sec. (*a*), 3, and Code Part VII.
Corrupt practices in municipal affairs.	Two years after commission.	Code sec. 1140, sub-sec. (*b*), 2, and sec. 161.
Fraud upon Government.	Two years after commission.	Code sec. 1140, sub-sec. (*b*), 1, and sec. 158.
Unlawful drilling, etc.	Six months after commission.	Code sec. 1140, sub-secs. (*d*), 1, 2, 3, and secs. 98, 99, 115.
Seduction under promise of marriage.	One year after commission.	Code sec. 1140, sub-sec. (*c*), 6, and sec. 212.
Seduction of ward or employee.	One year after commission.	Code sec. 1140, sub-sec. (*c*), 7, and sec. 213.
Parent or guardian procuring defilement of girl.	One year after commission.	Code sec. 1140(*c*), 8, and sec. 215.
Unlawfully defiling women, etc.	One year after commission.	Code sec. 1140(*c*), 9, and sec. 216.
Householders permitting defilement of girls on premises.	One year after commission.	Code sec. 1140(*c*), 10, and sec. 217.
Proprietor of newspaper offering reward for recovery of stolen property.	Six months after commission.	Code sec. 1140(*d*), 4, and sec. 183(*d*).
Acts done in pursuance of Part III.	Six months.	Code sec. 1149.
Actions for penalties under Code sec. 1134.	Six months.	Code sec. 1150.
Cruelty to animals and negligent carriage of cattle.	Three months after commission.	Code sec. 1140(*e*), 1, 2, and secs. 542, 543, 544 and 545.
Improper use of offensive weapons.	One month after commission.	Code sec. 1140(*f*), and Code secs. 116 and 118-124.
Overt act of treason.	Six days after commission.	Code sec. 1140(2), and sec. 74 or 78.

Laying the information is the commencement of a prosecution. Where, therefore, a statute provided that all prosecutions thereunder should be commenced within twenty days after the commission of the offence, and an information was taken on 30th December, laying the offence on 16th December, but no summons was issued on the information till 15th January, it was held that the prosecution was commenced in time. R. v. Lennox (1878), 34 U.C.Q.B. 28.

An information may be laid and proceedings taken thereon for the prosecution by indictment of an indictable offence, although the case is one which might have been summarily tried by a justice had the information been laid within the six months' limit provided by Cr. Code sec. 1124, and although that period had expired before the laying of the information. R. v. Edwards (1898), 2 Can. Cr. Cas. 96.

Where a seduction under promise of marriage has taken place and the illicit intercourse between the parties is continued, upon renewals of promise, for more than a year before the commencement of the prosecution, a prosecution for the original seduction is barred by Code sec. 1140, and a conviction is not warranted as for a subsequent seduction within the year as the woman is not then of "previously chaste character." R. v. Lougheed, 8 Can. Cr. Cas. 184.

Subject to statutory exceptions an indictment or information may be preferred at any time. The general rule is expressed in the Latin phrase *Nullum tempus occurrit regi*, which means that the Crown is not barred by lapse of time from instituting criminal proceedings against an offender.

Frequently, in criminal Courts, where there are two or more indictments found against an accused, he is only tried and sentenced upon one. On his release from prison, after serving his sentence, theoretically he may be tried upon the indictments remaining, but practically, such a course is not adopted.

Action for Statutory Penalty or Forfeiture Within Two Years After Commission of Offence.—Code sec. 1141.

Continuing Offence.—A person who organizes an association to restrict and control the business of retail coal dealing to the members of the association, and to prevent anyone else from obtaining coal from the foreign shippers at wholesale rates for resale in the district in which the association operates is properly convicted under Code sec. 498 of conspiracy to prevent competition in the sale of a commodity which is the subject of trade. And even if Code sec. 1141 which limits certain proceedings to two years after the offence, could be held to apply to a prosecution by indictment, it did not apply to bar this prosecution for the offence was a continuing one, the association remaining in active operation under the presidency of the defendant up to the commencement of the prosecution. R. v. Elliott, 9 Can. Cr. Cas. 505, 9 O.L.R. 648.

An information may be laid and proceedings taken thereon for the prosecution by indictment of an indictable offence, although the case is one which might have been summarily tried by a justice had the information been laid within the six months' limit provided by Cr. Code sec. 1142, and although that period had expired before the laying of the information. R. v. Edwards (1898), 2 Can. Cr. Cas. 96. And as an indictment for rape includes the lesser charge of assault, a verdict thereon of common assault is properly followed by a conviction although the information was laid more than six months after the offence was committed. *Ibid.*

A prosecution under the revenue tax laws of a province to enforce payment of the tax is a proceeding for the recovery of a Crown debt, and is not governed by a general statute of limitation, not expressly applying to the Crown, but requiring complaints in matters of summary conviction to be made within three months from the time when the matter of the complaint arose. R. v. Lee How (1901), 4 Can. Cr. Cas. 551 (B.C.).

Where an information under a licensing law does not shew that the alleged offence was committed within the statutory limit prior to the laying of the information, the magistrate has no jurisdiction. R. v. Breen (1904), 8 Can. Cr. Cas. 146 (N.S.); R. v. Boutilier, 8 Can. Cr. Cas. 82; R. v. Adams (1892), 24 N.S.R. 559.

The defect in the information is not cured by the appearance of the accused before the magistrate and the taking by the latter of evidence for the prosecution unless such evidence discloses a *primâ facie* case of an offence under the statute, within the statutory limit. R. v. Breen (1904), 8 Can. Cr. Cas. 146.

Where the limitation of time for bringing a prosecution is contained in a separate section of the statute creating the offence, it is not essential to the validity of the conviction that it should shew on its face that the limitation has not been exceeded. Neither the summary conviction nor the warrant of commitment for a third offence against the Canada Temperance Act need shew that the information leading to a prior conviction was laid within the statutory period of three months after the offence. R. v. Clark (No. 2) (1906), 12 Can. Cr. Cas. 485.

1. An information under the Liquor License Act (Ont.), charging the sale of liquor to a minor may be amended by adding that the minor was "apparently or to the knowledge of the defendant under the age of twenty-one," although the time for laying a new information for such offence had expired before the amendment was asked.

2. Such an amendment involving only the addition of words necessary to describe the offence intended to be charged, but incompletely

charged in the information is not the substitution of another and different offence as to which the prescription may apply. R. v. Ayer, 14 Can. Cr. Cas. 210.

Actions Against Persons Administering the Criminal Law—Period of Limitation.—See Code secs. 1143, 1144.

Sec. 4.—Jurisdiction of Courts.

Jurisdiction of Courts Generally.—Code sec. 577.

Alternative Modes of Procedure.—A prosecution against the keeper of a common bawdy house may be brought either by indictment or under the summary trials procedure, or the keeper may be charged as a vagrant under the summary convictions procedure, and neither the provision for summary trial nor that for summary conviction abrogates the right of the Crown to bring an indictment. The different methods of procedure with the varying penalties dependent upon the class of tribunal selected are not inconsistent but are alternative. R. v. Sarah Smith (1905), 9 Can. Cr. Cas. 338.

Common Law Offences.—It has never been contended that the Criminal Code of Canada contains the whole of the common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. Union Colliery Co. v. R. (1900), 4 Can. Cr. Cas. 400, 405; 31 Can. S.C.R. 81, per Sedgewick, J. If the facts stated in an indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force.

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. R. v. Cole (1902), 5 Can. Cr. Cas. 330.

Venue.—Whenever the accused has been committed by a magistrate or justice of the peace for trial before the Court in any district of the same province, the Court sitting in such district has jurisdiction to try the case. R. v. Hogle (1896), 5 Can. Cr. Cas. 53 (Que.). And see Code secs. 653 and 665.

The power conferred on a magistrate under sec. 665 of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction (but over which the magistrate still has jurisdiction because of the arrest of the accused within his district), to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. Re R. v. Burke (1900), 5 Can. Cr. Cas. 29 (Ont.).

But by sec. 888 of the Code, "nothing in this Act authorizes any Court in one province of Canada to try any person for any offence committed entirely in another province: Provided that every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed."

A police magistrate or stipendiary magistrate may summarily try a prisoner with his consent by virtue of Code secs. 771A(2) and 777 for an offence committed outside of his territorial jurisdiction but in the same province.

The presence of the accused, whether transitory or not in any part of the province in which the offence was committed will justify the exercise of jurisdiction by the magistrate of the place where the accused is found, to the same extent as if the offence had been there committed; but the magistrate has a discretion to send the prisoner for further preliminary enquiry before the magistrate of the place where the offence was committed. Re Seeley, 14 Can. Cr. Cas. 270.

A warrant of commitment must shew on its face that the committing magistrate is one having jurisdiction to impose the sentence which it recites.

Where the committing magistrate could have jurisdiction only as a stipendiary magistrate for the district and he is designated in the commitment only as a justice of the peace, the defect is not cured by the addition of the letters "S.M." to his signature upon the warrant, for it cannot be inferred therefrom that he was a stipendiary magistrate for the same district. R. v. Hong Lee, 15 Can. Cr. Cas. 39.

Jurisdiction of Superior Courts.—See Code sec. 580.

New Brunswick.—County Courts in New Brunswick are not Courts of oyer and terminer and general gaol delivery, as the circuits of the Supreme Court are. Criminal jurisdiction is given to the County Courts by statute, but nothing is said to the effect that they are Courts of general gaol delivery. R. v. Wright, 2 Can. Cr. Cas. 88 (N.B.). And see secs. 582 and 583 as to their jurisdiction.

Jurisdiction of Sessions and Other Courts.

Every Court of General or Quarter Sessions Presided Over by

(*a*) a Superior, County or District Court Judge, or

(*b*) a recorder or Judge of the sessions of the peace, in Montreal or Quebec, and

every County Court Judge in New Brunswick, has power to try any indictable offence except those mentioned in Code sec. 583.

The Courts here mentioned have their power limited by sec. 583.

Court Records.—The judgments of the Courts of General Sessions in Ontario are public records, and the clerk of the peace holds them as their statutory custodian in the interests of the public generally and not as a deputy officer of the Crown. Any person interested in the indictments and records of the Court of General Sessions is entitled of right to inspect them. R. v. Scully (1901), 5 Can. Cr. Cas. 1 (Ont.); Attorney-General v. Scully, 6 Can. Cr. Cas. 167.

An accused person tried and acquitted in such Court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to the clerk of the peace to compel the delivery to him of certified copies. *Ibid.*

Special Jurisdiction on Water Near Boundaries, in Respect to Mail or Vehicles or Vessels Where More Than One Jurisdiction Involved.—See Code sec. 584.

Jurisdiction of Indictable Offence Committed Within Limits Over Person Outside.—Code sec. 653(*b*).

Endorsement on Warrant.—Code sec. 662.

The Courts will take judicial notice of the local divisions, such as counties, municipalities and polling sections, into which their country is divided for purposes of political government. Ex parte Macdonald (1896), 3 Can. Cr. Cas. 10 (S.C. Can.).

Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed. R. v. Gillespie (No. 2) (1898), 2 Can. Cr. Cas. 309 (Que.); R. v. Ellis, [1899] 1 Q.B. 230.

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

The offence of fraudulent conversion of the proceeds of a valuable security may consist in a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly the failure to account for them; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be proceeded against in either district. R. v. Hogle (1896), R.J.Q. 5 Q.B. 59; 5 Can. Cr. Cas. 53.

Magistrates cannot give themselves jurisdiction or retain jurisdiction by finding a particular fact one way, if the evidence is clearly

the other way. White v. Feast (1872), L.R. 7 Q.B. 353; R. v. Davy (1900), 4 Can. Cr. Cas. 28, 33 (Ont. C.A.).

A prohibition may issue to a Court exercising criminal jurisdiction as well as to a civil Court. Per Cockburn, C.J., in R. v. Herford, 3 El. & El., p. 136. And there is no doubt that prohibition can issue to a justice of the peace to prohibit him from exercising a jurisdiction which he has not. Chapman v. Corporation of London (1890), 19 Ont. R. 33.

Jurisdiction in Case of Offences in Unorganized Tracts in Ontario.—See Code sec. 585.

Jurisdiction in Case of Offences Committed North of Ontario and Quebec.—See Code sec. 586.

Provincial Courts Competent.—See Code sec. 587.

Offences Committed in District of Gaspe.—See Code sec. 588.

Certain Persons not to Try Case Under Sec. 501, *Intimidation of Workmen, etc.*—See Code sec. 578.

Admiralty Jurisdiction.—See Code secs. 591, 656.

CHAPTER THE SECOND.

CRIMINAL PLEADINGS.

PRELIMINARY.

Preliminary.—It is not proposed in this work to treat in great detail the subject of criminal pleadings (*a*). Subject to the provisions of the statutes to be mentioned, the form of indictments and pleas, &c., depends upon the common law rules of pleading as they stood before the amendments effected by the Common Law Procedure Acts. The technical strictness with which these rules were enforced (*in favorem vitae*) (*b*) led to many inconveniences and miscarriages of justice.

By the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), numerous provisions are made for releasing such strictness with due regard for the protection of accused persons as to their defence on the merits.

SECT. I.—GENERAL RULES AS TO PLEADING.

Most of the general statutory provisions as to criminal pleading are contained in the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100).

Definitions.—By sect. 30, 'In the construction of this Act the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment (*c*), and also any "plea," "replication," or other pleading, and any *nisi prius* record; and the terms "finding of the indictment" shall be understood to include "the taking of an inquisition," "the exhibiting of an information," and "the making a presentment"; [and wherever in this Act, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender is used, the same shall be understood to include and shall be applied to several persons and parties as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing;] (*cc*) and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.'

Immaterial Averments.—By sect. 24 (*d*), 'no indictment (*e*) for any

(*a*) For further details and precedents see Archbold, Cr. Pl. (23rd ed.) 35–38: and Chitty's Cr. Law.

(*b*) 2 Hale, 193.

(*c*) Apart from statutory definition the word 'indictment' is not construed as including criminal information. See R. *v.* Slator, 8 Q.B.D. 267.

(*cc*) The words in brackets are repealed by the Interpretation Act, 1889, as superseded by ss. 1, 2 of that Act, *ante*, Vol. i. pp. 2, 3.

(*d*) Taken (except the words in italics which were new law in 1851) from 7 Geo. IV. c. 64, s. 20 (rep. 36 & 37 Vict. c. 91). The defects mentioned in the repealed enactment could be taken advantage of by demurrer. Under the present enactment they are wholly immaterial.

(*e*) See the interpretation clause, s. 30, *supra*.

offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words " as appears by the record," or of the words " with force and arms," or of the words " against the peace," (*f*), nor for the insertion of the words " against the form of the statute " (*g*), instead of " against the form of the statutes," or *vice versa*, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened (*h*), nor for want of a proper or perfect venue (*i*), *nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant* (*j*), *nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence* ' (*k*).

Defects which are cured by Verdict.—By the Criminal Law Act, 1826 (7 Geo. IV. c. 64), s. 21, ' no judgment after verdict upon any indictment or information for any felony or misdemeanor shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall after verdict be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute ' (*l*).

Commencement of Indictment.—The indictment must begin with the words, ' The jurors for our Lord the King on their oath present,' and the second and subsequent counts begin, ' and the jurors aforesaid on their oath aforesaid do further present.' What is called the caption is not part of the indictment, but it is a statement of the style and commission of the Court and of the proceedings leading up to the finding of the indictments, including the names and swearing of the grand jurors (*m*). It is now seldom necessary to make up the record or draw up the caption; writs of error being abolished as to England (*n*), and writs of *certiorari* (*nn*) to remove indictments rare, and the fact

(*f*) *Vide post*, p. 1937.
(*g*) *Vide post*, p. 1937.
(*h*) *Vide post*, p. 1939.
(*i*) *Vide post*, p. 1937.
(*j*) *Vide post*, p. 1940 (n.).
(*k*) *Vide post*, p. 1939.
(*l*) See R. *v.* Goldsmith, L. R. 2 C. C. R. 74; 42 L. J. M. C. 94. R. *v.* Stroulger, 17 Q.B.D. 327; 55 L. J. M. C. 137, decided on 26 & 27 Vict. c. 29, s. 6, and 46 & 47 Vict. c. 51, s. 53, *ante*, Vol. i. pp. 647, 648.
(*m*) O'Connell *v.* R., 5 St. Tr. (N.S.) I. R. *v.* Martin, 12 Ir. L. R. 399; 6 St. Tr. (N.S.), 925, 1001. Short and Mellor, Cr. Pr. (2nd ed.), 605. Archb. Cr. Pl. (23rd ed.), 93.
(*n*) 7 Edw. VII. c. 23, s. 20 (1), *post*, p. 2007.
(*nn*) *Post*, p. 2006.

of a criminal trial having taken place being usually proved by certificate and not by production of the complete record.

Conclusion.—The conclusion of an indictment states the offence charged to have been committed, '(1) against the statute (or statutes) in that case made and provided,' and '(2) against the peace of our Sovereign Lord the King, his crown and dignity.' The first part is appropriate to statutory crimes; the second to common law offences, but is usually added in all indictments (*o*). By 14 & 15 Vict. c. 100, s. 24, 'no indictment for any offence shall be held insufficient for the omission . . . of the words against the peace, nor for the insertion of the words against the form of the statute (*p*), instead of against the form of the statutes or *vice versa* . . . *nor for want of a formal or proper conclusion*' (*q*).

Where the offence is committed under one King and is tried under his successor it used to be necessary to frame the indictment so as to charge the offence against the peace, &c., properly (*r*). The need of particularity on this subject is removed by the enactments above stated (*s*). It would seem that, since the Act of 1851, by the words in italics a formal conclusion is rendered perfectly immaterial and unnecessary (*t*), and the conclusion '*ad commune nocumentum*' in nuisance cases (*u*) has been held unnecessary.

Venue and Local Description.—The subject of venue from the point of view of criminal jurisdiction has been dealt with, *ante* Vol. i. p. 19 *et seq.* From the point of view of pleading, the rules as to statement of venue are as follows:—

By 14 & 15 Vict. c. 100, s. 23, 'It shall not be necessary to state any venue in the body of the indictment, but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue' (*v*).

(*o*) See Archb. Cr. Pl. (23rd ed.), 85. Before this Act an indictment for common law felony must conclude 'against the peace,' &c., and so must an indictment for stealing articles, the stealing whereof was made felony by statute. R. *v.* Cook, R. & R. 176, and MS. Bayley, J.

(*p*) As to the former law, see R. *v.* Phipoe, 2 East, P. C. 599, 601. R. *v.* Morgan, ibid. 601.

(*q*) Taken, except the words in italics, from 7 Geo. IV. c. 64, s. 20 (rep.).

(*r*) Lookup *v.* R., 4 Bro. Parl. Cas. 332; 2 E. R. 225. R. *v.* Taylor, 3 B. & C. 502, and see Kel. (J.) 12 for conclusion of the indictment for the execution of Charles I.

(*s*) As to treason, see the indictment in R. *v.* Lynch [1903], 1 K.B. 744.

(*t*) Castro *v.* R., 6 App. Cas. 229. The contrary ruling in R. *v.* Mayor of Poole, 19 Q.B.D. 602, is admittedly erroneous, *vide*, ibid. 683 n. In practice many indictments are now drawn without a formal conclusion.

(*u*) R. *v.* Holmes, Dears. 207; 22 L. J. M. C. 122 (C. C. R.); an indictment for nuisance by indecent exposure of the person.

(*v*) Taken from 7 Geo. IV. c. 64, s. 20 (rep. 36 & 37 Vict. c. 91), which had after the word 'venue' 'where the Court shall appear by the indictment or information to have had jurisdiction over the offence,' which were advisedly omitted. Where

By 14 & 15 Vict. c. 100, s. 1 (*post*, p. 1972), variances between the statement in the indictment for felony or misdemeanor, and the evidence offered 'in the name of any county, riding, division, city, borough, town corporate, parish, township or place mentioned in such indictment' may be amended. And by sect. 24 (*ante*, p. 1936), 'no indictment for felony or misdemeanor shall be insufficient . . . for want of a proper and perfect venue.'

Local description appears to be necessary only in cases in which the offence has relation to a particular house or place, *e.g.* burglary or house-breaking, setting fire to, or maliciously damaging buildings, &c., or keeping gaming houses or other disorderly houses (*w*).

Transitory Offences.—On the trial of indictments for offences which are not local in their nature, it is as a general rule sufficient to allege (and prove) that the offence was committed in some place within the county or district for which the court is sitting; and a mistake as to the place in which an offence is laid is not material, if it is proved to have been committed at some other place in the same county or district (*x*). Although the offence must be proved to have been committed or to be cognizable in the county or district where the prisoner is tried, yet, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are admissible in evidence (*a*).

It is no offence in the case of a transitory felony (such as larceny), on the plea of not guilty, that there is no such place or parish in the county as that in which the offence is stated to have been committed (*b*).

Local Offences.—If the offence is in its nature local, and there is no such place as that laid in the indictment, the prisoner must be acquitted. If, however, the indictment charges a transitory offence (such as larceny), the prisoner may be convicted thereof, although he is acquitted of the local offence (*c*). The offence of stealing in the dwelling-house to the value of five pounds is local, and, therefore, if the house is stated to be situate in a parish and county, it has been held that the whole parish must be proved to be in such county, and that if it be not so proved the prisoner cannot be convicted of stealing in the dwelling-house to

a count for misdemeanor charged, without any statement of venue, that certain persons unlawfully and tumultuously assembled, and committed certain alleged offences, and then added, with a statement of venue, that the defendants did unlawfully aid, abet, &c., the said persons to continue such unlawful assemblings, and other offences, it seems to have been thought that such count was bad; because it did not state a proper venue to the offence alleged to have been committed by the first-mentioned persons; but it was held to be cured by 7 Geo. IV. c. 64, s. 20, because it consisted only in 'the want of a proper or perfect venue,' and the Court appeared by the indictment to have had jurisdiction. R. *v.* O'Connor, 5 Q.B. 16. See R. *v.* Albert, 5 Q.B. 37. R. *v.* Stowell, 5 Q.B. 44. R. *v.* Hunt, 10 Q.B. 925. Writs of *certiorari* for removing an indictment from the Central Criminal Court must specify the county or jurisdiction within which the removed indictment is to be tried. Crown Office Rules, 1906, r. 18. See Short and Mellor, Cr. Pr. (2nd ed.) 28.

(*w*) Archb. Cr. Pl. (23rd ed.) 67, 68. Taylor, Ev. (10th ed.), ss. 281, 282. As to amending variances, *vide post*, p. 1971. If the statute gives the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish laid in the indictment. R. *v.* Glossop, 4 B. & Ald. 616. Archb. Cr. Pl. (23rd ed.) 63.

(*x*) 2 Hawk. c. 25, s. 84.

(*a*) See 1 Phill. Ev. (6th ed.) 204.

(*b*) R. *v.* Woodward, 1 Mood. 323, and MS. Bayley, JJ. R. *v.* Perkins, 4 C. & P. 363, Park, J. R. *v.* Dowling, Ry. and M. 433.

(*c*) R. *v.* Brookes, C. & M. 543.

the value of five pounds, but may be convicted of the simple larceny (*d*).

And it has been held that where an injury is partly local and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole, for the whole being one entire fact, the local description becomes descriptive of the transitory injury (*e*).

Proof that the place or parish is usually and commonly known by the description used is sufficient (*f*). And even if there are two parishes of the general name, the general description will be sufficient (*g*).

Time.—By 14 & 15 Vict. c. 100, s. 24 (*supra*), no indictment is insufficient 'for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.'

It seems, therefore, clear that the particular time need only be proved where time is of the essence of the offence (*h*), or where the time for prosecuting the offence is limited by statute: and subject to these exceptions, that an indictment is not bad for not specifying any date for the commission of the offence (*i*), and the facts may be proved to have occurred on any day previous to the finding of the bill by the grand jury (*j*).

Value.—By 14 & 15 Vict. c. 100, s. 24, no indictment is insufficient 'for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value, or price, or the amount of damage, injury, or spoil is not of the essence of the offence' (*k*); and, therefore, it seems clear that the value, price, or amount need only be proved where it is of the essence of the offence.

(*d*) R. *v.* Jackson, Gloucester Spr. Ass. 1842, MSS. C. S. G.

(*e*) See R. *v.* Cranage, 1 Salk. 385. The indictment stated that the defendant, with others, riotously assembled, *et quoddam cubiculum cujusdam S. S., in domo mansionali cujusdam David James fregit et intravit*, and thirty yards of stuff took and carried away. It appeared to be the house of D. J.; and Parker, C.J., held that this did not maintain the indictment, for part is local and part not local; the *cubiculum* is local, the taking and carrying away is not local; but then all is put together as one entire fact under one description, and you cannot divide them. So if there is an indicting for acting a play and speaking obscene words in such a parish, in a play-house in Lincoln's Inn Fields; if there is no play-house in Lincoln's Inn Fields the defendant must be acquitted; for though the words are not local, yet they are made so. One may make a trespass local that is not so. If the speaking had been alleged in Lincoln's Inn Fields, then it had been laid as venue; but here it is otherwise, for here it is alleged as a description where the play-house stood. Per Parker, C.J., ibid.

(*f*) Kirtland *v.* Pounsett, 1 Taunt. 570. Goodtitle *v.* Walter, 4 Taunt. 671. Vowles *v.* Miller, 3 Taunt. 140. Sir J. Mansfield, C.J. R. *v.* St. John, 9 C. & P. 40.

(*g*) See Doe *d.* James *v.* Harris, 5 M. & S. 326. Taylor *v.* Willans, 3 Bing. 449. Where an indictment stated that a highway alleged to be out of repair led to the parish of Langwm, in the county of Monmouth, and it appeared that there were two parishes in the county, Langwm Isha and Langwm Ucha, and that the highway led to the former, Bosanquet, J., held that the Monmouth was a sufficient description. R. *v.* Lantrissent, Sum. Ass. 1832. MSS. C. S. G.

(*h*) Cases might occur where time was of the essence of the offence, and yet it might not be essential to prove the precise time; as, for instance, if a statute made the doing of an act in certain months of the year an offence, it would suffice to prove that the act was done between such a day and such another day in those months, though the particular day could not be proved. See R. *v.* Chandler, 1 Ld. Raym. 581. R. *v.* Simpson, 10 Mod. 248. And see R. *v.* Tieman [1908], Victoria L. R. 4, 7.

(*i*) R. *v.* Nicholls, 68 J. P. 452 (larceny), C.C.R.

(*j*) R. *v.* Levy, 2 Stark (N.P.), 458 Abbott, C.J.

(*k*) R. *v.* Forsyth, R. & R. 274.

As a rule, the want of a *videlicet* will never do harm where, from the nature of the case, the precise sum, date, magnitude, or extent is immaterial (*l*).

Identity.—Where in an action for a libel contained in a pamphlet, a witness proved that the defendant had given her a pamphlet, and, on a copy being put in her hand, she said, 'This is my handwriting. I believe this to be the pamphlet; it was like it and in this form. I read different portions of it, and lent it to several persons; it was returned to me, and I then wrote this upon it. The defendant has given me different tracts at different times. I cannot swear that this is the same pamphlet he gave me. It is an exact copy, if it is not the same. It is the one I wrote upon. I cannot say I got back the same copy I lent. I only say it is exactly like it. If that is not the copy the defendant gave me, I do not know what has become of it'; it was held that there was some evidence to go to the jury that the copy was the same as that given to the witness (*m*).

Names.—The indictment should correctly name (*n*) or describe the person by or against whom the offence charged is alleged to have been committed, where the name is known (*o*). When the name is unknown the person is described as a certain person whose name is to the jurors unknown (*p*). There has been considerable discussion as to the proper mode of describing an illegitimate person or an infant not baptized or named. A name by reputation is sufficient (*q*) or an infant may be described as a certain (male or female) child not named (*r*). It is now not material how the person is named or described (*s*) and mistakes in naming or description may be amended according to the evidence (*t*): and the older decisions are therefore omitted (*u*).

Statement of Ownership.—In indictments for offences against property, it is at common law necessary to state who owned the property at the date of the offence (*v*), or who was in possession of it, so as to have a special property therein entitling him to relief in respect of wrongful acts done with respect to it. In certain cases it is by statute made

(*l*) R. *v.* Gillham, 6 T. R. 265. 1 Phill. Ev. 213 n. (7th ed.). As to the old rule on this subject, see 2 Wms. Saund. 391, note (1) to Dakin's case.

(*m*) Fryer *v.* Gathercole, 4 Ex. 262. Alderson, B., said, 'If I give a shilling to a person to take upstairs and to put away, and he hands me one back as the same, it would be a question for the jury to say whether it is the same, and there is nothing unreasonable if they find that it is.' Alderson, B., also said, 'Suppose I pass my hand across my eyes for an instant, so as to lose sight of the coin for a moment, cannot I prove the identity?' Pollock, C.B., treated the question as one of degree. The evidence would be weaker or stronger in proportion as the numbers of the work were more or less, and the probability of the copy being the same would be greater or less according as there had been more or less lendings of it.

(*n*) Archb. Cr. Pl. (23rd ed.) 55. The old law required the Christian name and surname and addition of the person, stating his estate or degree and his residence.

(*o*) See R. *v.* Stroud, 2 Mood. 270; 1 C. & K. 187.

(*p*) As to the difficulty of proving larceny of the goods of a person or unknown, see Trainer *v.* R. [1906], 4 Australia C. L. R. 126, Griffith, C.J. 2 Hale, 290. 2 East, P. C. 651.

(*q*) R. *v.* Scarborough, 3 Cox, 72.

(*r*) R. *v.* Waters, 1 Den. 356; 18 L. J. M. C. 53.

(*s*) 14 & 15 Vict. c. 100, s. 24, *ante*, p. 1935.

(*t*) 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972.

(*u*) See 3 Russ. Cr. (6th ed.) 153; Archb. Cr. Pl. (22nd ed.) 47.

(*v*) In indictments for larceny the ownership of the goods is always stated. R. *v.* Martin, 8 A. & E. 481, 486, Denman, C.J.

unnecessary to state the property affected to belong to any person, *e.g.* in the case of property obtained by false pretences (*w*).

Mistakes in the statement of ownership may be amended under 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972, if the Court considers that the variance between the statement and the evidence is not material to the merits of the case, and that to make the amendment will not prejudice the debt in his defence on the merits. Thus where an indictment for burglary and larceny described as belonging to the husband, the goods stolen which by the evidence appeared to be the separate property of the wife, it was held that the judge at the trial ought to have amended the misdescription, but that as he had not done so the defendant had been wrongly convicted, as the nature of the property, a wedding ring, was such that the jury could not infer any possession by the husband sufficient to support the indictment (*x*).

Ownership of chattels is stated by describing them as ' of the goods and chattels of A. B., or of the goods and chattels of A. B., *and of and belonging to A. B.* ' (*y*).

The following enactments regulate the mode of pleading the ownership of property :—

Joint Owners.—The Criminal Law Act, 1826 (7 Geo. IV. c. 64), enacts (sect. 14), ' that in any indictment or information for any felony or misdemeanor wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others (*z*) as the case may be, and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid ; and this provision shall be construed to extend to all joint stock companies and trustees ' (*a*). The section applies to partnership within the Country Bankers Act, 1826 (7 Geo. IV. 46) (*b*).

A Bible and hymn book which had been given to a society of Wesleyans, at whose expense they had been bound, were laid in an indictment as the property of B. ' and others,' B. being both a trustee and a member of the society. Parke, J., held that the property

(*w*) 24 & 25 Vict. c. 96, s. 88, *ante*, p. 1514. Apart from legislation, omission to state the owner rendered the indictment bad. R. *v.* Norton, 8 C. & P. 196. R. *v.* Martin, 8 A. & E. 481. R. *v.* Bullock, Dears. 653. Sill *v.* R., 1 E. & B. 553.

(*x*) R. *v.* Murray [1906], 2 K.B. 385. The property could have been described as that of the wife, 45 & 46 Vict. c. 75, s. 16.

(*y*) See R. *v.* Stride [1908], 1 K.B., 671 624 ; 77 L. J. K.B. 490, where the words italicised applied to the eggs of wild pheasants were read as meaning ' collected by or on behalf of ' A. B., and so reduced into his possession. *Vide ante*, p. 1297.

(*z*) If ' others ' is inserted and one other owner only is proved the variance can be amended, *vide post*, p. 1976.

(*a*) The Irish Act (9 Geo. IV. c. 54), s. 28, is in similar terms. The word ' trustees ' has been held to include trustees of savings banks. R. *v.* Bull, 1 Cox, 137, Erle, J. In an anonymous case there cited, Wightman, J., is reported to have said that 7 Geo. IV. c. 64, s. 14, only applied to ordinary trustees and could not be applied to churchwardens, *sed quære*.

(*b*) R. *v.* Pritchard, L. & C. 34, *post*, p. 1943.

was rightly laid (*c*). So where the property in ore stolen from a mine was stated to be in S. D. 'and others,' who were proved to be the adventurers in the mine, an objection that they were not partners, joint-tenant, or tenants in common, within sect. 14, was overruled (*d*).

An indictment for attempting to obtain one thousand yards of silk by false pretences, alleged that the pretences were made to J. B. and others; by means whereof the prisoners did attempt to obtain from the said J. B. and others the silk in question, the property of the said J. B. and others, with intent to cheat the said J. B. and others of the same. J. B. and others were partners in trade, and the pretences were made to J. B. alone, and never reached the ears of any of his partners. An objection that there was a variance, as the evidence did not shew that the pretences were made to J. B. and others, was overruled (*e*).

Banks.—The Country Bankers Act, 1826 (7 Geo. IV. c. 46), provides (sects. 1–8) in what cases, and under what circumstances, a copartnership of more than six persons may carry on the business of bankers in England. By sect. 9, provision is made for appointing public officers of banks within the act, and it is enacted that '. . . all indictments, informations, and prosecutions, by or on behalf of such copartnership, for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property of or belonging to such copartnership, or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such copartnership, shall and lawfully may be had, preferred, and carried on in the name of any one of the public officers nominated as aforesaid, for the time being (*ee*) of such copartnership; and in all indictments and informations to be had or preferred by or on behalf of such copartnership against any person or persons whomsoever, notwithstanding such person or persons may happen to be a member or members of such copartnership, it shall be lawful and sufficient to state the money, goods, effects, bills, notes, securities, or other property of such copartnership, to be the money, goods, effects, bills, notes, securities, or other property of any one of the public officers, nominated as aforesaid, for the time being of such copartnership, and any forgery, fraud, crime, or other offence committed against, or with intent to injure or defraud any such copartnership, shall and lawfully may in such indictment or indictments, notwithstanding as aforesaid, be laid or stated to have been committed against, or with intent to injure or defraud any one of the public officers, nominated as aforesaid for the time being of such copartnership; and any offender or offenders may thereupon be lawfully convicted for any such forgery, fraud, crime, or offence; and in all other allegations, indictments, informations, or other proceedings of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, it shall and may be lawful and sufficient to state the

(*c*) R. *v.* Boulton, 5 C. & P. 537, and MS. C. S. G.

(*d*) R. *v.* Webb, 1 Mood. 431, Patteson, J., on the trial. The point was mentioned to the judges afterwards, who gave no opinion upon it, deciding the case on another ground.

(*e*) R. *v.* Kealey, 2 Den. 68; 20 L. J. M. C. 57. On a case reserved this ruling was upheld.

(*ee*) *i.e.* at the time when the offence was committed. R. *v.* Beard, 9 C. & P. 143, 146, Coleridge, J.

name of any one of the public officers, nominated as aforesaid, for the time being of such copartnership; and the death, resignation, removal, or any act of such public officer, shall not abate or prejudice any such action, suit, indictment, information, prosecution, or other proceeding, commenced against or by or on behalf of such copartnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being.'

It is not imperative upon the banking copartnerships constituted under this Act to prosecute in the name of a public officer. It was held in a case of forgery that they were not bound to allege an intent to defraud one of their public officers, but might lay the intent to be to defraud one of the shareholders by name 'and others' (*f*). On an indictment for stealing certain brasses, the property of P. W. and others, which belonged to a colliery worked by the Dudley and West Bromwich Bank, no registration of that company as a joint-stock banking company or of the appointment of any manager or public officer thereof was proved; but it was stated by a witness that P. W. was one of the partners or shareholders in the bank, and that there were more than twenty partners, and that it was a copartnership within the Act. It was objected that the property ought to have been laid in the public officer of the company under sect. 9, *supra*, and Chaplain *v.* Milvain (*g*) was relied upon; but it was held that the sect. 14 of the Criminal Law Act, 1826 (*h*), which expressly extends to all joint-stock companies, was a sufficient authority for laying the property in one of the partners by name 'and others' (*hh*).

In an indictment for forgery it has been held sufficient to aver the intent to be to defraud R. B., 'then and there being one of the public officers for the time being of a certain copartnership of persons carrying on the trade and business of bankers in England, exceeding the number

(*f*) R. *v.* Beard, 8 C. & P. 143, 147, Coleridge, J. See 11 Geo. IV. and 1 Will. IV. c. 66, s. 28 (rep.). Under 24 & 25 Vict. c. 98, s. 44, *ante*, p. 1642, it is not necessary to allege a particular intent to defraud. In R. *v.* Burgiss, 7 C. & P. 488, Littledale, J., had expressed great doubts on the point; but in R. *v.* James, 7 C. & P. 553, Patteson, J., had expressed an opinion that either the one mode or the other might be adopted.

(*g*) 5 Ex. 61, where it was held that in an action against a shareholder the company was bound to sue in the name of one of their officers.

(*h*) *Ante*, p. 1941.

(*hh*) R. *v.* Pritchard, L. & C. 34; 30 L. J. M. C. 169. This decision is in accordance with Mr. Greaves' note to the third edition of this work, and settles the doubt expressed in R. *v.* Carter, 1 Den. 65, whether in forgery the intent might be laid to defraud one of the shareholders and others. In the course of the argument, Pollock, C.B., said: 'Suppose they are not registered, may anybody go and steal their property without being punished for it?' And Blackburn, J., said: 'Granting all that you assume (*i.e.* that the company was carrying on their business legally), suppose more than six persons own a chattel, a horse for instance, and afterwards engage in business as bankers, would that alter the property in the horse?' In Bonar *v.* Mitchell, 5 Ex. 415, it was held that a plea that a company had not made a return to the Stamp Office in pursuance of the statute was bad; and Alderson, B., in answer to an argument that these companies were bound to observe the conditions imposed on them by the Act, said: 'According to such an argument it would be a good defence to a charge of larceny against a person for having stolen the company's goods, that they had not made any sufficient return as required by the statute. If the company were to make any single mistake in the course of twenty years, they would lose the right of suing in the mode given them by the Act'; and Pollock, C.B., thought that the penalty imposed by s. 14 was intended to cure these omissions; and Alderson, B., said that it was clear that the section was only directory. C. S. G.

of six persons, and called the National Provincial Bank of England'; and that it is not necessary to aver that R. B. was nominated under 7 Geo. IV. c. 46 (*i*).

The return made to the Stamp Office under 7 Geo. IV. c. 46, s. 4, is not the only mode of proving that a person is a public officer; that fact may be proved by other evidence (*j*). An examined copy of the return is as good evidence as the return (*k*).

The Country Bankers Act, 1826, was amended and continued by the Joint-Stock Bank Act, 1838 (1 & 2 Vict. c. 96). The Act of 1838 was continued and extended by the Joint-Stock Companies Act, 1840 (3 & 4 Vict. c. 111), and as so extended was made perpetual in 1842 (5 & 6 Vict. c. 85, s. 1).

By sect. 2 of the Act of 1840, 'If any person or persons, being a member or members of any banking copartnership within the meaning of the said Act, or of any other banking copartnership consisting of more than six persons, formed under or in pursuance of the Bank of England Act, 1833 (*l*), shall commit any fraud, forgery, crime, or offence against or with intent to injure or defraud any such copartnership, such member or members shall be liable to indictment, information, prosecution, or other proceeding in the name of any of the officers for the time being of any such copartnership, in whose name any action or suit might be lawfully brought against any member or members of any such copartnership for every such fraud, forgery, crime, or offence, and may thereupon be lawfully convicted, as if such person or persons had not been or was or were not a member or members of such copartnership, any law, usage, or custom to the contrary notwithstanding.'

The prisoner was convicted of embezzling three sums of money on an indictment, in which one class of counts described him as clerk of T. and others, and another as clerk of T., 'one of the public officers of the Carlisle and Cumberland Banking Company.' The prisoner was employed as clerk by a banking company established under the Country Bankers Act, 1826. A return, as required by sect. 4, had been made (and was proved by a certificate under sect. 6), which stated the true name of the copartnership to be 'The Carlisle and Cumberland Joint-Stock Bank,' and the names or firms of the banks established or to be established by the copartnership to be 'Carlisle and Cumberland Bank,' at Carlisle, at Wigton, and at Appleby. T. was described as a partner and

(*i*) R. *v.* Beard, *supra*. So it has been held in an action brought in the name of a public officer of such a company, that it is not necessary to allege in the declaration that he is a member of the company, that he is resident in England, or that he has been duly registered as required by s. 4; but that it is sufficient to allege that he has been 'duly nominated and appointed, and now is one of the public officers of the said company according to the force, form, and effect of the said Act of Parliament.' Spiller *v.* Johnson, 6 M. & W. 570. So it has been held sufficient to state in the declaration that the plaintiff is the manager of a certain joint-stock copartnership, established for the purpose of banking, and that he has been duly named and appointed as the nominal plaintiff on behalf of the copartnership under the provisions of the statute, without expressly stating that he has been named as manager, or that the copartnership has been established under the provisions of the Act. Christie *v.* Peart, 7 M. & W. 491.

(*j*) Edwards *v.* Buchanan, 3 B. & Ad. 788. R. *v.* Beard, *supra*. See Bosanquet *v.* Woodford, 3 Q.B. 310. Prescott *v.* Buffery, 1 C. B. 41. Steward *v.* Dunn, 12 M. & W. 655.

(*k*) R. *v.* Carter, 1 Den. 65; 1 C. & K. 741.

(*l*) 3 & 4 Will. IV. c. 98.

one of the public officers. The manager of the bank proved that the usual and only name employed by the copartnership in their dealings was 'The Carlisle and Cumberland Banking Company,' and they were described by the same name in a bond of the prisoner to the company, which was in evidence. The prisoner at the time of the transaction was a shareholder or partner in the company. It was objected (1) that the return proved the true name to be different from that laid in the indictment; (2) that the indictment could only be in the name of an officer nominated as mentioned in sect. 9 of the Act (*m*). But, on a case reserved, the majority of the judges were of opinion that the company described in the register was the same that had appointed T., acting under the name of the Carlisle and Cumberland Banking Company to the world, and so admitted by the prisoner in his bond (*n*).

Industrial and Provident Societies.—By the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 21, 'the registration of a society shall render it a body corporate by the name described in the acknowledgment of registry by which it may sue and be sued, with perpetual succession and a common seal, and with limited liability; and shall vest in the society all property for the time being vested in any person in trust for the society; and all legal proceedings pending by or against the trustees of any such society may be prosecuted by or against the society in its registered name without abatement.'

Friendly Societies.—By the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 51, 'In all legal proceedings whatsoever concerning any property vested in the trustees of a registered society or branch the property may be stated to be the property of the trustees in their proper names as trustees for the society or branch without further description' (*o*). The following cases were decided under repealed acts relating to friendly societies. An indictment charged larceny of a ten-pound promissory note, the property of W. S. S. was treasurer of a friendly society at C. The prisoner was clerk and trustee of the society. A. was also a trustee. By one of the rules of the society (*p*), it was provided that as soon as £10 more than was necessary for immediate use was in the box, it should be delivered to the trustees chosen for that purpose, who should dispose of it as the society should direct, under 10 Geo. IV. c. 56, s. 13 (rep.). It was the duty of the treasurer to receive from the stewards the money paid by the members, which the treasurer kept till £20 or £30 were collected, when he proposed that a certain amount should be deposited in the savings bank. The duty of the prisoner as clerk was to keep the books, and as trustee to deposit and take money from the savings bank. Either of the trustees could draw out money if he brought the book. Upon a club night previous to January 16, it was settled that £10 should be paid into the bank; the prisoner did not wish to take it then; but it was arranged that the trustees should come and take the money on the following Saturday. On January 16 the prisoner went to the treasurer's house alone,

(*m*) A third objection (that 1 & 2 Vict. c. 96, was not continued by 3 & 4 Vict. c. 111, by reason of the erroneous recital in the latter Act) was overruled on the ground that no other Act could be meant.

(*n*) R. *v.* Atkinson, 2 Mood. 278; C. & M. 525. No notice was taken of the second objection.

(*o*) See R. *v.* Marks, 10 Cox, 367.

(*p*) Which had been re-enrolled under 10 Geo. IV. c. 56, and 4 & 5 Will. IV. c. 40, both rep. by 18 & 19 Vict. c. 63.

and made a false statement, whereupon the treasurer gave him the promissory note in question, and the jury found that the prisoner obtained the note from the treasurer with intent to steal it. To an objection that, as the prisoner was a trustee, the property in the note was vested either wholly or in part with him, and that it was not the sole property of the treasurer; it was answered, that by 10 Geo. IV. c. 56, s. 21, all the effects of the society were vested in the treasurer or trustee for the time being, and were, for the purposes of suit, civil or criminal, to be the property of the treasurer or trustee for the time being, and that the meaning of this clause was to vest the property in one officer, and one only, whether he should be called treasurer or trustee, and that the treasurer in this case was that person. It was held that the property was laid in the treasurer, who, on the facts stated, was substantially the officer intended (*q*). On an indictment for larceny as a bailee, and also for simple larceny of the money of R. C., it appeared that C. was the treasurer of a lodge of Odd Fellows, which was a friendly society duly enrolled, and the prisoner was one of its trustees. At a lodge meeting it was resolved that £40 should be sent to the bank of Messrs. G., and that the prisoner should take it there. The £40 in gold and silver was taken from a box, which was in C.'s keeping as treasurer, by a person who acted for him, and put into a bag and carried away by the prisoner, who dishonestly applied it to his own purposes. It was objected, that the money was not proved to be the money of C., and that R. *v.* Cain (*r*) did not apply, because 18 & 19 Vict. c. 63, s. 18 (rep.), vested the property in the trustees and not in the treasurer, and that, supposing C. had a special property in the money, that property ceased as soon as the money was paid into the hands of the prisoner. It was held that the conviction on the indictment in this form could not be sustained. In R. *v.* Cain the property was rightly laid in the treasurer under 10 Geo. IV. c. 56; but in this case the money was not vested in the treasurer but in the trustees, of whom the prisoner was one, and he was specially appointed by a resolution of the society to take the money to the bank. It therefore could not be said that he stole the money, the property of the treasurer. As soon as the treasurer parted with the money he had nothing more to do with it. The prisoner might have been guilty of a breach of trust as against the other trustees, but it could not be said that he stole the money of the treasurer (*s*).

Savings Banks.—The prisoner was indicted for embezzling in 1842 money, the property of S., and it was proved that the prisoner as clerk to the R. Savings Bank had received and embezzled money which was the property of the trustees of the bank under 9 Geo. IV. c. 92, s. 8 (rep.). There was no rule or statement regulating the mode in which trustees should be appointed, or the mode in which resolutions of meetings should be entered. For the purpose of shewing that S. was trustee in 1842, S. proved that from 1843 he had acted as trustee, but before 1843 he had only attended meetings of trustees, and when he had so attended he had signed the minute-book. The only entry to be found with his signature was for a meeting in 1835, and he stated that he had been requested by a person

(*q*) R. *v.* Cain, 2 Mood. 204; C. & M. 309: a reserved case.

(*r*) *Supra.*

(*s*) R. *v.* Loose, Bell, 259; 29 L. J. M. C. 132 (C.C.R.).

acting as a trustee to attend that meeting as a trustee lest there should be a deficiency of trustees, and that he had attended and signed the entry accordingly. The prisoner was at that meeting, and the heading of the page containing the resolutions was in his handwriting. Mr. S. did not express by the signature that he was a trustee, or that he signed in that capacity. He did not do any act which trustees alone were capable of doing. All trustees and managers had an equal right to attend the meeting; there was nothing to shew that a meeting of managers only, without any trustee, would have been invalid, and S., as rector of the parish, was *ex officio* a manager. Erle, J., held that there was evidence that S. acted as trustee in 1835, and that that was some evidence, though very slight, that S. was trustee in 1842; but, upon a case reserved, it was held that the evidence was insufficient (*t*).

The Trustee Savings Banks Act, 1863 (26 & 27 Vict. c. 87) s. 10, vests the effects of a trustee savings bank in the trustee or trustees for the time being, and in all criminal proceedings the property may be stated to be that of the trustee or trustees for the time being, 'in his, her, or their proper name, or names, without further description' (*u*).

Loan Societies.—By the Loan Societies Act, 1840 (3 & 4 Vict. c. 110), s. 8, (*v*) 'All monies and securities for money, and all chattels whatsoever, belonging to any society, shall be vested in a trustee or trustees for the use and benefit of such society and the members thereof, their executors and administrators respectively, according to their several shares and interests therein, and after the death, resignation, or removal of any trustee or trustees shall vest in the surviving or succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any assignment or conveyance whatever, and also shall for all purposes of suit, as well criminal as civil, at law or in equity, in anywise concerning the same be deemed to be the property of the person or persons appointed to the office of trustee or trustees of such society for the time being, in his or their proper name or names without further description; and such person or persons are hereby respectively authorised to bring or defend, or cause to be brought or defended, any suit, criminal as well as civil, at law or in equity, concerning the property or any claim of such society, and to sue and be sued, plead and be impleaded, in his or their proper name or names, as trustee or trustees of such society, without any other description, and no suit shall abate or be discontinued by the death of such person or persons, or his or their removal from the office of trustee or trustees, as aforesaid, but the same shall and may be proceeded in and by or against the succeeding trustee or trustees and such succeeding trustee or trustees shall pay, or receive like costs for the benefit of or to be reimbursed from the funds of such society as if the suit had been commenced in his or their name or names.'

Building Societies.—By the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 9, every society, whether existing before or created after

(*t*) R. *v.* Essex, D. & B. 369; 27 L. J. M. C. 20.

(*u*) This section re-enacts 9 Geo. IV. c. 92, s. 8, which was held to be alternative to 7 Geo. IV. c. 64, s. 14 (*ante*, p. 1941). See R. *v.* Bull, 1 Cox, 137, Erle, J.

(*v*) Made perpetual in 1863 (26 & 27 Vict. c. 56).

the commencement of the Act (Nov. 2, 1874), upon receiving a certificate of incorporation under the Act becomes a body corporate by its registered name.

Trade Unions.—By the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 8, all real and personal estate whatsoever belonging to any trade union registered under the act is vested in the trustees for the time being of the trade union appointed as provided by the Act, for the use and benefit of such trade union and the members thereof, and the real or personal estate of any branch of a trade union is vested in the trustees of such branch, and is under the control of such trustees, their respective executors or administrators, according to their respective claims and interests, and upon the death or removal of any such trustees the same shall vest in the succeeding trustees for the same estate and interest as the former trustees had therein, and subject to the same trusts, without any conveyance or consignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, which shall be transferred into the names of such new trustees; and in all actions, or suits, or indictments, or summary proceedings before any court of summary jurisdiction, touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee, in their proper names, as trustees of such trade union, without any further description. By sect. 3 of the Trade Union Act, 1876 (39 & 40 Vict. c. 22), the property of a registered trade union is vested in trustees, and may be stated to be their property in any indictment in their proper names as trustees of such trade union without further description (*w*).

County Property.—By the Criminal Law Act, 1826 (7 Geo. IV. c. 64), s. 15, 'In any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction (*x*), infirmary, asylum, or other building erected or maintained, in whole or in part, at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court, or other such building as aforesaid, or to be used in or with any such court, or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any such inhabitants.'

On an indictment for stealing brass, the property of the inhabitants of the county of G., it appeared that some alterations had been made in the ball and concert room which formed part of the Shire Hall, and a brass chandelier, which hung from the roof of the room, was taken down and laid aside in a room in the Shire Hall. The prisoner afterwards sold this chandelier as old brass. It was objected that the ball room was not

(*w*) S. 9 provides for the carrying on of a prosecution in case of death or removal from office of a trustee. These enactments are not altered by subsequent legislation as to trade unions and trade disputes, as to which *vide ante*, pp. 1909 *et seq.*

(*x*) Gaols were in 1877 transferred from the county authorities and vested in a body corporate with a common seal, styled the Prison Commissioners (40 & 41 Vict. c. 21, ss. 6, 48).

within the term building in the preceding section, and that the chandelier was not a thing 'used in or with' such building at the time when it was stolen; but it was held that the room was clearly a building within the clause, and that the chandelier was also clearly within it (*y*).

The County Councils created under the Local Government Act, 1888 (51 & 52 Vict. c. 41), are corporate bodies (sect. 79), and all property held for any public uses or purposes or a county or any division thereof, is now held by the council for such purposes or uses (s. 3, sub-s. 4, & s. 64). Such property may be described as that of the council by its corporate name (*z*), but the old mode of description is not abrogated. Thus property held for a county asylum is property described as belonging to the county council and not to the asylum committee (*a*).

Parish and Union Property.—The Union and Parish Property Act, 1835 (5 & 6 Will. IV. c. 69), s. 7, provides that 'the guardians of the poor of every union already formed or which hereafter may be formed by virtue of the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), and of every parish placed under the control of a board of guardians by virtue of the said Act, shall respectively, from the day of their first meeting as a board, become, or be deemed to have become, and they and their successors in office shall for ever continue to be, for all the purposes of this Act, a corporation, by the name of the guardians of the poor of the union, (or of the parish of) in the county of ; and as such corporation the said guardians are hereby empowered to accept, take and hold, for the benefit of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property, and may use a common seal; and they are further empowered by that name to bring actions, to prefer indictments, and to sue and be sued, and to take or resist all other proceedings for or in relation to any such property, or any bonds, contracts, securities, or instruments, given or to be given to them in virtue of their office; and in every such action and indictment relating to any such property, it shall be sufficient to lay or state the property to be that of the guardians of the union, or of the parish of ; and in case of any addition to or separation of any parishes from any such union, under the authority of the said Act (of 1834), the board of guardians for the time being shall (notwithstanding such alteration) have and enjoy the same corporate existence, property, and privileges, as the board of guardians of the original union would have had and enjoyed had it remained unaltered' (*b*).

By the Poor Law Amendment Act, 1842 (5 & 6 Vict. c. 57), s. 16, boards of guardians may accept and hold on behalf of the parish or union, lands, buildings, goods, effects, or other property as a corporation, and in all cases may sue and be sued in their corporate name (*c*).

(*y*) R. *v.* Winbow, 5 Cox, 346. 'The room is parcel of the entire building, which includes the two courts, Grand Jury room, Counsel room, &c., and I have tried prisoners in it.' C. S. G. The prisoner was also held to be merely the servant of the inhabitants of the county.

(*z*) R. *v.* Hunting [1908], 73 J. P. 12; 1 Cr. App. 177, 179.

(*a*) Id. ibid. The committee is statutory (53 & 54 Vict. c. 5, ss. 169–176), but not incorporated, and sues and is sued by its clerk.

(*b*) This enactment is still in force. See R. *v.* Smallman [1897], 1 Q.B. 4; 66 L. J. Q.B. 82.

(*c*) See Archbold, Poor Law (15th ed.) 96.

By the Criminal Law Act, 1826 (7 Geo. IV. c. 64), s. 16, 'In any indictment or information for any felony or misdemeanor committed upon or with respect to any workhouse, or poor-house, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poor-house, in or belonging to the same, or by the master or mistress of such workhouse or poor-house, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers . . . ' (*d*).

By the Poor Law Act, 1849 (12 & 13 Vict. c. 103), s. 15, in indictments against assistant overseers or collectors for theft or embezzlement, the property in the money, &c., embezzled or stolen is to be laid on the inhabitants of the parish.

By the Local Government Act, 1894 (56 & 57 Vict. c. 73), the legal interest in all property in rural parishes, vested in the overseers or in the churchwardens and overseers, has been transferred to the parish council, if any, or if none, to the chairman of the parish meeting and the overseers of the parish (ss. 5 (2), 19 (7)).

Highway Property.—By 7 Geo. IV. c. 64, s. 16, 'In any indictment or information for any felony or misdemeanor committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within any parish, township, hamlet, or place, otherwise than by the trustees or commissioners of any turnpike road (*e*), it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways (*f*) for the time being of such

(*d*) 55 Geo. III. c. 137, s. 1, vested goods, furniture, apparel, &c., provided for the use of the poor in the overseers of the parish, &c., for the time being, and their successors, enacts that in any indictment in respect of such goods, &c., the said goods, &c., shall be laid or described to be the property of the overseers of the poor for the time being of such parish, &c., without stating or specifying their names. It was held that an indictment for stealing goods under this statute might state them to be the goods of the overseers of the poor for the time being of the parish of A., and that this sufficiently imported that they belonged at the time of the theft to the persons who were then the overseers. Thus, where the indictment stated that the prisoner, 6lbs. weight of pork of the goods and chattels of the overseers for the time being of the parish of K., feloniously did steal, &c., and a case was reserved on the question whether this was properly laid, the judges were of opinion that it sufficiently imported that the goods at the time of the theft were the property of the then overseers and therefore held the conviction right. R. *v.* Went, R. & R. 359, and MS. Bayley, J. The Acts of 1834 and 1842 do not completely divest the interest of the overseers under 55 Geo. III. c. 137. See Doe *v.* Webster, 12 A. & E. 442.

(*e*) As to laying ownership of the property of turnpike trusts, see 7 Geo. IV. c. 64, s. 17. By s. 60 of the Turnpike Roads Act, 1822 (3 Geo. IV. c. 60), property in certain things was vested in the commissioners or trustees of such roads. Ss. 97–103, 118, 124, were applied to disturnpiked roads in 1870 (33 & 34 Vict. c. 73, s. 11). The Act, so far as unrepealed, and 7 Geo. IV. c. 64, s. 17, are treated as local and personal (53 & 54 Vict. c. 59, s. 3). All turnpike trusts have now expired. See Pratt, Highways (15th ed.), 460.

(*f*) The surveyors of highways are now (a) in the administrative county of London, the Metropolitan borough councils, 18 & 19 Vict. c. 120, s. 96; 62 & 63 Vict. c. 14; (b) in urban districts, the urban sanitary authority, *i.e.* the district or town council, 38 & 39 Vict. c. 55, ss. 144–149; (c) in rural districts, the rural district council, 56 & 57 Vict. c. 73, s. 25, and see 5 & 6 Will. IV. c. 50, s. 41.

parish, township, hamlet, or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors' (*g*).

Commissioners of Sewers.—By sect. 18, 'In any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognizance, or management of any commissioners of sewers (*h*), it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognizance, or management, any such things shall be, and it shall not be necessary to specify the names of any of such commissioners.'

Public Service and Police.—Moneys, chattels or valuable securities stolen or embezzled by persons in the public service, including moneys, &c., received by persons in the service of the customs, or by constables or persons employed in the police of any county, borough, district or place, may be described as the property of His Majesty (*i*).

Post Office.—Letters, securities, money and telegrams entrusted to the post office for transmission may be described as the property of the Postmaster General (*j*).

Married Women.—The separate property of a married woman may be laid as her property in an indictment or criminal proceedings for the protection or security of such property (*k*): and such property should not be described as that of her husband unless by bailment or other transaction he has acquired a special property in the goods (*l*).

On an indictment for stealing in a dwelling-house goods described as the husband's were proved to be the separate property of the wife, who resided in the house with her husband. It was held that as the indictment had not been amended under 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972, the accused could not be convicted on the indictment (*m*). Goods of the husband in the possession of the wife should be described as his, and not as hers (*n*). The goods of a woman who has married since the date of the offence charged, may be laid as hers by her maiden name (*o*).

Description of Writings.—At common law where a document forms the gist of an offence, it must be set out according to its tenor, *i.e. verbatim* (*p*). This rule has been modified by the enactments following.

By 14 & 15 Vict. c. 100, s. 5, '. . . In any indictment for stealing, embezzling, destroying, or concealing, or for obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value

(*g*) Main roads and their materials, &c., are vested in the county council except in London, and in those urban districts which retain control of main roads within their districts. See 51 & 52 Vict. c. 41, s. 11.

(*h*) Appointed under the statute of sewers, 23 Hen. VIII. c. 5, and its amendments.

(*i*) 24 & 25 Vict. c. 96, ss. 69, 70; 39 & 40 Vict. c. 36, s. 29 (customs).

(*j*) 8 Edw. VII. c. 48, s. 73, *ante*, p. 1431.

(*k*) 45 & 46 Vict. c. 75, s. 12.

(*l*) R. *v.* Murray [1906], 2 K.B. 385, 388; 75 L. J. K.B. 593.

(*m*) Ib. ibid.

(*n*) 2 East, P. C. 652. R. *v.* French, R. & R. 491. R. *v.* Wilford, R. & R. 517.

(*o*) R. *v.* Turner, 1 Leach, 536.

(*p*) R. *v.* Coulson, 1 Den. 592; 19 L. J. M. C. 182. As to instruments made by statute the subject of larceny, *vide*, R. *v.* Johnson, 3 M. & S. 539.

thereof.' This section is repealed as to forgery and uttering (*q*), but is in substance re-enacted as to these offences (*r*).

By sect. 7, ' In all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part hereof.'

The term instrument in these sections is not defined. It clearly applies to instruments in writing or print. In sect. 5 it is necessarily limited to instruments which can be the subject of larceny, &c. Sect. 7 is general and seems to apply to writings of any description (*s*). But sect. 7 seems not to apply to libel, where the words are of the essence of the offence (*t*).

Description of Money.—By sect. 18, ' In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of *England* or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved, and in cases of embezzlement and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.'

Sect. II.—Joinder of several Counts or several Offences in an Indictment.

Joinder of Counts.—Where it is uncertain whether the facts of the transaction will in law constitute one variety of crime or another, it is usual to insert in the indictment counts specifying in terms of art all the alternative offences of which it is likely that the facts of the transaction may justify conviction, where such offences can be lawfully joined in the same indictment. Each count is in substance a separate indictment; and the grand jury in considering a bill of indictment may reject counts not supported by the witnesses called before them, and the petty jury at the trial may acquit on some counts and convict on others.

Where an indictment consisted of two counts, one for riot, the other for an assault, and the grand jury only found it a true bill as to the count for an assault, and endorsed *ignoramus* on the count for a riot, a motion was made on the part of the prosecutor to quash it, on the ground that

(*q*) 24 & 25 Vict. c. 95, s. 1.

(*r*) 24 & 25 Vict. c. 98, s. 42, *ante*, p. 1650, which applies to common law and statutory forgeries. R. *v.* Riley [1896], 1 Q.B. 309, 319, Wills, J.

(*s*) See R. *v.* Riley [1896], 1 Q.B. 309, 316, 319, where ' instrument ' in s. 38 of the Forgery Act, 1861, was held to include ' telegram.'

(*t*) Bradlaugh *v.* R., 3 Q.B.D. 607; 48 L. J. M. C. 5.

the grand jury should have found the whole to have been a true bill, or have rejected the indictment altogether; but it was held, that as there were two distinct counts, finding a true bill as to one count only, and rejecting the other, left the indictment, as to the count which the jury had affirmed, just as if there had originally been only that one count (*u*).

Indictment—Joinder of Distinct Felonies.—An indictment for felony is in practice limited to counts describing a single transaction (*v*). Where several distinct felonies are charged in the same indictment, the indictment is not thereby rendered bad (*w*); but the judge may call on the prosecution to elect upon which felony the trial shall proceed, and may thereafter exclude all evidence as to acts tending to prove any felony which is not part of the same transaction (*x*), or admissible under some other rule of evidence. This course prevents the jury from being influenced in determining the criminality of the accused by evidence relating to distinct offences which would not have been admissible on an indictment for a single felony.

On an indictment against a receiver for receiving several articles, if it appears that they were received at different times, the prosecutor may be put to his election (*y*), though on an indictment for stealing several articles it is no ground for confining the prosecutor's proof to some one of the articles, that they might have been, and probably were, stolen at different times, if they might have been stolen all at once (*z*). The rule as to election does not apply to larceny in cases within 24 & 25 Vict. c. 96, s. 5, nor to receiving counts added to a larceny indictment under 24 & 25 Vict. c. 96, s. 92 (*a*). Where an indictment contained two counts, one charging the prisoner with felony, and the second with being an accessory after the fact to the same felony, Cockburn, C.J., held that the prosecution must elect on which count they would proceed (*b*). But this ruling is inconsistent with R. *v.* Blackson (*c*), R. *v* Mitchel (*d*), and R. *v.* Tuffin (*e*).

Misdemeanors.—In indictments for misdemeanors there is in theory no limit to the number of counts or distinct misdemeanors which may be included (*f*), but in practice an indictment charging a number of distinct

(*u*) R. *v.* Fieldhouse, 1 Cowp. 325. As to indictments for homicide, *vide ante*, Vol. i. p. 818.

(*v*) It is old-established practice to include burglary and larceny in a single count, as the breaking in and stealing are in substance one transaction. The rule limiting to a single transaction does not apply where an offence is 'doing *and* causing to be done' a criminal act (R. *v.* Bowen, 1 Den. 22; R. *v.* Bradlaugh, 15 Cox, 217), but does apply where an offence is charged alternatively, *e.g.* using violence to *or* intimidating. R. *v.* Edmondes, 59 J. P. 776. As regards joining a count for being accessory after the fact with a count for homicide, *vide ante*, Vol. i. p. 134.

(*w*) R. *v.* Lynch [1903], 1 K.B. 744 (treason). R. *v.* Elliott [1908], 2 K.B. 452 (felony). R. *v.* Heywood, L. & C. 451.

(*x*) Young *v.* R., 3 T. R. 98, 106, Buller, J. R. *v.* Jones, 3 Camp. 132. R. *v.* Kingston, 8 East, 41. Campbell *v.* R., 11 Q.B. 799. Castro *v.* R., 6 App. Cas. 229.

(*y*) R. *v.* Dunn, 1 Mood. 146.

(*z*) Ibid.

(*a*) *Vide ante*, p. 1465, and R. *v.* Elliott [1908], 2 K.B. 452. R. *v.* Rye, 2 Cr. App. R. 155.

(*b*) R. *v.* Brannon, 14 Cox, 394.

(*c*) 8 C. & P. 43, Parke, B., and Patteson, J.

(*d*) 6 St. Tr. (N.S.) 599, 620, 621.

(*e*) [1903] Darling, J., noted Archb. Cr. Pl. (23rd ed.) 89.

(*f*) Young *v.* R., 3 T. R. 98. R. *v.* Finucane, 5 C. & P. 551. In R. *v.* O'Connell, 5 St. Tr. 1, 15, an indictment for seditious conspiracy contained eleven counts with details of overt acts and was over eighty feet long.

misdemeanors may be dealt with as embarrassing, and quashed, unless the prosecution consent to elect on which counts they will proceed, or to limit the evidence to such counts as can be fairly and conveniently tried together (*g*).

Duplicity.—The same count may not include two distinct felonies or misdemeanors. If it does it is liable to be quashed as bad for duplicity (*h*). Counts for felony may not be included in the same indictment with counts for misdemeanor (*i*), but the joinder, if not objected to before judgment, will not be a ground for arresting judgment on a verdict for the felony alone (*j*).

Sect. III.—Positive and Negative Averments.

The subject of positive and negative averments requires consideration from the points of view; (i) of pleading, (ii) of the burden of proof.

Positive and Negative Averments.—In an indictment the offence charged should be stated so as to aver directly and positively that the defendant did all the acts or made all the omissions essential to constitute the offence, whether it be one at common law or by statute. Where the offence is created by statute, or its punishment increased by statute, a description of the offence in the words of the statute, if not objected to *before verdict*, is sufficient after verdict to warrant imposition of the statutory punishment (*k*).

It is not enough to state an offence in general terms (*l*). The statement must, in the case of most offences, be specific, definite, certain, and particular as to the time, place, and person, and the property with respect to which the offence is said to have been committed, so as to shew that an offence has been committed by the defendant (*m*). And it should allege the intent or mental elements essential to constitute the offence. (*Vide ante*, Vol. i. p. 101.)

Exceptions, &c.—There has been some doubt whether if a statute creating a crime contains exemptions, exceptions, or provisoes, the indictment should *negative* them or leave the defendant to claim the benefit of them under a plea of not guilty.

In R. *v.* James (*n*), an indictment against a married woman for stealing the moneys and chattels of her husband, did not aver that she was the prosecutor's wife, not that she had taken them when leaving or deserting (*o*), or about to leave or desert the husband. It was contended that inasmuch as a wife cannot at common law be guilty of stealing from her

(*g*) Castro *v.* R., 6 App. Cas. 229, 245; 50 L. J. Q.B. 497. R. *v.* Kingston, 8 East, 41. R. *v.* King [1897], 1 Q.B. 214; 66 L. J. Q.B. 87. R. *v.* Fussell, 6 St. Tr. (N.S.) 723.

(*h*) Nash *v.* R., 4 B. & S. 935; 33 L. J. M. C. 94. It is too late to object to duplicity after verdict, ibid. Cf. R. *v.* Cable [1906], 1 K.B. 719. Smith *v.* Perry [1906], 1 K. B. 262.

(*i*) Young *v.* R., *ante*, p. 1953. Castro *v.* R., *ubi sup.*

(*j*) R. *v.* Ferguson, Dears. 427; 24 L. J. M. C. 61.

(*k*) 7 Geo. IV. c. 64, s. 21, *ante*, p. 1936. R. *v.* Martin, 8 A. & E. 481.

(*l*) R. *v.* Martin, 8 A. & E. 481, 486, Denman, C.J.

(*m*) Ibid. Cf. R. *v.* Norton, 8 C. & P. 196.

(*n*) [1902] 1 K.B. 540. In this case the prior authorities are collected and discussed.

(*o*) *Vide ante*, p. 1255, and R. *v.* Rendle, 2 Cr. App. R. 33.

husband, the indictment was bad, as not containing the words necessary to bring the case within 45 & 46 Vict. c. 75, s. 16 (*p*). After considering all the prior authorities on this point of pleading, it was held that conditions in a statute creating an offence, which are a necessary ingredient in the offence, are an essential part of the indictment, but that it is not necessary to make any allegations as to provisions in favour of the defence, nor to negative exemptions or exceptions where they are matter of defence, and not part of the statutory definition of the crime, *i.e.* where the exception, &c., is not so far incorporated, directly or by inference, with the enacting clause that the enacting clause cannot be read without the qualification introduced by the exception. This rule overrides the rule applied in some old cases, that the test was whether the exception was part of the enacting clause, or tacked on in a proviso, or included in another clause of the statute.

In R. *v.* Audley (*q*), the rule laid down in R. *v.* James was applied to an indictment for bigamy by a British subject at Gibraltar, which did not aver the accused to be a British subject, nor contain any reference to exemptions contained in 24 & 25 Vict. c. 100, s. 57, nor negative any of them. And it was held that the rule above stated applies equally to negative and positive averments (*r*).

Proof.—As a general rule, in criminal as in civil proceedings, the burden of proof of a fact lies on him who asserts it, and not on him who denies it (*s*). Thus, while the consent of parents or guardians was necessary for valid marriage by a minor (*t*), on an indictment for bigamy, where the first marriage was by licence, and the prisoner appeared to be under age at the time, it lay on the prosecutor to prove that the prisoner's parents had consented to the marriage, and not on the prisoner to prove the negative (*u*).

In criminal proceedings, however, in cases where negative averments impute a breach of the law to the defendant, the operation of this rule is sometimes counteracted by the presumption of law in favour of innocence (*v*); which presumption, making, as it were, a *prima facie* case in the affirmative for the defendant, drives the prosecutor to prove the negative (*w*). Thus, on an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of the Exchequer, the Court of Exchequer put the prosecution to proof that Lord Halifax did not deliver them; on the ground that a person is to be presumed duly to have executed his office till the contrary appears (*x*). And on an indictment for obtaining money, &c., under false pretences the prosecutor must prove the averments falsifying the pretences (*xx*).

(*p*) *Ante*, p. 1255.

(*q*) [1907] 1 K.B. 383; 76 L. J. K.B. 270.

(*r*) Cf. R. *v.* Jameson [1896], 2 Q.B. 425, 431.

(*s*) Gilb. Ev. 131. Bull. (N.P.) 298.

(*t*) By 26 Geo. II. c. 33, repealed in 1823 by 4 Geo. IV. c. 76, s. 1, under which Act and later legislation absence of the prescribed consent does not render invalid the marriage of a minor. R. *v.* Birmingham, 2 B. & C. 29, *ante*, Vol. i. p. 994 (*p*).

(*u*) R. *v.* Butler, R. & R. 61. R. *v.* Morton, ibid. 19.

(*v*) *Post*, p. 2058.

(*w*) The same rule applies in civil proceedings. See Monke *v.* Butler, 1 Rolle Rep. 83; 3 East, 199. R. *v.* Hawkins, 10 East, 211. Powell *v.* Milbank, 2 W. Bl. 851; 3 Wils. 355. Williams *v.* East India Company, 3 East, 193. R. *v.* Twyning, 2 B. & Ald. 386. Doe *v.* Whitehead, 8 A. & E. 571.

(*x*) Bull. (N. P.) 298.

(*xx*) R. *v.* Stoddart, 25 T. L. R. 612 73 J. P. 348; 2 Cr. App. R. 217.

And where the absence of consent is an element in the offence it appears to be necessary for the prosecution to prove that it was not given (*y*).

But where the affirmative is peculiarly within the knowledge of the party charged, the presumption in favour of innocence is not allowed to operate in the manner just mentioned; but the general rule is applied, viz., that he who asserts the affirmative is to prove it, and not he who avers the negative.

Thus upon a conviction under 6 Anne, c. 16 (c. 14 Ruffhead) (*z*), against a carrier for having game in his possession, it was held sufficient that the qualifications entitling a person to kill game mentioned in 22 & 23 Car. 2, c. 25 (*a*), were negatived in the information and adjudication, without negativing them in the evidence. Ellenborough, C.J., said: 'The question is upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer who denies any qualification, to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute, to which the proof may be applied; and according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information' (*b*).

In R. *v.* Hanson (*c*) there had been a conviction by two justices for selling ale without an excise licence. The information negatived the defendant's having a licence; but there was no evidence to support this negative averment; the only evidence to support the conviction being that the defendant had in fact sold ale. The question was, whether the informer was bound to give evidence to negative the existence of a licence. In support of the conviction it was contended, that such evidence was unnecessary, and that it lay upon the defendant to prove that he had a licence; for it is a rule, both of the civil and the common law, that a man is not bound to prove a negative allegation; R. *v.* Turner (*supra*) was cited as an express authority on the point. Abbott, C. J., 'I am of opinion that the conviction is right. It seems to me that this case is not distinguishable from R. *v.* Turner. It is a general rule that the proof of the affirmative lies upon the party who is to sustain it. The prosecutor, in general, is not called upon to prove negatively all that is stated in the information as matter of disqualification. In R. *v.* Turner all the learned judges concur in that principle. I concur in all the observations upon which the judgment of the court in that case was founded: and I think every one of them is applicable in principle to this. The general principle, and the justice of the case, are here against the defendant. It is urged,

(*y*) As to rape, *vide ante*, Vol. i. p. 935. As to assault, *vide ante*, Vol. i. p. 885.

(*z*) Repealed in 1831 (1 & 2 Will. IV. c. 32).

(*a*) Repealed in 1831 (1 & 2 Will. IV. c. 32)

(*b*) R. *v.* Turner, 5 M. & S. 206. See also Spieres *v.* Parker, 1 T. R. 140, and Jelfs *v.* Ballard, 1 B. & P. 468, Heath, J. In R. *v.* Stone, 1 East, 639, the judges were equally divided on the point.

(*c*) MS. Paley on Convictions (ed. by Dowling), p. 45, n. (1).

that if we decide against the defendant, we shall open the door to a great deal of inconvenience: that by no means follows; this man might have produced his licence without any possible inconvenience, which would at once have relieved him from all liabilities to penalties. Probably the whole enquiry before the magistrates was as to the fact of selling the ale, and that nothing was said about the licence; but, however, I think, by the general rule, the informer was not bound to sustain in evidence the negative averment that the defendant had not a licence. I do not mean to say that there may not be cases which may be fit to be considered as exceptions to that general rule; there is no general rule to which there may not be exceptions; all I mean to say is, that this is not one of those exceptions. The party thus called upon to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his licence; whereas, if the case is taken the other way, the informer is put to considerable inconvenience. Discussions may arise before the magistrates, whether the evidence produced is proper to sustain the negative; whether a book should be produced, or an examined copy, and many other questions of that sort; whereas none can arise when the defendant himself produces his licence. This, therefore, not being one of the excepted cases, but a case falling directly within the general rule, I am of opinion that judgment must be given for the Crown' (*d*).

In R. *v.* Willis (*e*) it is said to have been agreed that, where an indictment stated that the prisoner 'then or at any time before, not being a contractor with or authorised by the principal officers or commissioners of our said Lord the King of the navy, ordnance, &c., for the use of our said Lord the King, to make any stores of war, &c.,' yet that it was not incumbent on the prosecutors to prove this negative averment, but that the defendant must shew, if the truth were so, that he was within the exception in the statute.

Apothecaries' Company *v.* Bentley (*f*) was decided upon the same principle. That was an action for a penalty, under the Apothecaries Act, 1815 (55 Geo. III. c. 194), for practising as an apothecary without having obtained the certificate required by the Act. All the counts in the declaration contained the allegation that the defendant did act and practise as an apothecary, &c., 'without having obtained such certificate as by the said act is directed.' No evidence was offered by the plaintiffs to shew that the defendant had not obtained his certificate. The plaintiffs having closed their case, counsel for the defendant submitted that there must be a non-suit. Abbott, C.J., said: 'I am of opinion that the affirmative must be proved by the defendant. I think that it being a negative the plaintiffs are not bound to prove it, but that it rests with the defendant to establish his having a certificate' (*g*).

(*d*) So in R. *v.* Smith, 3 Burr. 1475, which was a conviction for trading as a hawker and pedlar without a licence, it was held that, where the defendant admitted the trading, the onus of proving that he had a licence lay on him.

(*e*) 1 Hawk. c. 80, s. 17.

(*f*) Ry. & M. 159: 1 C. & P. 538.

(*g*) Cf. R. *v.* Harris, 10 Cox, 541.

Sect. IV.—Indictments for Offences committed after Previous Convictions.

Section 11 of the Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28), after providing for the punishment of felony after a previous conviction of felony (*h*), enacts that 'In an indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state (*i*) that the offender was, at a certain time and place, convicted of felony, without otherwise describing the previous felony; and a certificate (*j*) containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court, where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same' (*k*).

An indictment under this section, which averred that the prisoners were duly convicted of felony, without alleging anything as to the judgment, was held sufficient (*l*).

This enactment did not indicate when the fact of a previous conviction was to be laid before the jury, and a practice grew up of charging the jury to inquire at the same time concerning the previous and the subsequent conviction. The omission was supplied, and the practice changed by the Previous Convictions Act, 1836 (6 & 7 Will. IV. c. 111), which enacts that 'It shall not be lawful, on the trial of any person for any such subsequent felony, to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same. And wherever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid: Provided, nevertheless, that if upon the trial of any such person for any such subsequent felony, as aforesaid, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction of felony at the same time that they inquire concerning the subsequent felony.'

The two enactments above set forth apply only to previous and subsequent convictions for *felony*. Wider provisions are made by sect. 116 of

(*h*) *Ante*, Vol. i. p. 247.

(*i*) This Act does not require that the previous conviction should be stated *after* charging the subsequent offence. See R. *v.* Hilton, Bell, 20. In that case it does not appear that the jury were sworn to inquire as to the previous conviction.

(*j*) A certificate under this Act, which stated that the prisoners were in due form of law tried and convicted of felony, but did not set out that any judgment was given, was held insufficient, as being consistent with the judgment having been arrested. R. *v.* Ackroyd, 1 C. & K. 158. Cf. R. *v.* Stonnell, 1 Cox, 142.

(*k*) The rest of the section imposes penalties for uttering a false certificate of conviction.

(*l*) R. *v.* Spencer, 1 C. & K. 159.

the Larceny Act, 1861 (24 & 25 Vict. c. 96), which enacts that 'in any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence (*m*), or offences punishable upon summary conviction, it shall be sufficient, *after charging the subsequent offence*, to state that the offender was at a certain time and place, or at certain times and places convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous felony, misdemeanor, offence or offences; and a certificate (*n*) containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, or a copy of any such summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or to which such summary conviction shall have been returned, or by the deputy of such clerk or officer (for which certificate or copy a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or official character of the person appearing to have signed the same; *and the proceedings upon any indictment for committing any offence* (*m*) *after a previous conviction or convictions shall be as follows; (that is to say), the offender shall, in the first instance, be arraigned* (*o*) *upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answers that he had been so previously convicted, the Court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction, or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry:* Provided, that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction (*p*) of such person for the previous offence or offences before such

(*m*) In Faulkner *v.* R. [1905], 2 K.B. 76, in proceedings upon a writ of error, it was held that the words 'any offence' were perfectly general and not limited to offences under the Larceny Act, 1861; and the Court quashed a conviction for attempting to commit larceny after a previous conviction of felony, because the direction of s. 116, as to arraignment, &c., had not been obeyed. The effect of the ruling, if it be correct, is to make 6 & 7 Will. IV. c. 111, *supra*, and 34 & 35 Vict. c. 112, s. 9 (*post*, p. 1960), both superfluous.

(*n*) As to other modes of proving previous convictions, see *post*, p. 2132.

(*o*) See R. *v.* Martin, L. R. 1 C. C. R. 214; 39 L. J. M. C. 31. R. *v.* Fox, 10 Cox, 502 (Ir.). R. *v.* Goodwin, 10 Cox, 534. As to former practice, see Anon., 5 Cox, 268; R. *v.* Key, 2 Den. 347; R. *v.* Shuttleworth, 2 Den. 351. Greaves, Cr. Law Cons. Acts (2nd ed.), 199.

(*p*) As to proof of previous convictions in certain proceedings for receiving goods knowing them to be stolen, see 34 & 35 Vict. c. 112, s. 19, *ante*, p. 1487.

verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence ' (*q*).

Sect. 37 of the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), is substantially in the same terms, but is limited to cases of offences under that Act, committed after previous offences under that Act or any former Act relating to the coin.

The provisions of sect. 116 of the Larceny Act, 1861, are by sect. 9 of the Prevention of Crime Act, 1871 (34 & 35 Vict. c. 112), with the necessary variations, applied to any indictment for committing a 'crime' as defined by the Act of 1871 (*qq*) after previous conviction for a crime, whether the crime charged in such indictment, or the crime to which such previous conviction relates, be or be not punishable under the Larceny Act, 1861.

The Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), sect. 9, virtually supersedes as to England and Ireland sect. 37 of the Coinage Offences Act, 1861: but does not extend to the offences created by sect. 7 of the Prevention of Crimes Act, 1871, where the accused elects to be tried on indictment for such offence (*r*).

'Previous conviction' in the Coinage Offences Act, 1861, and, it would seem, in the other Acts above cited, means a valid conviction by confession or verdict, whether judgment was or was not given (*s*).

Any Number of Previous Convictions may be Charged.—An indictment after charging a larceny from the person, alleged two previous convictions of the prisoner for felony, one after the other, and upon a case reserved, it was held that this was right. They do not vary the offence; they only affect the quantum of punishment. A difficulty as to the proof of identity might occur as to one conviction, and not as to another, and

(*q*) Framed from 7 & 8 Geo. IV. c. 28, s. 11 (E); 9 Geo. IV. c. 54, s. 21 (I); 6 & 7 Will. IV. c. 111; 12 & 13 Vict. c. 11, s. 4; and 14 & 15 Vict. c. 19, ss. 2, 9. The words 'after charging the subsequent offence' were inserted in order to render it absolutely necessary always to charge the subsequent offence or offences first in the indictment, and after so doing to allege the previous conviction or convictions. This was the invariable practice on the Oxford Circuit, and the Select Committee of the Commons were clear that it ought to be universally followed, so that the previous conviction should not be mentioned even by accident, before a verdict of guilty of the subsequent offence had been delivered. Davis (Cr. L. 113), however, says, 'It seems to be immaterial whether the prior conviction be alleged before or after the substantive charge,' for which he cites R. *v.* Hilton, Bell, 20, a case decided on 7 & 8 Geo. IV. c. 28, s. 11, which does not contain the words 'after charging the subsequent offence,' and is, therefore, no authority on the present section, in which those words are inserted to render the course held sufficient in R. *v.* Hilton unlawful. (See also 6 & 7 Will. IV. c. 111, *ante*, p. 1958). Whenever a statute increases the punishment of an offender on a subsequent conviction, and gives no mode of stating the former conviction, the former indictment, &c., must be set out at length, as was the case in Mint prosecutions before the Coinage Offences Act, 1861; but where a statute gives a new form of stating the former conviction, that form must be strictly pursued; for no rule is more thoroughly settled than that in the execution of any power created by any Act of Parliament, any circumstance required by the Act, however unessential and unimportant otherwise, must be observed, and can only be satisfied by a strictly literal and precise performance, R. *v.* Austrey, 6 M. & S. 319; and to suppose that this section, which makes it sufficient to allege the former conviction '*after* charging the subsequent offence,' can be satisfied by alleging it *before* charging the subsequent offence is manifestly erroneous. See also my note, Greaves, Crim. Law Cons. Acts, 201 (2nd ed.). C. S. G.

(*qq*) S. 20. The definition is set out *ante*, Vol. i. p. 224 (n).

(*r*) R. *v.* Penfold [1902], 1 K.B. 547; 71 L. J. K.B. 306. R. *v.* Osborne, 1 Cr. App. R. 134.

(*s*) R. *v.* Blaby [1894], 2 Q.B. 170; 63 L. J. M. C. 133.

it is also very important that the judge should know how many times the prisoner has been convicted (*t*).

If a Prisoner seeks to shew that he has a Good Character, the Previous Conviction may be proved.—Whether a prisoner calls witnesses to his character, or cross-examines the witnesses as to his character, he 'gives evidence' of his character within the meaning of sect. 116 of the Larceny Act, 1861 (24 & 25 Vict. c. 96) and the previous conviction may be proved in the first instance (*u*). Upon the trial of an indictment charging a previous conviction, a witness for the prosecution, on cross-examination by the counsel for the prisoner, stated that he had known the prisoner for six or seven years last past, and that during that time the prisoner had borne a good character for honesty. The counsel for the prosecution thereupon claimed (*v*) to give evidence of the previous conviction of the prisoner in 1838, as mentioned in the indictment. This evidence was objected to; first, because the evidence of the good character of the prisoner was confined to the period between 1841 and 1851, and, therefore, evidence of the prisoner's conviction in 1838 was no answer thereto; secondly, because the witness, being a witness for the prosecution only, the prisoner did not, by the answers of the witness on cross-examination, give evidence of his (the prisoner's) good character within the meaning of the statute. But the Court overruled the objections; and, upon a case reserved, the judges were unanimously of opinion that the natural and necessary meaning to be put upon the words of the statute was, that if the prisoner, either by himself or his counsel, attempts to prove a good character for honesty, either directly by calling witnesses, or indirectly by cross-examining the witnesses for the Crown, it is lawful for the prosecution to give in evidence the previous conviction for the consideration of the jury (*w*).

In the previous case, on the prisoner's counsel saying, 'Suppose that a witness for the prosecution is asked by the prisoner's counsel some question which has no reference to character, and he should happen to say something favourable to the prisoner's character, could the prisoner under such circumstances, be said to give evidence as to his character?' Campbell, C.J., observed, 'That would raise a different question; I should not, in such a case, admit evidence of a previous conviction' (*x*). It is obvious, that where the prisoner gives evidence of his good character, the proper course (*xx*) is for the prosecutor to require the officer of the Court to charge the jury with the previous conviction, and then to put in the certificate and prove the identity of the prisoner in the usual way. If the prisoner gives such evidence during the course of the case for the prosecution, then this should be done before the case for the prosecution closes; but if the evidence of character is given after the case for the prosecution closes, then the previous conviction must be proved in reply (*y*).

(*t*) R. *v.* Clark, Dears. 198; 3 C. & K. 367.

(*u*) R. *v.* Gadbury, 8 C. & P. 676. As to effect of the Criminal Evidence Act, 1898, *vide post*, pp. 2271 *et seq.*

(*v*) Under 14 & 15 Vict. c. 19, s. 9, repealed in 1861.

(*w*) R. *v.* Shrimpton, 2 Den. 319. See R. *v.* Solomon, 2 Cr. App. R. 80.

(*x*) Ibid.

(*xx*) These observations may still apply to 6 & 7 Will. IV. c. 3, and 7 & 8 Geo. IV. c. 28, s. 2, but this course is not adopted under 24 & 25 Vict. c. 96, s. 116.

(*y*) Even before 1851 (14 & 15 Vict. c. 100, s. 24, *ante*, p. 1935) an indictment for the subsequent felony need not conclude

As to charging a prisoner with being an 'habitual drunkard,' see 61 & 62 Vict. c. 60, *ante*, Vol. I. p. 244.

As to charging and proving that the defendant is an 'habitual criminal,' *vide* 8 Edw. VII. c. 59, s. 10, *ante*, Vol. I. p. 241.

As to modes of proving convictions other than those prescribed by the above statutes, *vide post*, p. 2132.

As to special offences, where a person has been twice convicted of crime, see 34 & 35 Vict. c. 112, s. 7, *ante*, Vol. I. p. 223.

As to the right to prove previous convictions for fraud or dishonesty within five years immediately preceding a charge of receiving stolen property, see 34 & 35 Vict. c. 112, s. 19, and *ante*, p. 1487.

Sect. V.—Conviction of Offences other than the Full Offence charged in the Indictment.

To justify a conviction for any offence, the indictment must completely state all the *material* facts which constitute the offence, and which are necessary, to enable the Court to judge what in law is imputed to the accused, and to enable the accused to avail himself of the verdict and judgment should the same charge be again preferred, and the requisite allegations must be proved as laid (subject to the power of the Court to amend immaterial variances), or so much of the matter charged as constitutes an offence punishable by law, and substantially charged in the indictment, of which the accused can be convicted on the indictment (*z*).

The distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shews that the defendant has committed a substantive crime therein specified (*a*).

The rule may also be stated as follows: At common law the jury may negative any matter alleged in an indictment and return a verdict of guilty as to other matters therein alleged which they find to be true. Upon such verdict judgment may be entered if the remaining allegations so found true describe a substantive offence punishable by law upon which the Court can give judgment (*b*). The portions of the indictment negatived are treated as surplusage (*c*).

But, except under the express authority of a statute, there cannot be a conviction of misdemeanor on an indictment for felony, or a conviction of felony on an indictment for misdemeanor (*d*); and the Court has not

contra formam statuti, as the charge of the previous conviction is merely a suggestion in order to warrant the higher punishment. R. *v.* Blea, 8 C. & P. 735, argued by Mr. Greaves before Patteson, J.

(*z*) R. *v.* Hollingberry, 4 B. & C. 329.

(*a*) R. *v.* Hunt, 2 Camp. 585: 31 St. Tr. 367, 408, Ellenborough, C.J. The same distinction applies to the averments in the indictment. If an offence sufficient to maintain the indictment is well laid, it is enough, though other matters which would increase the offence are ill averred.

(*b*) 2 Hale, 191. R. *v.* Hollingberry, 4 B. & C. 329. R. *v.* Hunt, [1811], 2 Camp. 583; 31 St. Tr. 367. Where on a count for composing, printing, and publishing a seditious libel, it was argued that the count failed for want of proof that the defendants were authors of the libel, Ellenborough, C.J., held that the count would be sustained by proof of publication only.

(*c*) *Vide post*, p. 1969.

(*d*) R. *v.* Thomas, L. R. 2 C. C. R.: 44 L. J. M. C. 42. Where on an indictment for uttering counterfeit coin, which is a felony if committed after a previous conviction of the same offence (24 & 25 Vict. c. 99, s. 42), the jury were held not to be entitled to convict of the uttering as a misdemeanor after negativing the previous conviction. Where upon a special verdict upon an indictment for felony, the Court of King's Bench was of opinion that the prisoner

power, either at common law (*e*) or under 14 & 15 Vict. c. 100, s. 1, *post*, p. 1972 (*f*) to amend the indictment according to the proof so as to make it charge an offence distinct in kind from that charged in the first instance. Thus it has been held that an indictment charging the obtaining of credit *under false pretences* contrary to sect. 13 (1) of the Debtors Act, 1869, cannot be amended so as to charge obtaining credit *by means of fraud other than false pretences* (*g*), which is a distinct offence, though punishable under the same subsection (*h*).

Illustrations.—The following cases illustrate the common law rule:—

Treason.—On an indictment for treason charging several overt acts, the jury may convict on one and negative the others (*i*).

Homicide.—On an indictment for murder the jury may convict of manslaughter, for the indictment contains all the allegations essential to that charge, A. is fully apprised of the nature of it, the verdict enables the Court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts (*j*).

Assault.—The jury may convict of common assault on an indictment for inflicting grievous bodily harm (*k*), or occasioning actual bodily harm (*l*) or unlawful wounding (*m*), or for indecent assault (*n*), or, it would seem, for offences against 48 & 49 Vict. c. 69, s. 5 (*o*). On an indictment charging the prisoner with having assaulted a female child, with intent to abuse and carnally to know her; the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention charged carnally to know her. Holroyd, J., held that the

could not be convicted of felony, Lee, C.J., raised a question, whether, as the case amounted undoubtedly to a great misdemeanor, they could not give judgment as for a trespass. Counsel for the Crown, in support of the power of the Court to do so, cited 2 Hawk. 440; and Martin Leeser's case, Cro. Jac. 497; 79 E. R. 424; and 1 And. 351. Kel. (J.) 29; & Dalt. 331. *E contra*, it was insisted that by this means a defendant would be deprived of many advantages; for if he was indicted properly, he might have counsel, a copy of his indictment, and a special jury. The Court ordered the prisoner to be discharged; and said, that in the cases cited *pro Rege*, the judges appeared to have been transported with zeal too far. R. *v.* Westbeer, 2 Str. 1133; 1 Leach, 12. Prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him (24 & 25 Vict. c. 96, s. 42). The jury found them guilty of an assault, but negatived the intent to rob. Held, that the prisoners could not, upon this indictment, and finding, be convicted of common assault. R. *v.* Woodhall, 12 Cox, 240, Denman, J.

(*e*) R. *v.* Wilkes [1770], 19 St. Tr. 1075, 1119.

(*f*) R. *v.* Benson [1908], 2 K.B. 270; 67 L. J. K.B. 644.

(*g*) Ibid.

(*h*) R. *v.* Jones [1898], 1 Q.B. 119; 67 L. J. Q.B. 41.

(*i*) Fost. 194.

(*j*) R. *v.* Mackalley, 9 Co. Rep. 67 *b*. See Co. Litt. 282 *a*. Gilb. Ev. 233. On a charge of petit treason, if the killing with malice were proved, but no circumstance of aggravation were proved to make the offence treasonable, the prisoner might have been found guilty of the murder. Case of Swan *v.* Jefferys, Fost. 104. On an indictment under 1 Jac. I. c. 8, repealed in England in 1828 (9 Geo. IV. c. 31, s. 1), for stabbing *contra formam statuti* the jury might acquit under the statute and convict of manslaughter at common law. 1 Hale, 302.

(*k*) R. *v.* Taylor, L. R. 1 C. C. R. 194; 38 L. J. M. C. 106.

(*l*) R. *v.* Yeadon, L. & C. 81; 31 L. J. M. C. 70. R. *v.* Oliver, Bell, 287; 30 L. J. M. C. 12.

(*m*) R. *v.* Taylor, *ubi sup.* Kelly, C.B., said: 'although the word assault does not occur in either count of the indictment, yet both counts necessarily include an assault, and both are counts for misdemeanor, and the prisoner having been found guilty of a common assault, we are of opinion that the conviction should be affirmed.'

(*n*) R. *v.* Bostock, 17 Cox, 700. Cf. R. *v.* Guthrie, L. R. 1 C. C. R. 241; 39 L. J. M. C. 95, decided on 24 & 25 Vict. c. 100, s. 51 (rep.).

(*o*) Ibid.

averment of intention was divisible, and that the prisoner might be convicted of an assault with intent to abuse simply (*p*), on an indictment for assault with intent to ravish, the accused (*q*) may be convicted of common assault (*r*).

Burglary, House-breaking, Robbery, Larceny.—On an indictment for burglary the jury may convict of entering a dwelling-house in the night with intent to commit felony therein (*s*), if there was no breaking, or of house-breaking, if the breaking was not by night (*t*), and on an indictment for burglary *or* house-breaking and larceny, the jury may convict of stealing in a dwelling-house to the amount of £5, if the indictment specifies goods to that value, or of simple larceny (*u*), and on an indictment for robbery, if no force is proved, the jury may convict of larceny (*v*). In fact, on any charge of compound or aggravated larceny, the jury may acquit of the matter of aggravation and find a verdict of simple larceny (*w*); and if the other facts warrant a conviction in the case of larceny by a clerk or servant, if the clerkship or service is not proved (*x*); or of stealing in a dwelling-house, persons being therein, and being thereby put in fear (*y*). On an indictment for horse stealing, which was bad for not describing the animal by any term used in the statute, it was held that there might be a conviction for simple larceny (*z*).

Perjury.—On an indictment for perjury in a judicial proceeding, the jury may convict of the common-law misdemeanor of taking a false oath for a public purpose in a proceeding which is not judicial (*a*).

Libel.—On an indictment for publishing a defamatory libel, knowing it to be false, punishable under 6 & 7 Vict. c. 96, s. 4, the jury may negative the *scienter*, and convict of publishing the libel which is punishable under sect. 5 (*b*). A person indicted for composing, printing, and publishing a libel, may be convicted only of the printing and publishing (*c*), and on an indictment for publishing a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley, J., informed the jury, that if they were of opinion that the defendants had published the libel with either of those intentions, they ought to find the prisoner guilty (*d*). Where an information for publishing a malicious and seditious libel contained an averment that outrages had been committed *in and in the neighbourhood* of Nottingham; it was held that such averment was divisible, and that it need not be proved that they had been committed in both places (*e*).

(*p*) R. *v.* Dawson, 3 Stark. (N. P.) 62.

(*q*) *Vide post*, p. 1968.

(*r*) See 1 Lew. 16, Hullock, B.

(*s*) 24 & 25 Vict. c. 96, s. 5. R. *v.* Brooke, C. & M. 543.

(*t*) R. *v.* Bullock, 1 Mood. 324.

(*u*) 2 Hale, 302, where the prisoners were acquitted of the burglary, upon an indictment for a burglary and larceny, and found guilty of stealing in the dwelling-house to the amount of forty shillings, it was held that they were excluded from their clergy, though there was no separate and distinct count in the indictment on 12 Anne, c. 7, and the judges were of opinion that the indictment contained every charge that was necessary in an indictment upon that statute. R. *v.* Withal, 1 Leach, 88.

(*v*) 2 Hale, 302.

(*w*) 2 East, P. C. 784.

(*x*) R. *v.* Jennings, 7 Cox, 397.

(*y*) R. *v.* Etherington, 2 Leach, 671; 2 East, P. C. 635, *ante*, p. 1113.

(*z*) R. *v.* Beaney, R. & R. 416.

(*a*) R. *v.* Hodgkiss, L. R. 1 C. C. R. 212; 39 L. J. M. C. 14.

(*b*) Boaler *v.* R., 21 Q.B.D. 284; 52 L. J. M. C. 85.

(*c*) R. *v.* Hunt, 2 Camp. 583; 31 St. Tr. 408. R. *v.* Williams, 2 Camp. 646.

(*d*) R. *v.* Evans, 3 Stark. (N. P.) 35.

(*e*) R. *v.* Sutton, 4 M. & S. 532.

Forgery.—If the indictment charges that the defendant did, and caused to be done, a particular act, as 'forged, and caused to be forged,' it is enough to prove either one or the other (*f*).

Embezzlement.—An indictment for embezzlement need not specify the exact sum embezzled; as where the indictment charged the prisoner with embezzling, among other things, notes 'or one pound each, and evidence was given that there were one pound notes in the sum of money embezzled; this was held to support the indictment (*g*).

On an indictment for embezzlement under 7 Geo. III. c. 50, s. 1 (rep.) (*h*) stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either was held sufficient (*i*). And in the same case, the letter embezzled having been described in the indictment as having contained several notes, proof of its having contained any one of them was held sufficient (*j*).

False Pretences.—Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part, is sufficient (*k*).

Joint Offences.—Where the indictment charges several with a joint offence, any one of them alone may be found guilty, unless the offence charged is a conspiracy between two of them (*l*). But at common law they cannot be found guilty separately of separate parts of the charge, and if two be so found guilty separately a pardon must be obtained, or *nolle prosequi* entered, as to the one who stands second upon the verdict, before judgment can be given against the other (*m*). Thus where Hempstead and Hudson were indicted (*n*) for stealing in a dwelling-house to the value of £6 10*s.*, and the jury found Hempstead guilty as to part of the articles of the value of £6, and Hudson guilty as to the residue; it was held that judgment could not be given against both, but that upon a pardon or *nolle prosequi* as to Hudson it might be given against Hempstead (*o*). As regards receivers the common law rule is altered by 24 & 25 Vict. c. 96, s. 94 (*ante*, p. 1466) (*p*).

Conviction of Misdemeanor, though Evidence proves Felony.—The Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 12, if upon the trial of any person for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards

(*f*) R. *v.* Middlehurst, 1 Burr. 400, Ld. Mansfield.

(*g*) R. *v.* Carson, R. & R. 303. So on an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. R. *v.* Burdett, Ld. Raym. 149, Holt, C.J. See also R. *v.* Gillham, 6 T. R. 265. Serjeaunt *v.* Tilbury, 16 East, 416. R. *v.* Hill, 1 Stark. (N. P.) 369.

(*h*) Rep. 1888 (S. L. R.).

(*i*) R. *v.* Ellins, R. & R. 188; and see R. *v.* Shaw, R. & R. 389.

(*j*) R. *v.* Ellins, *ubi sup.*

(*k*) R. *v.* Hill, R. & R. 303.

(*l*) *Ante*, Vol. i. pp. 146 *et seq.*

(*m*) On an indictment of two for burglary and larceny, one may be convicted of the burglary and the other of the larceny. R. *v.* Butterworth, R. & R. 520.

(*n*) Under 12 Anne, c. 7, repealed as to England in 1827 (7 & 8 Geo. IV. c. 27, s. 1) and now represented by 24 & 25 Vict. c 96, s. 60, *ante*, Vol. i. p. 773.

(*o*) R. *v.* Hempstead, R. & R. 344. As to receivers, see R. *v.* Davey, 2 Den. 86; 20 L. J. M. C. 105.

(*p*) See R. *v.* Reardon, L. R. 1 C. C. R. 31; 35 L. J. M. C. 171. R. *v.* Hughes, Bell, 242; 29 L. J. M. C. 71.

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

Even before this enactment, on an indictment under 9 Geo. IV. c. 31, s. 17 (rep.), for having carnal knowledge of a girl between ten and twelve, it was held that the prisoner was not entitled to be acquitted on proof that he had, in fact, committed a rape on her (*r*).

In view of the generality of this enactment it was unnecessary to provide in sect. 88 of the Larceny Act, 1861 (*s*), that the jury might convict on an indictment for obtaining property by false pretences even when the evidence proved larceny. It is to be observed that the jury cannot convict on an indictment for larceny either of that offence or of obtaining by false pretences where the evidence is of false pretences and not of larceny.

According to Maule, J., the section applies only in cases of merger, *e.g.* where, on a charge of false pretences, it appears that the false pretence was made good by forgery (*t*). To warrant a conviction the facts proved must in law amount to a felony, and on an indictment the misdemeanor of carnally knowing a girl above the age of ten years and under twelve: it was held that the enactment did not warrant a conviction, as it appeared in evidence that the girl was under ten (*u*).

Conviction of Attempt on Charge of Completed Offence.—By 14 & 15 Vict. c. 100, s. 9, 'if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same (i.e. *the offence charged in the indictment*) (*v*), and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried' (*w*). The enactment seems to apply to all felonies, whether

(*q*) This enactment alters the common law practice in which an acquittal was directed in such cases on the doctrine of merger of trespass in felony. See R. *v.* Harmwood *cor.* Buller, J., [1787], 1 East, P. C. 411. R. *v.* Nicholls, 2 Cox, 182. R. *v.* Shott, *infra*.

As to how far apart from this enactment a conviction for misdemeanor would be a bar to a fresh indictment for felony on the same facts, see R. *v.* Morris, L. R. 1 C. C. R. 90; 36 L. J. M. C. 84.

(*r*) R. *v.* Neale, 1 Den. 36. The *ratio decidendi* was that though consent was no defence under the enactment on which the indictment was founded, actual want of consent did not take the case out of the statute, nor relegate the case to the common law.

(*s*) *Ante*, p. 1514.

(*t*) R. *v.* Shott, 3 C. & K. 206.

(*u*) The offences were misdemeanors under 24 & 25 Vict. c. 100, ss. 50, 51, both since repealed.

(*v*) R. *v.* McPherson, D. & B. 197, 203; 26 L. J. M. C. 134, Willes, J.

(*w*) Under 7 Will. IV. and 1 Vict. c. 85, s. 11, on a trial for felony including an assault against the person, the jury might acquit of the felony and return a

at common law or by statute passed before or since 1851 (*x*). It has not been definitely decided whether the attempt of which the jury may convict must be a misdemeanor or may be a statutory felony (*y*). On an indictment of H. for rape, and W. for aiding and abetting, both were acquitted of felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H. in the attempt: it was held that W. was properly convicted (*z*).

On an indictment for committing a felony under sect. 57 of the Larceny Act, 1861 (*a*), *i.e.* breaking and entering with intent to steal, there was evidence of breaking the roof of a house but none of entering; and the jury were directed that if satisfied that the accused broke the roof with intent to enter and steal they might convict him of an attempt to commit that felony. It was held that the prisoner was on the above indictment lawfully convicted of an attempt to commit felony (*b*).

In R. *v.* Connell (*c*) the indictment contained four counts: (1) for feloniously administering vitriol to L. with intent to murder; (2) for an attempt to administer; (3) for applying vitriol with intent to burn L.; (4) for applying it with intent to do grievous bodily harm (*d*). C. had been previously tried and acquitted of the murder of L. by vitriol, and a plea of *autrefois acquit* was pleaded, and it was submitted that the jury could, on the indictment for murder, have convicted of the attempts charged on the above indictment. The Court held that 14 & 15 Vict. c. 100, s. 9, only authorised conviction of the attempt as a misdemeanor, and did not authorize on conviction of the statutory felony stated in the second indictment (*e*).

In R. *v.* McPherson (*f*) the prisoner was indicted for breaking and entering the house of M. Fowler, and stealing therein certain specified chattels (*g*). The evidence proved the breaking and entering, but that the specified chattels had been stolen from the house before the prisoner entered. The jury found that the prisoner was not guilty of the felony charged, but was guilty of breaking and entering, and of attempting to steal the goods therein. On a case reserved, it was held that the prisoner could not on the indictment be convicted of an attempt under 14 & 15 Vict. c. 100, s. 9. The reasons assigned for this decision were that as the specified chattels were not on the premises the defendant could not be said to have attempted to steal them, and that under the section

verdict of assault against the person convicted. But this enactment was repealed in 1851 (14 & 15 Vict. c. 100, s. 10), and now such acquittal appears to be no bar to an indictment for the assault. See R. *v.* Dingley, 4 F. & F. 99. R. *v.* Connell, *infra*.

(*x*) R. *v.* Bain, L. & C. 129, 130 *n.*; 31 L. J. M. C. 88.

(*y*) See R. *v.* Connell, *infra*.

(*z*) R. *v.* Hapgood, L. R. 1 C. C. R. 221. S. C. *sub. nom.* R. *v.* Wyatt, 39 L. J. M. C. 83.

(*a*) *Ante*, p. 1125.

(*b*) R. *v.* Bain, L. & C. 129; 31 L. J. M. C. 88.

(*c*) [1853], 6 Cox, 178, Williams and Talfourd, JJ.

(*d*) These offences were under 7 Will. IV. and 1 Vict. c. 85, which was repealed in 1861 and replaced by 24 & 25 Vict. c. 100.

(*e*) In R. *v.* Cook [1899], 20 N. S. W. Rep. Law, 264, this case was explained as not deciding that there could be no conviction of attempt if it were felony, but only that the offence included in the second indictment was not an attempt within 14 & 15 Vict. c. 100, s. 9. In 24 & 25 Vict. c. 100, the offence in question is classified with other offences under the cross-heading 'attempts to murder.'

(*f*) D. & B. 197; 26 L. J. M. C. 134.

(*g*) In an indictment for attempting to steal chattels, they need not be specified. R. *v.* Johnson, 34 L. J. M. C. 24; L. & C. 489.

he could only be convicted of an attempt, and not of a mere *intent* to commit the offence actually charged. So far as it relates to the general law with reference to attempts to commit crime, the case seems no longer of authority (*h*).

Statutory provisions:—On indictment for	Jury may convict of	Statute
Murder of a new-born child.	Concealment of the birth or feloniously destroying before full birth.	24 & 25 Vict. c. 100, s. 60.
Manslaughter of a child under sixteen by a person over sixteen who had custody, charge, or care of the child.	Cruelty to the child.	8 Edw. VII. c. 67, s. 12.
Administering poison with intent to endanger life or so as to inflict grievous bodily harm.	Administering poison with intent to injure, aggrieve, or annoy.	24 & 25 Vict. c. 100, ss. 23–25.
Feloniously wounding.	Unlawful wounding.	14 & 15 Vict. c. 19, s. 5 (*i*).
Robbery.	Assault with intent to rob.	24 & 25 Vict. c. 96, s. 41 (*j*).
Felonious demolition by rioters.	Unlawful damage by rioters.	24 & 25 Vict. c. 97, ss. 11-12.
Rape, or carnal knowledge of a girl under thirteen.	Indecent assault, or misdemeanor within ss. 3, 4, 5, of the Criminal Law Amendment Act, 1885, or of incest.	48 & 49 Vict. c. 69, s. 9 (*k*). 8 Edw. VII. c. 45, s. 4 (3).
Incest.	Offences under ss. 4 or 5 of the Criminal Law Amendment Act, 1885.	8 Edw. VII. c. 45, s. 4 (3).
Corrupt practices at parliamentary or local government elections.	'Illegal' practices at such elections.	46 & 47 Vict. c. 51, s. 52. 47 & 48 Vict. c. 70, s. 30.
Any completed felony or misdemeanor.	Attempt to commit the full offence.	14 & 15 Vict. c. 100, s. 9.
Embezzlement or fraudulent application or disposition of property.	Simple larceny, or larceny as a clerk or servant, or as a person employed in the public service or police.	24 & 25 Vict. c. 96, ss. 68-72.
Larceny.	Embezzlement or fraudulent application or disposition of property.	24 & 25 Vict. c. 96, s. 72.

(*h*) See R. *v.* Ring, 61 L. J. M. C. 116. R. *v.* Brown, 24 Q.B.D. 357; 59 L. J. M. C. 47, discussed, *ante*, Vol. i. p. 141.

(*i*) See R. *v.* Miller, 14 Cox, 356.

(*j*) This enactment overrides R. *v.* Reid, 2 Den. 88.; 20 L. J. M. C. 67.

(*k*) This enactment seems to override R. *v.* Catherall, 13 Cox, 109.

SECT. VI.—SURPLUSAGE.

Allegations in an indictment not essential for the complete description of the offence charged are considered as mere surplusage, and may be disregarded in evidence (*l*). Thus where P. was convicted upon an indictment, which charged him with robbing F. *in the dwelling-house* of A. W., and it was proved that the robbery was committed in a house, but it did not appear who was the owner of it; the conviction was upheld (*m*). Upon an indictment (*n*) for having a die *made of iron and steel* in possession, without lawful authority, it was held that, as it was immaterial to the offence of what the die was made, proof of a die, either of iron or steel, or both, would satisfy the charge (*o*). On an indictment (*p*) 'for stealing so much lead *belonging to the Rev. G. C. W.*, and then and there fixed to a certain building called Hendon Church,' Buller, J., thought the charging the lead to be the property of any one was absurd and repugnant, property (in this respect) being only applicable to personal things; that it should only have been charged to be lead affixed to the church; and that, therefore, the allegation as to property ought to be rejected as surplusage (*q*). In 24 & 25 Vict. c. 96, s. 31 (*ante*, p. 1258), which now governs this offence, it is provided that the lead, &c., need not be alleged to be the property of any person.

With regard to surplusage, it is necessary to keep in view the general rule that no allegation made in an indictment which is *descriptive* of the *identity* of what is legally essential to the charge in the indictment can be treated as surplusage (*r*). Thus on a charge of stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected (*s*). Upon an indictment (*t*) for being found armed with intent to destroy game in a wood 'called *the old walk* of, and belonging to, and then in the occupation of, John James, Earl of W.,' it was proved that the wood in question was in the occupation of the Earl of W., but it was also proved that the wood had always been called the *long* walk, and had never been called or known by the name of the *old* walk. It was held that, though it is not necessary, where the name of the owner or occupier of the close is stated, to state the name of

(*l*) R. *v.* Holt, 2 Leach, 593; 5 T. R. 436. R. *v.* Summers, 2 East, P. C. 785. R. *v.* Wardle, R. & R. 9; 2 East, P. C. 785.

(*m*) R. *v.* Pye, 2 East, P. C. 785, 786. R. *v.* Johnstone, ibid. See R. *v.* Minton, 2 East, P. C. 1021.

(*n*) On 8 & 9 Will. III. c. 26, s. 1, rep. as to England in 1827, (7 & 8 Geo. IV. c. 27, s. 1), and now represented by 24 & 25 Vict. c. 99, s. 24, *ante*, Vol. i. p. 365.

(*o*) R. *v.* Oxford, R. & R. 382. R. *v.* Phillips, ibid. 369.

(*p*) On 4 Geo. II. c. 32, repealed in 1832 (2 & 3 Will. IV. c. 34, s. 1), and now represented by 24 & 25 Vict. c. 96, s. 60, *ante*, Vol. i. p. 773.

(*q*) R. *v.* Hickman, 1 Leach, 318; 2 East, P. C. 593. On the authority of this case, Holroyd, J., doubted whether, on an indictment on 3 Will. & M. c. 9, s. 5 (rep.), for stealing in a lodging let to the prisoner, the allegation of the person *by whom* the lodging was let might not be rejected as surplusage. R. *v.* Healey, 1 Mood. I.

(*r*) 1 Stark. Ev. 628.

(*s*) 1 Stark. Ev. 374 (2nd ed.). So upon an indictment for stealing four *live* tame turkeys, the judges held that the word 'live,' being a description of the quality of the thing stolen, could not be rejected as surplusage. The turkeys were alive when taken in one county, but were killed there and were taken when dead into the county in which the taker was indicted. R. *v.* Edwards, R. & R. 497.

(*t*) Under 57 Geo. III. c. 90, now replaced by 9 Geo. IV. c. 69, s. 9, *ante*, p. 1333.

the close also, yet that the averment could not be rejected (*u*). On an indictment for breaking, &c., the house of J. D., 'with intent to steal the goods of J. W., in the said house being,' it appeared that there was no such person who had goods in the house, but J. W. was put by mistake for J. D., and the defendant was held entitled to an acquittal; and it was ruled that the words 'of J. W.' could not be rejected as surplusage, for the words were sensible and material, it being material to lay truly the property in the goods; and that without such words the description of the offence would be incomplete (*v*). This is not like the case of laying a robbery in the dwelling-house of A., which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery (*w*). On an indictment for stealing a bank note described as *signed by A. Hooper*, for the Governor and Company of the Bank of England, it was held that there could be no conviction without evidence of the signature being by *A. Hooper* (*x*).

The name of the person in whom the property which is the subject of the charge is laid, or on whom the offence is stated to have been committed cannot be rejected as surplusage, but must be proved, both as to Christian and surname, according to the indictment; for if the names there stated are not his real names, or the names by which he is usually known, the prisoner must be acquitted, unless the indictment is amended under 14 & 15 Vict. c. 100, s. 1, as it ought to be in such a case (*y*). If there be a sufficient description of the person and degree of the owner of the property, which is supported in evidence, any subsequent addition might, it seems, be rejected as surplusage. Thus where in an indictment for larceny, before the Irish union, the goods stolen were stated to be the property of 'James Hamilton, Esq., *commonly called* Earl of Clanbrassil, in the kingdom of Ireland,' and it appeared in evidence that the prosecutor was an Irish peer, viz. Earl of Clanbrassil, in Ireland, the judges, on a case reserved, were of opinion that, though the correct mode of describing the person of the prosecutor would have been 'James Hamilton, Esq., Earl of Clanbrassil, in the kingdom of Ireland,' yet as 'James Hamilton, Esq.,' was a sufficient description of his person and degree, the subsequent words 'commonly called Earl of Clanbrassil, in the kingdom of Ireland,' might be rejected as surplusage (*z*).

(*u*) R. *v.* Owen, 1 Mood. 118. See R. *v.* Durore, 1 East, P. C. 415, 1 Leach, 351; R. *v.* Pye and R. *v.* Johnstone, *ante*, p. 1969.

(*v*) R. *v.* Jenks, 2 East, P. C. 514; 2 Leach, 774. On an indictment for burglary, where the name of the owner of the dwelling-house was misstated, the error was held to be fatal. *Vide ante*, p. 1097.

(*w*) Ibid.

(*x*) R. *v.* Craven, R. & R. 14.

(*y*) See *post*, p. 1976, as to variances in respect of the name of the party injured.

(*z*) R. *v.* Graham, 2 Leach, 547. From what is said in the latter part of the opinion of the judges, as delivered by Perryn, B., it is not clear whether their Lordships thought the words stated above should be rejected as surplusage, or only the words 'commonly called.' Where the prisoner was indicted for stealing goods, the property of Andrew Wm. Gother, Esq., and it appeared that the prosecutor was not an esquire, it was objected that it was a fatal variance; but Burrough, J., overruled the objection, and held that the addition of esquire to the name of the person in whom the property was laid, was mere surplusage. R. *v.* Ogilvie, 2 C. & P. 230. Cf. R. *v.* Keys, 2 Cox, 225, Wilde, C.J. It has been said, however, that where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and that if he be described as a knight, when in fact he is a baronet, or the contrary, the variance would be fatal; because a name of dignity is not merely an addition but is

SECT. VII.—AMENDMENT.

Formal Defects.—At common law the indictment being the act of the grand jury was not amendable by the Court except in respect of certain purely formal defects; but it is said to have been the practice for the grand jury itself to amend if the defect was discovered in time (*a*), or to consent when sworn that the Court should amend matters of form (*b*).

By sect. 19 of the Criminal Law Act, 1826 (7 Geo. IV. c. 64), for preventing abuses from dilatory pleas (*c*), 'no indictment or information shall be abated by reason of any dilatory plea of misnomer or of want of addition, or of wrong addition of the party offering such plea; if the court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded' (*d*). Amendments under this section are made before the trial begins.

By the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 25, 'Every objection to any indictment (*e*) for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.' This section makes it necessary to move to quash the indictment before pleading to it.

Where the defect is substantial it is usual, but not essential, to move to quash before plea pleaded (*f*).

The Criminal Procedure Act, 1848 (11 & 12 Vict. c. 46), recites that 'a failure of justice frequently takes place in criminal trials by reason of variances between writings produced in evidence and the recital or setting forth thereof in the indictment or information, and the same cannot now be amended at the trial, except in cases of misdemeanor,' and enacts (sect. 4), 'that it shall and may be lawful for any Court of oyer and terminer and general gaol delivery, if such Court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the Court, and after such amendment the trial shall proceed in the same manner

actually part of the name. *Vide* 2 Hawk. c. 25, ss. 71, 72. Archb. Cr. Pl. (23rd ed.) 57.

(*a*) See 2 Chit. Cr. L. 297.

(*b*) Ibid.

(*c*) For form of dilatory plea in abatement, see Archb. Cr. Pl. (23rd ed.) 163.

(*d*) This section and 14 & 15 Vict. c. 100, s. 24 (*ante*, p. 1935) virtually repeal the Statute of Additions (1 Hen. V. c. 5) and it was repealed *in toto* in 1883 (46 & 47 Vict. c. 49, s. 4).

(*e*) This extends to all criminal pleadings. See s. 30 (*ante*, p. 1935).

(*f*) R. *v.* Chapple, 17 Cox, 455. R. *v.* Heane, 4 B. & S. 947; 33 L. J. M. C. 115. R. *v.* James, 12 Cox, 127.

in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared' (*g*).

The powers given by this section to Courts of gaol delivery are by sect. 10 of the Quarter Sessions Act, 1845 (12 & 13 Vict. c. 45) given to 'every Court of general or quarter sessions of the peace, on the trial of any offence within its jurisdiction,' and after amendment the trial is to proceed in all respects both as to liability of witnesses to be indicted for perjury and otherwise as if no variance had appeared.

The Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100) (*h*), reciting that 'offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence:' enacts, by sect. 1, that 'whenever on the trial of any indictment (*i*) for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the Court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof by some officer of the Court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms, as to postponing the trial to be had before the same or another jury, as such Court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the

(*g*) The similar provisions made by 9 Geo. IV. c. 15, as to misdemeanors only, were repealed in 1890 (S. L. R.). Amendments under the repealed statute were sparingly made. R. *v.* Cooke, 7 C. & P. 559, Patteson and Littledale, JJ. R. *v.* Hewins, 9 C. & P. 786, Coleridge, J. Jelf *v.* Oriel, 4 C. & P. 22. In R. *v.* Christian, C. & M. 388, an amendment was allowed, substituting 'peril' for 'part.' In R. *v.* Newton, 1 C. & K. 469, 'only *other* door' was allowed to be substituted for 'only *outer* door.'

(*h*) The Act applies to England and Ireland. See s. 32.

(*i*) See the interpretation clause, s. 30, *ante*, p. 1935. The section does not apply to treason.

liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at nisi prius the order for the amendment shall be endorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the Court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be endorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the Court: Provided that in all such cases where the trial shall be so postponed as aforesaid it shall be lawful for such Court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: Provided, also, that where any such trial shall be to be had before another jury the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.'

By sect. 2, 'Every verdict and judgment which shall be given after the making of any amendment under the provisions of this Act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.'

By sect. 3, 'If it shall become necessary at any time for any purpose whatsoever, to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.'

The enactments above set out taken with those rendering certain allegations immaterial (*vide* p. 1935) have removed much of the technicality of criminal procedure, and have made it unnecessary to refer to many cases where under the former laws variances between names, &c., in the indictment and the evidence were held fatal. These enactments from one point of view deal with the form of the indictment, from another with the question of proof.

The general rule as to proof is that it is sufficient if the evidence agrees in substance with the averments in the indictment (*j*) and that

(*j*) So where an indictment on 43 Geo. III. c. 58, s. 2 (rep.), charged the prisoner with having administered to a woman a *decoction* of a certain shrub called savin; and it appeared that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub; the medical men who were examined stated that such a preparation is called an *infusion*, and not a decoction (which is made by boiling the substance in the water); upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was misdescribed. But Lawrence, J., overruled the objection, and said that infusion and decoction are *ejusdem generis*, and that the variance was immaterial; that the question was, whether the prisoner administered any matter or thing to the woman

variance is immaterial if the matter of substance be found (*k*), but that differences in substance between the indictment and the proof as to the offence charged are fatal unless they can be amended under the above enactments.

In Turner *v.* Eyles (*l*), Chambre, J., said, 'The cases which relate to the necessity of proving particular averments only distinguish between that which is material and that which is impertinent, but make no distinction between that which is inducement and that which is the immediate cause of action.' In Starkie on Evidence, vol. i. 150 n., it is observed that the distinction between the gist and that which is the inducement is not always clear. If by *inducement* such averments only be meant as are not material, but which, if struck out, would leave a valid charge behind, there is no question; but if the term include essential and material averments, the proof being necessary, *legal proof* is essential, and that must, it should seem, depend upon the nature of the allegation itself, and not upon its mere order or connection in point of time, or otherwise, with other material averments. On the other hand, it is certain that whenever an allegation is material and essential, whether it fall within the scope of the term *inducement* or not, or whatever its connection may be in the order of time, or otherwise, with the other essential averments, it must be proved according to the precise and particular, though superfluous, description with which it is encumbered.

It has been ruled that the Act of 1851 should not be interpreted in favour of technical strictness (*m*).

In considering whether a variance should be amended under these statutes the Court has to determine (1) whether the variance is in one of the matters included in these statutes; (2) whether it is 'not material to the merits of the case;' and (3) if it is not material to the merits of

to procure abortion. R. *v.* Phillips, 3 Camp. 74. In former editions reference was made to indictments for homicide where the mode of killing or the cause of death were not proved as laid. R. *v.* Mackalley, 9 Co. Rep. 67 b. 676, *infra*, R. *v.* Thompson, 1 Mood. 139. The mode of killing is not now stated in the indictment. *Vide ante*, Vol. i. p. 818.

(*k*) 1 East, P. C. 345. In R. *v.* Mackalley, 9 Co. Rep. 67 b, an indictment for the murder of a sergeant at mace of the City of London supposed that the Sheriff of London, upon a plaint entered, made a precept to the sergeant at mace to arrest the defendant, and it appeared that no such precept was made, and that, by the custom of London, after the plaint entered, any sergeant *ex officio*, at the request of the plaintiff, might arrest a defendant, *absque aliquo præcepto, ore tenus vel aliter*. It was held that this statement of the precept was but circumstance, not necessary to be supported in evidence, and that it was sufficient if the substance of the matter were proved without any precise regard to circumstance. In an indictment for perjury in an answer to a bill in chancery, the bill was stated to have been filed by A. against B. (the present defendant) and *another*; it appeared in evidence that it was filed against B., C., and D., but the perjury was assigned on a part of the answer, which was material between A. and B.; and Lord Ellenborough held this not to be a fatal variance. R. *v.* Benson, 2 Camp. 508. Cf. R. *v.* Powell, Ry. & M. 101, Abbott, C.J.

(*l*) 3 B. & P. 463.

(*m*) R. *v.* Welton, 9 Cox, 297, Byles, J. In St. Losky *v.* Green, 9 C. B. (N. S.) 370, Byles, J., said, 'Various statutes have from time to time for more than 400 years been passed, from the 14 Edw. III. c. 6, downwards, to facilitate amendments, but the strict and almost perverse construction which the judges put upon them rendered them nearly abortive. *But now a totally different principle prevails; every amendment is to be made which is necessary for determining the real question in controversy between the parties.*'

the case, whether the defendant may be prejudiced by the amendment *in his defence on such merits* (*n*).

The expression 'merits of the case' obviously means the substantial truth and justice of the case with reference to the guilt or innocence of the prisoner. By acquittal upon the merits, we mean that the jury have heard and considered all the evidence adduced with reference to the guilt or innocence of the prisoner of the offence charged and have acquitted him on the ground that the charge was not proved. It would be a perversion of language to say that a prisoner had been acquitted on the merits, when he was acquitted on the ground of some trifling variance or technical objection, and though a matter may well constitute some part of the merits of a case, yet a variance as to such matter may not be material to the merits of the case within the meaning of this Act. Thus, on a trial for stealing an animal, the proof of the description of the animal constitutes a part of the merits of the case, and yet the description of it as a ewe instead of a lamb may not be in the least degree material to the merits of the case, as the animal may be of such an age that it may be doubtful whether the one or the other appellation be more correct (*o*).

Amendments allowed.—The Court may amend the description of an Act of Parliament in the indictment (*p*). Where an indictment alleged that the prisoner committed perjury on the trial of an indictment for setting fire to a certain *barn;* but the record when produced was of an indictment for setting fire to a certain *stack of barley;* it was held that the words 'stack of corn' might be inserted instead of barn (*q*).

Where the indictment stated that the prisoner had committed perjury at the hearing of a summons before the magistrates charging a woman with being *drunk*, whereas the summons was really for being drunk *and disorderly*, Lush, J., ruled that he had power to amend the indictment by adding the words 'and disorderly' (*r*).

Perjury was assigned to have been committed on the hearing of a complaint for trespass in pursuit of game alleged to have been committed in a close in the parish of T., in the borough of T., before certain justices assigned to keep the peace in and for the said county, and acting in and for the borough of T., in the said county. It appeared in evidence that the justices were justices for the borough of T. only, and were not justices for the county. The indictment was amended at the trial by striking out the words 'the said county,' so as to make the averment be that they were justices assigned to keep the peace in and for, and acting in and for, the borough of T., in the said county.

(*n*) The Act of 1851 only specifies the 2nd and 3rd particulars, but it is obvious that any Court would take them into its consideration in determining whether an amendment ought to be made under the previous statutes.

(*o*) In Pacific Steam Navigation Co. *v.* Lewis, 16 M. & W. 783, Pollock, C.B., said, that 'not material to the merits' means not material to the *real question between the parties.* Parke, B., said, 'By the term "merits of the case," I understand the *substantial merits of the case*'; and Rolfe, B., said, 'The words "not material to the merits" mean not material to the *real merits of the case.*'

(*p*) R. *v.* Westley, Bell, 193; 29 L. J. M. C. 35. The indictment erroneously stated the time of passing the Act.

(*q*) R. *v.* Neville, 6 Cox, 69. Williams, J.

(*r*) R. *v.* Tymms, 11 Cox, 645.

It was held, that the amendment was properly made as a variance in the description of a person named in the indictment (*s*).

The Court ordered an indictment alleging that the prisoner stole nineteen shillings and sixpence, to be amended at the trial by describing the property stolen to be a sovereign, subject to the question whether the Court had power so to do. The jury found the prisoner guilty of stealing a sovereign:—Held, that the Court had power to order the amendment to be made as a variance between the statement and the proof in the description of a thing named in the indictment (*t*).

Where goods were laid as the property of Archard, a carman, and it was proved that a clerk of the London Dock Company had delivered the goods by mistake to the prisoner, who had been sent by Archard for other goods; it was held that the indictment was properly amended by inserting the London Dock Company for Archard (*u*).

So where the prisoner was charged with throwing Annie Welton into the water with intent to murder her, and there was no proof of the name of the child, it was held that the indictment might be amended by striking out Annie Welton and inserting 'a certain female child whose name is to the jurors unknown' (*v*).

An indictment for nuisance on a highway between the top of Orme House Hill and Gravesend, alleged that a footway led from a turnpike-road into the town of G. It appeared that the highway was a carriage-way from the turnpike-road to the top of Orme House Hill, and from thence to G. a footway. It was held that the indictment might be amended by substituting a description of a footway running from Orme House Hill to G., as this appeared to be the very sort of case for which the Act of 1851 was passed (*w*).

One count in an indictment charged W. with stealing the property of E. R. and others; another count charged C. with the substantive felony of receiving the aforesaid goods. W. pleaded guilty, and on the trial of C. the felonious receiving was proved, but the names of the prosecutors were not proved; it was held that the count for receiving might be amended by stating the goods to be the property of persons unknown (*x*).

On an indictment for obtaining money by the false pretence that the prisoner had made arrangements with and paid an undertaker for the burial of a nurse child, G. S., an amendment was allowed substituting the name of another child, W. D. (*y*).

Where an indictment alleged that the prisoners pretended that a certain vessel 'called the Castenet' was in Penarth Roads, and the evidence failed to shew that the prisoners pretended that the vessel was

(*s*) R. *v.* Western, L. R. 1 C. C. R. 122; 37 L. J. M. C. 81.

(*t*) R. *v.* Gumble, L. R. 2 C. C. R. 1; 42 L. J. M. C. 7.

(*u*) R. *v.* Vincent, 2 Den. 464; 21 L. J. M. C. 109.

(*v*) R. *v.* Welton, 9 Cox, 297, Byles, J.

(*w*) R. *v.* Sturge, 3 E. & B. 734; 23 L. J. M. C. 172.

(*x*) R. *v.* Winch, 6 Cox, 523, Platt, B. The first count charged Winch with stealing the goods of R. and others, and C. with receiving the said goods so feloniously stolen, and a difficulty was started as to amending the charge against C., as W. had admitted the goods to be those of R. and others; but this difficulty was avoided by amending the count for the substantive felony.

(*y*) R. *v.* Byers, 71 J. P. 205, Kennedy, J.

the Castenet, it was held that the indictment might be amended by striking out those words (*yy*).

Misdescription of the occupation of a field in an indictment for night poaching has been amended (*z*), and on indictment for stealing in a dwelling house it is proper to amend the description of the property alleged to be that of the occupier when upon the evidence it turns out to be the separate property of his wife who is living there with him (*a*).

Amendments refused.—An amendment cannot be made where the effect will be to change the offence charged to another offence. On an indictment for abusing a girl above the age of ten and under the age of twelve years, it was proved that the girl was under ten years of age, and it was held that the indictment could not be amended (*b*). So where on an indictment for feloniously forging an undertaking for the payment of money, the instrument turned out not to be of that character, but if it were a forgery at all, it was the misdemeanor of forgery at common law; it was held that there was no power to amend the indictment by striking out the word 'feloniously' (*c*). Where a count charged the prisoners with assaulting a gamekeeper who attempted to apprehend them whilst committing an offence against 9 Geo. IV. c. 69, s. 1 (*cc*), and it turned out that the prisoners were attempting to take tame pheasants; Pollock, C.B., refused to allow the indictment to be amended by alleging an assault in resisting their apprehension whilst the prisoners were committing an indictable offence (*d*).

So an indictment charging the defendant with obtaining credit by false pretences cannot be amended so as to charge obtaining credit by fraud other than false pretences (*e*).

An amendment ought not to be made if the indictment would thereby be liable to be objected to on demurrer, though it would be good after verdict; as the prisoner would be deprived of his right to demur to it (*f*).

In an indictment for obtaining money by false pretences it is necessary to allege that the obtaining was 'with intent to defraud,' and when those

(*yy*) R. *v.* Baroisse, 5 Cox, 559, Wightman, J., who does not appear to have been satisfied that the amendment was properly made; as he left the case to the jury on another count, in order to relieve the case from any difficulty as to the amendment.

(*z*) R. *v.* Sutton, 13 Cox, 648, Lindley, J.

(*a*) R. *v.* Murray [1906], 2 K.B. 385.

(*b*) R. *v.* Shott, 3 C. & K. 206, Maule, J. By the Act in force at the time of this decision, to abuse a girl under ten was a felony, and to abuse a girl between ten and twelve was a misdemeanor.

(*c*) R. *v.* Wright, 2 F. & F. 320, Hill, J. The challenges and the swearing of the jurors differ in felony and misdemeanor. See Archb. Cr. Pl. (23rd ed.), 198.

(*cc*) *Ante*, p. 1331.

(*d*) R. *v.* Garnham, 8 Cox, 451. It does not appear upon what ground the amendment was refused, but refusal is not expressly based on lack of power to make the amendment.

(*e*) R. *v.* Benson [1908], 1 K.B. 270; 77 L. J. K.B. 644. Both offences are created by sect. 13 (1) of the Debtors Act, 1869, but are distinct. R. *v.* Jones [1908], 1 K.B. 119, *ante*, p. 1455.

(*f*) R. *v.* Lallement, 6 Cox, 204, Jervis, C.J., and Alderson, B. The indictment alleged that the prisoner shot at a person unknown with intent to murder him, and the amendment proposed was to insert 'with intent to murder' in the words of 7 Will. IV. & 1 Vict. c. 85, s. 2, but the Court thought that it might be a question whether the indictment would not then be demurrable for generality; and that the amendment ought to be made in such a manner as that the indictment should not be in any way defective.

words are omitted in the indictment, it cannot be amended by inserting them (*g*).

An indictment alleged that the prisoner pretended that he had served a certain order of affiliation on J. B.; but the evidence was that the prisoner had said that he had left the order with the landlady at the Chesterfield Arms, where B. lodged, he being out; and it was held that there was a variance; for the allegation in the indictment meant a personal service of the order; and that this variance was not amendable, as it was not a variance in the name or description of any matter or thing named or described in the indictment (*h*).

Where an indictment alleged that the prisoner endeavoured to conceal the birth of her child by placing it *in and among* a heap of carrots, and the proof was that the body was placed *on the back* of the heap, so that the middle of the heap by its height hid the body; it was held that there was no jurisdiction to amend the variance (*i*).

An indictment against two bankrupts alleged that they embezzled a part of their personal estate to the value of £10, to wit, certain bank notes and certain moneys, and it seemed that the money converted was foreign money. It was held that the statement under the videlicet was material, as the indictment would have been bad without a description of the property, and that 'moneys' meant English moneys; and the Court refused to amend (*j*).

An indictment alleged that S. stole a bushel of a mixture consisting of oats and peas, and that R. received the goods aforesaid so as aforesaid feloniously stolen, and it was proved that S. stole pure oats and peas, and then mixed them, and afterwards sold them to R. It was held that there was a variance, as the one prisoner did not steal a mixture and the other did not receive a mixture which had been stolen, and the Court refused to amend (*k*).

Time for amending.—Whether an amendment should be made or not is for the judge, and no question should be left to the jury as to any fact which may arise as to the propriety of making it (*l*).

An indictment for night-poaching described the land as in the occupation of George William Frederick Charles, Duke of Cambridge, but none of the witnesses were able to prove all the Christian names of the Duke; one witness, however, swore that George William were two of the

(*g*) R. *v.* James, 12 Cox, 127, Lush, J.

(*h*) R. *v.* Bailey, MSS. C. S. G.; 6 Cox, 29, Greaves, Q.C., after consulting Platt, B.

(*i*) Anon. 6 Cox, 391, Crompton, J., who gave no reason for the decision.

(*j*) R. *v.* Davison, 7 Cox, 158, Alderson, B., and Coleridge, J. Alderson, B., is reported to have said, 'Neither my learned brother nor myself think that the statute allowing amendments applied to such a case as this.' But the marginal note is that the averment was 'such as the Court in its discretion would decline to amend.' The case seems to be one in which an amendment clearly might have been made.

(*k*) R. *v.* Robinson, 4 F. & F. 43, Pollock, C.B. The marginal note states that, 'there being no evidence but that of the thief, the judge would not amend'; but the body of the report contains no such point. Pollock, C.B., had refused to take a verdict of guilty, as there was no sufficient corroboration of S. This case must not be taken as any authority against amending the description of stolen property. All it amounts to is that the judge did not think fit to amend on the uncorroborated evidence of the thief.

(*l*) See Bartlett *v* Smith, 11 M. & W. 483, Major Campbell's case there cited by Parke, B., and an Anonymous case, ibid. Boyle *v.* Wiseman, 11 Ex. 360. R. *v.* Hill, 2 Den. 254; 20 L. J. M. C. 222.

Christian names of the Duke, but he believed the Duke had some other Christian names, but he could not say what they were. The sessions refused to amend the indictment by striking out the names Frederick Charles; and, on a case reserved on the question whether the sessions were bound to amend the indictment by striking out the names Frederick Charles, it was held that they were not bound to do so, as it was in their discretion whether they would amend or not; that the sessions 'were right in not making an amendment in the manner prayed; but that they would have been wrong if they had been applied to to strike out the Christian names altogether, leaving the prosecutor described as the Duke of Cambridge, and had refused to do so' (*m*). As no amendment was made it was held that the prisoners ought to have been acquitted (*n*).

The amendment must be made by the Court of trial (*o*), unless the record has been removed into the High Court, and the trial is on a record of the King's Bench Division. In such a case the Court before the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), came into force could with the consent of counsel reserve for consideration by a Divisional Court the question whether the amendment ought to have been made, with leave to enter a verdict for the Crown if the amendment ought to have been made (*p*).

As a general rule, the proper course is for counsel for the Crown to ask for the amendment desired before closing his case, and then if the amendment is allowed, counsel for the prisoner addresses the jury on the indictment as amended (*q*). But where the prisoners were charged with stealing rabbits, the property of E. C., and the rabbits turned out to be the property of J. C. and another, but the mistake was not discovered until the prisoner's counsel had addressed the jury; it was held that the indictment ought to be amended (*r*), and it seems that an amendment may be made at any time before the verdict, but not afterwards (*s*).

By the statute the amendment may be made 'on the trial,' and the trial is clearly continuing until the verdict is given.

Where the indictment has been once amended it cannot be re-amended by the Court of trial, or the Court of Criminal Appeal. And where after an amendment the indictment as it originally stood at the trial was proved by the verdict, the conviction was quashed (*ss*).

SECT. VIII.—PLEAS.

The pleas or answers to an indictment are of three kinds: (1) pleas in abatement, (2) pleas to the jurisdiction, (3) pleas in bar.

(*m*) R. *v.* Frost, Dears. 474, per Parke, B.

(*n*) Ibid.

(*o*) R. *v.* Harris, Dears. 344. R. *v.* Frost, Dears. 474. R. *v.* Murray [1906], 2 K.B. 385.

(*p*) R. *v.* Sturge, 3 E. & B. 734. And see R. *v.* Dunkinfield, 4 B. & S. 158.

(*q*) R. *v.* Rymes, 3 C. & K. 326.

(*r*) R. *v.* Fullarton, 6 Cox, 194 (Ir.), Monahan, C.J., and Lefroy, C.J.

(*s*) R. *v.* Frost, Dears. 474, Parke and Crompton, JJ. See Brashier *v.* Jackson, 6 M. & W. 549, Alderson, B. R. *v.* Larkin, Dears. 365. R. *v.* Oliver, 13 Cox, 588.

(*ss*) R. *v.* Barnes, L. R. 1 C. C. R. 45; 35 L. J. M. C. 204. R. *v.* Pritchard, L. & C. 34; 30 L. J. M. C. 169. R. *v.* Webster, L. & C. 77; 31 L. J. M. C. 17. See Greaves, Lord Campbell's Acts, p. 9.

(a) *In Abatement.*

Pleas in abatement (*t*) do not admit or deny the facts stated in the indictment, but set forth some matter of fact which if proved would defeat the indictment. These pleas do not deal with the merit of the case, and owing to their technical and purely dilatory character have been discouraged by legislation (*tt*).

1. *Misnomer.*—The Statute of Additions (1 Hen. V. c. 5), which prescribed the mode of describing a defendant is repealed, and an indictment is not rendered defective by want of or imperfection in the 'addition' of a defendant (*u*). By 7 Geo. IV. c. 64, s. 19, no indictment or information shall be abated by reason of any dilatory plea of *misnomer*, or of want of addition or of wrong addition of the party offering such plea, if the Court shall be satisfied by affidavit, or otherwise, of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded (*v*).

2. *Privilege of Peerage.*—Where an indictment for treason, misprision of treason, or felony, is found against a person having privilege of peerage, the accused on arraignment claims his privilege by plea in abatement (*w*).

3. *Disqualification of a Grand Juror.*—It is said that where an indictment has been found by a grand jury containing persons not qualified to serve (*x*), objection may be taken by plea in abatement. This has been so held in Ireland (*y*). But the objection may be taken in arrest of judgment (*z*), and possibly by challenge (*a*).

(b) *To the Jurisdiction.*

This form of pleais used only when the indictment is preferred in the wrong English or Irish court, and must state the court or jurisdiction in which the defendant could lawfully be tried (*c*). Where the objection is that the offence is not within the jurisdiction of any English court it is taken by motion to quash or by demurrer, or motion in arrest of judgment (*d*), or under the plea of not guilty (*e*).

(c) *In Bar.*

Where the prisoner, on arraignment, confesses the indictment (*f*), or

(*t*) As to form of such pleas, see O'Connell *v.* R., 5 St. Tr. (N. S.) 1, 787.

(*tt*) As to civil proceedings by 42 & 43 Vict. c. 59, and wholly by 46 & 47 Vict. c. 49.

(*u*) 14 & 15 Vict. c. 100, s. 24, *ante*, p. 1935.

(*v*) Archb. Cr. Pl. (23rd ed.) 101.

(*w*) See R. *v.* Earl of Cardigan, 4 St. Tr. (N. S.) 606; Lord Graves' case, ibid. 609 *n.* Archb. Cr. Pl. (23rd ed.) 164, 182.

(*x*) See Archb. Cr. Pl. (23rd ed.) 101.

(*y*) R. *v.* Sheridan, 31 St. Tr. 543. R. *v.* Duffy, 7 St. Tr. (N. S.) 795, 805.

(*z*) R. *v.* Jackson, 25 St. Tr. 885.

(*a*) R. *v.* Sheares, 27 St. Tr. 255, 267.

(*c*) See Archb. Cr. Pl. (23rd ed.) 162.

(*d*) R. *v.* Fearnley, 1 T. R. 316. R. *v.* Bainton, 2 Str. 1088. R. *v.* Hewitt, R. & R. 158. Error is abolished, but an appeal lies under 7 Edw. VII. c. 23, *post*, p. 2009.

(*e*) R. *v.* Johnson, 6 East, 583. R. *v.* Jameson [1896], 2 K.B. 425.

(*f*) Powlter's case, 11 Co. Rep. 29. This rule does not apply to misdemeanor tried in the K.B.D. See Cr. Off. Rules, 1906, rr. 117–122.

during the trial withdraws a plea of not guilty (*g*), a verdict of guilty on his own confession is entered and the Court proceeds to judgment (*gg*).

1. *General Issue.*

The prisoner takes general issue on the indictment by pleading 'not guilty,' except in the case of misdemeanors tried in the King's Bench Division (*h*). This plea is pleaded *ore tenus* on arraignment. It has the effect of traversing all allegations of fact, and of enabling the defendant to set up any answer in fact or law, except those raised by a plea in abatement or the special pleas, *infra*.

By the Criminal Law Act, 1827 (7 & 8 Geo. IV. c. 28), s. 1, 'If any person, not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of "not guilty," he shall by such plea, without any further form, be deemed to have put himself upon the country for trial; and the court shall, in the usual manner, order a jury for the trial of such person accordingly.'

By sect. 2, 'If any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice (*i*), or will not answer directly to the indictment or information (*j*), in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.'

2. *Autrefois Convict.*

A plea of *autrefois convict* may be successfully pleaded: (1) Where the former conviction and sentence was for the exact offence charged in the subsequent indictment and is valid and unreserved (*k*); (2) Where the subsequent prosecution is in respect of the same acts or omissions as those on which the former conviction and sentence were founded (*l*). The general rule of the common law forbids a man to be *punished* twice for the same offence. This is now read as meaning for the 'same acts and omissions,' irrespective of the exact terms of the indictment, and as meaning that the evidence to obtain a legal conviction on the first charge was *in substance* the same as that necessary to sustain the second charge where an act or omission constitutes an offence under two or more Acts,

(*g*) See R. *v.* Holdsworth, 1 Lew. 279, following Sir Hardres Waller's case, Kel. (J.) (ed. Loveland), p. 13. Crown Office Rules, 1906, r. 149. Short & Mellor, Cr. Pr. (2nd ed.) 119.

(*gg*) Powlter's case, 11 Co. Rep. 29. This rule does not apply to misdemeanor tried in the K.B.D. See C. O. R. 1906, rr. 117–122.

(*h*) C. O. R. r. 121. Short & Mellor, Cr. Pr. (2nd ed.) 101.

(*i*) As to the mode of ascertaining whether the defendant is mute of malice, *vide ante*, Vol. i. p. 85.

(*j*) When the defendant states that he refuses to plead, the Court enters a plea of not guilty. R. *v.* Bernard, 8 St. Tr. N. S. 887, 889. R. *v.* Bitton, 6 C. & P. 92. Where the defendant pleads guilty with a qualification or excuse it is usual to enter a plea of not guilty.

(*k*) R. *v.* Drury, 3 C. & K. 193: 18 L. J. M. C. 189.

(*l*) See R. *v.* King [1897] 1 Q.B. 214, 218: 66 L.J. Q.B. 87. Thus *autrefois convict* of manslaughter has been held a good plea on an appeal of murder (R. *v.* Wigges, 4 Co. Rep. 45); and *autrefois attaint* of murder a good plea to an indictment on the same facts for petit treason, 2 Hale, 246, 252: Fost. 329.

or both under an Act, and at common law the offender shall, *unless a contrary intention* appears, be liable to be prosecuted under either *or* any of these acts, *or* at common law, but is not liable to be punished twice for the same offence (*m*). The principle on which the right to plead *autrefois convict* are in substance the same as in the case of the plea of *autrefois acquit*. The form of plea and mode of pleading and trying it are stated, *post*, p. 1993, and it is only necessary to state the following decisions as to cases in which it is or is not admissible.

A previous summary conviction for assault (*n*) is not a bar to a subsequent indictment for manslaughter upon the death of the man assaulted in consequence of the assault (*o*), for the death is a new fact (*p*). Where, after a summary conviction for common assault, the prisoner was indicted for wounding with intent to murder, but failed to plead the previous conviction, Erle, J., ruled that such conviction if pleaded would have been an estoppel to a judgment on the indictment (*q*). And in R. *v.* Elrington (*r*), a certificate of dismissal of a complaint for a common assault was held a bar to a subsequent indictment for unlawful wounding, and for an assault occasioning actual bodily harm arising out of the same circumstances. And in R. *v.* Miles (*s*), where the prisoner had been summarily convicted of assault, but discharged on giving security for good behaviour under 42 & 43 Vict. c. 49, s. 16, now repealed and replaced by the Probation of Offenders Act, 1907 (7 Edw. VI. c. 17) (*t*), it was held that he could not afterwards be convicted on indictment for the same assault.

3. *Autrefois Acquit.*

At common law a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was 'in jeopardy' on the first trial. He was so 'in jeopardy' if (1) the Court was competent to try him for the offence; (2) the trial was upon a good indictment (*u*),

(*m*) 52 & 53 Vict. c. 63, s. 33 (*ante*, Vol. i. pp. 4, 6) which in substance affirms the common law, R. *v.* Miles, 24 Q.B.D. 423, 431. See Hardcastle on Statutes (4th ed. by Craies), 307.

(*n*) Under 24 & 25 Vict. c. 100, s. 42, *ante*, Vol. i. p. 896.

(*o*) See R. *v.* Friel, 17 Cox, 325.

(*p*) R. *v.* Morris, L. R. 1 C. C. R. 90; 36 L. J. M. C. 84. R. *v.* De Salvi, 46 Cent. Crim. Ct. Sess. Pap. p. 884, is clearly distinguishable. There the prisoner was indicted for the murder of one R., and pleaded a plea of *autrefois acquit*, the acquittal having been upon an indictment for wounding, with intent to kill. It was clear that the acquittal might have been pronounced upon the ground of the jury having negatived the intent to kill, and yet that the prisoner might well be guilty of the murder, without an intent to kill the individual murdered, as if he had shot at another man, but unintentionally killed R. The plea, therefore, of *autrefois acquit* was in that case properly overruled. Martin, B.: 'I agree that R. *v.* De Salvi is not in point. The prisoner there had been acquitted of an assault with intent to murder, but convicted of an assault with intent to do grievous bodily harm, and was afterwards indicted for the murder upon the death of the person assaulted, and it was there held by Pollock, C.B., that murder might be committed without any intent to kill, and that if a man intended to maim and caused death, and it could be made out most distinctly that he did not mean to kill, yet if he did those acts for the purpose of accomplishing that limited object, and they were calculated to produce death, and death ensued, that was murder, although the man did not intend to kill.'

(*q*) R. *v.* Stanton [1851], 5 Cox, 344.

(*r*) 1 B. & S. 688; 31 L. J. M. C. 14.

(*s*) 24 Q.B.D. 423; 59 L. J. M. C. 56.

(*t*) *Ante*, Vol. i. p. 227.

(*u*) 1 Chit. Cr. L. 452. R. *v.* Clarke, 1 B. & B. 473. Wherever the indictment whereon a man is acquitted is so far erroneous (either for want of substance in setting out the crime, or the authority in the Court before which it was taken, as where

on which a valid judgment of conviction could be entered; and (3) the acquittal was on the merits (*v*), *i.e.* by verdict on the trial, or in summary cases by dismissal on the merits (*x*), followed by a judgment or order of acquittal (*y*). In other words, the meaning of not having been 'in jeopardy' within the rule 'seems to be that by reason of some defect in the record either in the indictment, place of trial, process, or the like, the defendant was not lawfully liable to suffer judgment in that proceeding' (*z*). It is not necessary that the judgment of acquittal should be, in fact, correct and proper, for while unreversed it will support a plea of *autrefois acquit* in bar of a second trial (*a*). Thus a judgment for the defendant, though consequent on a misdirection or erroneously given on a special verdict (*b*), or on an insufficient indictment, so long as it stands unreversed, is a bar to a new indictment (*c*). Since the abolition of writs of error (*d*), there is now no means of correcting an erroneous judgment of acquittal. Judgment for the defendant on a demurrer (*e*) to the indictment or on a motion to quash the indictment or to arrest judgment thereon is not equivalent to an acquittal on the merits (*f*). Nor is a conviction by verdict or confession on an insufficient indictment on which no judgment is given (*g*), and an acquittal for variance between the recital of a will in the indictment and the will, as proved on evidence, has been held no bar to a fresh indictment for the same offence, unless the will is again misdescribed in the same way (*i*). G. was indicted for stealing goods described as those of R. B. The evidence proved the goods to be those of J. B., whose son R. B., a boy of fourteen, at the time of a theft, had charge of his father's stall on which the goods were, but was not a bailee of the goods. The Court, considering the ownership misdescribed,

sessions were held on a day to which they had not been adjourned (R. *v.* Bowman, 6 C. & P. 337), that no good judgment could have been given upon it against the prisoner, the acquittal is no bar to a subsequent indictment, because in judgment of law the prisoner was never in danger upon it: for the law will presume, *prima facie*, that the judge would not have given a judgment which would have been liable to be reversed. 2 Hawk. c. 35, s. 8. R. *v.* Turner, 1 Mood. 239. Vaux's case, 4 Co. Rep. 44.

(*v*) An acquittal because the indictment presented in one reign charged an offence against the peace of a previous and deceased king, is no bar to a subsequent indictment properly framed on the same facts. R. *v.* Taylor, 3 B. & C. 502.

(*x*) 2 Hawk. c. 35, s. 6. 2 Hale, 246. A discharge by a coroner's jury is not enough. 2 Hale, 246. A jury sworn and charged with a prisoner may be discharged without giving a verdict if a necessity requires it. The judge at the trial is to decide whether such necessity has arisen, and his decision is not subject to review. Such a discharge is not a bar to a subsequent trial of the prisoner for the same offence, either upon the same or a fresh indictment. Winsor *v.* R., L. R. 1 Q.B. 289, 390; 35 L. J. M. C. 161. This was an indictment for murder. See R. *v.* Lewis, *post*, p. 2006. In a capital case in which a juryman during the course of the trial separated himself from his fellows and mingled with the outside public, Kennedy, J., directed the jury to be discharged, and a fresh jury being subsequently empannelled, the prisoner was tried and convicted. R. *v.* Macrae, Northampton Assizes, Dec. 1892.

(*y*) 2 Hawk. c. 36. R. *v.* Drury, 18 L. J. M. C. 189, 193, Coleridge, J.

(*z*) R. *v.* Drury, id. ibid.

(*a*) R. *v.* Drury, 18 L. J. M. C. 189: 3 C. & K. 193. This was a case of a plea of *autrefois convict*, in which the record of conviction was of a judgment which had been reversed for error, and was held null.

(*b*) 2 Hale, 246, 251.

(*c*) Vaux's case, 4 Co. Rep. 44. An insufficient indictment. 2 Hale, 248.

(*d*) By 7 Edw. VII. c. 23, s. 20. *Vide post*, p. 2005.

(*e*) R. *v.* Richmond, 1 C. & K. 240.

(*f*) Error in the process as distinct from error in the indictment is a defect cured by appearance, and does not vitiate the first trial so to defeat a plea of *autrefois acquit*. 2 Hawk. c. 35, s. 8.

(*g*) Vaux's case, *ubi sup.*

(*i*) R. *v.* Coogan, 1787. 1 Leach, 448, Wilson, J. In the second indictment a facsimile of the will was set out.

directed an acquittal, and a new indictment, laying the goods in J. B., to be preferred. To this indictment G. pleaded *autrefois acquit*. The plea was overruled, the Court holding that G. could not have been convicted on the first indictment, which stood unamended, and that the question whether the Court could have amended under 14 & 15 Vict. c. 100, s. 1, *ante*, p. 1972, could not be considered in adjudicating on the plea of *autrefois acquit* (*k*).

The acquittal must have been before a competent jurisdiction (*l*), but it does not matter whether the trial was summary or on indictment (*m*), nor whether the Court is an English Court, or one of another of the King's dominions, or of a foreign country (*n*).

In the earlier authorities there is some disposition to limit the rule to charges exactly identical in substance in the two indictments. But it has long been fully established that acquittal on an indictment (subject *ut supra*) is a bar to a subsequent indictment for any offence of which the accused could have been lawfully convicted on the first indictment (*o*),

(*k*) R. *v.* Green, 26 L. J. M. C. 17: D. & B. 113. As to power to amend see R. *v.* Murray [1906], 2 K.B. 385, *ante*, p. 1977.

(*l*) The rule applies not only to the general jurisdiction to try offences of the kind, but also to the jurisdiction to try them with a jury of the county in which the offence is tried. Mr. Greaves' note on this subject, 6th ed. Vol. i. p. 51, is as follows: 'Generally speaking an acquittal in one county can only be pleaded in the same county, because all indictments are local, and if the first were laid in an improper county, the defendant could not be found guilty upon it, 2 Hawk. c. 35, s. 3; 2 Hale, 245; and if the first indictment were laid in the proper county the second must be an improper one, and therefore the defendant, not being liable to be found guilty upon it, is not put to plead *autrefois acquit* 2 Hawk. c. 35, s. 3. But there seems to be many exceptions to this rule. Thus, where a man steals goods in one county, and carries them into another, as he may be indicted in either, it seems but reasonable that he should plead the acquittal in one county in bar to a subsequent indictment in the other county, 2 Hawk. c. 35, s. 4; but this point does not seem settled; and Hale (2 P. C. 245) says, it seems that an acquittal in the county into which the goods are carried is no bar, because it may be the goods were never brought into that county, and so the felony may not have been in question; but this reason rather tends to shew that an acquittal in the county where the goods were stolen would be a bar to an indictment in the county into which they were carried, for in such case the felony must have been in question. If A. rob B. in the county of C., and carry the goods into D., though he cannot be indicted of robbery in D., yet he may of larceny, and if acquitted, that acquittal of larceny is no bar to an indictment for robbery in C., because it is another offence. 2 Hale, 245. So if A. commit a burglary in the county of B., and carry the goods into C., if he be acquitted of larceny in C. he may be indicted for the burglary in B., ibid. Where an acquittal pleaded in a foreign county has been allowed, as in 41 Ass. 9, it must be intended of an indictment removed out of that county where the prisoner was first indicted. 2 Hale, 245.'

(*m*) Wemyss *v.* Hopkins, L. R. 10 Q.B. 3784; 4 L. J. M. C. 101. R. *v.* Miles, 24 Q.B.D. 423: 59 L. J. M. C. 56.

(*n*) 2 Hawk. c. 35, s. 10. R. *v.* Hutchinson, 3 Keb. 785, cited in Beak *v.* Thyrwhit, 1 Show. 6; Bull. (N. P.) 245; 3 Mod. 194; and in R. *v.* Roche, 1 Leach, 135, note (*a*). The defendant, being apprehended in England, and committed to Newgate, was brought into K.B. by *habeas corpus*, where he produced an exemplification of the record of his acquittal in Portugal: but the King (Car. II.), being willing to have him tried here for the same offence, referred the point to the consideration of the Judges; who all agreed that, as the party had been already acquitted of the charge by the law of Portugal, he could not be tried for it again in England.

(*o*) Where a prisoner is indicted for a compound offence, as burglary, robbery, murder, &c., and altogether acquitted, it would seem that such acquittal is a good bar to every felony included in the compound offence, of which he might have been convicted on the trial of the compound offence; thus an acquittal on a burglary charging a stealing of goods would be a good bar to an indictment for stealing the same goods, for on the indictment for burglary he might have been acquitted of the burglary and convicted of the larceny only; and although it is said, 2 Hale, 246, that if a man be 'indicted for burglary and acquitted, yet he may be indicted for the larceny, for they are several offences, though committed at the same time'; yet this must be intended of an indictment for

whether the offence was or was not specifically stated in the first indictment, and whether the proper evidence was or was not adduced at the first trial (*p*). The common law or statutory rules under which a conviction may take place for an offence other or less than that charged in an indictment have been stated *ante*, pp. 1962 *et seq.* In all cases where the power to convict is given by statute, the statute specifically provides against a fresh trial in the event of acquittal of the other or lesser offence.

At common law an acquittal of misdemeanor was not a bar to an indictment for felony (*q*) nor an acquittal of felony a bar to an indictment for misdemeanor, but this is expressly altered by 14 & 15 Vict. c. 100, s. 12 (*ante*, p. 1965), as to acquittals on indictments for misdemeanor (*r*).

Under the present practice the substance rather than the form of the charges in the two indictments is considered.

It is not enough to defeat the plea of *autrefois acquit* to shew that the second indictment charges circumstances of aggravation not included in the first, or serious consequences of the offence which have accrued since the first indictment (*s*), unless the new facts or circumstances are such as to indicate a different kind of offence of which there could be no conviction on the first trial.

In R. *v.* De Salvi (*t*), to an indictment for the murder of R., S. pleaded acquittal on an indictment for wounding R. with intent to kill. The plea was held no bar to the second indictment.

In R. *v.* Morris (*u*) to an indictment for manslaughter it was pleaded that the defendant had already been convicted summarily and sentenced and imprisoned for the assault from the effects whereof the assaulted had subsequently died. The Court held the plea failed considering that the 'form and intention of the common law pleas of *autrefois convict* and *autrefois acquit* shew that they apply only when there has been a former judicial decision on the same question in substance, and where the question in dispute has been already decided (*v*).

If the means of death charged in two indictments be such as would be supported by the same evidence, a plea to the one that the prisoner was acquitted on the other is good. Therefore, to an indictment for murder by giving the deceased oil of vitriol, and forcing him to take it into his mouth and throat it is a good plea that the prisoner had been acquitted on an indictment for giving the deceased poison, that is, oil of vitriol, and forcing him to take, drink, and swallow it down (*w*).

burglary *with intent* to steal the goods, as is evident from the words which follow, 'and burglary may be where there is no larceny, and larceny may be where there is no burglary.' C. S. G.

(*p*) R. *v.* Sheen, 2 C. & P. 634, Burrough and Bosanquet, JJ. R. *v.* Clark, R. & R. 358.

(*q*) Hawk. c. 35, s. 5, says it is a general rule that a bar to an action of an inferior nature will not bar another of a superior nature.

(*r*) 7 Will. IV. & 1 Vict. c. 85, s. 11, allowed a conviction on an indictment for a felony which included an assault. This enactment was repealed in 1851 (14 & 15 Vict. c. 100, s. 10). But while it was in force an acquittal on such an indictment was a bar to a subsequent indictment for the same assault (R. *v.* Gould, 9 C. & P. 364. R. *v.* Bird, 2 Den. 94): and an acquittal or conviction of common assault under 9 Geo. IV. c. 31, s. 27 was held to be a bar to an indictment for wounding with intent to maim in the same transaction. R. *v.* Walker, 2 M. & Rob. 446, Coltman, J. Note by C. S. G.

(*s*) 2 Hawk. c. 36.

(*t*) 42 Cent. Cr. Ct. Sess. Pap. 884. Pollock, C.B., Martin and Willes, JJ.

(*u*) L. R. 1 C. C. R. 90; 36 L. J. M.C. 84: Kelly, C.B., diss.

(*v*) L. R. 1 C. C. R. 94, Byles, J.

(*w*) R. *v.* Clark, 1 B. & B. 473.

In R. *v.* Connell (*x*) it was ruled that an acquittal for murder by poison could not be pleaded in bar to an indictment for feloniously administering poison with intent to murder.

An acquittal of murder is not a bar to an indictment for arson in respect of the acts by which the death was caused (*y*), and an acquittal of murder of an infant is a bar to an indictment for endeavouring by a secret disposition to conceal its birth (*z*).

In R. *v.* Gould (*a*), the prisoner was indicted for simple burglary in the house of A., for whose murder he had been acquitted. Parke, B., said, 'The charge in the indictment does not affect the life of the prisoner, as there is no allegation that the burglary was accompanied by violence. If he had been indicted for burglary with violence, as he might have been convicted of manslaughter, or even assault, on the indictment for murder, on which he was acquitted altogether, in my opinion that acquittal would have been an answer to the allegation of violence, if it had been inserted in the present indictment.'

An acquittal of the manslaughter of a child under sixteen by a person over sixteen who had custody, charge, or care of the child is a bar to an indictment for cruelty to that child which caused its death (*b*).

Accessories, Receivers.—An acquittal on a charge of jointly receiving is a bar to a subsequent indictment against one of the prisoners alone (*c*).

At common law an acquittal of a man as accessory before or after the fact was no bar to an indictment against him as a principal (*d*). Nor an acquittal on an indictment as a principal a bar to indictment as accessory after the fact (*e*).

P. was indicted and tried for the murder of her child, and B. for having been present, aiding and abetting her in the said murder. P. was found guilty, B. was acquitted. They were arraigned on a second indictment in which P. was charged with the murder, B. as an accessory before the fact; B. pleaded *autrefois acquit*, referring to his acquittal on the former indictment. On demurrer by the prosecutor, Denman, C.J., held the plea bad, and directed the prisoner to plead to the indictment, which he did, and was found guilty; and upon a case reserved, the judges were of opinion that the plea of *autrefois acquit* was properly overruled (*f*).

The common law rule appears to have been abrogated by the

(*x*) 6 Cox, 178. This ruling is discussed, *ante*, p. 1967.

(*y*) R. *v.* Serné (No. 2), 107 C. C. C. Sess. Pap. 418, Charles, J. The prisoner had set fire to a house with intent to defraud the insurers. Some of his children in the house were burnt to death. He was first indicted and acquitted of the murder of the children (*vide ante*, Vol. i. p. 757), and subsequently indicted for setting fire to the house.

(*z*) 24 & 25 Vict. c. 100, s. 60, *ante*, Vol. i. p. 773.

(*a*) 9 C. & P. 364, Tindal, C.J., and Parke, B.

(*b*) See 8 Edw. VII. c. 67, s. 1 (4), *ante*, p. 914: R. *v.* Dyson [1908], 2 K.B. 454.

(*c*) R. *v.* Dann, 1 Mood. 424. 24 & 25 Vict. c. 96, s. 91, *ante*, p. 1465.

(*d*) 1 Hawk. c. 35, s. 12.

(*e*) Ibid. s. 11; 2 Hale, 244. 'It is said to have been held that an acquittal of a man as accessory to one principal will not save him from being arraigned as accessory to another in the same fact. 2 Hawk. c. 35, s. 13. But it is presumed this would only apply where the acquittal of the principal necessarily caused the acquittal of the accessory, see R. *v.* Woolford, 1 M. & Rob. 384, and not where the accessory might be convicted on a count for a substantive felony, although the principal were acquitted. See R. *v.* Pulham, 9 C. & P. 280.' C. S. G.

(*f*) R. *v.* Birchenough, 1 Mood. 477; 7 C. & P. 575. This case overruled 1 Hale, 626; 2 Hale, 224; Foster, 361; 2 Hawk. c. 35, s. 11; Ksl. (J.) 25.

Accessories, &c., Act, 1861 (*g*), so far as it rests on the distinction between principals and accessories before the fact. But accessories after the fact cannot be convicted on indictment for the principal offence unless specially therein charged as accessories after the fact (*h*), so that as to them the common law rule appears still to apply (*i*).

Homicide.—A man who has been acquitted generally upon an indictment for murder, cannot be indicted for the manslaughter of the same person; and *è converso* a man who has been acquitted on an indictment for manslaughter cannot be indicted for the same death as murder; the fact being the same, and the difference only in the degree (*j*).

Where the prisoner had been tried for murder and convicted of manslaughter, and was subsequently tried for murder, and convicted of manslaughter in killing another individual (who had died after the first trial) by the same act which caused the death of the first; the judges were unanimously of opinion that the former allowance of clergy protected the prisoner against any punishment upon the second verdict; and that, if the prisoner were to be called up for judgment, he might rely upon such allowance as a bar (*k*).

An acquittal on a coroner's inquisition for the murder of an infant is a bar to an indictment for endeavouring to conceal the birth of the child (*l*).

The prisoners having been acquitted of a rape on M. L., pleaded that acquittal to another indictment of rape on M. L. at the same time and place as was alleged in the first indictment, issue was taken on the identity of the rapes charged in the two indictments. The record of the first acquittal of rape on M. was put in, and it was contended on behalf of the prisoners that it was evidence that the offence charged in the second was the same as that charged in the first; but it was answered, on the part of the Crown, and held by the Court (*m*), that it was no evidence at all, for if the same prisoners had committed several rapes on the same woman on the same day (which was the fact) each indictment would be in the same terms. So if a man stole twenty sheep from the same person

(*g*) Vol. i. pp. 130 *et seq.*

(*h*) See R. *v.* Tuffin, July, 1903, where Darling, J., held that a count for being accessory after the fact could be joined with a count for the principal felony. Archb. Cr. Pl. (23rd ed.) 89, 1307: 19 T. L. R. 640.

(*i*) See Richards *v.* R., 66 L. J. Q.B. 459. R. *v.* Fallon, 32 L. J. M. C. 66; L. & C. 217.

(*j*) Holcroft's case, 4 Co. Rep. 46 *b*; 2 Hale, 246. In R. *v.* Tancock, 13 Cox, 217, the prisoner, having been convicted of manslaughter, pleaded *autrefois convict* to a charge of murder on the coroner's inquisition. Denman, J., held that the depositions disclosed only evidence of manslaughter and held the plea proved.

(*k*) R. *v.* Jennings [1819], R. & R. 388. The act which occasioned the death of the two individuals (two children) was one and the same. The general effect of the allowance of clergy, after 8 Eliz. c. 4, was to discharge all offences precedent within clergy; but not such as were not entitled to the benefit of clergy. But by 6 Geo. IV. c. 25, s. 4, the allowance of the benefit of clergy to any person who was convicted of any felony did not render the person to whom such benefit was allowed dispunishable for any other felony, by him or her committed, before the time of such allowance.

(*l*) 24 & 25 Vict. c. 100, s. 60 (*ante*, Vol. i. p. 773), which replaces 9 Geo. IV. c. 31, s. 14, on which was decided R. *v.* Ryland, Gloucester Summer Ass. 1845, Atcherley, Serjeant, after consulting Tindal, C.J. MSS. C. S. G.

(*m*) R. *v.* Parry, 7 C. & P. 836; 2 Mood. 9, Bolland, B. But he left the case to the jury, reserving the point, which, however, was not decided by the judges, the jury finding a verdict for the prisoners. See R. *v.* Martin, 8 A. & E. 483.

at different times on the same day, or wounded the same person several times on the same day, each indictment would be in the same words. This opinion has been since confirmed (*n*). In the same case the commitment of the prisoners for a rape upon the prosecutrix was tendered in evidence on the part of the prisoners, and objected to on the ground that it had no bearing on the issue, as a commitment might be for one crime, and any number of indictments might afterwards be preferred for different crimes, and the learned judge was strongly of opinion that it was not admissible (*o*).

An acquittal of rape is a bar to a prosecution on the same facts for any of the offences specified in 48 & 49 Vict. c. 69, s. 9 (*p*), or for an attempt to commit rape (*q*), but is not a bar to prosecution for a common assault (*r*) nor, it would seem, for assault with intent to commit rape (*s*).

Robbery.—Acquittal on an indictment for robbery is a bar to an indictment for assault with intent to commit the robbery (*t*).

So an acquittal upon an indictment under 24 & 25 Vict. c. 97, s. 35, and 24 & 25 Vict. c. 100, s. 32, charging the prisoners with the felony of obstructing a railway with intent to endanger the safety of the passengers, was held to be no bar to a subsequent indictment under sects. 36 and 34, of the same statutes respectively, preferred on the same facts, charging them with the misdemeanor of endangering the safety of passengers by an unlawful act, since they could not be convicted of this misdemeanor on the first indictment (*u*).

In R. *v.* Vandercomb (*v*), the indictment charged the prisoners with burglariously breaking and entering the dwelling-house of M. N. and A. N., *with intent to steal* their goods. They pleaded a plea of *autrefois acquit* upon a former indictment, which charged them with burglariously breaking and entering the dwelling-house of M. N. and A. N., *and stealing* goods of M. N., goods of A. N., and goods of one S. G. The plea concluded with averring that the burglary was the same identical burglary. To this plea there was a demurrer, which was argued before all the common law judges. Buller, J., in delivering the opinion of the judges, said that

(*n*) R. *v.* Martin, 8 A. & E. 482. Denman, C.J., asked, 'Have you any authority for saying that identity is shewn *prima facie* by collation of the indictments? A defendant may have stolen the goods of the same party twenty times'; and on R. *v.* Parry, *ante*, p. 1987 *n.*, being cited, said, 'The point as to the sufficiency of the proof was not decided by the fourteen judges.' But there is no doubt that there was no evidence whatever of identity in that case.

(*o*) R. *v.* Parry, *ante*, p. 1987, note (*m*). The commitment was, however, received subject to the opinion of the judges. The jury found that the offences were the same, although the learned judge told them that he thought there was no evidence to shew that they were so. Upon a case reserved, the judges held that they could not direct the verdict to be set aside, but they did not decide any other point.

(*p*) *Ante*, p. 1988.

(*q*) 14 & 15 Vict. c. 100, s. 12, *ante*, p. 1965.

(*r*) R. *v.* Dungey, 4 F. & F. 99.

(*s*) In R. *v.* Gisson, 2 C. & K. 781, on an indictment for rape, the evidence failed to prove the complete offence, and Pollock, C.B., directed an acquittal, though under 7 Will. IV. & 1 Vict. c. 85, s. 11, there might have been a conviction for assault, and said that the acquittal would be no bar to an indictment for an assault with intent to commit rape. In R. *v.* Goadby, ibid. 782, note, on an indictment for feloniously stabbing with intent to do grievous bodily harm, the evidence to prove the felony being insufficient, and it appearing to be a mere question of assault, Pollock, C.B., directed an acquittal, and said, 'It had better be inquired of in another tribunal.' Both these cases seem very questionable. C. S. G.

(*t*) 24 & 25 Vict. c. 96, s. 41, *ante*, p. 1127.

(*u*) R. *v.* Gilmore, 15 Cox, 85. See *ante*, Vol. i. p. 872.

(*v*) 2 Leach, 708.

it had been contended on behalf of the prisoners, that as the dwelling-house in which, and the time when, the burglary was charged to have been committed were precisely the same both in the indictment for the burglary *and stealing* the goods, on which they were acquitted, and in the indictment for the burglary *with intent to steal* the goods, which was then depending, the offence charged in both was, in contemplation of law, the same offence, and that of course the acquittal on the former indictment was a bar to all further proceedings on the matter. He then proceeded, 'It is quite clear, that at the time the felony was committed, there was only one act done, namely, the breaking of the dwelling-house. But this fact alone did not decide this case, for burglary is of two sorts: first, breaking and entering a dwelling-house in the night time, *and stealing goods therein;* secondly, breaking and entering a dwelling-house in the night time, *with intent to commit a felony*, although the meditated felony be not in fact committed. The circumstance of *breaking* and *entering* the house is common and essential to both the species of this offence; but it does not of itself constitute the crime in either of them; for it is necessary to the completion of burglary that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed, or intended to be committed; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other (*w*). In the present case, therefore, evidence of the breaking and entering with intent to steal, was rightly held not to be sufficient to support the indictment charging the prisoner with having broken and entered the house, and stolen the goods stated in the first indictment; and if crimes are so distinct, that evidence of the one will not support the other, it is as inconsistent with reason as it is repugnant to the rules of law, to say that they are so far the same that an acquittal for the one shall be a bar to prosecution for the other.'

Buller, J., then observed upon the cases cited, in support of the proposition contended for by the counsel for the prisoners, namely, R. *v.* Turner (*x*), and R. *v.* Jones (*y*). In R. *v.* Turner, it was agreed that the prisoner, having been formerly indicted for burglary, in breaking the house of a Mr. T., and stealing his goods, and acquitted, could not be indicted again for the same burglary, in breaking his house, and stealing therein the money of one H. (a servant of Mr. T.), but that he might be

(*w*) An indictment for breaking and entering, &c., and stealing goods, will not be supported by evidence of a breaking and entering, &c., with intent to steal them. But it has been supposed that an indictment for breaking and entering, &c., with intent to steal, would be supported by evidence of breaking and entering, &c. and an actual stealing. *Vide ante*, p. 1095. If this be so, the report of the judgment delivered by Buller, J., as here given, states the point too largely; as it seems to go to the extent of saying that evidence of a breaking and entering, and a felony actually committed, will not support an indictment for breaking and entering, &c., and a felony intended to be committed. In 2 East, P. C. 520, there is a *quære*, 'whether the definition of the crime be not solely resolvable into the breaking, &c., with an intent to commit felony; of which the actual commission is such a strong presumptive evidence that the law has adopted it, and admits it to be equivalent to a charge of the intent in an indictment. And therefore an indictment charging the breaking, &c., to be with intent to steal is said to be supported by proof of actual stealing; though certainly not *vice versa*.'

(*x*) Kel. (J.) 30.

(*y*) Kel. (J.) 52.

indicted for felony in stealing the money of H. Upon this case, Buller, J., observed: 'The decision was not a solemn judgment, for the prisoner was not indicted a second time for the burglary; it was merely a direction from the judges to the officer of the Court how to draw the second indictment for the larceny; and it proceeded upon a mistake, as I shall presently shew. If the judges in that case exercised a little lenity before the indictment, which might more properly have been done after conviction, much censure could not fall on them. But they proceeded on the ground that Turner having been indicted for burglary in breaking the house of Mr. T., and stealing his goods, and acquitted thereof, could not be again indicted for the same burglary for breaking the house, though he might be indicted for stealing the money of H., for which he had not been indicted before; and he was indicted accordingly. The judges, therefore, must have conceived that the *breaking the house* and the *stealing the goods* were two distinct offences; and that breaking the house only constituted the crime of burglary; which is a manifest mistake, for the burglary consisted in breaking the house and stealing the goods; and if stealing the goods of H. was a distinct felony from that of stealing the goods of T., which it was admitted to be, the burglaries could not be the same.'

With respect to the case of Jones and Bever (*z*), Buller, J., said, that it proceeded entirely upon the decision in R. *v.* Turner; and that, the foundation failing, the superstructure could not stand.

He then referred to several authorities (*a*), and continued: 'These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon it by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now, to apply the principle to the present case: the first indictment was for burglariously breaking and entering the house of N., and *stealing the goods* mentioned; but it appeared that the prisoners broke and entered the house *with intent to steal*, for, in fact, no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering the house of N., *with intent to steal:* which is the charge in the present indictment, and therefore their lives have never been in jeopardy for this offence. For this reason, the judges are all of opinion that the plea is bad; that there must be judgment for the prosecutor upon the demurrer; and that the prisoners must take their trials on the present indictment.' And the prisoners were accordingly tried and convicted (*b*).

In the above case the property in the goods was laid differently in the two indictments. The first, upon which the prisoners had been acquitted, stated some of the goods stolen to belong to M. N., others to

(*z*) Kel. (J.) 52. The prisoners were indicted for burglariously breaking and entering the dwelling-house of Lord C., and stealing his goods therein; and, being acquitted, were afterwards indicted for the same burglary, in breaking and entering Lord C.'s house, and stealing the goods of a Mr. N.; and it was agreed that, as they had been before acquitted, they could not be indicted again for the same burglary, but that they might be indicted for the felony in stealing the goods of Mr. N., precisely as had before been done in Turner's case. R. *v.* Vandercomb (*infra*) appears to overrule this case and R. *v.* Turner.

(*a*) 2 Hawk. c. 35, s. 3. Fost. 361, 362. R. *v.* Pedley, 1 Leach, 242.

(*b*) R. *v.* Vandercomb, 2 Leach, 708; 2 East, P. C., 519.

A. N., and others to S. G., and the second indictment stated the goods intended to be stolen to belong to M. and A. N. only. Buller, J., in delivering the opinion of the judges on the case is said to have observed that the property in the goods was differently described in the two indictments and that this might afford another objection to the plea; but that he had not entered into the consideration of the circumstance, as the case did not require it (*c*).

In R. *v.* Dann (*d*) to an indictment against D. for receiving stolen goods, he pleaded that at previous assizes, an indictment was found against two persons for stealing the said goods, and against W., D., and two others, for receiving the said goods, and that the two principals and W. were found guilty, but D. and the other receivers acquitted; to this plea there was a demurrer, and after consideration the following judgment, prepared by Gaselee, J., was delivered at the next assizes (*e*): 'The plea of *autrefois acquit* is grounded upon an ancient maxim of the common law of England, that no one ought to be brought into jeopardy of his life twice for the same offence. A great deal of learning is to be found upon the subject in 2 Hawk. P. C. c. 35, and Starkie on Criminal Pleading, p. 316, and many other books. Upon the result of all the authorities the question is, whether the prisoner could have been convicted on the former indictment, for, if he could, he must be acquitted on the second; and the law is very correctly stated to the jury by Burrough, J., in the case of R. *v.* Sheen (*f*). It is argued for the prosecution, that an acquittal of a joint felony is not a bar to an indictment for a several felony. However that might be, if it clearly appeared upon the record that several felonies had been committed, in some of which the prisoner D. had been jointly, and in another separately concerned, it does not appear that the present indictment is confined to any offence committed by the prisoner separately, nor is it so. Upon it he is liable to be convicted of an offence committed, separately or jointly with any other person, and consequently with W. The plea alleges that the charge in the former indictment against W. and the prisoner and the other three, is the same offence as that charged in the former indictment, and this is admitted by the demurrer. The argument that the prisoner could not be convicted upon the former indictment is not true. The result of that indictment shows that it was not necessary to convict all the parties charged by that indictment. The prisoner might have been convicted either with W., or without him; nay, if the judge had called upon the prosecutor to elect against whom he would proceed (whether he did so or not the learned judge was not at liberty to consider, as nothing respecting it appears upon record), and he had elected to proceed against the prisoner, he might have been convicted alone, which shews he had been in jeopardy; and if the plea of *autrefois acquit* is not a bar, he may now be convicted of the very offence committed jointly with W., and of which W. has been convicted. A replication that the charges were not the same might possibly, upon evidence,

(*c*) 2 East, P. C., 519, note (*b*).

(*d*) 1 Mood. 424.

(*e*) The case was postponed in order to consult the other judges, but they declined giving any opinion on it, as no judgment had been given, and the case might come before some of them upon error.

(*f*) 2 C. & P. 634, *ante*, p. 1985.

have placed the case in a very different point of view. As the record now stands, the learned judge is bound to adjudge the plea to be good, and that the prisoner be discharged' (*g*).

On a charge of larceny at common law, and also with receiving 'the goods aforesaid,' the prisoner was acquitted on the ground that the goods were a fixture, and therefore incapable of being stolen at common law (*h*). He was then indicted under 24 & 25 Vict. c. 96, s. 31, for stealing the fixture, and also with receiving the same. A plea of *autrefois acquit*, was held bad, since he was never in jeopardy on the first indictment either for stealing or receiving (*i*).

In a colonial case (*j*) on an indictment for stealing and receiving 1000 cigars, the property of a person in trade, it appeared that the defendant had previously been indicted and acquitted of burglary and stealing property including the said cigars. A plea of *autrefois acquit* was pleaded to the larceny which the judge considered good, but he left the case to the jury on the authority of R. *v.* Green (*k*) to find whether in fact the goods were the same, and they so found, and the plea was held proved.

An acquittal of stealing one of several chattels stolen at the same time is no bar to indictment for stealing another of them; for 'it hath happened that a man acquitted for stealing the horse hath yet been arraigned and convicted for stealing the saddle, though both were done at the same time (*l*), so where the prisoner had been convicted of stealing one pig, it was held that he might be tried for stealing another pig at the same time and place (*m*).

False Pretences and Larceny.—In R. *v.* King (*n*) a conviction on an indictment for obtaining credit by false pretences (*o*) was declared to be a bar to a subsequent indictment for larceny on the same facts. In the case of an indictment for false pretences within 24 & 25 Vict. c. 96, s. 88, the jury may convict though the evidence proves a larceny (*p*). But as on an indictment for larceny the defendant cannot be convicted of obtaining by false pretences, his acquittal is no bar to a subsequent indictment for the false pretences, as it may have proceeded from the conclusion that the evidence did not prove a felony and if so, the accused was not in jeopardy (*q*).

Forgery.—Acquittal on an indictment for uttering a forged note

(*g*) Cf. R. *v.* Barnett, *ante*, 1305.

(*h*) See R. *v.* Cooper [1908], 1 Cr. App. R. 88; 24 T. L. R. 867.

(*i*) R. *v.* O'Brien, 15 Cox, 29.

(*j*) R. *v.* Dawson [1907], 7 N. S. W. State Rep. 723.

(*k*) D. & B. 113, *ante*, p. 1984.

(*l*) 1 Hale, 246.

(*m*) R. *v.* Brettell, C. & M. 609 and MSS. C. S. G., Cresswell, J.; but, as the prisoner was undergoing his sentence for the stealing of the other pig, Cresswell, J., thought the second indictment should be abandoned, and that course was adopted. These authorities show that Erle, J., was in error in saying in R. *v.* Bond, 1 Den. 517, 'I do not think it necessary, in a plea of *autrefois convict*, to allege the identity of the specific chattel charged to be taken. Suppose the first charge to be taking a coat; the second to be taking a pocket-book; *autrefois convict* pleaded; parol evidence showing that the pocket book was in the pocket of the coat; I think that would support the plea; because it would show a previous conviction for the same act of taking.'

(*n*) [1897] 1 Q. B. 214; 66 L. J. Q. B. 81.

(*o*) An offence against 32 & 33 Vict. c. 62, s. 13, *ante*, p. 1454.

(*p*) 14 & 15 Vict. c. 100, s. 12, *ante*, p. 1965. 24 & 25 Vict. c. 96, ss. 88, 89, *ante*, p. 1514.

(*q*) R. *v.* Henderson, 2 Mood, 192; C. & M. 328.

is no bar to an indictment for uttering another forged note at the same time and place (*r*). Arrest of judgment on an informal indictment is no bar to a subsequent indictment for the same offence properly framed (*s*).

Offences by Bankrupts.—Where an insolvent debtor had been acquitted upon an indictment for omitting certain goods out of his schedule, and was again indicted for omitting those goods and *some others* out of his schedule; it was held that a plea of *autrefois acquit* was not, in strictness, a good defence to the whole of the second indictment, as the prisoner might have fraudulently omitted out of his schedule the goods mentioned in the last indictment, which were not mentioned in the first, and in point of law a prosecutor might prefer separate indictments for each such omission; but excepting under very particular circumstances such a course ought not to be pursued (*t*).

Perjury.—The defendant was indicted in Middlesex for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded *with* a *prout patet* by the affidavit filed in the Court of King's Bench, at Westminster, &c., and on this he was acquitted; after which he was indicted again in Middlesex, for the same perjury, with this difference only, that the second indictment set out the *jurat* of the affidavit, in which it was stated to have been sworn in London; which was traversed by an averment that, in fact, the defendant was so sworn in Middlesex, and not in London; and the Court of King's Bench held that he was entitled to plead *autrefois acquit*, as the *jurat* was not conclusive as to the *place* of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore, the defendant had been 'in jeopardy' for the same offence (*u*).

Form and Mode of Pleading.—By the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 28, 'In any plea of *autrefois convict* or *autrefois acquit* (*v*) it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the said offence charged in the indictment' (*w*).

(*r*) Anon. Wood, B., cited in R. *v.* Brettell, C. & M. 609, 611.

(*s*) R. *v.* Reading [1793], 2 Leach, 590, Buller, J. R. *v.* Gilchrist, 2 Leach, 657. Cf. R. *v.* Coogan, 1 Leach, 449.

(*t*) R. *v* Champneys, 2 M. & Rob. 26; 2 Lew. 52, Patteson, J.

(*u*) R. *v.* Emden, 9 East, 437.

(*v*) The plea of *autrefois attaint* was limited in 1827 to attainder for the same offence as that charged in the subsequent indictment (7 & 8 Geo. IV. c. 28, s. 4), and has been rendered obsolete by the abolition of attainder on conviction of treason or felony, 33 & 34 Vict. c. 23, *ante*, Vol. i. p. 250.

(*w*) Formerly the plea must have set out the former indictment in order that it might appear to the Court that it was valid on the face of it. R. *v.* Wildey, 1 M. & S. 182. It must also have averred that the prisoner was acquitted by verdict, and that he had judgment *quod eat inde sine die*, ibid., and it must have concluded with a voucher of the record, ibid.; it must also have averred the identity of the offences charged in the two indictments, and if the name of a person were different in the two indictments, it must have averred that the person was as well known by the one name as the other. 2 Hawk. c. 35, s. 3. R. *v.* Sheen, 2 C. & P. 634. R. *v.* Austin, 2 Cox, 59. R. *v.* Hedgcock [1825], 4 Chit. Cr. L. 530. For precedents of such pleas, see 4 Chit. Cr. L. 528 *et seq.*; R. *v.* Sheen, *supra*; R. *v.* Dann, 1 Mood, 474; R. *v* Clarke, 1 B & B. 473. The Crown might either traverse or demur to the plea, and this might be done *ore tenus*. R. *v.* Sheen, *supra*. R. *v.* Parry, 7 C & P. 863; 2 Mood. 9. See 4 Chit. Cr. L. 529, 530, 532, for precedents of demurrers and joinders in demurrer to such pleas. For a plea of *autrefois acquit*, pleaded *puis darrein continuance*, see 4 Chit. Cr. L. 567. For modern forms see Greaves' Campbell's Acts, p. 88; Archb. Cr. Pl. (23rd ed.) 172, 173, 176.

These pleas may be pleaded *ore tenus* (*x*), which means that the prisoner may state the plea, but he must do so in the proper form, the difference being that it may either be put upon parchment by the prisoner, or he may dictate it *ore tenus*, and it may be taken down by the clerk of arraigns, and put upon parchment by him (*y*). The Court will not reject an informal plea of *autrefois acquit*, pleaded by a prisoner, but will assign counsel to put it into a formal shape (2 Hale, 241), and postpone the trial to give time for its preparation (*z*).

A plea of *autrefois acquit* (or *convict*) in strictness should refer to or set out the record of one acquittal (or conviction) only; but the Court will take care that the prisoner is not prejudiced by pleading one acquittal instead of the other.

To an indictment for the murder of a child, described in different counts as Charles William, William, &c., the prisoner pleaded that at a former delivery of the gaol of Newgate he had been indicted, tried, and acquitted of the murder of Charles William B., and the plea averred that the child was as well known by the name of Charles William B. as by any of the several names and descriptions of Charles William, &c., as he was in and by the present indictment described: and this averment was traversed by the replication. The prisoner's counsel asked if they might add to this plea, that the prisoner was acquitted on the coroner's inquisition, in which the deceased was described as Charles William S. Burrough, J., said: 'If the prisoner by his plea, insists on two records, his plea would be double (*a*), but if in the course of the case it shall appear that he ought to have pleaded his acquittal on the inquisition, I will take care that he shall not be prejudiced.' For the prisoner a register was put in, in which the baptism of the deceased, who was about four months old, was entered 'Charles William, the son of Lydia B.'; a witness proved the identity of the child, and that his mother was an unmarried woman, named Lydia B., whom the prisoner had married after the birth of the deceased, and stated that the deceased was always called William or Billy, but that she should have known him by the name of Charles William B.; and if any one had inquired for him by that name she would have known who was neamt. The prisoner's father stated that the child's name was Charles William S., but that he had never

(*x*) R. *v.* Bowman, 6 C. & P. 337. R. *v.* Champneys, 2 M. & Rob. 26. R. *v.* Coogan, 1 Leach, 448, where prisoner's counsel relied chiefly upon Hale's construction of Vaux' case, 2 Hale, 246 as reported, 4 Co. Rep. 44; 3 Co. Inst. 214. In R. *v.* Sheen, 2 C. & P. 634, counsel for the Crown replied *ore tenus*, reading the replication from the back of his brief, and the prisoner's counsel joined issue *ore tenus*; the Court awarded a *venire* returnable *instanter*, and the sheriff having made his return forthwith, and the jury having been sworn, the counsel for the prisoner opened his case in support of the plea, and called his witnesses; the counsel for the Crown afterwards addressed the jury and called witnesses, and the counsel for the prisoner replied.

(*y*) R. *v.* Bowman, *ubi sup.*, Patteson, J.

(*z*) In R. *v.* Chamberlain, 6 C. & P. 93, where the record of acquittal was not made up the trial might be postponed to enable the prisoner to take steps to compel its completion. R. *v.* Bowman, 6 C. & P., 101. R. *v.* Middlesex Justices, 5 B. & Ad. 1113.

(*a*) In Ashford *v.* Thornton, 1 B. & Ald. 423, a plea by the defendant contained an averment of an acquittal both on an indictment for murder and on an indictment for a rape, as well as an allegation of an alibi, and divers other facts tending to prove the defendant's innocence. See also 2 Hawk. c. 23, s. 128, where it is said that there seems to be no doubt that a prisoner may plead as many pleas as he like, unless they be repugnant to each other; and see ibid. s. 137, and c. 34. C. S. G.

heard him called so. Burrough, J. (in summing up): 'The question on this issue is, whether the deceased was as well known by the name of Charles William B. as by any of the names and descriptions in the present indictment; and I ought to say that if the prisoner could have been convicted on the former indictment, he must be acquitted now. And whether at the former trial the proper evidence was adduced before the jury or not, is immaterial; for if by any possible evidence that could have been produced, he could have been convicted on that indictment, he is now entitled to be acquitted. The first evidence we have is the register; and, looking at that, would not every one have called the child Charles William B.? And it is proved by one of the witnesses that she should have known him by that name. It cannot be necessary that all the world should know the child by that name; because children of so tender an age are hardly known at all, and are generally called by a Christian name only. If, however, you should think that the name of the deceased was Charles William S., I wish you would inform me of it by your verdict, because it is agreed, that as that is the name in the coroner's inquisition, the prisoner should derive the same advantage from the course he has taken, as if he had pleaded his acquittal on that inquisition. My Brother Littledale suggests to me, that if a legacy had been left to this child by the name of Charles William B., he would have taken it upon this evidence; and if this evidence of the child's name had been given at the former trial, I think the prisoner should have been convicted. The case of R. *v.* Clark (*b*) has been cited, but in that case there was an entire absence of evidence as to the surname of the deceased. If you think that in the present case the name of the deceased was either Charles William B. or Charles William S., or if you think that he was known at all by these names, you ought to find a verdict for the prisoner' (*c*).

The prisoner is not entitled as of right to a copy of the indictment, in order to draw up his plea, but the Court will order the indictment to be read over slowly in order that it may be taken down (*d*), and the counsel for the Crown may give a copy of the indictment to save time (*e*). If a prisoner has pleaded 'not guilty' to two indictments, and is tried and acquitted on one, the Court may grant the prisoner leave to withdraw his plea of 'not guilty' on the other, and plead *autrefois acquit* (*f*). But perhaps such leave might not be necessary, as it is conceived that a plea would be good, alleging that after the pleading 'not guilty' the defendant had been acquitted (*g*).

On indictments for treason and felony, the plea of *autrefois convict* (or *acquit*), may be joined with a plea of not guilty (*h*), but it is now usual to plead the special plea alone (*i*) (as it must be tried separately) (*j*) and

(*b*) R. & R. 358.

(*c*) R. *v.* Sheen, 2 C. & P. 634, Burrough and Littledale, JJ.

(*d*) R. *v.* Parry, 7 C. & P. 863; 2 Mood. 9.

(*e*) Ibid.

(*f*) Ibid.

(*g*) See R. *v.* Taylor, 3 B. & C. 612, and the precedent of indictment in that case. 4 Chit. Cr. L. 567.

(*h*) In cases of misdemeanor the special plea alone can be pleaded and judgment against the defendant is said to be final. R. *v.* Taylor, 3 B. & C. 502. R. *v.* Goddard, 2 Ld. Raym. 922; 2 Hale, 256.

(*i*) R. *v.* Sheen, *ante*, p. 1994, note (*x*). R. *v.* Parry, *ubi sup.* R. *v.* Birchenough, 1 Mood. 575. R. *v.* Welch, Carr. Supp. 56, and see 2 Hawk. c. 23, s. 128. According to older cases it was deemed necessary to plead both pleas together. R. *v.* Vandercomb, 1 Leach, 712, note (*a*). R. *v.* Welsh, 1 Mood. 175.

(*j*) R. *v.* Roche, 1 Leach, 134.

if it fails, then to plead over the general issue (*k*). It would seem that the Crown cannot demur to a plea under 14 & 15 Vict. c. 100, s. 28, but must traverse it. The preliminary issues raised on the plea are tried by a jury, either that already empanelled (*l*), or a jury returned on a *venire instanter* awarded to the sheriff (*m*). The burden of proof falls on the defendant who has pleaded the plea (*n*). In felony, if the plea is decided in favour of the accused the judgment is *quod eat inde sine die* (*o*).

Pardon.—The plea of pardon (*p*) is now rarely if ever used, since pardons before conviction, if legal, are not now given. The only cases in which such a plea would now be needed would be in cases of amnesty or general pardon (*q*).

(*k*) R. *v.* Birchenough, *ubi sup.* 2 Hawk. c. 23, s. 128.
(*l*) R. *v.* Parry, *ubi sup.*
(*m*) R. *v.* Sheen, *ubi sup.* R. *v.* Scott, 1 Leach, 401.
n R. *v.* Parry, R. *v.* Sheen, *ubi sup.*
(*o*) 2 Hale, 391. R. *v.* Coogan, 1 Leach, 448.
(*p*) As to pardons, *ante*, Vol. i. p. 252.
(*q*) As to form of plea, see Archb. Cr. Pl. (23rd ed.) 178.

CANADIAN NOTES.

CRIMINAL PLEADINGS.

Sec. 1.—*General Rules as to Pleadings.*

(*a*) *Criminal Indictments Need not be on Parchment.*—See Code sec. 843.

Unnecessary Statements, Mistakes in Heading, Form, etc.—See Code sec. 845.

Counts, How Stated, sufficiency of Indictment, etc.—See Code sec. 852.

Sufficiency of the Indictment.—The examples in Code Form 64 of the description of offences in indictments are intended to illustrate the provisions of Code sec. 852, relating to the form of counts; and the operative effect of Form 64 is not restricted to the validating of counts in respect only of the particular offences for which examples are given in the form, but extends to counts for other offences. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

An indictment only states the legal character of the offence and does not profess to furnish the details and particulars. These are supplied by the depositions and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions which it may be intended to produce at the trial. Mulcahey v. R. (1868), L.R. 3, H.L. 306. Per Willes, J.; Downie v. R. (1888), 15 Can. S.C.R. 358, 375.

Each count of an indictment must contain a statement of all the essential ingredients which constitute the offence charged. R. v. Weir (No. 5) (1900), 3 Can. Cr. Cas. 499 (Que.).

An indictment multifarious in that it combines a charge of a failure to provide necessaries for a child under sixteen under secs. 242 and 244 with a charge of an attempt to murder the child and to which indictment the prisoners pleaded, is sufficient upon which to base a conviction thereon for the latter offence without a formal amendment of the indictment, where the presiding Judge has withdrawn from the jury that portion of the charge based upon secs. 242 and 244. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

Sufficiency of Indictment—Special Cases.

Libel.—See Code sec. 861.

Perjury.—See Code sec. 862.

False Pretences.—See Code sec. 863.

An indictment for conspiracy to defraud is valid without setting out any overt acts and the name of the person injured or intended to be injured need not be stated therein. R. v. Hutchinson (1904), 8 Can. Cr. Cas. 486 (B.C.).

It is submitted that this section does not mean that the false pretences need not be set out at all. While Meredith, C.J., in his judgment in R. v. Patterson (1895), 2 Can. Cr. Cas. 339, speaks of the "addition of the words unnecessarily setting out in what the false pretences consisted," and expresses the view that the indictment would have been fully authorized if laid "without alleging in what the false pretence consisted," it will be observed that Rose, J., limits his opinion to the case of an indictment in which the false pretence is not set out in detail.

An indictment for perjury which charged that the false evidence was given before a coroner, whereas the evidence was in fact taken before the coroner and a jury and not only by the coroner is sufficient for the words of the indictment were "sufficient to give the accused notice of the offence with which he was charged." R. v. Thompson (1896), 4 Can. Cr. Cas. 265 (N.W.T.).

An indictment that at a specified time and place the accused did attempt to "pick the pocket" of a person named is sufficiently explicit to charge an attempt to commit theft from the person. R. v. Morgan (No. 2), 5 Can. Cr. Cas. 272, per Armour, C.J.O.

An indictment is sufficient in form if it contains all the allegations essential to constitute the offence and charges in substance the offence created by the statute; and it is immaterial in what part of the same the averment is contained, or that words of equivalent import are used instead of the language of the statute. An indictment charging bank officials with having made a monthly report, etc., "a wilful, false and deceptive statement" of and concerning the affairs of the bank, with intent to deceive, sufficiently charges the offence, under the Bank Act, of having made "a wilfully false or deceptive statement in any return or report" with such intent. R. v. Weir (No. 1), 3 Can. Cr. Cas. 102, R.J.Q. 8 Q.B. 521.

A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed. R. v. Fulton (1900), 5 Can. Cr. Cas. 36 (Que.).

It is not necessary that an indictment which sufficiently describes that which is by statute an indictable offence should conclude with

the words "against the form of the statute in such case made and provided, and against the peace of Our Lord the King, his Crown and dignity." R. v. Doyle (1894), 2 Can. Cr. Cas. 335 (N.S.).

Where two or more names are laid in an indictment under an *alias dictus* it is not necessary to prove them all. R. v. Jacobs (1889), 16 Can. S.C.R. 433. J. was indicted for the murder of A.J., otherwise called K.K. On the trial it was proved that the deceased was known by the name of K.K., but there was no evidence that she ever went by the other name. Held, that this variance between the indictment and the evidence did not invalidate the conviction of J. for manslaughter. *Ibid.*

As a general rule the name of the person against whom an offence has been committed should be given, and any property which has been the subject of an offence should be described. But to prevent a crime going unpunished where it is impossible to give the name of the party, it is in such cases sufficient, as an exception to the general rule, for the grand jury to state that it has been committed against a person to the jurors unknown. R. v. Taylor (1895), R.J.Q. 4 Q.B. 226.

An indictment charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person without giving the name of the person against whom the offence was committed or the description of the property the accused attempted to steal, is sufficient. R. v. Taylor (1895), R.J.Q. 4 Q.B. 226.

An indictment that does not set up in the statement of the charge all the essential ingredients, is defective and cannot be sustained. So where an indictment charging the publication of a defamatory libel, did not state that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, it was held bad by reason of the omission of an essential ingredient of the offence. Such an indictment cannot be amended and must be set aside and quashed as the defect is a matter of substance. R. v. Cameron (1898), 2 Can. Cr. Cas. 173 (Wurtele, J.).

Indictment Sufficient After Verdict Notwithstanding Certain Objections.—Code sec. 1010.

Venue.—See Code sec. 844.

The venue mentioned in sec. 844 of the Code means the place where the crime is charged to have been committed and, in cases where local description is not required, there is an implied allegation that the offence was committed at the place mentioned in the venue in the margin of the record. It is of no consequence whether or not the trial Court should be considered an inferior Court. Smitheman v. R., 9 Can. Cr. Cas. 17, 35 S.C.R. 490.

The offence of fraudulent conversion of the proceeds of a valuable security, mentioned in Code sec. 355, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. R. v. Hogle (1896), 5 Can. Cr. Cas. 53.

The place of trial—the venue—is usually the place of the crime, *i.e.*, the same county, district or place; and the trial then takes place by a jury of that county or district taken from a panel summoned by the sheriff of the same. Mallot v. R. (1886), 1 B.C.R. pt. 2, p. 212; Sproule v. R., 1 B.C.R., pt. 2, p. 219, and *sub nom* Re Sproule, 12 Can. S.C.R. 140. But by reason of the extended jurisdiction of justices to hold preliminary enquiries in certain cases although the offences were not within the territory for which they were commissioned to be justices (see secs. 584-588), a committal for trial, and consequently the trial itself, may be in another district. A justice has under sec. 653 jurisdiction to compel the attendance of an accused person for the purpose of a preliminary enquiry to be held by him if the charge against the person accused is that he has committed an indictable offence in any part of the same province, and is, or is suspected to be, or resides, or is suspected to reside, within the territorial limits of the justice's district. Section 653. Jurisdiction also attaches on a charge of receiving stolen property, if the theft took place within the justice's limits, or if the accused has the stolen property within such limits in his possession, although stolen or unlawfully acquired or unlawfully received elsewhere. Section 653. If, however, an accused person is brought before a justice charged with an offence committed out of the limits of the latter's jurisdiction, but over which he has jurisdiction by reason only of such special provisions, the justice has a discretion after hearing both the prosecution and the defence on the question of removal, and at any stage of the preliminary enquiry, to order the accused to be taken by a constable before a justice whose territorial jurisdiction extends over the place where the offence was committed. Section 615.

Objection to Venue.—An objection to the jurisdiction in respect of venue had formerly to be raised by a special plea to the indictment. R. v. O'Rourke, 1 O.R. 464, which plea was required to be duly verified by affidavit or otherwise. R. v. Mallot (1885), 1 B.C.R., pt. 2, p. 207; Mallot v. R. (1886), 1 B.C.R., pt. 2, p. 212; but sec. 631 abolishes that form of special plea, and any such ground of defence may now be relied on under the plea of not guilty. Section 905(2).

Change of Venue.—See secs. 884-886.

Details of Circumstances, etc.—See Code sec. 853.

Count not Objectionable or Insufficient on Ground of Omission of Certain Statements.—See Code sec. 855.

See also note to sec. 852.

Indictment in Certain Special Cases.

(*a*) *Pretending to Send Money in Letter.*—See Code sec. 846.
(*b*) *Indictment for Treason, etc.*—See Code sec. 847.
(*c*) *For Stealing by Tenant or Lodger.*—See Code sec. 848.
(*d*) *Accessories After the Fact and Receivers.*—See Code sec. 849.
(*e*) *Offences by Post-office Employees.*—See Code sec. 850.

Statement of Ownership.

Joint Owners, etc.—See Code sec. 864.
Body Corporate.—See Code sec. 865.
Theft of Ores or Minerals, etc.—See Code sec. 866.
Offences in Respect of Postal Cards.—See Code sec. 867.
Theft by Public Servants.—See Code sec. 868.
Offences Respecting Letter Bags, etc.—See Code sec. 869.

Sec. 2.—Joinder of Several Courts or Several Offences in an Indictment.

Any number of counts may be joined, except that to a count charging murder no count charging any offence other than murder shall be joined. See Code sec. 856.

Joinder of Counts.—Even before the Code, offences of the same character, though differing in degree, might be united in the same indictment, and the prisoner tried on both at the same time, and on the trial he might be convicted on the one and not on the other. Theal v. R. (1882), 7 Can. S.C.R. 397, 405.

The former rule was that if different felonies were stated in several counts of an indictment, while no objection could be made to the indictment on that account in point of law, the Judge, in his discretion, might quash the indictment, or require the counsel for the prosecution to select one of the felonies and confine himself to that. That was technically termed putting the prosecutor to his election, and was done when the prisoner, by reason of two charges being inquired into at the same time, would be embarrassed in his defence, or, as it has been said, lest it should "confound" him in his defence, a matter however only of prudence and discretion, to be exercised by the Judge. Per Ritchie, C.J., in Theal v. R. (1882), 7 Can. S.C.R. 397, 405. A separate trial may now be directed under sec. 857 in respect of any of the counts instead of, as formerly, putting the prosecutor to his election.

Each Count May be Treated as a Separate Indictment and Tried Separately.—Code sec. 857.

Several Counts.—The word "may" is permissive and not imperative unless the context otherwise requires. R.S.C. (1906) ch. 1, sec. 34 (Interpretation Act).

Misjoinder of counts is no longer an objection except in the single instance named in sec. 856 that no other offence shall be joined to a charge of murder. An objection in point of form to one count would not necessarily affect the validity of the other count, and a sentence passed on two or more counts is by sec. 1005 validated "if any of such counts would have justified it."

Although the charges are cumulative as contained in the various counts, the trial, in the absence of an order for separate trial, is a single one, and by sec. 965 the former practice in regard to juries remains in effect except where expressly altered by or inconsistent with the Criminal Code. The number of peremptory challenges still depends on the quality of the most serious of the charges laid in the indictment (sec. 932), and not upon the number of offences which are included therein.

Upon the trial at the same time and upon the same indictment of three distinct charges of theft alleged to have been committed within six months of one another by a prisoner, the jury must necessarily be placed in possession of the evidence upon all the charges before being required to find the verdict upon any of them, notwithstanding the danger that a jury might not separate and properly apply the evidence upon the different charges in dealing with them. See Re A. E. Cross (1900), 4 Can. Cr. Cas. 173 (Ont.).

1. An indictment charging the offence of theft by a person required to account under Code sec. 355 is valid if the offence is stated as combining fraudulent conversion, fraudulent omission to account and fraudulent omission to pay over money, although the offence would be complete with one of these elements.

2. After an election of speedy trial upon a charge of theft containing particulars of many separate offences of theft, the Judge may permit the prosecution to substitute separate charges for each offence and call upon the accused to elect in each case for or against speedy trial.

3. The provisions of Code secs. 856 and 857 as to joinder of counts and as to orders for separate trials apply to proceedings under the Speedy Trials Part as well as to proceedings by indictment.

4. Where many separate charges of theft are brought against a person arraigned for speedy trial and it appears that each might properly have been treated at a jury trial as a separate count in an indictment for continuous embezzlement or theft from one corporation, the Judge holding a speedy trial without a jury on the prisoner

electing against a jury, may deal with each charge as the counts in one indictment might be dealt with, and is not bound to proceed with a separate trial upon each formal charge. R. v. Cross (1909), 14 Can. Cr. Cas. 171.

Where a prisoner is charged in separate counts firstly with using an instrument to procure an abortion, and secondly with "operating" for that purpose, a conviction on the second count will be set aside if the jury acquitted on the first, and there was no reasonable evidence to be left to the jury that the accused had illegally used other means than an instrument. R. v. Cooke, 15 Can. Cr. Cas. 41.

Order May be Made for Trial of One or More Counts Separately.—See Code sec. 858.

Directing Separate Trial of Persons Jointly Indicted.—Where several persons are indicted jointly, the Crown has the option of having them tried separately instead of together, and none of them can demand a separate trial as a matter of right. R. v. Weir (No. 4) (1899), 3 Can. Cr. Cas. 351 (Que.).

But if the trial of the defendants jointly instead of separately would work an injustice to any of them, the presiding Judge may, on due cause being shewn, exercise his discretionary right to direct a separate trial. *Ibid.*

The trial Judge has a discretion at the close of the case for the prosecution to submit the case of one of the defendants separately to the jury, if no evidence is to be given on his behalf; but he is not bound to do so. R. v. Hambly (1859), 16 U.C.Q.B. 617 (Robinson, C.J., McLean and Burns, JJ.).

Before the Canada Evidence Act, where persons were indicted jointly, and all pleaded not guilty, but having severed in their challenges, the Crown elected to proceed against three of them, leaving the fourth to be tried separately, it was held that he was a competent witness on behalf of the other prisoners. R. v. Jerrett (1863), 22 U.C.Q.B. 499 (Hagarty, J., and Adam Wilson, J.).

Now, by the Canada Evidence Act, every person charged with an offence is a competent witness for the defence whether the person so charged is charged solely, or jointly with any other person (sec. 4). That section does not make the accused person a compellable witness. It, however, makes it possible for the accused to go into the witness box if he so desires, at the same time providing that the failure of the person charged to testify shall not be made the subject of comment by the Judge or by counsel for the prosecution in addressing the jury (sub-sec. 5 of sec. 4), Can. Evidence Act, R.S.C. (1906), ch. 145.

Where the accused person becomes a witness he is not excused from answering any question upon the ground that the answer may tend to criminate him or may tend to establish his liability to a civil

proceeding at the instance of the Crown or of any person; (Canada Evidence Act, sec. 5), provided, however, that if the witness objects to answer upon that ground and if but for the Canada Evidence Act or a provincial statute, as the case may be, he would upon such objection have been excused from answering the question then, although the witness shall be compelled to answer, yet the answer so given shall not be used or be receivable in evidence against him in "any criminal trial or other criminal proceeding against him, thereafter taking place" other than a prosecution for perjury in giving such evidence; Canada Evidence Act, sec. 5. See also R. v. McLinehy (1899), 2 Can. Cr. Cas. 416.

Where two prisoners are being jointly tried for an offence, a voluntary admission made by one of them is evidence against himself only, and if it implicates a fellow prisoner the trial Judge should warn the jury that the statement is evidence only against the person making it and should not be considered in weighing the evidence against the fellow prisoner. Semble, the prisoner jointly charged and likely to be implicated by the statement of the other accused person, would have good ground for applying to be separately tried, in order to prevent the statement being put in even with such warning, as evidence before the jury by which he is to be tried. R. v. Martin (1905), 9 Can. Cr. Cas. 371 (Ont.).

Under the rule of the common law a person on trial for an offence was neither competent nor compellable to give evidence for or against himself, and co-defendants on trial for an offence could not be called as witnesses for or against themselves or each other. The new law only declares that such persons shall be competent witnesses, and the old law which declares that they are not compellable to give evidence remains in force. R. v. Connors (1893), 5 Can. Cr. Cas. 70, 3 Que. Q.B. 100.

The rule of the English criminal law—that no one can be compelled to criminate himself—still prevails, and therefore in criminal cases no person accused of an offence, whether indicted and tried alone or jointly with others, can be required to give evidence, although he may do so of his own accord. R. v. Connors (1893), 5 Can. Cr. Cas. 70, 3 Que. Q.B. 100.

The decision in the Connors Case is contrary to *dicta* in the Ontario case of R. v. Blais, 10 Can. Cr. Cas. 354, 358, in which it was said in effect that where two prisoners are jointly indicted but an order is made for their separate trial, the one is an admissible witness for the other and is bound to testify although he may prevent his evidence being used against himself at his subsequent trial.

Where two persons are jointly indicted for murder and one pleads guilty and the other not guilty, and the trial upon the latter plea results in an acquittal, leave should be granted the other defendant

to change his plea of guilty to one of not guilty, if the circumstances of the case are such that the verdict of acquittal already given in respect of the one would be absolutely inconsistent with the guilt of the other who had pleaded guilty. R. v. Herbert (1903), 6 Can. Cr. Cas. 214 (Ont.).

Offences May be Charged in the Alternative.—See Code sec. 854.

Sec. 4.—Indictments for Offences Committed After Previous Convictions.

Indictment Charging Previous Convictions.—See Code sec. 851.

Arraignment in Subsequent Offence and Trial as to Previous Offence.—See Code sec. 963.

Charging Previous Conviction.—When a prisoner is convicted on a summary trial before a police magistrate, of theft, he cannot be sentenced, under sub-sec. 2 of sec. 386 of the Code, to more than seven years' imprisonment, although he has been previously convicted of theft, unless such previous conviction has been charged in the information by analogy to sec. 851 and proved in accordance with sec. 963; and, where in such a case a greater punishment is inflicted, the Court of Appeal, upon an application under sub-sec. 2 of sec. 1016 of the Code, will set aside the sentence and pass what it considers a proper sentence. R. v. Edwards (1907), 17 Man. R. 288.

Proving Previous Conviction.—See secs. 568, 851 and 982.

If a Prisoner Seeks to Shew he has a Good Character the Previous Conviction May be Proved.—See Code sec. 964.

Previous Conviction as Evidence of Character—Evidence of Character Generally.—See notes to B.K. 13, ch. 2, sec. 4.

Proof of Previous Conviction.—See Code sec. 982.

Proof of Previous Conviction.—The date of the information upon which a summary conviction is based may properly be included in the conviction itself although it is no longer essential for the purpose of upholding the conviction.

If the certificate or exemplification be that of a Court having a seal it must be certified under such seal; if the proceedings to be certified be before a justice of the peace or coroner, the proceeding may be certified under the hand or seal of such justice or coroner; and, if any such Court, justice or coroner has so seal, or so certifies, then a copy purporting to be certified under the signature of a Judge or presiding magistrate of such Court or of such justice or coroner is admissible without any proof of the authenticity of such signature or other proof whatsoever. Canada Evidence Act, R.S.C. ch. 15, sec. 23.

It is said that where no particular circumstance tends to raise a question as to the party being the same, identity of name is in civil cases something from which an inference of identity may be drawn

in proof of a signature to a document, but that, in a criminal case, the mere fact that a person of the same name as the prisoner signed a document, or the like, would not be considered sufficient. Russell on Crimes, 6th ed. (1896), vol. 3(*n*). Section 982 expressly refers to "proof of identity of the person," but it has been held that where the name and description is the same, a presumption of identity arises, which throws the onus on the accused to disprove the same. Ex p. Dugan, 32 N.B.R. 98; R. v. Clark, 15 O.R. 49; R. v. Batson, 12 Can. Cr. Cas. 62. But *quære* whether such construction gives full force to the words of the section.

In the Irish case of R. v. Ellen Murtagh (1854), 6 Cox C.C. 447, the prisoner was indicted for a misdemeanour in making a false declaration, before a magistrate. The magistrate, who had taken the declaration, and a clerk from the police office, were examined, and proved that the declaration produced was made by a woman describing herself as Ellen Murtagh, and who signed by making her mark on it, but were unable to identify the prisoner. It was attempted to prove identity by means of alleged admissions in prisoner's examination upon a subsequent statutory inquiry under oath, but such being held inadmissible it was held there was no evidence to support the indictment.

A defendant in a criminal case tendering himself as a witness on his own behalf is subject on cross-examination to be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate under Code sec. 982 will upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate. Can. Evid. Act, sec. 12; Phipson on Evidence, 2nd ed. 164.

Where the depositions and record of proceedings before the magistrate for a second offence under the Ontario Liquor License Act did not disclose any evidence or submission of a prior conviction, leave was refused on *habeas corpus* to supplement the proof by affidavits shewing that such evidence was in fact given in admission made. R. v. Farrell (1907), 12 Can. Cr. Cas. 524, 15 O.L.R. 100.

The omission of the magistrate to ask the accused in a charge of a second or subsequent offence, whether he had been previously convicted does not deprive him of jurisdiction to receive proof of the prior conviction. R. v. Wallace, 4 O.R. 127, per Armour, J.; R. v. Brown, 16 O.R. 41.

It has been held that the magistrate cannot act on his own personal knowledge of identity. R. v. Herrell (No. 1), 1 Can. Cr. Cas. 510.

Under the Ontario Liquor License Act, R.S.O. 1897, ch. 245, sec. 101, the question of the identity of the accused, charged with a second offence, with the person previously convicted is one for the magistrate to determine upon the evidence before him apart from his personal recollection, but a certificate of the previous conviction in the same locality of a person of the same name, is some evidence of identity.

2. A certificate under the Liquor License Act of a prior conviction thereunder is not affected by Code sec. 982, under which evidence of identity apart from and in addition to a certificate of the prior conviction is required on the trial for an indictable offence if a prior conviction of the accused is to be proved.

Quære, per Britton, J., whether Code sec. 892 has any application other than to the trial of indictable offences. See R. v. Leach et al., 14 Can. Cr. Cas. 375.

Punishment for Offence Committed After Previous Conviction.—See Code sec. 568.

A conviction for an offence charged as a second offence, which second offence was committed prior to the date of the conviction for the first offence was bad at common law. Ex p. Miller, 2 Pugs. 485; Ex p. McCoy, 7 Can. Cr. Cas. 487.

Conviction of Offence Other Than the Full Offence Charged.—See Code sec. 951.

It is not necessary that the lesser offence should be expressly charged on the face of the indictment. It will be sufficient if the offence charged must of necessity include it. Per Richards, C.J., R. v. Smith (1874), 34 U.C.Q.B. 552.

An indictment for rape includes the lesser charge of assault, and a verdict thereon of guilty of common assault is properly followed by a conviction although the information was laid more than six months after the offence was committed. R. v. Edwards (1898), 2 Can. Cr. Cas. 96 (Ont.).

The essential elements of the offence of receiving stolen goods are not included in the offence of "housebreaking and theft," and a conviction for receiving stolen goods cannot be rendered on the summary trial of a person charged only with housebreaking and theft. R. v. Lamoureux (1900), 4 Can. Cr. Cas. 101, 10 Que. Q.B. 15.

As to what constitutes an attempt to commit an offence see sec. 72.

An assault with intent to commit an offence is an attempt to commit such an offence. R. v. John (1888), 15 Can. S.C.R. 384.

Upon a summary trial with consent upon a charge of assault occasioning bodily harm, the magistrate may convict of common assault. Section 951 of the Code applies to summary trials as well as to trials upon an indictment. R. v. Coolen, 8 Can. Cr. Cas. 157, 36 N.S.R. 510.

The word "count" includes an information before a justice for an indictable offence. *Ibid.*

Apart from the statute it has been decided by the Court for Crown cases reserved in England that such a conviction is good. R. v. Oliver, 30 L.J.M.C. 12; R. v. Taylor, L.R. 1 C.C.R. 194.

The offence of shooting with intent includes that of common assault and a verdict may be returned for the latter offence. R. v. Cronan, 24 U.C.C.P. 106.

Upon the trial of an indictment for wounding with intent to disable a verdict of "guilty without malicious intent" is equivalent to a verdict of acquittal, although the jury were instructed that if intent to disable were negatived they might still convict of the simple offence of wounding. Such verdict is to be construed as a finding that the act of the accused which resulted in wounding the complainant was done without malice. R. v. Slaughenwhite (No. 2) (1905), 9 Can. Cr. Cas. 173, 35 Can. S.C.R. 607.

On the trial of an indictment to commit rape if the only issue involved is as to the identity of the prisoner, it is unnecessary for the trial Judge to point out to the jury that the law permits the finding of a lesser offence than the one charged. R. v. Clarke (1907), 12 Can. Cr. Cas. 300 (N.B.).

The offence of carnal knowledge of a girl under fourteen years includes the offence of indecent assault, and a trial for the greater offence is a trial also for the lesser offence included therein, and the accused may, although found not guilty of the greater offence, be convicted for such lesser offence, if proved, under the same charge or indictment. R. v. Cameron (1901), 4 Can. Cr. Cas. 385 (Ont.). A police magistrate trying an accused with his consent summarily upon the charge of carnal knowledge, has the same power to convict of the lesser offence as a Court of General Sessions would have upon a trial under an indictment. *Ibid.* And an acquittal by the police magistrate on such summary trial is a bar to a charge upon a fresh information for indecent assault in respect of the same occurrence. *Ibid.* An indictment for rape under secs. 298 and 299 lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding this section. R. v. Riopel (1898), 2 Can. Cr. Cas. 225.

Upon an indictment charging a shooting at a person with intent, a verdict for common assault may be rendered. R. v. Cronan (1874), 24 U.C.C.P. 106.

Justices of the peace have no power on a preliminary investigation before them of a charge of unlawfully wounding to reduce the charge to one of common assault over which they would have summary jurisdiction. R. v. Lee (1897), 2 Can. Cr. Cas. 233; Miller v. Lee (1898), 2 Can. Cr. Cas. 282. A conviction recorded by justices in

such a case upon a plea of guilty to the charge as reduced, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of *autrefois convict*. *Ibid.*

Upon an indictment for assaulting, beating, wounding and inflicting grievous bodily harm, the prisoner may be convicted of a common assault. Sec. 951.

If, on an indictment for rape, the jury acquit the accused of that offence, but find him guilty of indecent assault and the other evidence in the case is ample to warrant the verdict, it should stand, notwithstanding the improper admission in evidence of statements made by the prosecutrix by way of complaint following the offence, she having then complained of an assault, but not of rape. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.). The accused may, on an indictment for rape, be convicted of assault with intent to commit rape. John v. R., 15 S.C.R. 384.

Conviction of Attempt in Charge of Completed Offence.—See Code sec. 949.

If a person is charged with the commission of an offence and there is not sufficient evidence to convict him of the offence charged, but there is evidence of an attempt to commit the offence notwithstanding which the accused was acquitted, he could not again be put on trial for an attempt to commit the offence, for that was included in the charge on which he was tried and he should have been convicted of the attempt. R. v. Cameron (1901), 4 Can. Cr. Cas. 385.

This provision applies to the summary trial of indictable offences, as well as to speedy trials and trials by jury. And when the prisoner consented to be tried summarily for whatever offence he might properly be found guilty of upon the said charge, and having been properly found guilty upon the said charge of an attempt to commit the offence charged; he must be held to have been legally convicted upon the said trial. R. v. Morgan (No. 2), 5 Can. Cr. Cas. 275, 3 O.L.R. 356.

On an indictment for murder or manslaughter if the prisoner is guilty of an assault which has conduced to the death, he cannot in respect of that assault be convicted of assault merely, and if the assault proved did not conduce to the death, it is distinct from and independent thereof and is therefore not included in the crime charged and is *dehors* the indictment; and therefore no verdict of assault can be rendered upon an indictment for homicide in respect of such an assault. R. v. Ganes (1872), 22 U.C.C.P. 185.

Speedy Trials.—See sec. 835.

On Indictment for Murder, Conviction May be of Concealment of Birth.—See Code sec. 952.

The offence of "concealment of birth" is dealt with by sec. 272

which provides that "every one is guilty of an indictable offence and liable to two years' imprisonment who disposes of the dead body of any child in any manner with intent to conceal the fact that its mother was delivered of it, whether the child died before or during or after birth.

Charge for Stealing, Conviction for Fraudulently Dealing with Cattle.—See Code sec. 953.

Sec. 6.—Surplusage.

What Statements are Sufficient.—See Code sec. 864.

Sec. 7.—Amendment.

In case of Variance Between Indictment and Evidence in Case Where Indictment Under Wrong Act or Contains Defective Statement.—See Code sec. 889.

Amendment of Indictment on Account of Variance.—The Court may, at the trial, amend an indictment if the amendment does not change the character or nature of the charge, and if the accused cannot be prejudiced by the change either as regards the evidence applicable or the defence raised. If the amendment asked would substitute a different transaction from that first alleged, or would render a different plea necessary, it ought not to be made. R. v. Weir (No. 3), 3 Can. Cr. Cas. 262 (Que.).

When the false pretence in a charge of obtaining money under false pretences was erroneously laid in the indictment as being that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," instead of that there were in store "2,680 bushels of beans," as appeared from the depositions taken on the preliminary inquiry, the trial Judge may allow an amendment of the indictment to conform with the proof. Although upon the indictment in its original form the charge would be merely upon a false pretence that there was in store "a large quantity of beans," and the number of bushels would not be required to be proved, the variance by reason of the amendment is not such as would mislead or prejudice the accused in his defence. R. v. Patterson (1895), 2 Can. Cr. Cas. 339 (Ont.).

On a speedy trial before a county Judge, the Judge shall have all the powers of amendment which are possessed by any Court before which an indictment may be tried under the Code. Sec. 839.

But Code sec. 889 applies to authorize an amendment as to time or place in a speedy trial charge without re-election, only where the act or transaction which forms the foundation of the charge is the same, and a mistake was made in the evidence or charge as to the true date of the occurrence. R. v. Lacelle, 10 Can. Cr. Cas. 229.

Reserved Case as to Propriety of Amendment.—See Code sec. 890(3).

Amendment to Cure Formal Defects.—See Code sec. 898.

Adjournment if Accused Prejudiced by Amendment.—See Code sec. 890.

Amendment to be Endorsed on Record.—See Code sec. 891.

Application to Amend or Divide Counts.—See Code sec. 892.

Amendment at Trial When Property Wrongly Laid.—See Code sec. 893.

Objections to Indictment and Amendment Before Plea.—See Code sec. 898.

Defects on Face of Indictment.—Section 852 of the Code provides that—"every count of an indictment shall contain, and shall be sufficient if it contains, in substance, a statement that the accused has committed some indictable offence therein specified." Section 898 of the Code, by which an amendment may be made by the Court for defects, is restricted to formal defects; a defect in substance could not be cured. R. v. Cameron, 2 Can. Cr. Cas. 173 (Que.). R. v. Bulmer, 5 Montreal Legal News 287.

If the indictment is in such a form that it does not charge an offence, the Court cannot allow an amendment to remedy the defect. R. v. Flynn, 18 N.B.R. 321; R. v. Morrison, 18 N.B.R. 682.

But if the defect is one which the Court has power to amend sec. 898 of the Code then applies, and the objection must be raised before plea. R. v. Mason (1872), 22 U.C.C.P. 246.

In ordinary cases the defect in jurisdiction would appear in the face of the indictment; but it is not necessary to allege in the indictment that the preliminaries required by statute before preferring it, have been complied with, and in such cases the defect must be brought to the knowledge of the Court by affidavit. *Ibid.* R. v. Burke (1893), 24 O.R. 64.

Where the defendants had elected to be tried by the County Court Judge under the Speedy Trial Clauses, they cannot be deprived of such right because indictments were found against them at the assizes for the offences for which they had so elected to be tried, although through the mistake or error of their junior counsel a plea of "not guilty" was by him entered on each of the indictments. R. v. Burke (1893), 24 O.R. 64, 68.

An objection to an indictment against a corporation upon the ground that it does not disclose any offence in respect of which the defendant corporation could be liable, must be taken by demurrer and not by motion to quash. R. v. Toronto Ry. Co. (1900), 4 Can. Cr. Cas. 4 (Ont.).

Section 898 applies only to formal defects, and the reason is that the grand jury are the accusers on the indictment, and the accusation cannot be changed into another one without their consent, and, if they have brought an accusation of an offence not known to the law,

the Court cannot turn it into an offence known to the law by adding to the indictment.

Strictly, a notice to quash an indictment cannot be made after plea, yet in furtherance of substantial justice the Court will sustain an objection, though in strict law a prisoner may be too late in making it. R. v. Dowey (1869), 1 P.E.I. Rep. 291. But where the objection is merely technical where the prisoner cannot be injured by the irregularity of which he complains, and it is evidently made merely in delay of justice, the Court will not use its power to assist him. Sir William Withpole's Case, Cro. 134; R. v. Sullivan, 8 A. & El. 831. And a motion in arrest of judgment of guilty in a murder case was refused on this principle, where it was objected that one of the grand jury who found the indictment had also been on the coroner's jury. R. v. Dowey (1869), 1 P.E.I. Rep. 291, per Peters, J.

It is not necessary that an indictment which sufficiently describes that which is by statute an indictable offence should conclude with the words "against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity." R. v. Doyle (1894), 2 Can. Cr. Cas. 335 (N.S.).

In charging the offence of uttering a forged instrument, the indictment must aver that the defendants made use of or uttered the instrument knowing it to have been forged. A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration, without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed. Such a defect is one of substance and cannot be amended under this section. R. v. Weir (No. 5), 3 Can. Cr. Cas. 499 (Que.).

An application for a reserved case must be made before verdict to preserve the right of appeal from its refusal, if the defect is one which might have been cured by an amendment at the trial. Ead v. R., 13 Can. Cr. Cas. 348.

Amendment in Case of Speedy Trial.—See Code sec. 839.

An amendment of a charge under the Speedy Trials Clauses should not be allowed if it involves the investigation of entirely new facts not disclosed in the depositions. R. v. Clark, 9 Can. Cr. Cas. 125.

A county Judge holding a speedy trial upon a charge of seduction may substitute a new charge to conform to the evidence of the prosecution by stating it as of a prior date upon which a different occurrence is sought to be proved, but such substitution is subject to the right of the accused to re-elect the mode of trial. As regards the offence of seduction the change of the date of the alleged offence by an amendment of the indictment or charge is in substance the laying

of a new charge to which a different defence might be applicable. Secs. 889 and 890 apply to authorize an amendment as to time and place in a speedy trial charge without re-election, only where the act or transaction which forms the foundation of the charge is the same, and a mistake was made in the evidence or charge as to the true date of the occurrence. R. v. Lacelle, 10 Can. Cr. Cas. 229.

Sec. 8.—Pleas.

(*a*) *In Abatement.*—No plea in abatement shall be allowed. Code sec. 889.

Any objection to the constitution of the grand jury may be taken by motion to the Court, and the indictment shall be quashed if the Court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise. Code sec. 899.

It was held in R. v. Hayes (No. 2) (1903), 9 Can. Cr. Cas. 101, that an objection on the ground that a member of the grand jury by which the indictment was found, was not indifferent as between the Crown and the accused, by reason of an alleged interest in the subject-matter of the prosecution and that he was therefore disqualified from acting as a grand juror in respect of such indictment, is not an objection to the "constitution" of the grand jury which must be raised by motion to quash the indictment under Code sec. 899.

The presence in the grand jury room of an unauthorized person, summoned as a grand juror but not impanelled, during the deliberations of the grand jury will not invalidate an indictment then under consideration, if such person was excluded from the grand jury before the presentment unless it be shewn that the accused was thereby prejudiced. On discovery that a person summoned as a grand juror and coming into Court with the grand jury to present an indictment had not been sworn and had been admitted to the grand jury room during their deliberations, the Court may exclude such person and direct the grand jury to retire to reconsider the bill without requiring the grand jurors to be re-sworn. R. v. Kelly (1905), 8 Can. Cr. Cas. 130 (Que.).

The means taken to bring together the men who should serve as a grand jury may be so radically defective that a "grand jury" is not constituted at all. Such cases are to be classified as mere attempts at organization as distinguished from the other class as to which irregularities take place which do not prevent the body of men summoned from becoming a grand jury although their acts as such may be thereby invalidated upon objection taken in due time.

Of the former class is the British Columbia case of R. v. Hayes (1902), 7 Can. Cr. Cas. 453, 9 B.C.R. 574. There, twelve instead of

thirteen jurors had been summoned, the sheriff omitting one of the thirteen as he had learned that the missing juror had become demented. Martin, J., said that it would be a dangerous precedent to substitute the discretion of the sheriff for the positive requirement of a statute which aims at excluding all discretion. An indictment was quashed although seven grand jurors were sufficient in number to find an indictment and at least seven had found the indictment there in question.

And in a later case at Montreal, R. v. Belanger (1902), 6 Can. Cr. Cas. 295, 12 Que. K.B. 69, it was held by the Court of Queen's Bench of the Province of Quebec that where the grand jurors were called and selected their foreman before being impanelled, and the foreman was then impanelled and sworn alone instead of the whole jury being first impanelled, the grand jury was not constituted by calling the other jurors to the jury box and swearing them to observe their foreman's oath.

In R. v. McGuire (1898), 4 Can. Cr. Cas. 12, it was held by the Supreme Court of New Brunswick that where a grand jury had been summoned by a sheriff who is disqualified from acting because of his relationship to a prosecutor, a new grand jury may be summoned on a venire to a coroner, without formally discharging the jury summoned by the sheriff or disposing of the indictment found by it.

An indictment found by the sheriff's grand jury is in such case void, and it is open to the coroner summoning another jury to summon persons already summoned by the sheriff. *Ibid.*

The same case is authority for saying that there is at common law inherent power in a Superior Court of criminal jurisdiction to order one or more grand juries to be summoned.

In the case of R. v. Belyea (1854), 2 N.S.R. 220, there had been an omission of the residences and occupations of grand jurors in the jury list and in the panel in contravention of a provincial statute enacting that the list of grand jurors shall contain all the Christian names and surnames of all those qualified to serve as grand jurors, the places of residence, trades, callings or employment, and whether senior or junior or by any other appellation by which they may be usually called or known.

Three of the five Judges comprising the Supreme Court of Nova Scotia held that this omission was a sufficient ground for quashing an indictment for felony, Dodd, J., saying that as the omission was general and not confined to a single case it was impossible for the sheriff to know with any degree of certainty who he was to summon and that there was no certainty that the grand jury that found the bill were the same persons who were named in the panel and whom the sheriff was bound to summon.

Thos. C. Haliburton, J., and Desbarres, J., considered the direction of the statute to be imperative and as the objection was taken before trial agreed that the indictment must be quashed even if the Court has a discretion in the matter.

Chief Justice Brenton Halliburton and Bliss, J., dissented upon the ground that it would not be a sound exercise of the Court's discretionary power to set aside the panel and quash the indictment without proof that a wrong person had been brought into the grand jury by the irregularity or that some mischief, injury or inconvenience had been caused thereby to the accused.

By enacting Code sec. 899, Parliament has in part adopted the view of the dissenting Judges in R. v. Belyea, but under it an indictment must be quashed not only when the irregularity in the constitution of the grand jury has prejudiced the accused, but also where the Court is of opinion that the accused "may suffer prejudice thereby." Code sec. 899.

Since 1885 the Canadian law has been that seven grand jurors, instead of twelve, may find a true bill in any province where the panel of grand jurors is not more than thirteen. Code sec. 921(2); and see note to sec. 871.

Since 1885 the Canadian law has been that seven grand jurors, instead of twelve, may find a true bill in any province where the panel of grand jurors is not more than thirteen. Code sec. 921(2); and see note to sec. 871.

It is within the power of a Provincial Legislature to fix the number of the grand jurors, who should compose the panel, that being part of the organization or constitution of the Court. R. v. Cox (1898), 2 Can. Cr. Cas. 207 (N.S.). But a Provincial Legislature has no power to fix the number of grand jurors to find a good bill of indictment, that being a matter of criminal procedure and exclusively within the powers of the Dominion Parliament. *Ibid.*

Where by the provincial law the number of grand jurors summoned has been reduced to less than thirteen, and some of those summoned fail to appear, seven of those who appear may find a bill of indictment. R. v. Girard (1898), 2 Can. Cr. Cas. 216 (Que.).

In the Province of Quebec where the number of grand jurors to be summoned had been reduced to twelve, a sheriff by mistake summoned twenty-four grand jurors but only twelve were called; eleven of them were duly sworn and were held to constitute a grand jury, the other juror called being excused on account of illness and not being sworn. R. v. Poirier, 7 Que. Q.B. 483.

Prejudice to Accused.—In R. v. Hayes (No. 2), 9 Can. Cr. Cas. 101, at page 120, Martin, J., held that it is the intention of sec. 899 that the question of prejudice shall be determined solely by the Court of Assize and in the absence of any direct provision giving an appeal

from the exercise of such discretion the decision arrived at cannot be reviewed.

(*b*) *To the Jurisdiction.*—See Code secs. 898, 900, 905.

The defendant has the right to raise the question of jurisdiction under a plea of not guilty. R. v. Hogle (1896), 5 Can. Cr. Cas. 53 (Que.).

(*c*) *In Bar.*—See Code secs. 898, 900, 905.

1. *General Issue.*—See Code sec. 900.

The defendant has the right to raise the question of jurisdiction under a plea of not guilty. R. v. Hogle (1896), 5 Can. Cr. Cas. 53 (Que.).

If at any time after the indictment is found, and before the verdict is given, it appears to the Court that there is sufficient reason to doubt whether the accused is then, on account of insanity, capable of conducting his defence, the Court may direct that an issue shall be tried whether the accused is or is not then, on account of insanity, unfit to take his trial. Sec. 967.

2. *Autrefois Convict.*—See Code secs. 905, 906.

The previous indictment must have been one upon which the defendant could legally have been convicted. *Ibid.*

A conviction for keeping a disorderly house at a specified address from the 3rd day of May to the 3rd day of November is a bar under a plea of *autrefois convict*, to a conviction for the like offence charged for the 3rd day of November only. R. v. Clark, 9 Can. Cr. Cas. 125.

A conviction by a magistrate or magistrates upon an information or complaint charging an offence for which a previous information against the same defendant has been made before another magistrate, and while such previous information is pending, is null and void, and will not avail in support of a plea of *autrefois convict* to the first complaint. R. v. Bombardier, 11 Can. Cr. Cas. 216.

Where the name of the accused, the place of the offence and the character of the offence are the same in the certificate of conviction produced in proof of a plea of *autrefois convict* and in the charge then being tried, it will be presumed that the accused is the party named in such certificate without parol evidence of identity. See R. v. Clark (1904), 9 Can. Cr. Cas. 125 (N.S.).

Issue on Plea of Autrefois Convict.—See Code sec. 907.

Evidence to Prove Identity of Charges.—See Code sec. 908.

Indictment Charging Substantially Same Offence with Circumstances of Aggravation.—See Code sec. 909.

Every person who obtains a certificate of dismissal or is convicted under the provisions of the Summary Trials Part of the Code, shall be released from all further or other criminal proceedings for the same cause. See Code sec. 792.

Evidence of Conviction or Dismissal.—See Code sec. 794.

If the person against whom any information has been laid, by or on behalf of the person aggrieved, obtains a certificate of dismissal, or, having been convicted, pays the whole of the amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labour awarded, he shall be released from all further or other proceedings, civil or criminal, for the same cause. See Code sec. 734.

Bar of Civil Action for Assault.—No action of damages for assault lies in favour of the party aggrieved against an assailant who has been convicted under Code sec. 732 and who has paid the amount of the fine or suffered the imprisonment as the case may be. Larin v. Boyd (1904), 11 Can. Cr. Cas. 74 (Que.).

A summary conviction for assault upon a female, causing bruises, will be presumed to be one of common assault under Code secs. 291 and 732, and not of an assault occasioning bodily harm under sec. 295, where there has been no election of summary trial. *Ibid.*

The conviction for common assault would be a bar to a subsequent prosecution for assault occasioning bodily harm. Larin v. Boyd (1904), 11 Can. Cr. Cas. 74 (Que.).

The explanation regarding the previous decision of Archibald, J., in Hardigan v. Graham (1897), 1 Can. Cr. Cas. 437 (Que.), given in Larin v. Boyd, *supra*, makes it clear that that case is no longer of authority since the Code Amendment Act of 1900, upon which the present sec. 734 is taken.

Sec. 734 applies to bar the civil action, only where the charge is triable summarily under sec. 732 without regard to the consent of the accused, and does not have that effect where the charge is under sec. 295 for assault occasioning actual bodily harm. Nevills v. Ballard (1897), 1 Can. Cr. Cas. 434 (Ont.).

Section 734 does not apply to bar a civil action for assault, after conviction and payment of the fine, where such conviction is by a petit jury on a trial upon an indictment. Clermont v. Lagacé (1897), 2 Can. Cr. Cas. 1.

On a charge of shooting and wounding with intent, the justices holding a preliminary enquiry cannot, of their own motion, vary or reduce the charge to one of common assault and so acquire jurisdiction to adjudicate thereupon. Miller v. Lea (1898), 2 Can. Cr. Cas. 282. A certificate of conviction by justices for common assault under those circumstances, and the payment of the fine imposed, do not bar a civil action by the injured party for damages against the wrongdoer, and this section does not apply. *Ibid.*

Where a magistrate invested with the powers of two justices tries a case of aggravated assault under the summary trials procedure with the consent of the accused (secs. 773 and 778), the conviction is a

bar to a further criminal proceedings for the same cause (sec. 792), but not to be a civil action for damages. The provisions of sec. 734 do not apply to such a case. Clarke v. Rutherford (1901), 5 Can. Cr. Cas. 13 (Ont.).

A summary conviction for assault has been held sufficient to bar a subsequent indictment, charging an assault and wounding with intent to murder, where the accused had been summoned before magistrates by the prosecutor of the indictment for the same assault, and had been imprisoned in his making default of payment of the fine imposed by the magistrate. See Code sec. 732.

Autrefois Acquit.—See Code secs. 905, 906.

May be Pleaded with Plea of Autrefois Convict.—See Code sec. 906.

The previous indictment must have been one upon which the defendant could legally have been convicted, upon which his life or liberty was not merely in imaginary but in actual danger, and consequently in which there was no material error. So if the accused were merely acquitted on some error in the indictment or variance in the recitals, he may be indicted again upon the same charge, because the first proceedings were nugatory.

If the former indictment is bad on its face, the acquittal of the accused upon his trial thereunder will be presumed to be upon that defect, and a plea of *autrefois acquit* will fail. Formerly when a verdict was quashed for informalities therein or other technical grounds apart from the merits (as to which see Code secs. 1010 and 1011) the entry thereof in the record specially mentioned the defect, and concluded with an adjudication upon the indictment "that the defendant go thereof without day," and a plea of *autrefois acquit* was then impossible. But if a prisoner were convicted and sentenced in an insufficient indictment, a plea of *autrefois convict* was good, unless the judgment had been reversed. *Ibid.*

In R. v. Bulmer, 5 Legal News (Montreal), 92, the prisoner had been put on his trial on an indictment containing six counts, charging him with shooting with intent to murder, and was found guilty on the first count. The verdict was afterwards set aside on a reserved case for insufficiency of the first count. It was held that he could not be afterwards tried on the other counts, as they all referred to the same act of shooting, and he was discharged on a plea of *autrefois acquit.*

On an indictment for an assault, defendant pleaded that he had been lawfully acquitted of the offence charged in the indictment, and proved an acquittal on an indictment for murder of the same person, which indictment did not charge an assault; the County Court Judge directed a verdict for the Crown, and a case was reserved for the opinion of the Court whether the prisoner could have been lawfully in-

dicted for assault after having been acquitted on the indictment for murder. It was held that as the prisoner could not have been convicted of the assault on the indictment for murder as framed, his plea failed, and he could be tried and convicted of the assault, and his conviction was upheld. R. v. Smith (1874), 34 U.C.Q.B. 552.

A count charging any offence other than murder cannot now be joined with a count charging murder. Code sec. 856. On a count charging murder, if the evidence proves manslaughter, but does not prove murder, the jury may find the accused not guilty of murder, but guilty of manslaughter, but they cannot on that count find the accused guilty of any other offence. Code sec. 951(2).

Upon a defence that the accused has been formerly acquitted in a summary proceeding before magistrates for the same alleged offence, the onus of proving the identity of the charge is upon the defendant. Ex parte Flanagan, 5 Can. Cr. Cas. 82.

Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea of *autrefois acquit* is generally good. The meaning of this is that where the same facts would justify a conviction for two different offences (say burglary and petty larceny) a man who has been convicted for one offence cannot be tried over again on the same facts for the second offence. Wentworth v. Mathieu, 3 Can. Cr. Cas. 434 (B.C.).

Where the jury find a verdict of not guilty of shooting with intent, not guilty of common assault, but guilty of unlawful wounding, the indictment containing several counts charging such offences, and a new trial is ordered on a case reserved at the request of the accused because of an irregularity occurring upon the trial, it is competent for the accused upon the new trial to support a plea of *autrefois acquit* to the charge of unlawful wounding, by shewing that the charge is based on the identical acts of shooting which were the foundation for the other charges. R. v. Hill, 7 Can. Cr. Cas. 38, per Graham, E.J.

Where a person has been acquitted by a Court of competent jurisdiction, the acquittal is a bar to all further proceedings to punish him for the same matter, although a plea of *autrefois acquit* may not be allowed because of the different nature of the charges. A plea of *autrefois acquit* to a charge of perjury in taking the oath of identity at a polling booth is not supported by a record of acquittal on a charge of personating an election at the same time and place, although the oath of identity and the alleged personation were in regard to the same election. R. v. Quinn, 10 Can. Cr. Cas. 412. A verdict for personation could not have been received under an indictment for perjury in taking the oath of identity, although the facts constituting personation must necessarily be shewn in order to prove the perjury. *Ibid.*

The acquittal on the first charge became *res judicata* as between the Crown and the accused, and it was not open to the Crown to proceed on the second charge in which a conviction could only be had by the second overruling the contrary verdict of the first jury. *Ibid.*

The offence of carnal knowledge of a girl under fourteen years includes the offence of indecent assault, and a trial for the greater offence is a trial also for the lesser offence included therein, and the accused may, although found not guilty of the greater offence, be convicted for such lesser offence, if proved, under the same charge or indictment. R. v. Cameron (1901), 4 Can. Cr. Cas. 385 (Ont.). A police magistrate trying an accused with his consent summarily, upon the charge of carnal knowledge, has the same power to convict of the lesser offence as a Court of General Sessions would have upon a trial under an indictment. *Ibid.* And an acquittal by the police magistrate in such summary trial is a bar to a charge upon a fresh information for indecent assault in respect of the same occurrence. *Ibid.* An indictment for rape under secs. 298 and 299 lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding this section (301). R. v. Riopel (1898), 2 Can. Cr. Cas. 225.

An acquittal on a charge of manslaughter is not a bar to a charge of inflicting bodily harm based upon the same circumstances. R. v. Shea, 14 Can. Cr. Cas. 319.

Issue on Plea of Autrefois Acquit.—See Code sec. 907.

Evidence to Prove Identity of Charges.—See Code sec. 908.

To prove the identity of the offence may not always be easy. If more or less evidence is gone into on the first trial the difficulty is little; if none is offered, and the acquittal takes place, it is still an acquittal, entitling the prisoner to an exemption from any subsequent trial for the same offence. In such a case there is more difficulty in shewing what the offence charged was, but it may be proved by the testimony of the witnesses who were subpœnaed to go, and did go, before the grand jury, by the proof of what they swore, or perhaps by a grand juryman himself, or by the evidence of the prosecutor, or by proof how the case was opened by counsel for him; in short, by any evidence which would shew what crime was the subject of the inquiry, and would identify the charge and limit and confine the generality of the indictment to a particular case. *Ibid.*

Indictment Charging Substantially the Same Offence with Circumstances of Aggravation.—See Code sec. 909.

Certificate of Dismissal or Conviction.—See Code sec. 792.

This section, formerly sec. 45 of 32 and 33 Vict. ch. 20 was held not to be *ultra vires* as interfering with civil rights. Wilson v. Codyre (1886), 20 N.B.R. 516. That was an action of damages for assault and

the defendant pleaded that an information had been laid against him by plaintiff before a magistrate in respect to the trespass declared on, and that the magistrate, after hearing, dismissed the information and gave the defendant a certificate of dismissal, whereby, and by force of the statute, he was released from the action. It was held on demurrer that the plea was insufficient in not stating that the complainant had prayed the magistrate to proceed summarily. *Ibid.*

Evidence of Conviction on Dismissal.—See Code sec. 794.

Certificate of Dismissal.—See Code sec. 730.

The certificate of dismissal may be granted as well where the informant neglects to appear, and the complaint is dismissed on that ground, as where he does appear and the information is dismissed on the merits. Ex parte Phillips (1884), 24 N.B.R. 119. Upon the hearing of an information for an offence against the Canada Temperance Act the defendant in answer to the charge gave in evidence a certificate stating that an information against the defendant for the same offence had been considered and was dismissed, but the police magistrate gave no effect to the certificate of dismissal, on the ground that the original information had been dismissed on the default of the informant to appear and give evidence and not on the merits, and it was held that it was within the power of a magistrate, to whom a certificate of dismissal is tendered, as a bar to his proceeding, to inquire whether such prosecution was real and *bonâ fide*, or was instituted fraudulently and collusively for the purpose of escaping the penalties of the Act. *Ibid.*

Although the informant gives notice that he withdraws, the justice may in his discretion grant a certificate of dismissal at the request of the defendant. *Ibid.*

Where a magistrate invested with the powers of two justices tries a case of aggravated assault under the summary trials procedure with the consent of the accused (secs. 773 and 778), the conviction is a bar to further criminal proceedings for the same cause (sec. 792) but not to a civil action for damages. The provisions of sec. 734 do not apply to such a case. Clarke v. Rutherford (1901), 5 Can. Cr. Cas. 13 (Ont.).

Plea of Pardon.—See Code sec. 905.

A plea of pardon, other than by statute, should be pleaded at the first opportunity which offers, for if a person has obtained a pardon before he is arraigned and instead of pleading it in bar he pleads not guilty he will thereby waive the benefit of the pardon and cannot use it by way of arrest of judgment. R. v. Norris (1615), 1 Rolle Rep. 297.

Pardons are either free or conditional, and are granted in Canada by warrant under the hand and seal-at-arms of the Governor-General. See also Code sec. 1076.

Offences of Defamatory Libel, Pleading Justification.—See Code sec. 910.

A plea of justification to an indictment for defamatory libel must allege that the defamatory matter published is true and that it was for the public benefit that the alleged libel was published. R. v. Grenier (1897), 1 Can. Cr. Cas. 55 (Que.).

Such plea must then set forth concisely the particular facts by reason of which its publication was for the public good, but it must not contain the evidence by which it is proposed to prove such facts, nor any statements purely of comment or argument. *Ibid.*

A plea of justification, which embodies a number of letters which it is proposed to use as evidence, and contains paragraphs of which the matter consists merely of comments and argument, is irregular and illegal; and the plea itself should be struck from the record, or the illegal averment should be struck out, and the defendant allowed to plead anew. *Ibid.*

To an indictment for libel, the language of which was couched in general terms, the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit, etc. It was held that the plea was insufficient because it did not set out the particular facts upon which the defendant intended to rely. R. v. Creighton (1890), 19 (Ont.) 339.

In a prosecution for an alleged defamatory libel contained in a newspaper article, condemning an employer's dismissal of employees belonging to a trade union and charging that the distribution of certain gratuities by the employer to his employees was impelled by motives of selfishness on his part and was for the purpose of winning public approval and favourable public comment through press notices thereof, a plea of justification will not be struck out on the objection that the facts therein alleged do not shew that it was for the public benefit that the publication should be made, if such plea contains a charge that the press notices favourable to the complainant were published at his instance. If the complainant in a prosecution for defamatory libel has himself called public attention to the subject matter of the alleged libel by obtaining the publication of newspaper articles commending his conduct therein, he thereby invites public criticism thereof and cannot object that the answer to his own articles is not a publication in the public interest. R. v. Brazeau (1899), 3 Can. Cr. Cas. 89 (Que.).

Matters of Public Interest May be Classified as follows:—

1. Affairs of state.
2. The administration of justice.
3. Public institutions and local authorities.
4. Ecclesiastical matters.

5. Books, pictures and architecture.
6. Theatres and other public entertainments.
7. Other appeals to the public.

Where in the trial of a criminal information for libel the Judge in substance told the jury that the defendant, under the pleas of justification, has bound to shew the truth of the whole of the libel so much a direction in the law as a strong observation on the evidence, fell far short of the whole matter charged; such a direction is not so much a direction in the law as a strong observation on the evidence, which may be made in a proper case without being open to the charge of misdirection. R. v. Port Perry, etc., Co., 38 U.C.Q.B. 431; R. v. Wilkinson (1878), 42 U.C.Q.B. 492, 505 (per Harrison, C.J., Wilson, J., diss.).

Plea of Justification Necessary to Try Truth of Matters Alleged.—See Code sec. 911.

The maxim used to be "the greater the truth the greater the libel," meaning that the injudicious publication of the truth about an individual would be more likely to provoke him to a breach of the peace than if some falsehood were invented about him which he could easily and completely refute. So, on a criminal trial, whether of an indictment or an information, before the statute, 37 Vict. (Can.) ch. 38, secs. 5 and 6, now Code sec. 331, no evidence could be received of the truth of the matters charged, not even in mitigation of punishment. Under the Code the matters must not only be true but the defendant has to prove that it was for the public benefit that they should be published.

To take advantage of this section (331), it must be pleaded. R. v. Moylan, 19 U.C.Q.B. 521; R. v. Hickson, 3 Montreal Legal News 139; R. v. Laurier, 11 Rev. Legale 184; R. v. Creighton, 19 O.R. 339. The section is limited to "defamatory libels" and does not apply to blasphemous, obscene or seditious words.

The plea of justification must affirm the truth of all the charges, and not merely that some of them are true or that the defendant believed them, or some of them, to be true. R. v. Moylan (1860), 19 U.C.Q.B. 521.

Plea of Publication by Order of Legislative Body.—See Code sec. 912.

Pleading in British Columbia.

British Columbia.—The following rules of procedure apply in British Columbia:—

Every pleading, other than a plea of guilty or not guilty, to an indictment, information or inquisition shall be intituled "In the Supreme Court of British Columbia," and shall be dated on the day, month, and year when the same was pleaded, and shall bear no other

date. A copy shall be delivered to the opposite party, and a copy filed with the registrar of the Court. B.C. Rule 48.

All proceedings shall be entered on the record made up for trial, and on the judgment roll under the respective dates at which the same took place. B.C. Rule 49.

Every special plea or demurrer shall be in writing, and signed by counsel, or by the solicitor or party, if he defends in person. B.C. Rule 50.

One order only to plead, reply, join in demurrer, or in error, or plead subsequent pleadings in all prosecutions by way of indictment, inquisition, or information shall be given; and every such order shall limit the time from service in which the pleading is to be delivered. B.C. Rule 51.

Time to plead may be extended on application by summons to a Judge at Chambers, on such terms as to the Judge appears right. B.C. Rule 52.

Particulars.—Particulars may be ordered given by the Crown prosecutor in case of perjury, etc. See Code sec. 859.

Particulars furnished under sec. 859 have not the effect of amending or extending the scope of the original indictment or charge, and the inclusion of a separate and distinct offence as a particular under a charge of conspiracy will not authorize a conviction which would otherwise not be within the scope of the indictment. R. v. Sinclair (1906), 12 Can. Cr. Cas. 20 (Sask.).

When an indictment for defamatory libel consisting of words harmless in themselves, but importing by innuendo an imputation of dishonourable conduct, contains in addition to the enunciation of the incriminating words an allegation of the sense in which they should be understood the Crown will be allowed to prove intrinsic circumstances which impute this meaning to them. It is not necessary to enumerate these circumstances in the indictment, and the accused is sufficiently guarded against surprise by the right that he has to demand particulars. Failing to do so, he will not be allowed to object to the admission of the evidence above mentioned, and the question of its legality is not one which can be reserved for the opinion of the Court of Appeal. R. v. Molleur (No. 1), 12 Can. Cr. Cas. 8.

The ordering of particulars to be furnished to the accused by the Crown in respect of an indictment for theft is a matter of judicial discretion. R. v. Stevens, 8 Can. Cr. Cas. 387.

Where the Crown is unable to specify in detail the several sums alleged to have been received and misappropriated by a Government employee and the prosecution is laid for theft of a sum aggregating the deficit appearing upon the employee's books and returns, particulars should be ordered against the Crown only with regard to the direct

proof of details so as not to exclude general evidence based upon the balances returned from time to time. With the consent of the Crown, an order may be made for the delivery of particulars shewing what statements of account made by the accused are proposed to be put in evidence for the prosecution, and what sums are alleged to have been wrongfully omitted therefrom or wrongfully inserted therein. R. v. Stevens (1904), 8 Can. Cr. Cas. 387 (N.S.).

On an indictment under Code sec. 477, for unlawfully and with intent to defraud, signing a promissory note by procuration, although the name signed is the name of a testamentary succession or of an estate in liquidation (*e.g.*, "Estate John Doe"), an order will be made against the Crown to furnish particulars of the names and capacities of the persons representing such estate at the time when the offence is alleged to have been committed, and directing that the defendants be not arraigned until after the particulars have been delivered. Reg. v. Weir (No. 2) (1899), 3 Can. Cr. Cas. 155 (Que.).

In a case of conspiracy to do that which is not a crime or to do a wrong which is not well known as being the subject of a criminal conspiracy, the facts should be set out in the indictment that it may appear whether or not the conspiracy charged is an indictable offence. An indictment for conspiracy to cure another of an illness endangering life, "by unlawful and improper means" and thereby causing his death is bad and should be quashed because it does not specify the unlawful and improper means nor indicate the specific crime or wrong intended to be relied upon. R. v. Goodfellow (1906), 10 Can. Cr. Cas. 425, 11 O.L.R. 359.

Copy of Particulars to be Furnished to Accused or his Solicitor.—See Code sec. 860.

CHAPTER THE THIRD.

PROCEEDINGS AT THE TRIAL.

SECT. I.—TRAVERSING OR POSTPONING TRIAL.

By the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 27, 'No person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any sessions of the peace, session of oyer and terminer, or session of gaol delivery: Provided always that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose' (*a*).

Under sect. 6 of the Habeas Corpus Act, 1679 (31 Car. II. c. 2), a person committed for felony can insist on being indicted at the sessions or assizes to which he is committed, if the witnesses for the Crown are ready. If, however, it appears upon oath that the witnesses for the Crown cannot then be produced, he may be committed to the next assizes or sessions without being released on bail (*b*), and the judge has power again to postpone the trial if there is material evidence for the Crown which cannot then be produced (*c*); or if it is proposed to give at the trial evidence not given at the preliminary inquiry, and whereof the defendant has not received adequate notice before the trial (*d*), but it has been held that the presentment of a bill to the grand jury cannot be postponed on the ground that there are other charges which may be brought against the prisoner (*e*). A trial has been postponed on the ground that infection might be conveyed to the public by bringing into Court witnesses for the Crown who were themselves able to travel, but came from an infected place (*f*).

(*a*) At common law a person indicted for misdemeanor was entitled to traverse, or postpone the trial till the assizes or sessions next after the finding of the indictment. See 4 Bl. Com. 351; 4 Chit. Cr. L. 278; 2 Pollock and Maitland, Hist. Eng. Law, 649. The expression 'traverse' to describe pleading in misdemeanor has fallen out of use in England, but is retained in Ireland.

(*b*) R. *v.* Chapman, 8 C. & P. 558.

(*c*) R. *v.* Bowen, 9 C. & P. 509, and see R. *v.* Dripps, 13 Cox, 25 (Ir.). In R. *v.* Palmer, 6 C. & P. 652, a trial for arson was postponed on the ground of the illness of a material witness for the Crown. As to absence of witnesses for the Crown, where depositions were not taken at the preliminary inquiry, see R. *v.* Savage, 1 C. & K. 75. R. *v.* Lawrence, 4 F. & F. 901.

(*d*) R. *v* Flannagan, 15 Cox, 403.

(*e*) R. *v.* Heesom, 14 Cox, 40.

(*f*) R. *v.* Taylor, 15 Cox, 8. Baggallay, L.J. The prisoner seems not to have objected.

Postponing a trial for the purpose of instructing a child to qualify to be sworn has been refused (*g*).

Sect. II.—Opening, Summing Up, and Reply.

On prosecutions on indictment the addresses of the advocates to the jury are thus regulated. Except in very simple cases counsel for the prosecution opens the case before calling his witnesses (*h*): and the witnesses for the Crown are called, examined, cross-examined, and if need be re-examined.

All persons accused of an indictable offence are entitled to be defended by counsel. This right has always existed as to misdemeanor (*h*); was recognised as to treason in 1696 (7 & 8 Will. III. c. 3, s. 1) (*i*); and was given in case of felony by the Trials for Felony Act, 1836 (6 & 7 Will. IV. c. 114), which by sect. 1 enacts, 'That all persons tried for felonies shall be admitted after the close of the case for the prosecution to make full answer or defence thereto by counsel learned in the law or by attorney, in courts where attorneys practice as counsel.' In the case of 'poor prisoners' prosecuted for felony or misdemeanor the committing justices or the Court of trial may certify for legal aid in accordance with the provisions of the Poor Prisoners' Defence Act, 1903, and on such certificate or the certificate of the Court of trial the prisoner is entitled to have counsel and solicitor assigned for his defence (*j*).

Where the prisoner is not defended by counsel the judge should inform him of his right to address the jury and to give evidence on oath on his own behalf, or to make an unsworn statement, but omission to do so does not invalidate the conviction (*k*).

Summing up Evidence.—By sect. 2 of the Criminal Procedure Act, 1865 (*l*) (which by sect. 1 applies to every trial for felony or misdemeanor), 'If any prisoner or prisoners, defendant or defendants, shall be defended by counsel but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence (*m*): and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants: and upon every trial for felony or misdemeanor, whether the prisoners or defendants or any of them shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit to open his or their cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners or defendant or defendants or their counsel shall be entitled to examine such witness as he or they may think fit, and when all the

(*g*) R. *v.* Nicholas, 2 C. & K. 246.
(*h*) See R. *v.* Gascoine, 7 C. & P. 772. R. *v.* Morgan, 6 Cox, 116, Talfourd, J.
(*i*) See R. *v.* Lynch [1903], 1 K.B. 744.
(*j*) 3 Edw. VII. c. 38, s. 1, *post*, p. 2048.
(*k*) R. *v.* Saunders, 63 J. P. 24. R. *v.* Warren, 25 T. L. R. 633.
(*l*) 28 & 29 Vict. c. 18, usually known as Denman's Act.
(*m*) *i.e.* oral evidence or putting in documents.

evidence is concluded to sum up the evidence respectively: and the right of reply and practice and course of proceedings, save as hereby altered, shall remain as at present.'

The right to sum up includes a right to comment on evidence given by a prisoner on his own behalf, and the right is exercised after the prisoner's evidence if he is the only witness for the defence (*n*).

The right of a prisoner to make an unsworn statement is unaffected by the Criminal Evidence Act, 1898. If such prisoner is defended by counsel his statement must be made before counsel for the prosecution sums up the evidence (*o*).

The right of reply ordinarily depends on whether any oral evidence other than that of the defendant has been given for the defence or any document has been put in for the defence. If the defendant is defended and wishes to make an answering statement he must do so before counsel for the prosecution sums up.

Reply.—If the defendant is undefended there is no right to sum up or reply if he calls no witnesses, whether he himself does or does not give evidence: but there is a right to reply if he calls a witness. If being defended he does not give evidence himself or call any witness the prosecution may sum up but may not reply. The summing up is after the defendant has given evidence if he does, and before the speech for the defence if he does not.

Where the only evidence for the defence (other than the evidence of the defendant) is that of witnesses to character, in strictness counsel for the prosecution has a right to reply on the whole case (*p*), and not merely on the evidence as to character (*q*). But whether the offence charged is felony or misdemeanor it is considered that in practice the right should not be exercised save in very special circumstances (*r*).

Counsel for the prosecution may not in his reply comment on the fact that the defendant or the husband or wife has not been called as a witness (*s*), but the judge in his summing may (*ss*).

By the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 2, 'Where the *only* witness to the facts of the case called by the defence in the person charged he shall be called as a witness immediately after the close of the prosecution,' *i.e.* before counsel for the prosecution sums up his case.

By sect. 3, 'In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not in itself confer on the prosecution the right of reply.'

The effect of sects. 2 & 3, in cases in which the prosecution has not

(*n*) R. *v.* Gardner [1899], 1 Q.B. 150.

(*o*) R. *v.* Sherriff, 20 Cox, 334, Darling, J.

(*p*) R. *v.* Stannard, 7 C. & P. 673; 6 L. J. M. C. 37, Patteson and Williams, JJ. As regards felonies the practice was laid down in a conference of the judges in 1837, immediately after the passing of the Trials for Felony Act, 1836 (6 & 7 Will. IV. c. 114). The rules then laid down are printed in 7 C. & P. 676. Rules 1, 2, and 3, as to cross-examining witnesses on depositions taken before a magistrate, are superseded by 28 & 29 Vict. c. 18, s. 5, *post*, pp. 2314 *et seq.* By Rule 4, If the only evidence called on the part of the prisoner (on a charge of felony) is evidence as to character, although the counsel for the prosecution is entitled to reply, it will be for his discretion whether he will use it or not. Cases may occur in which it will be fit and proper so to do.

(*q*) R. *v.* Whiting, 7 C. & P. 771. See R. *v.* Dowse, 4 F. & F. 492.

(*r*) R. *v.* Stannard, *ubi sup.*

(*s*) 61 & 62 Vict. c. 36, s. 1 (*b*), *post*, p. 2271.

(*ss*) R. *v.* Rhodes [1899], 1 Q.B. 77, 83.

a reply is to postpone the summing up of the case by counsel for the prosecution until after the evidence of the defendant has been taken (*t*), and if the person charged gives evidence on his own behalf, counsel for another defendant cannot put further questions to him without giving the Crown a right to reply. If, however, his evidence has been hostile to the other defendant, counsel for that defendant may cross-examine him without giving the Crown a right to reply (*u*).

Counsel for the defence is not entitled 'to state to the jury as alleged existing facts matters which he has been told in his instructions on the authority of the prisoner, but which he does not propose to prove in evidence' (*v*), but in summing up the evidence given or statements made for the defence he is not restricted to remarks on the evidence of his witnesses but has all the latitude of an advocate to say what he thinks desirable on the whole case (*w*).

Where the defendant is not called as a witness on his own behalf he is free to make an unsworn statement to the jury (*x*). His right to make such statement as to the facts (*y*) seems to be cumulative upon and not

(*t*) R. *v.* Gardner [1899], 1 Q.B. 150; 68 L. J. Q.B. 42.

(*u*) R. *v.* Hadwen [1902], 1 K.B. 882: 71 L. J. K.B. 581.

(*v*) Resolution of the judges, 26 Nov. 1881. The decisions had till then been conflicting on this point. See R. *v.* Weston, 14 Cox, 346. R. *v.* Butcher, 2 M. & Rob. 228. R. *v.* Beard, 8 C. & P. 142.

(*w*) R. *v.* Wainwright, 13 Cox, 171, Cockburn, C.J.

(*x*) This right is preserved by 61 & 62 Vict. c. 36, s. 1 (*b*), *post*, p. 2272. R. *v.* Pope, 17 T. L. R. 717, Phillimore, J.

(*y*) The right when the prisoner is defended seems to be limited to facts and not to extend to arguments. See R. *v.* Everett, 97 C. C. C. Sess. Pap. 333, Hawkins, J. The following earlier decisions on the subject are included for reference. In R. *v.* Beard, 8 C. & P. 142, Coleridge, J., ruled that, 'If the prisoner does not employ counsel, he may make a statement for himself, and tell his own story, which is to have such weight with the jury as, all circumstances considered, it is entitled to; but if he employs counsel he must submit to the rules which have been established with respect to the conduct of cases by counsel.' And in R. *v.* Boucher, 8 C. & P. 141, he held that after the prisoner's counsel had addressed the jury for him, the prisoner himself was not at liberty also to address them. But in R. *v.* Malings, 8 C. & P. 242, where on an indictment for maliciously wounding the prosecutor when no other person was present, the prisoner had made a statement before the magistrate, which was not put in by the counsel for the prosecution. Alderson, B., permitted the prisoner to make a statement before his counsel addressed the jury, and then his counsel addressed the jury and commented on the prisoner's statement as according with the evidence, and only supplying what was otherwise deficient in it. He said, 'I think it is right that a person should have an opportunity of stating such facts as he may think material, and that his counsel should be allowed to comment on that statement, as one of the circumstances of the case. On trial for high treason the prisoner is always allowed to make his own statement after his counsel has addressed the jury. It is true that the prisoner's statement may often defeat the defence intended by his counsel; but if so, the ends of justice will be furthered; besides, it is often the genuine defence of the party, and not a mere imaginary case invented by the ingenuity of counsel.' And in R. *v.* Walking, 8 C. & P. 243, Gurney, B., after conferring with Alderson, B., allowed a similar course to be adopted, but said he thought it ought not to be drawn into a precedent; and the prisoner read a written statement. The report does not state what the particular facts were in this case. Alderson, B., allowed the same course in R. *v.* Dyer, 1 Cox, 113, and R. *v.* Williams, 1 Cox, 363; and in R. *v.* Manzano, 2 F. & F. 64, Martin, B., after consulting Channell, B., allowed the same course, as there was a precedent for it (in 8 C. & P.), although he was entirely opposed to the practice. But where on an indictment for child-murder the two previous cases in 8 C. & P. were cited, and permission asked for the prisoner to make a statement, Patteson, J., said, 'The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed. If the prisoner were allowed to make a statement, and stated as a fact anything which could not be proved by evidence the jury should dismiss that statement from their minds;

alternative upon his right to be defended by counsel (*z*). There has been a divergence of practice as to the time when an unsworn statement should be made by a prisoner defended by counsel. Before the Criminal Evidence Act, 1898, the majority of the judges considered that the statement should be made *after* the address of the prisoner's counsel (*a*), when no witnesses were to be called for the defence. The practice now most generally adopted is for the prisoner to make his statement *before* counsel for the prosecution sums up his case and before the speech of counsel for the defence (*b*). There are rulings that the making of the unsworn statement gives the prosecution a reply (*c*) though to call a prisoner as sole witness for the defence does not in itself give the prosecution a reply (*d*).

When two or more defendants are tried together and sever in their defences the order of proceedings with reference to the summing up or reply for the prosecution and to speeches for the defence is regulated in the manner prescribed by 28 & 29 Vict. c. 16, s. 2 (*ante*, p. 1998), as modified by the provisions of the Criminal Evidence Act, 1898.

When one of the defendants is not defended by counsel it is for the judge to decide whether his statement of facts or speech, if any, shall precede or follow the address of counsel for other defendants.

When evidence (other than that of a defendant) is adduced for one defendant but not for others, the last word is with the defendant who has called no evidence or for his counsel, whose address to the jury will follow the reply for the prosecution, on the whole case against the other defendants, and the summing up of the prosecution on the case against the defendant, who has not called evidence (*e*). If the evidence adduced by one defendant applies to all defendants the prosecution seems to be entitled to the last word (*f*).

Reply where the Crown is directly represented.—By rule 5 of the rules of practice agreed by the judges in 1837 (*g*), 'In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner.'

but if what the prisoner states is really a comment on what is already in evidence, his counsel can do that much better than he can.' The prisoner did not make any statement. R. *v.* Rider, 8 C. & P. 539. And where on an indictment for a misdemeanor in uttering base coin, a prisoner wished to make a statement of facts to the jury before his counsel addressed them, and it was said that Denman, C.J., had allowed it to be done; Bosanquet, J., refused to permit it, and observed that he was not informed of the circumstances of the cases decided on this Act, which he thought could only be meant to put prisoners in the same situation in felonies as they were in before in misdemeanors, and in those cases certainly a defendant could not be allowed the privilege of two statements, one by himself, and one by his counsel. R. *v.* Burrows, 2 M. & Rob. 124. And in R. *v.* Taylor, 1 F. & F. 535, where R. *v.* Dyer, *supra*, and R. *v.* Malings, *supra*, were cited, Byles, J., refused to allow the prisoner to state his defence before his counsel addressed the jury, but gave the prisoner the option of either speaking himself or having his counsel speak for him. No facts are stated in this case, which was a Mint prosecution.

(*z*) See 61 & 62 Vict. c. 36 s. 1 (*h*) *post*, p. 2272.

(*a*) R. *v.* Shimmin, 15 Cox, 122, Cave, J. Coleridge, C.J., disapproved of the rule. R. *v.* Millhouse, 15 Cox, 622.

(*b*) R. *v.* Sherriff, 20 Cox, 334, Darling, J. R. *v.* Pope, 17 T. L. R. 717; following on this point, R. *v.* Doherty, 16 Cox, 306, Stephen, J.

(*c*) R. *v.* Doherty, *ubi sup.*

(*d*) *Ante*, p. 1999.

(*e*) R. *v.* Kain, 15 Cox. 388, Stephen, J. R *v.* Burns, 16 Cox, 195, Day and Smith, JJ. R. *v.* Trevelli, 15 Cox, 289, Hawkins, J.

(*f*) R. *v.* Davis, 17 T. L. R. 164, Lawrance, J., and see R. *v.* Hayes, 2 M. & Rob. 155.

(*g*) 7 C. & P. 677.

The exceptional right thus recognised has been much criticised (*h*), and the judges at a meeting in December 1884 (*i*), resolved that in those Crown cases in which the Attorney- or Solicitor-General is personally engaged, where no witnesses are called for the defence it is to be allowed as of right to the counsel for the Crown and *in no others*.

Sect. III.—Judgment on Conviction of Felony or Misdemeanor tried on a Record of the High Court (K.B.D.).

The Crown Office Rules, 1906 provide as follows:—

Rule 161. 'Upon every trial, whether at the assizes or at the sittings in London or Middlesex, the proper officer shall enter in a book to be

(*h*) The recorded instances in which the right has been claimed and recognised are collected in 2 St. Tr. (N. S.) 1019. See R. *v.* Williams [1797], 26 St. Tr. 661, 696 (right exercised by Erskine). R. *v.* Sheridan [1811], 31 St. Tr. 709. In R. *v.* Marsden [1829], M. & M. 439, an indictment for publishing a libel on the Duke of Wellington, the Attorney-General, instructed by the Solicitor for the Treasury, conducted the prosecution, and stated, in answer to an objection that he was not entitled to reply, that he appeared in his official capacity. Tenterden, C.J., said, 'There is no doubt of the rule; wherever the King's counsel appears officially, he is entitled to reply.' But on the same day in R. *v.* Bell, ibid. 440, a criminal information for a libel on the Lord Chancellor, the Attorney-General stated that he appeared as the counsel and private friend of the Lord Chancellor, and, no evidence being offered in defence, he did not reply. In R. *v.* Gardner [1845], 1 C. & K. 628, an indictment for stealing money out of a post letter, Whately, Q.C., claimed the reply, as he represented the Attorney-General; but it was urged that this was like a prosecution by any other of the public departments. Pollock, C.B., 'If this is a prosecution by the Attorney-General, those who represent him, though not usually counsel for the Crown, have the right to reply, as in the Mint cases at the Old Bailey.'

In R. *v* Christie [1858], 7 Cox, 506, an indictment for murder on the sea, Bliss, Q.C., at the close of the case for the prosecution, claimed the reply under any circumstances, as he appeared *ex officio* as Attorney-General of the County Palatine of Lancaster; Martin, B., 'I cannot admit your claim; the right is a very objectionable one; I shall limit it wherever possible, and I wish I could prevent even the Attorney-General of England from exercising it.'

In R. *v.* Esdaile [1858], 1 F. & F. 237, Atherton, A.-G., exercised the right without objection.

In R. *v.* Taylor [1858], 1 F. & F. 535, a Mint prosecution on circuit, Byles, J., would not admit the right of reply by counsel for the Crown. Mr. Greaves says, 'On the Oxford circuit I never knew the right to reply claimed in a Mint case. I was myself counsel for the Mint at Hereford, Monmouth and Gloucester for many years, and never claimed, or had it suggested to me that I should claim the reply where no evidence had been given for the prisoner.'

In R. *v.* Beckwith [1858], 7 Cox, 505, an indictment for forging voting papers at an election of guardians of the poor, the prosecution had been directed by the Poor Law Board, and Bliss, Q.C., stated that he appeared for the Attorney-General and claimed the reply, citing R. *v.* Gardner; but Byles, J., said, 'I am of opinion that the right to reply where the prisoner calls no witnesses ought to be limited to the Attorney-General when prosecuting in person, and if I could do so, I would not allow it even in that case. I certainly cannot permit it under any other circumstances,' and refused to allow a reply.

In R. *v.* McCubrey [1869], 70 Cent. Crim. Ct. Sess. Pap. 540. On an indictment for conspiracy to steal goods from the Royal Arsenal at Woolwich, Brett, J., denied that the right existed except in favour of the law officers in person.

In R. *v.* Waters [1870], 72 Cent. Crim. Ct. Sess. Pap. 565, on an indictment for murder Kelly, C.B., said that the right existed by prerogative from time immemorial and could be exercised whether the law officers appeared personally or were represented by some other counsel. The same view was expressed by Channell, B., in R. *v.* Dixblanc [1872], 76 Cent. Crim. Ct. Sess. Pap. 124, and said not to be affected by 28 & 29 Vict. c. 18, s. 2, and by Hawkins, J., in R. *v.* Wood [1877], 88 Cent. Crim. Ct. Sess. Pap. 261, and in R. *v.* Moriggia [1878], 88 Cent. Crim. Ct. Sess. Pap. 352, a bankruptcy prosecution instituted by the Treasury, in which counsel for the Crown claimed the reply.

(*i*) Present: Coleridge, L.C.J., Denman, J., Pollock, B., Field, J., Huddleston, B., Manisty, Lopes, Stephen, Mathew, Cave, Day, A. L. Smith, and Wills, JJ. 5 St. Tr. (N. S.) 3 n.

kept for that purpose,—1st, the verdict of the jury and all such findings of fact, if any, as the Judge may direct to be entered; 2nd, the directions if any, of the Judge as to judgment; 3rd, the certificates, if any, granted by the Judge; and the sentence of the Judge if then passed. A certificate, signed by such officer, of such verdict, finding, or direction, judgment, or sentence shall be transmitted to the Crown Office by such officer, and judgment upon the *postea* may be entered at the Crown Office at any time after the expiration of the time (*j*), limited for applying for a new trial, or for entering judgment *non obstante veredicto*, or arresting judgment unless otherwise ordered: the certificate shall be in the form No. 103 in the Appendix with such variations as circumstances may require' (*k*).

Rule 162. 'On all trials for felonies or misdemeanors in the King's Bench Division, except upon information filed by leave of the court and ex-officio information (*l*), where the Attorney-General shall pray that the judgment may be postponed, judgment may be pronounced during the sittings or assizes at which the trial has taken place by the judge before whom the verdict has been taken, as well upon the defendants who shall have suffered judgment by default or confession as upon those who shall have been tried and convicted, and whether such persons be present or not in court' (*m*).

Rule 163. 'The Judge whom the trial shall be had may either issue an immediate order or warrant for committing the defendant in execution, or respite the execution of the judgment on such terms, as he shall think fit, and for such time as may be necessary for the purpose of enabling the defendant to move for a new trial (*j*), or in arrest of judgment, and if imprisonment be part of the sentence, may order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison.'

(*j*) The power of moving for a new trial, which was limited to cases of misdemeanors, is abolished and superseded by the provisions of the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), *post*, p. 2005.

(*k*) See Short & Mellor, Cr. Pr. (2nd ed.) 122.

(*l*) The exception applies only to misdemeanors.

(*m*) This rule reproduces r. 172 of the Crown Office Rules, 1886, which was framed from 11 Geo. IV. & 1 Will. IV. c. 70, s. 9, repealed in 1888 (S.L.R.).

SECT.

THE
ceased
state
fully
BI
cases
trary
or Ir
NO
in cri
High
insta
felon
as un
was i
Act,
existi
for n
aboli
W
on in
Atto
(K.B
of A
of ap
in th

(a)
et seq.
Excep
(b)
15; 1
(*treas*
Paget
(K.B.
Hard
(c)
883.
10 Co
R. *v.*
[1858
v. R.
Re H
(Ir.)
(d)

CHAPTER THE FOURTH.

CRIMINAL APPEAL.

SECT. I.—FORMER MODES OF REVIEW, &C., OBSOLETE IN ENGLAND.

THE following modes of reviewing decisions in criminal cases have ceased to exist in England: and it is not proposed to do more than state briefly their nature and to refer to the works in which they are more fully discussed.

Bill of Exceptions.—Bills of exceptions, commonly used in criminal cases in the United States (*a*), have, after certain expressions of a contrary opinion (*b*), been declared not to apply to criminal cases in England or Ireland (*c*).

New Trials.—Motions for a new trial have never been allowed except in criminal cases tried on a record of the Court of King's Bench or the High Court of Justice (K.B.D.) in England and Ireland (*d*). In one instance such a motion was granted on a conviction in England of felony (*e*), but in later cases of high authority this decision was described as unprecedented and not warranted by law: and the grant of new trials was in practice limited to misdemeanors (*f*). By the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23) s. 20 (1), the powers and practice existing in the High Court of Justice, *England*, in respect of motions for new trials or the granting thereof in criminal cases in England were abolished as to persons convicted after April 18, 1908 (*g*).

Writ of Error.—Legal errors in a record of conviction or acquittal on indictment might be corrected by writ of error issued by leave of the Attorney-General (*h*). The writ was returnable in the High Court (K.B.D.), but the decision of that Court was reviewable by the Court of Appeal, and the decision of that Court might be made the subject of appeal to the House of Lords (*i*). The last writ of error considered in that tribunal was Castro *v.* R. (*j*), and writs of error were abolished

(*a*) Bishop Amer Cr. Law, vol. i., ss. 1001 *et seq.*; Bouvier Law Lexicon, *tit.* 'Bill of Exceptions.'

(*b*) Sir H. Vane's case, 1 Lev. 68; Kel (J.) 15; 1 Sid. 85; 1 Keb. 324; 6 St. Tr. 119 (*treason*). 2 Hawk. c. 46, s. 210. R. *v.* Lord Paget, 1 Leon. 5. R. *v.* Nutt, 1 Barnard (K.B.), 307. R. *v.* Preston, Cas. K.B. *temp.* Hardwicke, 249 (misdemeanor).

(*c*) R. *v.* Edmonds, 1 St. Tr. (N.S.) 785, 883. R. *v.* Rice, 2 Cox, 118. R. *v.* Jelly, 10 Cox, 553. R. *v.* Esdaile, 1 F. & F. 213. R. *v.* Alleyne, Dears. 505. R. *v.* Brown [1858], Archb. Cr. Pl. (23rd ed.) 291. Mansell *v.* R., 8 St. Tr. (N.S) 831; 8 E. & B. 54. *Re* Haynes and Rice, 3 Jones and Latouche (Ir.) 568.

(*d*) Archb. Cr. Pl. (23rd ed.) 291.

(*e*) R. *v.* Scaife, 17 Q.B., 238; 2 Den. 281; 20 L. J. M. C. 229.

(*f*) R. *v.* Mawbey, 6 T. R. 619, 622. R. *v.* Bertrand, L. R. 1 P. C. 520; 36 L. J. P. C. 51. R. *v.* Murphy, L. R. 2 P. C. 535; 38 L. J. P. C. 53. Cf. *Re* Eduljee Byramjee, 5 Moore P. C. 276, 289; 13 E. R. 496.

(*g*) See R. *v.* Dyson [1908], 2 K.B. 454; 77 L. J. K. B. 813. R. *v.* Stoddart, 25 T. L. R. 612, 617; 73 J. P. 348, 351.

(*h*) See Short & Mellor, Cr. Off. Pr. (1st ed.) 312. Archb. Cr. Pl. (23rd ed.) 282.

(*i*) Crown Office Rules 1906, rr. 156, 159; and see Short & Mellor, Cr. Pr. (2nd ed.) 142: Archb. Cr. Pl. (23rd ed.) 291.

(*j*) 6 A. C. 229: 50 L. J. Q. B. 497.

in England by sect. 20 (1) of the Criminal Appeal Act, 1907, as to persons convicted after April 18, 1908.

Sect. II.—Venire de Novo, Arrest of Judgment and Certiorari.

'Venire de novo.'—The Court of trial has power to discharge the jury before verdict and direct a fresh jury to be sworn (*venire de novo juratores*), if in the opinion of the judge such a course is necessary (*k*). The discretion of the Court as to necessity is not subject to review, but should not be exercised merely because witnesses for the Crown have not arrived (*kk*). A like power is said to exist after verdict when there has been some irregularity in the proceedings not affecting the merits, but amounting to a mistrial, as cases of defects of jurisdiction, or in cases of verdicts so imperfect (*l*), or so insufficiently worded, or so ambiguous or inconsistent that no judgment can be founded thereon (*m*). *Venire de novo*, if not granted at the trial, was granted under a writ of error (*n*), or by the King's Bench Division on a rule *nisi* (*o*). The Court of Criminal Appeal has no express power conferred on it by the Criminal Appeal Act, 1907, to grant a *venire de novo*, and as sect. 4 (1) of the Act, after providing for the cases in which that Court shall allow an appeal enacts that the Court 'in any other case shall dismiss the appeal' it seems doubtful whether that Court has power to award a *venire de novo* at all (*p*).

Motions in Arrest of Judgment.—The powers of the High Court (K.B.D.) to entertain motions to a Divisional Court to arrest judgment, or enter judgment *non obstante veredicto* as a criminal case tried on a record of the K. B. D., have not been specifically abolished by the Criminal Appeal Act, 1907 (*q*).

'Certiorari.'—The Court of *certiorari* has rarely if ever been used as a means to remove the record of an indictment and trial in an inferior Court

(*k*) Winsor *v.* R., L. R. 1 Q.B. 289, 390; 35 L. J. M. C. 121, 161. R. *v.* Shields, 28 St. Tr. 619, 646. R. *v.* Cobbett, 2 St. Tr. (N. S.) 789, 903. R. *v.* Newton, 13 Q.B. 716; 18 L. J. M. C. 201. R. *v.* Davison, 8 Cox, 360. R. *v.* Charlesworth, 1 B. & S. 460; 31 L. J. M. C. 25. R. *v.* Bertrand, L. R. 1 P. C. 520; 36 L. J. P. C. 51. R. *v.* Ward, 10 Cox, 573. R. *v.* Gould, 3 Burn's Just. (30th ed.) 98. R. *v.* Scalbert, 2 Leach, 620. R. *v.* Beere, 2 M. & Rob. 472. R. *v.* Ashe, 1 Cox, 150. R. *v.* Edwards, R. & R. 224. R. *v.* Phillips, 11 Cox, 142. R. *v.* Streek, 2 C. & P. 413. R. *v.* Stevenson, 2 Leach, 546. R. *v.* Stokes, 6 C. & P. 151. Kinlock's case, Fost, 16, 31. R. *v.* Deane, 5 Cox, 501. R. *v.* Wedderburn, Fost, 22, 30. R. *v.* Wade, 1 Mood 86. Cf. R. *v.* Grand, 3 N. S. W. State Rep. 216. As to the American view, see Dreyer *v.* Illinois, 187 U. S. 71.

(*kk*) R. *v.* Lewis [1909], 73 J. P. 346.

(*l*) 1 Wils. (K.B.) 56.

(*m*) Evans *v.* R., 7 Cox, 151 (Ir.). R. *v.* Murphy, L. R. 2 P. C. 535, 538; 38 L. J. P. C. 53, 133. R. *v.* Woodfall, 5 Burr. 2661. R. *v.* Oxfordshire, 13 East, 411, 416 n. R. *v.* Day, Sayer, 202. R. *v.* Peters, 1 Burr. 568. R. *v.* Oxford Corporation, 3 N. & M. 877.

(*n*) *Vide ante*, p. 2005, and see R. *v.* Edmonds, *ante*, p. 2005. Evans *v.* R. (*supra*). Campbell *v.* R., 11 Q.B. 799. Witham *v.* Lewis, 1 Wils. (K.B.) 48. R. *v.* Fowler, 4 B. & Ald. 273.

(*o*) See R. *v.* Murphy, *supra*. R. *v.* Mawbey, 6 T. R. 619, 640. The jurisdiction of the King's Bench Division to grant a *venire de novo* does not seem to be affected by the Criminal Appeal Act, 1907.

(*p*) R. *v.* Yeadon, L. & C. 81, 31 L. J. M. C. 70, seems to be the only reported case of a *venire de novo* being granted by the Court for Crown Cases Reserved. See s. 20 (4) of the Criminal Appeal Act, 1907 (*post*, p. 2009), as to the transfer to the Court of Criminal Appeal of the jurisdiction under the Crown Cases Act, 1848.

(*q*) See Short & Mellor, Cr. Pr. (2nd ed.) 142. Crown Office Rules, 1906, r . 15[illegible].

after verdict and judgment (*r*), although it might properly be used to remove a special verdict into the High Court (K.B.D.) (*s*). But where a person convicted at the assizes, and put under recognizances to come up for judgment, and in the meantime to keep the peace and (or) be of good behaviour, a *certiorari* may be issued to bring up the indictment, conviction, and recognizance with a view to passing judgment on the offender and (or) estreat of the recognizance (*t*).

SECT. III.—PRESENT MODES OF APPEAL.

On convictions in criminal cases other than indictments at common law for nuisance to highways, the following modes of appeal now exist:—

1. Under the Crown Cases Act, 1848 (*u*) (11 & 12 Vict. c. 78), by case stated by the judge on a question of law arising on the trial. Under this enactment it has been held that misreception of evidence avoids the conviction, although there was also sufficient legal evidence upon which to convict (*v*).

2. Under the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), by appeal against conviction, on questions of law or fact, or of mixed law and act, or against the sentence. Under this Act the Court may, it would seem, dismiss the appeal, even in the case of misreception of evidence, if they consider that no substantial miscarriage of justice has actually occurred (*w*).

3. In the case of indictments at common law for obstruction, or non-repair, of a highway or public bridge, or navigable river the appeal is to the Civil Court of Appeal created by the Judicature Acts (*x*).

(a) '*The Crown Cases Act*, 1848' (*y*).

By this Act, sect. 1, 'When any person shall have been convicted of any treason, felony, or misdemeanor before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial (*z*), for the consideration of the justices

(*r*) See Crown Office Rules, 1906, r. 12. Short & Mellor, Cr. Pr. (2nd ed.) 16; Archb. Cr. Pl. (23rd ed.), 129, 291.

(*s*) Short & Mellor, Cr. Pr. (2nd ed.), 121.

(*t*) R. *v.* Mul Luchman, (K.B.D.) Jan. 18 [1909], 44 L. J. (Newsp.) 60; March 24 [1909], 25 T. L. R.

(*u*) Before this Act it was the practice of the judge of assize if he doubted whether he had admitted inadmissible evidence, or whether the evidence established the crime charged, to forbear to pass sentence or respite judgment and submit the case for the opinion of all the common law judges.

(*v*) R. *v.* Gibson, 18 Q.B.D. 537; 56 L. J. M. C. 49. Cf. Makin *v.* Att.-Gen. for New S. Wales [1894], A. C. 57. Connor *v.* Kent [1891], 2 Q.B. 547.

(*w*) 7 Edw. VII. c. 23, s. 4 (1) proviso. See R. *v.* Meyer [1908], 99 L. T. 602: 1 Cr. App. R. 10: 24 T. L. R. 620.

(*x*) 7 Edw. VII. c. 23, s. 20 (3). This enactment does not in terms prohibit statement of a case on conviction on such an indictment; and it is not clear whether indictments under 41 & 42 Vict. c. 77 are within the rule as to appeals.

(*y*) 11 & 12 Vict. c. 78, passed Aug. 31, 1848. The Act applies to England and Ireland but not to Scotland (s. 7). As to Ireland it continues in force unaffected by the Criminal Appeal Act, 1907.

(*z*) Including motions to quash the indictment, R. *v.* Webb, 1 Den. 137: or motions in arrest of judgment, R. *v.* Martin, 1 Den. 398: or as to the legality of sentence, R. *v.* Summers, L. R. 1 C. C. R. 182: but not on demurrer, R. *v.* Faderman, 1 Den. 565. Even where a defendant has pleaded guilty a case can be reserved under this Act. R. *v.* Brown, 24 Q.B.D. 357. R. *v.* Plummer [1902], 2 K.B. 339, which disapproved R. *v.* Clark, L. R. 1 C. C. R. 54.

of either bench and barons of the exchequer (*a*), and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the court (of trial) in its discretion shall commit the person convicted to prison, or shall take a recognisance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be.'

Sect. 2. 'The judge or commissioner or court of quarter sessions shall thereupon state (*aa*), in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen (*b*); and such case shall be transmitted to the said justices and barons, and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions (*aa*), and thereupon to reverse, affirm, or amend any (*c*) judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said justices and barons, shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record, in proper form; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case (*d*), shall be delivered or transmited by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment as the same shall be so certified to have been affirmed or amended and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next Court

(*a*) See s. 20 (4) of the Criminal Appeal Act, *post*, p. 2009 and rule 26, *post*, p. 2015.

(*aa*) Now in England of the Court of Criminal Appeal, 7 Edw. VII. c. 23, s. 20 (4) *post*, p. 2009.

(*b*) The case should briefly state the questions of law reserved, and such facts as raise these questions, and the judge stating the case is not to adopt as part of the case a transcript of the shorthand notes of proceedings at the trial. R. *v.* Gray 68 J. P. 40.

(*c*) See R. *v.* Saunders [1899], 1Q.B. 490, under this Act, and cf. R. *v.* Harrison, 2 Cr. App. R. 94, and R. *v.* Boxall, ibid. 175, under the Criminal Appeal Act, 1907.

(*d*) See Archb. Cr. Pl. (23rd ed.), p. 274, for the forms of certificates.

of oyer and terminer and gaol delivery or sessions of the peace shall vacate the recognisance of bail, if any; and if the Court of oyer and terminer and gaol delivery or Court of quarter sessions shall be directed to give judgment, the said Court shall proceed to give judgment at the next session' (*e*). Regulations as to cases under the Act were made on June 1, 1850 (*f*).

By the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 20, sub-s. 4, 'All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials, which is transferred to the judges of the High Court by sect. 47 of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act . . .' (*g*).

By sect. 4, of the act of 1848, 'The said justices and barons, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended.'

By sect. 6, 'Every person who shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any certificate of or copy certified by a chief justice, or any certificate of or copy certified by a clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice, shall be guilty of felony, and being convicted thereof shall be liable to be transported for any term not exceeding ten years' (*h*).

(b) *The Criminal Appeal Act*, 1907 (7 *Edw. VII. c.* 23).

'An Act to establish a Court of Criminal Appeal, and to amend the Law relating to Appeals in Criminal Cases (28th August, 1907).'

Constitution of Court of Criminal Appeal.—Sect. 1. (1) There shall be a Court of Criminal Appeal, and the Lord Chief Justice of England and *all* the judges of the King's Bench Division of the High Court shall be judges of that Court (*i*).

(2) For the purpose of hearing and determining appeals under this Act, and for the purpose of any other proceedings (*j*) under this Act, the Court of Criminal Appeal shall be summoned in accordance with directions given by the Lord Chief Justice of England *with the consent of the Lord Chancellor*, and the Court shall be duly constituted if it consists of not less than three judges and of an uneven number of judges.

If the Lord Chief Justice so directs, the Court may sit in two or more divisions.

The Court shall sit in London except in cases where the Lord Chief Justice gives special directions that it shall sit at some other place.

(*e*) Ss. 3 and 5 were repealed as to England by 7 Edw. VII. c. 23, s. 22, *post*, p. 2038.

(*f*) They are printed in Archb. Cr. Pl. (23rd ed.) 277.

(*g*) On appeals on law the Court may direct procedure by case stated under the Act of 1848, *infra*.

(*h*) The words omitted are repealed as to punishments. See 54 & 55 Vict. c. 69, s. 1, *ante*, Vol. i. pp. 211, 212.

(*i*) The Act of 1907 provided that eight judges of the K.B.D. appointed for the purpose by the L.C.J. with the consent of the Lord Chancellor, should be the judges of the Courts. The section as printed represents the change effected by the Criminal Appeal Amendment Act, [1908] 8 Edw. VII. c. 46, s. 1.

(*j*) As to the power of a single judge of the Court, *vide post*, s. 17, p. 2024.

(3) The Lord Chief Justice, if present, and in his absence the senior member of the Court, shall be president of the Court.

(4) The determination of any question before the Court of Criminal Appeal shall be according to the opinion of the majority of the members of the Court hearing the case.

(5) Unless the Court direct to the contrary in cases where, in the opinion of the Court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court, the judgment of the Court shall be pronounced by the president of the Court or such other member of the Court hearing the case as the president of the Court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the Court.

(6) If in any case the director of public prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that Court to any other Court.

(7) The Court of Criminal Appeal shall be a superior Court of Record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the Court.

(8) Rules of Court shall provide for securing sittings of the Court of Criminal Appeal, if necessary, during vacation (*k*).

(9) Any direction which may be given by the Lord Chief Justice under this section may, in the event of any vacancy in that office, or in the event of the incapacity of the Lord Chief Justice to act from any reason, be given by the senior judge of the Court of Criminal Appeal.

Sect. 2 provides for the appointment of a Registrar of the Court of Criminal Appeal. As amended by sect. 2 of the Criminal Appeal Act, 1908 (8 Edw. VII. c. 46), it makes the Master of the Crown Office Registrar of the Court, and provides for an Assistant Registrar.

Right of Appeal in Criminal Cases.—By sect. 3, 'A person convicted (*l*) on indictment may appeal under this Act to the Court of Criminal Appeal—

(a) Against his conviction on any ground of appeal which involves a question of law alone (*m*); and

(*k*) The Criminal Appeal Rules provide (rule 50) that 'the judges of the Court of Criminal Appeal shall make arrangements for any sittings that may be necessary between the 1st of August and the 12th of October.'

(*l*) *i.e.* by verdict, or on his own confession; even a false plea of guilty. R. *v.* Verney, 73 J. P. 288. This section does not give an appeal against the verdict of a jury on the preliminary question whether the accused is fit to plead and take his trial. R. *v.* Jefferson, 1 Cr. App. R. 95, 96: 72 J. P. 467.

(*m*) Where a case is stated by the judge under the Crown Cases Act, 1848, *ante*, p. 2007, the convicted person is deemed to be an appellant who has appealed under this section. See Rule 26 (d). *post*, p. 2015.

(b) With the leave of the Court of Criminal Appeal (*n*), or upon the certificate (*o*) of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact (*p*), or any other ground which appears to the Court to be a sufficient ground of appeal; and

(c) With the leave of the Court of Criminal Appeal (*n*) against the sentence passed on his conviction (*q*), unless the sentence is one fixed by law' (*r*).

By the Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), s. 11, 'a person sentenced to preventive detention (*s*) may, notwithstanding anything in the Criminal Appeal Act, 1907, appeal against the sentence without the leave of the Court of Criminal Appeal' (*t*).

By the Children Act, 1908 (8 Edw. VII. c. 67), s. 99, sub-s. 6, 'a parent or guardian may appeal against an order under this section (*u*), . . . (*b*) if made by a Court of Assize or a Court of Quarter Sessions to the Court of Criminal Appeal in accordance with the Criminal Appeal Act, 1907, as if the parent or guardian against whom the order is made had been convicted on indictment, and the order were a sentence passed on his conviction' (*v*).

By sect. 20 (2) of the Act of 1907, 'This Act shall apply in the case of convictions on criminal informations and coroners' inquisitions and in cases where a person is dealt with by a Court of Quarter Sessions as an incorrigible rogue under the Vagrancy Act, 1824 (*w*), as it applies in the case of convictions on indictments (*x*), but shall not apply in the case of convictions on indictments or inquisitions charging any peer or peeress, or other person claiming the privilege of peerage, with any offence not now lawfully triable by a Court of Assize (*y*).

(3) 'Notwithstanding anything in any other Act, an appeal shall lie from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river

(*n*) A single judge of the Court may give leave to appeal. See sect. 17, *post*, p. 2034.

(*o*) A form of certificate is given in the Schedule to the Criminal Appeal Rules [1908]. By Rule 6 (*b*) 'The judge of the court of trial may, in any case in which he considers it desirable so to do, inform the person convicted before or sentenced by him that the case is in his opinion one fit for an appeal to the Court of Appeal under sect. 3 (*b*), and may give to such person a certificate to that effect in the form (I.) in the schedule to these Rules.'

(*p*) In cases of alleged misdirection, leave to appeal seems to be unnecessary. R. *v.* Meyer, 1 Cr. App. R. 10; 99 L. T. 602.

(*q*) Whether a verdict or plea of guilty; and see definition in s. 21, *post*, p. 2037.

(*r*) *e.g.* judgment of death for murder (R. *v.* Lord, 1 Cr. App. R. 110), or orders made on a verdict of guilty but insane. On appeal against sentence turning only on questions of fact only one counsel will be heard. R. *v.* Weaver, 1 Cr. App. R. 12. On appeal against sentence as being wrong in law, leave is necessary. See R. *v.* Davidson, 2 Cr. App. R. 38.

(*s*) *Ante*, Vol. i. p. 240.

(*t*) This Act came into force on Aug. 1, 1909, s. 19 (1).

(*u*) *i.e.* that the parent or guardian of a person under 16 should pay a fine, damages or costs, in respect of an offence by the child or ward, or give security for the good behaviour of the child or ward. The order is not made if the Court is satisfied that the parent or guardian has not conduced to the commission of the offence by neglecting to exercise due care of the child or ward. S. 99 (1), (2).

(*v*) The Act came into force on April 1, 1909, s. 134 (2).

(*w*) 5 Geo. IV. c. 83, s. 3.

(*x*) In such cases the appeal is against sentence only. R. *v.* Brown, 72 J. P. 427; R. *v.* O'Brien, 2 Cr. App. R. 193; R. *v.* Johnson [1909], 1 K.B. 439. As to reference of such cases to the Court under s. 19, see R. *v.* Johnson, *ubi supra*.

(*y*) As to trial of such persons, see R. *v.* Earl Russell [1901], A. C. 446; 20 Hen. VI. c. 9; 4 & 5 Vict. c. 22.

in whatever Court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes, and shall not lie under this Act ' (*z*).

Determination of Appeals in Ordinary Cases.—By sect. 4. ' (1) (*zz*) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice (*a*), and in any other case shall dismiss the appeal (*b*):

' Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage (*c*) of justice has actually occurred.'

' (2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the

(*z*) See R. S. C. Order xxxix. Ann. Pr. 1909, p. 561, and see *ante*, p. 2007.

(*zz*) As to the effect of this subsection and the proviso, see R. *v.* Cohen, 73 J. P. 352.

(*a*) See R. *v.* Tate [1908], 2 K.B. 680; 77 L. J. K.B. 1043. R. *v.* Beauchamp, 25 T. L. R. 330 (failure to caution the jury against accepting the uncorroborated evidence of an accomplice): R. *v.* Coleman, 72 J. P. 425, and R. *v.* Mason, 2 Cr. App. R. 60 (misdirection as to facts). Cf. R. *v.* Hayes, ibid. 70. In R. *v.* Preston (1909), 1 K.B. 568, the conviction was quashed where evidence of previous convictions was improperly admitted. In R. *v.* Joyce, 72 J. P. 483: a conviction was quashed on the ground that the judge had misdirected the jury by treating a statement made by the prisoner as a confession of guilt, though it was consistent with innocence. See also R. *v.* Warren, 73 J. P. 359 (corroboration). R. *v.* Warner, 73 J. P. 73 (stopping prisoner's explanation). R. *v.* Deana, ibid. 399 (not putting defence to jury). R. *v.* Westacott, ibid. 192.

(*b*) There is no power to grant a new trial. R. *v.* Dyson [1908], 2 K.B. 454: 77 L. J. K.B. 813. R. *v.* Colclough, 73 J. P. 148. If other untried indictments have been found against the appellant he will not be discharged when the appeal is allowed; but remanded in custody to take his trial on such indictments or until he is otherwise lawfully discharged of the same. R. *v.* Sovoski [1908], 72 J. P. 435.

(*c*) In R. *v.* Meyer, 1 Cr. App. R. 10, 12, Lord Alverstone, C.J., said that probably one test as to whether there had been a miscarriage of justice was that the facts proved should be consistent with innocence, and not consistent with guilt. See R. *v.* O'Sullivan, ibid. 36. In R. *v.* Dyson, *ubi sup.*, the jury had been misdirected by the judge at the trial. The Court of Criminal Appeal were of opinion that had the jury been properly directed they would in all probability on the evidence have convicted the prisoner, but the Court refused to act under this proviso, as they were unable to say that the jury must have convicted. In R. *v.* Stoddart, 25 T. L. R. 612, 617, the Court said that possibly it was open to consideration whether the word ' must ' in the last case was not too strong, and the word ' would ' sufficient. In Makin *v.* A.-G. for New South Wales [1894], A. C. 57–70, Lord Halsbury said: ' Their Lordships do not think it can properly be said that there was no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the judge to consider, in arriving at their verdict, matters which ought not to have been submitted to them. In R. *v.* Lee, 72 J. P. 253; the judge at the trial did not expressly warn the jury that they must disregard the fact that the prisoner had been in prison before. The Court of Criminal Appeal allowed the appeal. But see R. *v.* Warner, 73 J. P. 73. Where there is no case on the evidence for the prosecution, the case should be withdrawn from the jury (R. *v.* Leach, 2 Cr. App. R. 72): but if this is not done and the evidence for the defence supplies the defects in that for the Crown, a conviction will be upheld. R. *v.* George, 73 J. P. 11. In considering whether there has been a miscarriage of justice the Court may consider the grounds set out in the appellant's notice. R. *v.* Nicholls, 25 T. L. R. 65.

conviction and direct a judgment and verdict of acquittal to be entered (*d*).

'(3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (*e*) (whether more or less severe) (*f*) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal' (*ff*).

In considering the propriety of the sentence the appellate Court has regard not only to the legality of the sentence but also to the nature of the offence disclosed by the evidence (*g*), the existence of extenuating circumstances (*h*), the antecedents (including the previous good character) of the prisoner (*i*), the treatment the prisoner is to receive (*ii*), and whether the Court of trial has proceeded upon wrong principles (*j*), or has given undue weight to some of the facts proved in evidence (*k*), or has taken into account prior offences which should have been treated as covered by a prior sentence (*l*), or has taken into account previous convictions without regarding evidence that the accused had for a considerable time lived honestly (*m*), or charges which have not been proceeded with (*mm*). The ultimate aim of the Court is to standardise sentences (*n*).

Powers of Court in Special Cases.—By sect. 5. '(1) If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may

(*d*) By rule 35, (a) the Registrar at the final determination of an appeal shall notify in such manner as he thinks most convenient to the proper officer of the Court of Trial the decision of the Court of Appeal in relation thereto and also any orders or directions made or given by the Court under the Act, or these Rules, in relation to such appeal or any matter connected therewith. (b) The proper officer of the Court of Trial shall on receiving the notification referred to in this rule, enter the particulars thereof on the Records of the Court of which he is such officer.

(*e*) The words 'by the verdict' may be disregarded and the Court can alter a sentence, although the appellant pleaded guilty. R. *v.* Ettridge, 25 T. L. R. 391, overruling R. *v.* Davidson, 25 T. L. R. 352.

(*f*) In R. *v.* Mortimer, 1 Cr. App. R. 20, the sentence was increased by substituting imprisonment with hard labour for imprisonment in the second division (*vide ante*, Vol. i. pp. 212, 213).

(*ff*) In no case can any sentence be increased by reason of or in consideration of any evidence that was not given at the trial. (See s. 9, proviso, *post*, p. 2023.) The Court will not interfere with a sentence unless satisfied that the judge at the trial proceeded upon a wrong principle, or gave undue weight to some fact: and will not allow such appeals merely on the ground that individual members of the Appellate Court think that they would have given a different sentence. R. *v.* Sidlow, 72 J. P. 391. R. *v.* Hawes, 1 Cr. App. R. 42. R. *v.* Woodman, 73 J. P. 286. In considering a sentence it is established practice to inquire into the prisoner's history, in his own interests. R. *v.* Weaver, 1 Cr. App. R. 12, 13.

(*g*) R. *v.* George, 25 T. L. R. 66: 73 J. P. 11.

(*h*) *e.g.* provocation: R. *v.* O'Connell, 2 Cr. App. R. 259. Drunkenness: R. *v.* Morton, 1 Cr. App. R. 255. R. *v.* Nuttall, 73 J. P. 30. R. *v.* Haden, 2 Cr. App. R. 148.

(*i*) R. *v.* Nuttall, *ubi sup.* R. *v.* Francis, 1 Cr. App. R. 259. R. *v.* Whiteman, 2 Cr. App. R. 10. R. *v.* Grice, ibid. 74. Cf. R. *v.* Dickinson, ibid. 78, where the character of a prosecutrix in a case of wounding was considered.

(*ii*) R. *v.* Kirkpatrick, 25 T. L. R. 66 (Borstal).

(*j*) R. *v.* Sidlow, 72 J. P. 39. Cf. R. *v.* Raybould, 73 J.P. 334, where the appellant had been wrongly dealt with as an habitual criminal within the Prevention of Crimes Act, 1908.

(*k*) R. *v.* Sidlow, *ubi sup.*

(*l*) R. *v.* Syres, 73 J. P. 13: 25 T. L. R. 71. R. *v.* Jones, 1 Cr. App. R. 196. R. *v.* Hawes, ibid. 42.

(*m*) R. *v.* Nuttall, *ubi sup.*

(*mm*) R. *v.* Wells, 2 Cr. App. R. 259.

(*n*) R. *v.* Nuttall, 73 J. P. 30. R. *v.* Woodman, 2 Cr. App. R. 67.

either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court consider that the appellant has been properly convicted (*o*).

'(2) Where an appellant has been convicted of an offence, and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence (*oo*), the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

'(3) Where on the conviction of the appellant the jury have found a special verdict, and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

'(4) If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions the court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic (*p*) under the Trial of Lunatics Act, 1883 (*q*), in the same manner as if a special verdict had been found by the jury under that Act' (*r*).

Appeal on Question of Law alone (*rr*).—By sect. 15. (2) 'If it appears to the registrar that any notice of an appeal against a conviction purporting to be on a ground of appeal which involves a question of law alone does not show any substantial ground of appeal, the registrar may refer the appeal to the court for summary determination, and, where the case is so referred, the court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily, without calling on any persons to attend the hearing or to appear for the Crown thereon.'

(*o*) See R. *v.* George, 73 J. P. 11. There is no express limitation in this subsection that the substituted sentence should not be of greater severity than the original sentence. It seems, however, clear that the intention of the Act is that the Court of Appeal should only have power to increase the sentence when the appeal is against the sentence: see s. 4 (3) *supra*.

(*oo*) *Vide* R. *v.* Rose, 2 Cr. App. R. 265.

(*p*) *Vide* 47 & 48 Vict. c. 64, *ante*, Vol. i. p. 82.

(*q*) 46 & 47 Vict. c. 38, *ante*, Vol. i. p. 83.

(*r*) In R. *v.* Jefferson, 1 Cr. App. R. 95: 72 J. P. 467, a conviction of murder was quashed on the ground that the verdict was unsatisfactory, the evidence being strong to shew that the accused when he killed the deceased was in such a state of mind as not to be responsible for his actions. The Court did not use its power under s. 9 of having an examination by experts into the sanity of the accused. In R. *v.* Atkins, 1 Cr. App. R. 45, 69, leave was given to call further witnesses for the purpose of shewing that the appellant at the time he committed the offence was, though not insane in law, in such a weak state of mind as to shew that the sentence passed on him was unduly severe. The Court heard the witnesses and dismissed the appeal. Cf. R. *v.* Macdonald, 1 Cr. App. R. 262. R. *v.* Harding, ibid. 219.

(*rr*) See s. 3 (a), *ante*, p. 2010.

By sect. 20, '(4) All jurisdiction and authority under the Crown Cases Act, 1848 (*ante*, p. 2007), in relation to questions of law arising in criminal trials which is transferred to the judges of the High Court by sect. 47 of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act, and in any case where a person convicted appeals under this Act against his conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require a case to be stated accordingly under that Act in the same manner as if a question of law had been reserved' (*s*).

By rule 26, (a) Where a person entitled to appeal under the Act on grounds of appeal involving a question of law alone, and his appeal is not dealt with under the provisions of sect. 15, sub-sect. 2, of the Act, an application by him or by the respondent may at any time be made to the Court of Appeal that the questions of law raised in such appeal should be decided by the Court of Appeal in accordance with the procedure under the Crown Cases Act, 1848, as amended by the Act. And the Court of Appeal may, upon such application, or upon a report made to them by the registrar that the procedure under the Crown Cases Act, 1848, as amended by the Act, would, in his opinion, be a more convenient method of dealing with the points of law raised in such appeal, make an order that the same shall be so dealt with.

(b) When an order has been made under this Rule, the registrar shall notify the judge of the court of trial thereof, and shall forward to him for the purpose of giving to him facilities in the statement of the case, a copy of the notice of appeal and any supplemental or explanatory statement furnished by the appellant to the registrar and any other information or material which the registrar may think necessary or such judge may require.

(c) The judge of the Court of trial shall forward a case stated by him in pursuance of this rule to the registrar, together with all documents or other material received from the registrar, who shall on receiving the same send a copy of such case to the appellant and respondent respectively.

(d) Where, under the provisions of the Crown Cases Act, 1848, the judge of the court of trial states a case for the consideration of the Court for Crown Cases Reserved, the person convicted shall for the purposes of these rules be deemed to be an appellant who has appealed under sect. 3 (a) of the Act, provided that in such case sect. 15, sub-sect. 2 thereof shall not apply.

Restitution and other Orders, Disqualifications, &c.—By sect. 6, (1) The operation of any order for the restitution (*t*) of any property to any person made on a conviction on indictment, and the operation in case of any such conviction, of the provisions of subsection (1) of section twenty-four of the Sale of Goods Act, 1893 (*u*) as to the re-vesting of the property in stolen goods on conviction, shall (unless the court before whom the

(*s*) See s. 14 (4), *post*, p. 2027, as to bail, &c., or imprisonment when a case is stated.

(*t*) See 24 & 25 Vict. c. 96, s. 100, *ante*, p. 1313.

(*u*) 56 & 57 Vict. c. 71, *ante*, p. 1315.

conviction takes place direct to the contrary in any case in which, in their opinion, the title to the property is not in dispute) be suspended—

(a) in any case until the expiration of ten days after the date of the conviction; and

(b) in cases where notice of appeal or leave to appeal is given within ten days after the date of conviction, until the determination of the appeal;

and in cases where the operation of any such order, or the operation of the said provisions, is suspended until the determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal. Provision may be made by rules of court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.

(2) The Court of Criminal Appeal may by order annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied (*v*).

By Rule 9, Where, upon the trial of a person entitled to appeal under the act against his conviction, an order of restitution of any property to any person has been made by the judge of the court of trial, the person in whose favour or against whom the order of restitution has been made, any person in whose favour or against whom an order to which rule 10 relates has been made, and, with the leave of the Court of Appeal, any other person, shall, on the final hearing by the Court of Appeal of an appeal against the conviction on which such order of restitution was made, be entitled to be heard by the Court of Appeal before any order under the provisions of sect. 6, subsect. 2, of the act, annulling or varying such order of restitution is made (*v*).

By Rule 10, Where the judge of the court of trial is of opinion that the title to any property the subject of an order of restitution made on a conviction of a person before him, or any property to which the provisions of subsection 1 of sect. 24 of the Sale of Goods Act, 1893, apply, is not in dispute, he, if he shall be of opinion that such property or a sample or portion or facsimile representation thereof is reasonably necessary to be produced for use at the hearing of any appeal, shall give such directions to or impose such terms upon the person in whose favour the order of restitution is made, or in whom such property revests under such subsection as he shall think right in order to secure the production of such sample, portion or facsimile representation for use at the hearing of any such appeal.

By Rule 11 (a), Where, on the conviction of a person, the judge of the court of trial makes an order condemning such person to the payment of the whole or of any part of the costs and expenses of the prosecution for the offence of which he shall be convicted out of any moneys taken from such person on his apprehension or otherwise, or where such judge lawfully

(*v*) A person against whom an order of restitution is made on conviction has no right to appeal against the order, or to ask that the order may be varied, where the Court of Criminal Appeal dismiss the appeal and does not propose to annul or vary the order of restitution. R. *v.* Elliott [1908], 2 K.B. 452; 77 L. J. K.B. 812.

orders a reward to any person who shall appear to have been active in the apprehension of any such convicted person, or where such judge makes any order under sect. 30 (*post*, p. 2051) of the Criminal Law Act, 1826 (7 Geo. IV. c. 64), or under sect. 74 (*vv*) of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), or under sect. 9 of the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), or where such judge makes any order awarding to any person aggrieved any sum of money to be paid by such convicted person under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), or where such judge lawfully makes on the conviction of any person before him any order for the payment of money by such convicted person or by any other person or any order affecting the rights or property of such convicted person the operation of such orders shall in any of such cases be suspended until the expiration of ten days after the day on which any of such orders were made. And in cases where notice of appeal or notice of application for leave to appeal is given within ten days from and after the date of the verdict against such person, such orders shall be further suspended until the determination of the appeal against the conviction in relation to which they were made. The Court of Appeal may by order annul any order to which this rule refers on the determination of any appeal under the act, or may vary such order, and such order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

The proper officer of the court of trial shall keep a record of any orders to which this rule refers.

(b) Where the judge of the court of trial makes any such order on a person convicted before him, as in this rule mentioned, he shall give such directions as he thinks right as to the retention by any person of any money or valuable securities belonging to the person so convicted and taken from such person on his apprehension, or of any money or valuable securities at the date of his conviction in the possession of the prosecution for the period of ten days, or in the event of an appeal, until the determination thereof by the Court of Appeal. The proper officer of the court of trial shall keep a record of any directions given under this rule.

(c) Where upon conviction of any person of any offence any disqualification, forfeiture or disability attaches to such person by reason of such conviction, such disqualification, forfeiture or disability shall not attach for the period of ten days from the date of the verdict against such person nor in the event of an appeal under the act to the Court of Appeal, until the determination thereof. This Rule shall not affect the provisions of sect. 8 of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), *ante*, Vol. I. p. 250.

(d) When the judge of the court of trial on the conviction of a person before him, makes any order for the payment of money by such person or by any other person upon such conviction, and, by reason of this Rule, such order would otherwise be suspended, such judge may, if he thinks right so to do, direct that the operation of such order shall not be suspended unless the person on whom such order has been made shall in such manner and within such time as the said judge shall direct, give security by way of undertaking or otherwise for the payment to the person in whose favour such order shall have been made of the amount therein named. Such security may be to the satisfaction of the person

(*vv*) Repealed in 1908 as to England. *Vide post*, p. 2046.

in whose favour the order for payment shall have been made or of any other person as such judge shall direct.

(e) Where on a conviction any property, matters or things the subject of the prosecution or connected therewith, are to be or may be ordered to be destroyed or forfeited under the provisions of any statute, the destruction or forfeiture or order for destruction or forfeiture thereof shall be suspended for the period of ten days from and after the date on which the verdict on such indictment was returned, and in the event of an appeal under the act, shall be further suspended until the determination thereof by the Court of Appeal.

(f) Where, upon conviction of any person of any offence, any claim may be made or any proceedings may be taken under any statute against such person or any other person in consequence of such conviction, such proceedings shall not be taken until after the period of ten days from the date on which the verdict against such person was returned, nor in the event of an appeal under the act to the Court of Appeal until the determination thereof.

Any person affected by any orders which are suspended under this Rule, may, with the leave of the Court of Appeal, be heard on the final determination of any appeal, before any such orders are varied or annulled by the Court of Appeal (*w*).

By Rule 12, The time during which an order of restitution or the operation of subsect. 1, of sect. 24 of the Sale of Goods Act, 1903, is suspended under sect. 6 of the act, shall commence to run from the day on which the verdict of the jury was returned, and, in cases where notice of appeal or notice of application for leave to appeal is duly given within ten days after such day, the period of suspension of such order or of the operation of the subsect. shall continue until the determination of the appeal.

By Rule 13, (a), The clerk of the court of trial or other officer thereof, having the custody of the records of such court, or the deputy of such clerk or other officer, shall not issue, under any statutes authorising him so to do, a certificate of conviction of any person convicted on indictment in the court to which he is such clerk, officer, or deputy, for the period of ten days after the actual day on which such conviction took place, nor in the event of such clerk, officer, or deputy receiving information from the registrar of the court within such ten days that a notice of appeal or of application for leave to appeal has been given under the act, until the determination thereof.

(b) Where an application is made to such clerk, officer, or deputy to issue such certificate of conviction as in this rule mentioned after the expiration of the said period of ten days, he shall require, before issuing the same, to be satisfied that there is no appeal then pending in the Court of Appeal against such conviction. A person desirous of obtaining a certificate of conviction from such clerk, officer, or deputy shall be entitled to obtain from the registrar a certificate in such form as the said registrar may think right for the purpose of satisfying by the production thereof, such clerk, officer, or deputy that no appeal against such conviction is

(*w*) See R. *v.* Elliott [1908], 2 K.B. 452; 77 L. J. K. B. 812.

then pending. After the expiration of two months from the date of the conviction a certificate thereof may be issued by such clerk, officer, or deputy as heretofore, except in cases in which he has had notice of an appeal still undetermined.

For the purposes of this rule the expression 'conviction' shall mean the verdict or plea of guilty and any final judgment passed thereon (*x*).

Time for and Notice of Appeal.—By sect. 7 (1), Where a person convicted desires to appeal under this act to the Court of Criminal Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within ten days of the date of conviction (*xx*). Such rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires. Any case or argument so presented shall be considered by the court.

Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Criminal Appeal (*y*).

(2) In the case of a conviction involving sentence of death or corporal punishment—

(a) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and

(b) if notice is so given, the appeal or application shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused, of the application.

By sect. 15 (4), 'The registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this act to any person who demands the same, and to officers of courts, governors of prisons, and such other officers or persons as he thinks fit, and the governor of a prison shall cause those forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this act, and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the registrar.'

By Rule 4, (a) Every notice of appeal or notice of application for leave to appeal or notice of application for extension of time within which such notice shall be given under the act shall be signed by the appellant himself, except under the provisions of paragraphs (d) and (e) of this rule.

Any other notice required or authorised to be given for the purposes of the act or these rules shall be in writing and signed by the person giving the same or by his solicitor. All notices required or authorised to

(*x*) Cf. Rules 18 and 19, *post*, p. 2020, under s. 7 (1) of the Act.

(*xx*) See Rules 18, 19, *post*, p. 2020.

(*y*) In a capital case the Court, being unable to extend the time, amended the notice of application for leave to appeal on grounds involving questions of fact into a notice of appeal on questions of law raised by the summing up. R. E. *v.* Meade (No. 1.) 73 J. P. 192.

be given for the purposes of the act or these rules to the Court of Criminal Appeal shall be addressed to 'The Registrar of the Court of Criminal Appeal, London.'

(b) Any notice or other document which is required or authorised by the act or these rules to be given or sent shall be deemed to be duly given or sent if forwarded by registered post addressed to the person to whom such notice or other document is so required or authorised to be given or sent.

(c) When an appellant or any other person authorised or required to give or send any notice of appeal or notice of any application for the purposes of the Act or of these rules is unable to write he may affix his mark thereto in the presence of a witness who shall attest the same and thereupon such notice shall be deemed to be duly signed by such appellant.

(d) Where, on the trial of a person entitled to appeal under the act it has been contended that he was not responsible according to law for his actions on the ground that he was insane at the time the act was done or the omission made by him, any notice required by these rules to be given and signed by the appellant himself may be given and signed by his solicitor or other person authorised to act on his behalf.

(e) In the case of a body corporate where by the act or these rules any notice or other document is required to be signed by the appellant himself, it shall be sufficient compliance therewith if such notice or other document is signed by the secretary, clerk, manager, or solicitor of such body corporate.

By Rule 17, A person desiring under the provisions of the act, to appeal to the Court of Appeal against his conviction or sentence, shall commence his appeal by sending to the registrar a notice of appeal or notice of application for leave to appeal, or notice of application for extension of time within which such notice shall be given, as the case may be, in the form of such notices respectively set forth in the schedule to these rules, and in the notice or notices so sent, shall answer the questions and comply with the requirements set forth thereon, subject to the provisions of Rule 45 (*post*, p. 2036) (*yy*).

By Rule 18, The time within which a person convicted shall give notice of appeal or notice of his application for leave to appeal to the Court of Criminal Appeal against his conviction, shall commence to run from the day on which the verdict of the jury was returned, whether the judge of the court of trial shall have passed sentence or pronounced final judgment upon him on that day or not.

By Rule 19, The time within which a person convicted and sentenced, shall give notice of appeal or notice of application for leave to appeal against such sentence under the Act to the Court of Criminal Appeal, shall commence to run from the day on which such sentence shall have been passed upon him by the judge of the court of trial.

By Rule 22, Where the Court of Appeal has, on a notice of application for leave to appeal duly served, and in the form provided under these Rules, given an appellant leave to appeal, it shall not be necessary for such

(*yy*) See R. *v.* Nicholls, 25 T. L. R. 65: and rule 25 (*a*), *post*, p. 2035.

appellant to give any notice of appeal, but the notice of application for leave to appeal shall in such cases be deemed to be a notice of appeal.

By Rule 23, An appellant at any time after he has duly served notice of appeal or of application for leave to appeal, or of application for extension of time within which under the Act such notices shall be given, may abandon his appeal by giving notice of abandonment thereof in the form (III.) in the Schedule to these Rules to the registrar, and upon such notice being given the appeal shall be deemed to have been dismissed by the Court of Appeal.

By Rule 24, An application to the Court of Appeal for an extension of time within which notices may be given, shall be in the form (IX.) in the Schedule hereto. Every person making an application for such extension of time, shall send to the registrar together with the proper form of such application, a form, duly filled up, of notice of appeal, or of notice of application for leave to appeal, appropriate to the ground or grounds upon which he desires to question his conviction or sentence, as the case may be.

By Rule 43, (a) Except where otherwise provided in these Rules, any application to the Court of Appeal may be made by the appellant or respondent, or by counsel on their behalf, orally or in writing, but in regard to such applications if the appellant is unrepresented and is in custody and is not entitled or has not obtained leave to be present before the Court, he shall make any such application by forwarding the same in writing to the registrar, who shall take the proper steps to obtain the decision of the Court thereon.

Judge's Notes and Report.—By Sect. 8, 'The judge or chairman of any court before whom a person is convicted shall in the case of an appeal under this Act against the conviction or against the sentence, or in the case of an application for leave to appeal under this Act, furnish to the registrar, in accordance with rules of court, his notes of the trial; and shall also furnish to the registrar in accordance with rules of court a report giving his opinion upon the case or upon any point arising in the case.'

By Rule 14, The registrar when he has received a notice of appeal, or a notice of application for leave to appeal under the Act, or a notice of application for extension of the time within which under the Act such notices shall be given, or when the Secretary of State shall exercise his powers under sect. 19 of the Act, shall request the judge of the court of trial to furnish him with the whole of or any part of his note of the trial or with a copy of such note or any part thereof, and such judge of the court of trial shall thereupon furnish the same to the registrar in accordance with such request.

By Rule 15, (a) The registrar when he has received a notice of appeal, or a notice of application for leave to appeal under the Act, or a notice of application for extension of time within which under the Act such notices shall be given, or when the Secretary of State shall exercise his powers under sect. 19 of the Act, or whenever it appears to be necessary for the proper determination of any appeal or application, or for the due performance of the duties of the Court of Appeal under the said section, may and, whenever in relation to any appeal under the Act the Court of Appeal or any judge thereof directs him so to do, shall, request the judge

of the court of trial to furnish him with a report in writing, giving his opinion upon the case generally or upon any point arising upon the case of the appellant, and the judge of the court of trial shall furnish the same to the registrar in accordance with such request.

(b) The report of the judge shall be made to the Court of Appeal, and except by leave of the Court or a judge thereof the registrar shall not furnish to any person any part thereof.

Examination of Witnesses, &c.—By Sect. 9, 'For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice,—

(a) order the production of any document, exhibit, or other thing (*z*) connected with the proceedings, the production of which appears to them necessary for the determination of the case; and

(b) if they think fit order any witnesses (*zz*) who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial (*a*) or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court or before any officer of the court or justice of the peace or other person appointed by the court for the purpose, and allow the admission of any depositions so taken as evidence before the court (*b*); and

(c) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the court conveniently be conducted before the court, order the reference of the question in manner provided by rules of court for inquiry and report to a special commissioner appointed by the court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

(e) appoint any person with special expert knowledge to act as assessor to the court in any case where it appears to the court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Court of Appeal on

(*z*) See *post*, p. 2031, as to exhibits.

(*zz*) In R. *v.* Jones, 2 Cr. App. R. 88, and R. *v.* Malvisi, ibid. 192, the Court gave leave to call such witnesses as the Registrar should be satisfied could give relevant evidence.

(*a*) See R. *v.* Laws, 72 J. P. 271. R. *v.* Osborne, ibid. 473. In R. *v.* Mortimer, 1 Cr. App. R. 22, Alverstone, C.J., said that the Court would not allow witnesses to be called at an appeal to support a case which obviously ought to have been set up at the trial. Cf. R. *v.* Martin, 1 Cr. App. R. 33. R. *v.* Roumillen, ibid. 25. R. *v.* Stewart, ibid. 57. R. *v.* Kirkham, 25 T. L. R. 656 (alibi). R. *v.* Bradley, 2 Cr. App. R. 124 (evidence to show accident, &c.). R. *v.* Perry, ibid. 89. R. *v.* Betridge, 73 J. P. 71 (mistaken identity).

(*b*) Where an appellant is represented by a solicitor and applies to the Court for leave to call further witnesses, the evidence that such witnesses, if called, could give should be set out in affidavits if no evidence on the point was given on the trial. R. *v.* Atkins, 1 Cr. App. R. 45.

appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.'

By Rule 40, (a) Where the Court of Appeal have ordered any witness to attend and be examined before the Court under sect. 9 (b) of the Act, an order in the form (XXV.) in the schedule hereto shall be served upon such witness specifying the time and place at which to attend for such purpose.

(b) Such order may be made on the application at any time of the appellant or respondent, but if the appellant is in custody and not legally represented the application shall be made by him in the form (XXVI.) in the schedule hereto.

(c) Where the Court of Appeal order the examination of any witness to be conducted otherwise than before the Court itself, such order shall specify the person appointed as examiner to take and the place of taking such examination and the witness or witnesses to be examined thereat.

(d) The registrar shall furnish to the person appointed to take such examination any documents or exhibits and any other material relating to the said appeal as and when requested so to do. Such documents and exhibits and other material shall after the examination has been concluded be returned by the examiner together with any depositions taken by him under this Rule to the registrar.

(e) When the examiner has appointed the day and time for the examination he shall request the registrar to notify the appellant or respondent and their legal representatives, if any, and when the appellant is in prison, the governor of that prison, thereof. The registrar shall cause to be served on every witness to be so examined a notice in the form (XXVII.) in the schedule hereto.

(f) Every witness examined before an examiner under this Rule shall give his evidence upon oath to be administered by such examiner, except where any such witness if giving evidence as a witness on a trial on indictment need not be sworn.

(g) The examination of every such witness shall be taken in the form of a deposition in the same manner as is prescribed by sect. 17 of The Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), and unless otherwise ordered shall be taken in private. The caption in the form (XXIV.) in the schedule hereto shall be attached to any such deposition.

(h) Where any witness shall receive an order or notice to attend before the Court of Appeal or an examiner, the police officer serving the same may, if it appears to him necessary so to do, pay to him a reasonable sum not exceeding the amount of the scale sanctioned by the Secretary of State for the travelling expenses of such witness from his place of residence to the place named in such notice or order, and the sum so paid shall be certified by such officer to the registrar. Any expenses certified by the registrar under this Rule shall be paid as part of the expenses of the prosecution.

(i) Any order or notice required by this Rule to be given to any witness may be served as an order may be served under Rule 32 (c) hereof (*post*, p. 2032), and any such notice shall be deemed to be an order

of the Court of Appeal on such witness to attend at the time and place specified therein.

(j) The appellant and respondent, or counsel or solicitor on their behalf, shall be entitled to be present at and take part in any examination of any witness to which this Rule relates.

By Rule 41, When an order of reference is made by the Court of Appeal under sect. 9 (d) of the Act, the question to be referred and the person to whom as special commissioner the same shall be referred shall be specified in such order. The Court of Appeal may in such order or by giving directions as and when they from time to time shall think right, specify whether the appellant or respondent or any person on their behalf may be present at any examination or investigation or at any stage thereof as may be ordered under sect. 9 (d) of the Act, and specify any and what powers of the Court of Appeal under the Act or these Rules may be delegated to such special commissioner, and may require him from time to time to make interim reports to the Court of Appeal upon the question referred to him under sect. 9 (d) of the Act, and may, if the appellant is in custody, give leave to him to be present at any stage of such examination or investigation and give the necessary directions to the governor of the prison in which such appellant is, accordingly, and may give directions to the registrar that copies of any report made by such special commissioner shall be furnished to the appellant and respondent or to counsel or solicitor on their behalf.

Legal Assistance to Appellant.—By sect. 10, 'The Court of Criminal Appeal may at any time assign to an appellant a solicitor and counsel or counsel only (*c*) in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means (*d*) to enable him to obtain that aid' (*e*).

By sect. 15, (5) 'The registrar shall report to the Court or some judge thereof any case in which it appears to him that, although no application has been made for the purpose, a solicitor and counsel or counsel only ought to be assigned to an appellant under the powers given to the Court by this Act' (*f*).

Right of Appellant to be present.—By sect. 11, '(1) An appellant, notwithstanding that he is in custody, shall be entitled to be present (*ff*), if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an

(*c*) Rule 38 provides for the making and sending to the Registrar by the Clerks of Assize lists of counsel and solicitors who are willing to act for appellants when nominated under the Act. As to the fees, see s. 13 (2), *post*, p. 2026.

(*d*) By rule 30, it shall be the duty of the chief officer of police of the district in which the appellant shall have resided before his conviction, or of the district from which he was committed, to enquire as to and to report to the Registrar, when applied to by him, upon the means and circumstances of any appellant where a question as to his means and circumstances arises under the Act or these Rules.

(*e*) On appeals against sentence only, legal aid will only be granted in exceptional cases. R. *v.* Crawley, 72 J. P. 270.

(*f*) By rule 37, this report is to be made to a judge of the Court and any directions given thereupon by such judge are to be final.

(*ff*) The Court has no power to hear the appeal in his absence if he desires to be present. R. *v.* Dunleavey [1909], 1 K.B. 200: 1 Cr. App. R. 212.

application for leave to appeal (*g*) and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of court provide that he shall have the right to be present, or where the court gives him leave to be present (*h*).

'(2) The power of the court to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present.'

Duty of Director of Public Prosecutions.—By sect. 12, 'It shall be the duty of the Director of Public Prosecutions to appear for the Crown on every appeal to the Court of Criminal Appeal under this Act, except so far as the solicitor of a Government department (*i*), or a private prosecutor in the case of a private prosecution, undertakes the defence of the appeal, and the Prosecution of Offences Act, 1879 (*j*), shall apply as though the duty of the Director of Public Prosecutions under this section were a duty under sect. 2 of that Act, and provision shall be made by rules of court for the transmission to the Director of Public Prosecutions of all such documents, exhibits, and other things (*k*) connected with the proceedings as he may require for the purpose of his duties under this section.'

By Rule 27, (a) When the registrar has received a notice of appeal, or a notice of appeal on grounds of law alone, which does not, in his opinion, fall within the provisions of sect. 15, sub-sect. 2, of the Act, or where leave to appeal is granted to any appellant, he shall forthwith ascertain from the person specified in form (II.) as the prosecutor, unless such person shall be the Director of Public Prosecutions, or a Government Department (*i*), or from the solicitor of such person, whether the prosecutor intends to undertake the defence of the appeal. And in the event of the prosecutor declining to undertake the defence of the appeal, notice to that effect shall be sent by the registrar to the Director of Public Prosecutions.

Where such prosecutor in the Court of trial was the Director of Public Prosecutions, the registrar shall notify him of such appeal.

(b) It shall be the duty of a prosecutor who declines to undertake the defence of an appeal, and of his solicitor, to furnish to the registrar and the Director of Public Prosecutions, or either of them, any information, documents, matters and things in his possession or under his control connected with the proceedings against the appellant, which the registrar or Director of Public Prosecutions may require for the purposes of their duties under the Act.

By Rule 28, Where the defence of an appeal is undertaken by a private prosecutor the Court of Appeal may, at any stage of the proceedings in such appeal, if it shall think right so to do, order that the Director of Public Prosecutions or the solicitor of a Government

(*g*) As a rule where the appellant is represented by counsel, leave is not given for him to be present at the hearing of an application. See Rule 25 (b), *post*, p. 2035.

(*h*) An appellant who is on bail must be personally present at the hearing of his appeal, and must surrender whenever his case is called on. See Rules 29 (h), *post*, p. 2029, and 31 (b), *post*, p. 2030.

(*i*) This expression includes the Commissioners of Police of the Metropolis; Rule 2 (a).

(*j*) *Ante*, p. 1924.

(*k*) See *post*, p. 2031.

Department shall take over the defence of the appeal and be responsible on behalf of the Crown for the further proceedings in the same.

Costs.—By sect. 13, (1) On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto under this Act no costs shall be allowed on either side (*l*).

(2) The expenses of any solicitor or counsel assigned to an appellant under this Act, and the expenses of any witnesses attending on the order of the Court or examined in any proceedings incidental to the appeal, and of the appearance of an appellant on the hearing of his appeal or on any proceedings preliminary or incidental to the appeal, and all expenses of and incidental to any examination of witnesses conducted by any person appointed by the Court for the purpose, or any reference of a question to a special commissioner appointed by the Court, or of any person appointed as assessor to the Court, shall be defrayed, up to an amount allowed by the Court, but subject to any regulations (*m*) as to rates and scales of payment made by the Secretary of State, in the same manner as the expenses of a prosecution in cases of felony; *vide post*, p. 2044.

(*l*) The hearing of a case stated under the Crown Cases Act, 1848, is to be deemed an appeal, and the provisions of the Costs in Criminal Cases Act, 1908, giving power to direct the payment of the costs of the prosecution and defence shall not apply to the hearing of the case so stated, 8 Edw. VII. c. 15, s. 9 (5): *post*, p. 2044.

(*m*) By an order of the Secretary of State, dated March 27, 1908:—

1. The expenses of any solicitor or counsel assigned to an appellant by the Court of Criminal Appeal shall be allowed as follows:—As respects an application for leave to appeal or an application for extension of time; a fee not exceeding £2 2*s.* for a solicitor, and £1 3*s.* 6*d.* for counsel. As respects any appeal; a fee not exceeding £2 2*s.* for a solicitor, and a fee for counsel not exceeding £1 3*s.* 6*d.*, or, if in the opinion of the Court the case is one of difficulty, not exceeding £2 4*s.* 6*d.*: provided that the Court, after the conclusion of the appeal may, if it thinks fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as the Court, having regard to the length and difficulty of the case, may direct, but not exceeding £7 7*s.* for a solicitor and £11 for counsel. In addition to such fees as aforesaid, a solicitor may be allowed travelling expenses actually and necessarily incurred by himself or his clerk on the scale applicable to an ordinary witness in a case of felony tried at Assizes under the Secretary of State's Order of the 14th June, 1904.

2. The expenses of any witnesses attending on the Order of the Court or examined in any proceedings incidental to the appeal shall be allowed on the same scale as those of a witness in a case of felony tried at Assizes under the Secretary of State's Order of 14th June, 1904: except that the night allowance of witnesses necessarily detained away from home in London for one or more nights may, if the Court thinks fit, be increased to not more than 8*s.* a night, but shall not exceed the expense reasonably incurred by the witness.

3. The expenses of the appearance of an appellant not in custody on the hearing of his appeal or on any proceeding preliminary or incidental to the appeal may be allowed on the same scale as those of an ordinary witness in a case of felony tried at Assizes under the Secretary of State's Order of 14th June, 1904. Where the appellant appears in custody, the warders attending in charge of him may receive the same allowances as warders in charge of a prisoner may receive under the said Order.

4. Where any examination of witnesses is conducted by a person appointed by the Court for the purpose, the person so appointed shall be allowed, if he be a Stipendiary Magistrate or Justice of the Peace, the actual expenses of travelling, the actual cost of hiring a room for the examination, if no Court or public room is available, and such other incidental expenses as in the opinion of the Court are necessarily and reasonably incurred. If the person appointed be a practising barrister he shall be allowed such expenses as aforesaid, and in addition such fee, not exceeding five guineas a day, as the Court may allow.

5. Where any question is referred to a special commissioner appointed by the Court, or where any person is appointed as assessor to the Court, he shall be allowed such fee as the Court having regard to his qualifications and ordinary professional remuneration may think reasonable, not exceeding ten guineas a day.

Treatment of Appellant in Custody.—By sect. 14, (1) An appellant who is not admitted to bail, shall, pending the determination of his appeal, be treated in such manner as may be directed by prison rule within the meaning of the Prison Act, 1898.

(2) The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail, pending the determination of his appeal (*mm*).

(3) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated (*n*) as an appellant under this section, shall not count as part of any term of imprisonment, or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court of Criminal Appeal, shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

(4) Where a case is stated under the Crown Cases Act, 1848, this section shall apply to the person in relation to whose conviction the case is stated as it applies to an appellant.

(5) Provision shall be made by prison rules within the meaning of the Prison Act, 1898, for the manner in which an appellant, when in custody, is to be brought to any place at which he is entitled to be present for the purposes of this Act, or to any place to which the Court of Criminal Appeal or any judge thereof may order him to be taken for the purpose of any proceedings of that Court, and for the manner in which he is to be kept in custody while absent from prison for the purpose; and an appellant whilst in custody in accordance with those rules shall be deemed to be in legal custody.

Fine.—By Rule 7, (a) Where a person has, on his conviction, been sentenced to payment of a fine, and in default of payment to imprisonment, the person lawfully authorised to receive such fine shall, on receiving the same, retain it until the determination of any appeal in relation thereto.

(b) If such person remains in custody in default of payment of the fine, he shall be deemed, for all purposes of the Act or these rules, to be a person sentenced to imprisonment.

(c) Where any person has been convicted and is thereupon sentenced to the payment of a fine, and, in default of such payment, to imprisonment, and he intimates to the judge of the Court of trial that he is desirous of appealing against his conviction to the Court of Appeal, either upon grounds of law alone, or, with the certificate of the judge of the Court of trial, upon any grounds mentioned in sect. 3 (b) of the Act, such

(*mm*) See *post*, p. 2028.

(*n*) As to appellants in second division, see R. *v.* Gylee, 73 J. P. 72.

judge may, if he thinks right so to do, order such person forthwith to enter into recognizances in such amount, and with and without sureties in each amount as such judge may think right, to prosecute his appeal. And, subject thereto, may order that payment of the said fine shall be made at the final determination of his said appeal, if the same be dismissed, to the registrar of the Court of Appeal, or as such Court may then order. The recognizance under this rule shall be in the forms (XX.) and (XXI.) in the Schedule hereto. A surety becoming duly bound by recognizance under this rule shall be deemed to be, for all purposes, and shall have all the powers of a surety under the provisions of Rule 29 (*infra*). The proper officer of the Court of trial shall forward the recognizances of the appellant and his surety or sureties to the registrar.

(d) An appellant who has been sentenced to the payment of a fine, and has paid the same in accordance with such sentence, shall, in the event of his appeal being successful, be entitled, subject to any order of the Court of Appeal, to the return of the sum or any part thereof so paid by him.

(e) If an appellant to whom Rule 7 (c) applies, does not serve in accordance with these rules, a notice of appeal upon grounds of law alone, or with the certificate of the judge of the Court of trial upon any grounds mentioned in sect. 3 (b) of the Act, within ten days from the date of his conviction and sentence, the registrar shall report such omission to the Court of Appeal, who may, after notice in the forms (XXII.) and (XXIII.) in the Schedule hereto has been given to the appellant and his sureties, if any, order an estreat of the recognizances of the appellant and his sureties, in manner provided by Rule 29 (p) hereof, and may issue a warrant (*post*, p. 2031) for the apprehension of the appellant and may commit him to prison in default of payment of his fine, or may make such other order as they think right.

Bail.—By Rule 29, (a) When the Court of Appeal under the Act admits an appellant to bail (*nn*) pending the determination of his appeal on an application by him duly made in compliance with these rules, the Court shall specify the amounts in which the appellant and his surety or sureties (if any be required) shall be bound by recognizance, and shall direct, if they think right so to do, before whom the recognizances of the appellant and his surety or sureties (if any) may be taken.

(b) In the event of the Court of Appeal not making any special order or giving special directions under this rule, the recognizances of the appellant may be taken before a justice of the peace being a member of the visiting committee of and at the prison in which he shall then be confined, or the governor thereof, and the recognizances of his surety or sureties (if any) may be taken before any petty sessional court.

(c) The registrar shall notify the appellant and the governor of the prison within which he is confined, the terms and conditions on which the Court shall admit the appellant to bail under the Act.

(d) The said petty sessional Court shall be entitled to require the

(*nn*) See s. 14 (2), *ante*, p. 2027. Notice of application for bail should be given to the prosecutor. R. *v.* Ridley, 25 T. L. R. 508. Forms of application for bail can be obtained from the registrar.

assistance of the police acting within such petty sessional division for the purpose of making inquiry as to the sufficiency or otherwise of any person offering himself as a surety on behalf of any appellant who has, under the Act, been granted bail, and it shall be the duty of such police to give such assistance to and as and when required by a petty sessional Court under this rule.

(e) After the recognizances of a surety have been duly taken under these rules by such petty sessional Court, the clerk thereof shall forward such recognizances to the registrar, and the governor of the prison in which the appellant is then confined shall, after the appellant's recognizances have been duly taken in pursuance of this rule, forward the same to the registrar. The clerk shall, after the recognizances of a surety are taken, give to him a certificate in the form (XV.) in the Schedule hereto, which such surety shall sign, and retain.

(f) The registrar on being satisfied that the recognizances of the appellant and his surety or sureties (if any) are in due form and in compliance with the order of the Court admitting the appellant to bail, shall send in the form (XII.) in the Schedule to these rules a notice to the governor of the prison in which the appellant shall then be confined. This notice, when received by the said governor, shall be a sufficient authority to him to release the appellant from custody.

(g) The recognizances provided for in this rule shall be in the forms (X.) and (XI.) in the Schedule hereto.

(h) An appellant who has been admitted to bail under the Act, shall, by the order of the Court of Appeal or a judge thereof under which he was so admitted to bail, be ordered to be and shall be personally present at each and every hearing of his appeal, and at the final determination thereof. The Court of Appeal may, in the event of such appellant not being present at any hearing of his appeal, if they think right so to do, decline to consider the appeal, and may proceed to summarily dismiss the same, and may issue a warrant for the apprehension of the appellant in the form (XIX.) in the Schedule hereto: provided that the Court of Appeal may consider the appeal in his absence, or make such other order as they think right.

(i) When an appellant is present before the Court of Appeal, such Court may on an application made by any person or, if they think right so to do, without any application make any order admitting the appellant to bail or revoke or vary any such order previously made, or enlarge from time to time the recognizance of the appellant or of his sureties or substitute any other surety for a surety previously bound as they think right.

(j) Where the surety or sureties, for an appellant under the Act, upon whose recognizances such appellant has been released on bail by the Court of Criminal Appeal, suspects that the said appellant is about to depart out of England or Wales, or in any manner to fail to observe the conditions of his recognizances on which he was so released, such surety or sureties may lay an information before one of His Majesty's justices of the peace acting in and for the petty sessional division in which the said appellant is, or is by such surety or sureties believed to

be or in which such surety or sureties may then be, in the form (XVI.) in the Schedule hereto, and such justice shall thereupon issue a warrant in the form (XVII.) in the Schedule hereto, for the apprehension of the said appellant.

(k) The said appellant shall, on being apprehended under the said warrant, be brought before the petty sessional Court in and for which the said justice acts before whom the said information was laid, or some other petty sessional Court specified in the said warrant. The said petty sessional court shall on verification of the said information by oath of the informant, by warrant of commitment in the form (XVIII.) in the Schedule hereto, commit him to the prison to which persons charged with indictable offences before such petty sessional Court are ordinarily committed. The governor of such prison shall, unless such prison was the prison from which the appellant was released on bail under these rules, notify the prison commissioners of such commitment, as in this rule mentioned.

Where the appellant is by such petty sessional Court committed to a prison which was not the prison from which he was released on bail after his conviction, the prison commissioners subject to any order of the Court of Appeal may transfer him to the prison from which he was so released.

(l) The clerk of the said petty sessional Court on the commitment of any such appellant, shall forthwith notify the registrar to that effect, and forward to him the said information and the deposition in verification thereof taken before such petty sessional Court together with a copy of the said warrant of commitment.

(m) At any time after an appellant has been released on bail under the Act, the Court of Appeal may, if satisfied that it is in the interest of justice so to do, revoke the order admitting him to bail, and issue a warrant in the form (XIX.) in the Schedule hereto for his apprehension, and order him to be committed to prison.

(n) When an appellant has been released on bail and has, under a warrant under these rules or by his surety or sureties, been apprehended and is in prison, the governor thereof shall forthwith notify the registrar, who shall take steps to inform the Court thereof, and the Court of Appeal may give to the registrar such directions as to the appeal or otherwise as they shall think right.

(o) Nothing in these rules shall affect the lawful right of a surety to apprehend and surrender into custody the person for whose appearance he has become bound, and thereby to discharge himself of his suretyship.

(p) The Court of Appeal may on any breach of the recognizances of the appellant, if it thinks right so to do, order such recognizances and those of his surety or sureties to be estreated, and the manner of such estreat shall be that provided for estreating recognizances under the Crown Office Rules, 1906 (Rule 115).

For Rule 30, see *ante*, p. 2024, note (*d*).

By Rule 31. (b) An appellant who is not in custody, shall, whenever his case is called on before the Court of Appeal, surrender himself to such persons as the Court shall from time to time direct, and thereupon shall be searched by them, and shall be deemed to be in their lawful

custody until further released on bail or otherwise dealt with as the Court shall direct.

By Rule 47, Any warrant for the apprehension of an appellant issued by the Court of Appeal shall be deemed to be, for all purposes, a warrant issued by a justice of the peace for the apprehension of a person charged with any indictable offence under the provisions of The Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), or any Act amending the same.

Exhibits, Documents, &c. —By sect. 15, '(1) The registrar shall take all necessary steps for obtaining a hearing under this Act of any appeals or applications, notice of which is given to him under this Act, and shall obtain and lay before the Court in proper form all documents, exhibits, and other things (*o*) relating to the proceedings in the Court before which the appellant or applicant was tried which appear necessary for the proper determination of the appeal or application.'

For sub-sect. 2, *vide ante*, p. 2014.

(3) 'Any documents, exhibits, or other things connected with the proceedings on the trial of any person on indictment, who, if convicted, is entitled or may be authorised to appeal under this Act, shall be kept in the custody of the court of trial in accordance with rules of court made for the purpose, for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits, or things from that custody.' For subsect. 4, see p. 2019: for subsect. 5, see p. 2024.

By Rule 2, (a) The expression 'Exhibits' shall include all books, papers, and documents, and all other property, matters and things whatsoever connected with the proceedings against any person who is entitled or may be authorised to appeal under the Act, if the same have been forwarded to the Court of trial on the person accused being committed for trial or have been produced and used in evidence during the trial of, or other proceedings in relation to a person entitled or authorised under the Act to appeal, and any written statement handed in to the judge of the Court of trial by such person, but shall not include the original depositions of witnesses examined before the committing justice or coroner, nor any indictment or inquisition against any such person, nor any plea filed in the Court of trial.

By Rule 8, (a) The judge of the Court of trial may make any order he thinks fit for the custody, disposal, or production of any exhibits in the case, but unless he makes any such order, exhibits shall be returned to the custody of the person producing the same or of the solicitor for the prosecution or defence respectively. Such person or solicitor shall retain the same pending any appeal, and shall, on notice from the registrar or Director of Public Prosecutions, produce or forward the same as and when required so to do (*oo*).

(b) The proper officer of the Court of trial shall keep a record of any order or direction of the judge thereof given under this rule.

(c) Whenever a person is committed for trial, it shall be the duty of the coroner or of the clerk to the justice committing such person for trial to make and forward, with the depositions taken in relation to such

(*o*) See s. 9 (a), *ante*, p. 2022, as to the production of exhibits.

(*oo*) See also rule 27 (b), *ante*, p. 2025.

person, a complete list of such exhibits as have been produced and used in evidence for or against him during any proceedings before such coroner or justice, to the Court before which such person is to be tried. Such list shall be in the form (XXXIII.) in the Schedule to these rules, subject to the necessary modifications, and shall be signed by such coroner or clerk. The exhibits appearing on such list shall be marked with consecutive numbers for the purpose of readily identifying the same.

Any exhibits put in for the first time at the trial shall be added to such list by the proper officer of the Court of trial and marked as herein provided.

By Rule 32, (a) The registrar may, on an application made to him by the appellant or respondent in any appeal, or where he considers the same to be necessary for the proper determination of any appeal or application, or shall, where directed by the Court of Appeal so to do, obtain and keep available for use by the Court of Appeal any documents, exhibits, or other things relating to the proceedings before the Court, and pending the determination of the appeal, such documents, exhibits, or other things shall be open as and when the registrar may arrange, for the inspection of any party interested.

(b) The Court of Criminal Appeal may, at any stage of an appeal, whenever they think it necessary or expedient in the interest of justice so to do, on the application of an appellant or respondent, order any document, exhibit, or other thing connected with the proceedings, to be produced to the registrar or before them, by any person having the custody or control thereof. Any order of the Court of Appeal under this rule may be served as in this rule provided.

(c) Service of any order made under this rule shall be personal service, unless the Court otherwise order, and for the purpose of effecting due service thereof the registrar may require the assistance of the Metropolitan Police, or may forward the order together with instructions to the chief officer of police of the county or borough in which the person is, or is believed to be, in whose custody or under whose control such document, exhibit, or other thing is; and it shall be the duty of the Metropolitan Police or of such chief officer of police to carry out any directions of the registrar under this rule.

By Rule 33, (a) Exhibits, other than such documents as are usually kept by the proper officer of the Court of trial, shall, subject to any order which the Court of Appeal may make, be returned to the person who originally produced the same, provided that any such exhibit to which the provisions of sect. 6 of the Act (*ante*, p. 2015) relate shall not be so returned except under the direction of the Court of Appeal.

By Rule 36, Upon a final determination of an appeal for the purposes of which the registrar has obtained from the proper officer of the Court of trial any original depositions, exhibits, indictment, inquisition, plea, or other documents usually kept by the said officer, or forming part of the record of the Court of trial, the registrar shall cause the same to be returned to such officer.

By Rule 39, (a) At any time after notice of appeal or notice of application for leave to appeal has been given under the Act or these rules, an appellant or respondent, or the solicitor or other person representing either of them, may obtain from the registrar copies of any documents

or exhibits in his possession under the Act or these rules for the purposes of such appeals. Such copies shall be supplied by the registrar at such charges as may be provided in regulations as to rates and scales of payment to be made by the Treasury, and such charges shall be paid by stamps (*p*).

(b) Where solicitor and counsel, or counsel only, are assigned to an appellant under the Act, copies of any documents or exhibits which they or he may request the registrar to supply shall without charge be supplied, unless the registrar thinks that they are not necessary for the purpose of the appeal.

(c) A transcript of the shorthand notes taken of the proceedings at the trial of any appellant shall not be supplied free of charge, except by an order of the Court of Appeal or a judge thereof, upon an application made by an appellant or by his counsel or solicitor assigned to him under the Act.

(d) Where an appellant, who is not legally represented, requires from the registrar a copy of any document or exhibit in his custody for the purposes of his appeal, he may obtain it free of charge if the registrar thinks, under all the circumstances, it is desirable or necessary to supply the same to him.

Shorthand Notes of Trial.—By sect. 16, '(1) Shorthand notes shall be taken (*pp*) of the proceedings (*q*) at the trial of any person on indictment (*r*), who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the registrar so directs (*s*), and furnished to the registrar for the use of the Court of Criminal Appeal or any judge thereof: provided that a transcript shall be furnished to any party interested (*t*) upon the payment of such charges as the Treasury may fix (*u*).

'(2) The Secretary of State may also, if he thinks fit in any case, direct a transcript of the shorthand notes to be made and furnished to him for his use.

(3) The cost of taking any such shorthand notes, and of any transcript where a transcript is directed to be made by the registrar or by the Secretary of State, shall be defrayed, in accordance with scales of payment fixed for the time being by the Treasury, out of moneys provided by Parliament, and rules of Court may make such provision as is necessary for securing the accuracy of the notes to be taken and for the verification of the transcript' (*v*).

(*p*) The scale authorised is 1½*d.* per folio of 72 words. For copies of maps, &c., the actual cost is certified by the registrar.

(*pp*) This is directory. Absence of a shorthand note does not invalidate the trial. R. *v.* Rutter, 25 T. L. R. 73. R. *v.* Elliott [1909], ibid. 572.

(*q*) By an additional rule to the Criminal Appeal Rules, 1908: 'For the purpose of s. 16 of the Act "proceedings" shall mean the evidence and any objections taken in the course thereof, any statement made by the prisoner, the summing up, and sentence of the judge of the court of trial, but unless otherwise ordered by such judge, shall not include any part of the speeches of counsel or solicitor.'

(*r*) See s. 20 (2), *ante*, p. 2081.

(*s*) See Rule 5 (c), *infra*. The questions and answers are to be numbered. R. *v.* Grey, 2 Cr. App. R. 37.

(*t*) See Rule 5 (f), *infra*.

(*u*) The scales of payment fixed are 8*d.* a folio of 72 words for transcripts when they are directed to be made, this payment to cover the supply of one copy of the transcript also when it is required by the officer for whom the transcript is ordered. For any further copy of transcripts supplied either for public use or to parties interested, 1½*d.* a folio.

(*v*) See rule 5 (b, g, and h), *infra*.

By Rule 5, (a) Shorthand writers shall be appointed from time to time as required for the purposes of the Act by the Lord Chancellor and the Lord Chief Justice for such period and on such conditions as they shall think right.

(b) The shorthand writer shall sign the shorthand note taken by him of any trial or proceeding, or of any part of such trial or proceeding, and certify the same to be a complete and correct shorthand note thereof, and shall retain the same unless and until he is directed by the registrar to forward such shorthand note to him.

(c) The shorthand writer shall, on being directed by the registrar, furnish to him for the use of the Court of Appeal a transcript of the whole or of any part of the shorthand note taken by him of any trial or proceeding in reference to which an appellant has appealed under the Act.

(d) The shorthand writer shall furnish to a party interested in a trial or other proceeding in relation to which a person may appeal under the Act, and to no other person, a transcript of the whole, or of any part of the shorthand note of any such trial or other proceedings, on payment by such party interested to such shorthand writer of his charges on such scale as the Treasury may fix.

(e) A party interested in an appeal under the Act may obtain from the registrar a copy from the transcript of the whole or of any part of such shorthand note as relates to the appeal subject to the provisions of sect. 16 of the Act.

(f) For the purposes of this rule, 'a party interested' shall mean the prosecutor (not being the Director of Public Prosecutions), or the person convicted, or any other person named in, or immediately affected by, any order made by the judge of the Court of trial, or other person authorised to act on behalf of a party interested, as herein defined.

(g) Whenever under the Act or these rules a transcript of the whole or of any part of such shorthand note is required for the use of the Court of Appeal, such transcript may be made by the shorthand writer who took and certified the shorthand note, or by such other competent person as the registrar may direct.

(h) A transcript of the whole or any part of the shorthand note relating to the case of any appellant which may be required for the use of the Court of Appeal shall be type written and verified by the person making the same by a statutory declaration in the form (VIII.) in the Schedule to these rules that the same is a correct and complete transcript of the whole, or of such part, as the case may be, of the shorthand note purporting to have been taken, signed, and certified by the shorthand writer who took the same.

Powers which may be exercised by a Judge of the Court.—By sect. 17, 'The powers of the Court of Criminal Appeal under this Act to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the Court of Criminal Appeal in the same manner as they may be exercised by the court, and subject to the same provisions; but, if the judge refuses an application

on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court of Criminal Appeal as duly constituted for the hearing and determining of appeals under this Act' (*w*).

By Rule 25, (a) Notice of application for leave to appeal or for extension of time within which notice of appeal or notice of application for leave to appeal shall be given under the Act in the forms in the Schedule hereto, and the answers to the questions on forms (IV.), (V.), (VI.), and (VII.), which an appellant is by these rules required to make, in reference to legal aid being assigned to him, or to leave being granted to him to be present at the hearing of his appeal, shall be deemed to be applications to the Court of Appeal in such matters respectively.

(b) The registrar, when any application mentioned in this rule has been dealt with by such judge, shall notify to the appellant the decision. In the event of such judge refusing all or any of such applications the registrar, on notifying such refusal to the appellant, shall forward to him form (XIII.) in the Schedule hereto, which (*sic*) form the appellant is hereby required to fill up and forthwith return to the registrar. If the appellant does not desire to have his said application or applications determined by the Court of Appeal as duly constituted for the hearing of appeals under the Act, or does not return within five days to the registrar form (XIV.) duly filled up by him, the refusal of his application or applications by such judge shall be final. If the appellant desires that his said application or applications shall be determined by the Court of Appeal as duly constituted for the hearing of appeals under the Act and is not legally represented he may, if the Court of Appeal give him leave, be present at the hearing and determination by the Court of Appeal of his said application; provided that an appellant who is legally represented shall not be entitled to be present without special leave of the Court of Appeal.

When an appellant duly fills up and returns within the prescribed time to the registrar form (XIV.) expressing a desire to be present at the hearing and determination by the Court of Appeal of the applications mentioned in this rule, such form shall be deemed to be an application by the appellant for leave to be present. And the registrar, on receiving the said form, shall take the necessary steps for placing the said application before the Court of Appeal. If the said application to be present is refused by the Court of Appeal, the registrar shall notify the appellant; and if the said application is granted, the registrar shall notify the appellant and the governor of the prison wherein the appellant is in custody, and the prison commissioners, as provided by these rules. For the purpose of constituting a Court of Appeal the judge who has refused any such application may sit as a member of such Court, and take part in the determining such application.

(c) A judge of the Court of Appeal sitting under the provisions of sect. 17 of the Act may sit and act wherever convenient.

By Rule 43, (b) In all proceedings before a judge under sect. 17 of the

(*w*) The judge can refer any of these applications to the full Court. R. *v.* Munns, 25 T. L. R. 627: 1 Cr. App. R. 4. The judge has no power under this section to allow further witnesses to be summoned.

Act, and in all preliminary and interlocutory proceedings and applications except such as are heard before the full Court, the parties thereto may be represented and appear by a solicitor alone.

Rules.—By sect. 18, '(1) Rules of court for the purposes of this Act shall be made subject to the approval of the Lord Chancellor, and so far as the rules affect the governor or any other officer of a prison, or any officer having the custody of an appellant, subject to the approval also of the Secretary of State, by the Lord Chief Justice and the judges of the Court of Criminal Appeal, or any three of such judges, with the advice and assistance of the committee hereinafter mentioned. Rules so made may make provision with respect to any matter for which provision is to be made under this Act by rules of court, and may regulate generally the practice and procedure under this Act, and the officers of any court before whom an appellant has been convicted, and the governor or other officers of any prison or other officer having the custody of an appellant and any other officers or persons, shall comply with any requirements of those rules so far as they affect those officers or persons, and compliance with those rules may be enforced by order of the Court of Criminal Appeal.

'(2) The committee hereinbefore referred to shall consist of a chairman of quarter sessions appointed by a Secretary of State, the permanent Under-Secretary of State for the time being for the Home Department, the Director of Public Prosecutions for the time being, the Registrar of the Court of Criminal Appeal, and a clerk of assize, and a clerk of the peace, appointed by the Lord Chief Justice, and a solicitor appointed by the President of the Law Society for the time being, and a barrister appointed by the General Council of the Bar. The term of office of any person who is a member of the committee by virtue of appointment shall be such as may be specified in the appointment.

'(3) Every rule under this Act shall be laid before each House of Parliament forthwith, and, if an address is presented to His Majesty by either House of Parliament within the next subsequent thirty days on which the House has sat next after any such rule is laid before it, praying that the rule may be annulled, His Majesty in Council may annul the rule, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.'

Non-compliance with Act or Rules.—By Rule 45, Non-compliance on the part of an appellant with these rules or with any rule or practice for the time being in force under the Act, shall not prevent the further prosecution of his appeal in the Court of Appeal or a judge thereof consider that such non-compliance was not wilful, and that the same may be waived or remedied by amendment or otherwise. The Court of Appeal or a judge thereof may in such manner as he or they think right, direct the appellant to remedy such non-compliance, and thereupon the appeal shall proceed. The registrar shall forthwith notify to the appellant any directions given by the Court or the judge thereof under this rule, where the appellant was not present at the time when such directions were given.

By Rule 46, The performance of any duty imposed upon any person under the Act or these rules may be enforced by order of the Court of Appeal.

Reference by Home Secretary.—By sect. 19, 'Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment (*x*) or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—

(a) refer the whole case (*xx*) to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or

(b) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly.'

By Rule 48, When the Secretary of State exercises his powers under sect. 19 (a) of the Act and refers the whole case to the Court of Appeal, the petitioner whose case is so dealt with shall be deemed to be for all the purposes of the Act or these rules a person who has obtained from the Court of Appeal leave to appeal, and the Court of Appeal may proceed to deal with his case accordingly.

By Rule 51, Where the Secretary of State refers a point to the Court of Criminal Appeal under sect. 19 (b) of the Act, such Court shall, unless they otherwise determine, consider such point in private.

Writs of Error.—By sect. 20, (1) Writs of error (*ante*, p. 2005) and the powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases are hereby abolished. For subsects. 2, 3, *vide ante*, p. 2011: for subsect. 4, *vide ante*, p. 2009.

Definitions.—By sect. 21, 'In this Act, unless the context otherwise requires—

'The expression "appellant" includes a person who has been convicted and desires to appeal under this Act; and

'The expression "sentence" includes any order of the court made on conviction with reference to the person convicted or his wife or children (*y*) and any recommendation of the court as to the making of an expulsion order in the case of a person convicted, and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order of the Court or recommendation, and a recommendation so made by the Court of Criminal Appeal shall have the same effect for the purposes of section 3 of the Aliens Act, 1905 (*z*), as the certificate and recommendation of the convicting court.'

This definition is extended by sect. 99 (6) of the Children Act, 1908 (set out *ante*, p. 2011). Orders for restitution of stolen property are dealt with by sect 6, *ante*, p. 2015.

(*x*) As to referring case of person sentenced as incorrigible rogue, see R. *v.* Johnson [1909], 1 K.B. 439: 2 Cr. App. R. 13.

(*xx*) *e.g.* as to the propriety of the sentence. R. *v.* Smith: R. *v.* Wilson, 2 Cr. App. R. 271.

(*y*) *e.g.* a separation order under the Summary Jurisdiction, Married Women, Act, 1895, made on conviction of the husband, *ante*, Vol. i. p. 899.

(*z*) 5 Edw. VII. c. 13, *ante*, Vol. i. p. 208.

Repeal.—By sect. 22, 'The Acts specified in the Schedule to this Act are hereby repealed to the extent mentioned in the third column of that Schedule' (*a*).

Short Title, Extent, and Application—By sect. 23, '(1) This Act may be cited as the Criminal Appeal Act, 1907.

'(2) This Act shall not extend to Scotland or Ireland.

'(3) This Act shall apply to all persons convicted after the eighteenth day of April nineteen hundred and eight, but shall not affect the rights, as respects appeal, of any persons convicted on or before that date' (*b*).

(*a*) Enactments repealed: The Treason Act, 1695 (7 & 8 Will. III. c. 3)—in s. 9, from 'but nevertheless' to the end of the section. The Crown Cases Act, 1848 (11 & 12 Vict. c. 78)—ss. 3 and 5. The Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77)—in s. 19, the words 'including the practice and procedure with respect to Crown cases reserved.' The Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68)—s. 15.

(*b*) See R. *v.* Davies [1909], 1 K.B. 892: 2 Cr. App. R. 31.

CANADIAN NOTES.

APPEALS.

From Summary Convictions.—Appeals from summary convictions (Part XV. of the Criminal Code) form the subject of secs. 749-769, and are not within the purview of this work.

Summary Trials Under Code Sec. 777.

With his consent an accused may be tried summarily, in Ontario, by a police magistrate, or by a stipendiary magistrate in any county, district or provisional county; and in any other part of Canada by a police or stipendiary magistrate of any city or incorporated town, for any indictable offence except the following. Code secs. 777 and 582.

No Court mentioned in Code sec. 582 has power to try any of the following offences. Code sec. 583.

(1) Treason. Code sec. 74.

(2) Accessories after the fact to treason. Code sec. 76.

(3) Treasonable offences. Code secs. 77, 78 and 79.

(4) Assaults on the King. Code sec. 80.

(5) Inciting to mutiny. Code sec. 81.

(6) Unlawfully obtaining and communicating official information. Code sec. 85.

(7) Communicating information acquired in office. Code sec. 86.

(8) Administering, taking or procuring the taking of oaths to commit certain offences. Code sec. 129.

(9) Administering, taking or procuring the taking of other unlawful oaths. Code sec. 130.

(10) Seditious offences. Code sec. 134.

(11) Libels on foreign sovereigns. Code sec. 135.

(12) Spreading false news. Code sec. 136.

(13) Piracy. Code sec. 137-140 (inclus.).

(14) Judicial, etc., corruption. Code sec. 156.

(15) Corruption of officers employed in prosecuting offenders. Code sec. 157.

(16) Frauds upon the Government. Code sec. 158.

(17) Breach of trust by a public officer. Code sec. 160.

(18) Municipal corruption. Code sec. 161.

(19) Selling offices. Code sec. 162(*a*).

(20) Murder. Code sec. 263.

(21) Attempt to murder. Code sec. 264.
(22) Threat to murder. Code sec. 265.
(23) Conspiracy to murder. Code sec. 266.
(24) Accessory after the fact. Code sec. 267.
(25) Rape. Code sec. 299.
(26) Attempt to commit rape. Code sec. 300.
(27) Defamatory libel. Code secs. 317-334.
(28) Combination in restraint of trade. Code sec. 498.
(29) Conspiring or attempting to commit, or being accessory after the fact to any of the offences in this section before mentioned. Code sec. 583.
(30) Any indictment for bribery or undue influence, personation or other corrupt practice under the Dominion Elections Act. Code sec. 583.

Speedy Trials.—With his consent a person accused of an indictable offence not included in the above list may be tried by a Judge (Code sec. 823) without a jury.

Appeal by Reserved Case.—From a conviction by a Judge (speedy trial) or a magistrate acting under Code sec. 777 (Summary Trials), an appeal may be taken. Code sec. 1013.

Summary Trials Under Code sec. 773.

Magistrates may try certain specified indictable offences. Code sec. 773.

The offences triable by magistrates under the last named section are all indictable offences, and are therefore all triable also under Code sec. 777.

With regard to (*a*) and (*f*) of sec. 773 there is a right of appeal by stated case, on the law and the facts, by the convicted person. Code sec. 797.

(*a*) Theft, or obtaining money or property by false pretences, or unlawfully receiving stolen property, where the value of the property does not, in the judgment of the magistrate, exceed ten dollars.

(*f*) Keeping or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy house. Code sec. 773.

With regard to offences other than (*a*) and (*f*) of sec. 773, there is no right of appeal by stated case, on the law and the facts. (Code sec. 798.)

From the decision of a magistrate under sec. 777 there is a right of appeal by question reserved, but not from convictions under sec. 773. Code sec. 1013.

If, therefore, a person is convicted for any offence except (*a*) or (*f*) in sec. 773 by a magistrate named in sec. 771 who is not a police or stipendiary magistrate, there is no appeal on law or fact, while from

a conviction by a police or stipendiary magistrate acting under 777 there is an appeal on points of law from a conviction for the same offence.

Right of Appeal Dependent on Jurisdiction of Convicting Magistrate.

For the following offences, therefore, there is or is not an appeal according to whether the jurisdiction of the convicting magistrate is exercised under Code secs. 777 or 773.

(1) Attempt to commit theft;

(2) Unlawfully wounding or inflicting grievous bodily harm upon any other person either with or without a weapon or instrument;

(3) Indecent assault upon a male person whose age does not, in the opinion of the magistrate, exceed fourteen years, when such assault is of such a nature as cannot, in the opinion of the magistrate, be sufficiently punished by a summary conviction before him under any other part; or indecent assault upon a female not amounting in the magistrate's opinion to an assault with intent to commit a rape;

(4) Assaulting or obstructing any public or peace officer engaged in the execution of his duty or any person acting in aid of such officer.

(5) Using or allowing any part of premises under control of accused to be used for the purpose of recording or registering any bet or wager, or selling any pool;

(6) Keeping, exhibiting or employing or knowingly allowing to be kept, exhibited or employed, in any part of any premises under control of accused, any device or apparatus for the purpose of recording any bet or wager or selling any pool;

(7) Becoming the custodian or depositary of any money, property or valuable thing staked, wagered or pledged;

(8) Recording or registering any bet or wager or selling any pool upon the result

(*a*) of any political or municipal election,

(*b*) of any race,

(*c*) of any contest or trial of skill or endurance of man or beast. Code sec. 773.

There is no appeal on the merits from the decision of a magistrate mentioned in Code sec. 782(*a*) (now 771(*a*)) except in (*a*) and (*f*) of 783 (now 773), R. v. Racine (1900), 3 Can. Cr. Cas., at p. 449 (Que.); R. v. Portugais (1901), 5 Can. Cr. Cas. 100 (Que.); R. v.

Nixon (1900), 5 Can. Cr. Cas. 32 (Ont.); R. v. Bougie, 3 Can. Cr. Cas., at p. 492.

The distinction as to the right of appeal mentioned in the last cited cases, between an appeal from a conviction by two justices of the peace and any other magistrate, has been modified by statute, 6 & 7 Edw. VII. ch. 45, sec. 6, because with respect to (*a*) and (*f*) of sec. 773, there was only an appeal on the merits when the decision was by two justices of the peace sitting together.

Nevertheless there is still the anomaly that in certain offences the right of appeal from a relatively inferior class of magistrates is denied and from the superior class is permitted in respect of the same offences. An amendment to the Criminal Code, making sec. 1013 applicable to all convictions under Part XVI., would rectify the matter.

Sec. 1.—Former Modes, now Obsolete, in Canada.

Writ of Error.—No proceeding in error shall be taken in any criminal case. Code sec. 1014.

Sec. 2.—Arrest of Judgment and Certiorari.

(*a*) *Arrest of Judgment.*—Motion in arrest of judgment. See Code sec. 1007.

A motion in arrest of judgment is not the proper manner to raise the question of jurisdiction, for such a motion can only avail when the indictment does not state any indictable offence. R. v. Hogle (1896), 5 Can. Cr. Cas. 53 (Que.).

If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground to have the verdict quashed. R. v. Harris (1898), 2 Can. Cr. Cas. 75.

When a defendant and one of the empanelled jurors have had an unpremeditated and innocent conversation, which could not bias the juror's opinion nor effect his mind and judgment, although such conversation is improper, it cannot have the effect of avoiding the verdict and constituting ground for a new trial. *Ibid.*

An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property (sec. 356), but particulars will be ordered as to the date, nature or purport of the alleged power of

attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a motion in arrest of judgment. R. v. Fulton (1900), 5 Can. Cr. Cas. 36 (Que.).

That a jury may correct their verdict, or that any of them may withhold assent and express dissent therefrom at any time before it is finally entered and confirmed is clear from numerous authorities; and the Judge presiding over a criminal Court cannot be too cautious in being assured that, when a verdict so serious to the party accused as a verdict of guilty is arrived at, all the jury understand the effect and concur in the decision; and if at any moment before it is too late, anything occurs to excite suspicion on this subject he should carefully assure himself that there is no misapprehension in the matter. R. v. Ford (1853), 3 U.C.C.P. 209, 217, per Macaulay, C.J.

There is no legislative authority for amending the verdict of a jury in a criminal case, though an erroneous judgment may be in certain cases made right when the case is being reviewed in a Court of Appeal R. v. Ewing (1862), 21 U.C.Q.B. 523.

Where the misconduct of a jury can be so far impeached as to warrant the Court in interposing to relieve against the verdict, application should be made to stay the judgment, for, after sentence pronounced, judgment cannot be arrested. R. v. Smith (1853), 10 U.C. Q.B. 99.

It has been a long-established rule of law that no affidavit of a juror or of what a juror has said can be received for the purpose of upsetting the verdict of a jury as entered and confirmed. R. v. Lawson (1881), 2 P.E.I. 403.

Certiorari.

General Remedy of Certiorari.—See Code sec. 1124.

Certiorari Generally.—A certiorari is an original writ issuing out of Chancery, or the King's Bench, directed in the King's name to the Judges or officers of inferior Courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him or such other justices as he shall assign to determine the cause. Bacon's Abr. "Certiorari Title."

A town council which has passed a resolution to pay informers, other than the inspector, the costs and a portion of the fine, when collected in prosecutions under the Canada Temperance Act, does not thereby exercise a judicial function. Such a resolution is a ministerial or legislative act which the Court has no jurisdiction to review or quash. Re New Glasgow (1897), 1 Can. Cr. Cas. 22 (N.S.).

The record of conviction may be said generally to consist of two adjudications; the one, the adjudication of guilt, and the other the adjudication of punishment; but the adjudication of guilt cannot be quashed in part and stand good for the residue. McLennan v. McKinnon, 1 O.R. 219; R. v. Dunning, 14 O.R. 52.

If the conviction has been returned to the clerk of the peace or other officer, the writ of certiorari need only be directed to the officer having the custody of the papers. R. v. Frawley, 45 U.C.R. 231.

Provincial statutes in force at the time of Confederation in 1867 regarding certiorari in criminal matters, remain in force except in so far as they have been repealed by or are inconsistent with Dominion legislation. R. v. Marquis (1903), 8 Can. Cr. Cas. 346 (Que.).

Where a defendant applying for a certiorari knows that the minute of adjudication purported to be signed by three magistrates, he should ask that the writ be directed to all of them, for by directing it to one only he affirms that the conviction was made by one justice only, and is estopped from taking the objection that it was made by three. R. v. Smith (1881), 46 U.C.Q.B. 442.

Where there are several convictions for assault against the applicant and others the rule *nisi* should not be a joint rule against all jointly; a separate rule should be taken out in each case. Ex parte Landry (1900), 36 C.L.J. 169 (N.B.).

On a motion for a certiorari it is necessary to produce a copy of the proceedings sought to be removed. Ex parte Emmerson (1895), 1 Can. Cr. Cas. 156 (N.B.).

It is the duty of the party who obtains a rule to have the papers on which it was granted filed in the clerk's office; and where this has not been done an order *nisi* for a certiorari granted at Chambers was discharged by the Court. Ex parte Ryan (1885), 24 N.B.R. 528.

So soon as the return to the certiorari has been filed the cause is in the Court, and the motion paper and the rule must be entitled in the cause. R. v. Morton (1867), 27 U.C.Q.B. 132.

Objections on account of any omission or mistake in a conviction made by a magistrate must be set forth in the rule *nisi* in certiorari proceedings, or the same will not be allowed. R. v. Beale (1896), 1 Can. Cr. Cas. 235 (Man.).

A rule *nisi* for a writ of certiorari under British Columbia practice need not set out the grounds of the application in further detail than is required under the English Crown Office Rules. R. v. McGregor, 10 Can. Cr. Cas. 313.

Where the sentence imposed upon a summary trial by consent before a city stipendiary magistrate for common assault was, in the first instance, three months' imprisonment without mention of hard labour, and the minute of adjudication did not include hard labour, a formal conviction including hard labour is invalid. Ex parte Carmichael, 8 Can. Cr. Cas. 19.

In Bond v. Conmee, 15 O.R. 716, 16 Ont. App. R. 398, a paper purporting to be a conviction signed by the magistrates, but not under their seal was returned to a certiorari issued in aid of a habeas corpus.

The prisoner was discharged, the so-called conviction being a nullity as it was not sealed. It was held in an action brought against the justices that after the return of the certiorari a new conviction could not be returned, and that it was not necessary that the unsealed conviction, being a nullity, should be quashed before an action was brought.

A summary conviction evidenced only by a memorandum of conviction returned to a certiorari may be quashed although no formal record of conviction had been drawn up by the magistrate. R. v. Mancion (1904), 8 Can. Cr. Cas. 218, 8 O.L.R. 24.

An application for a writ of certiorari by the accused to remove a summary conviction may be made without making the informant a party thereto or serving him with a notice of application, if an immediate order to quash without the issue of the writ is not asked, and if the Court has not specially directed service on the informant. Ex parte Harris, 14 Can. Cr. Cas. 109.

Certiorari and not appeal is the appropriate remedy to raise the question of want of jurisdiction, *ex gr.*, whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest. Re Ruggles (1902), 5 Can. Cr. Cas. 163, 35 N.S.R. 57. A statutory provision taking away the right to a certiorari does not deprive the Superior Court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction; and when there is a defect in the jurisdiction of justices or inferior Courts, the common law right of certiorari should not be refused merely because a new trial might be had by means of an appeal. *Ibid.* Even where an appeal is pending, a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. *Ibid.*

No more latitude is given the Court for the exercise of its discretion in granting or refusing a certiorari than in respect of other applications which are in the discretion of the Court. Re Ruggles (1902), 5 Can. Cr. Cas. 163, 35 N.S.R. 57.

Semble, that, whether or not a conviction be good on its face, the Court may on certiorari go into the facts, where the right of appeal to the general sessions upon both law and fact has been taken away by statute. R. v. Hughes (1898), 2 Can. Cr. Cas. 5.

The Court may in its discretion, refuse a certiorari when defendant has pleaded guilty, and there was a right of appeal. Ex parte Barbarie, 31 N.B.R. 368.

Certiorari does not lie to bring up a warrant of commitment to be quashed upon grounds not affecting the convictions under which the warrant issued, nor will the Court quash the warrant in certiorari proceedings in which the conviction is also brought up, if the conviction itself is valid. The proper procedure for reviewing upon grounds not

affecting the conviction, the validity of a warrant of commitment under which the accused is in custody, is by way of habeas corpus. Ex parte Bertin, 10 Can. Cr. Cas. 65.

Where there is a right of review by other process a certiorari should not be granted except under exceptional circumstances. Ex parte Young (1893), 32 N.B.R. 178.

Where there is a right of appeal from a summary conviction, and it appears upon an application for a certiorari to bring up the conviction to be quashed that the ground alleged therefor is more properly the subject of an appeal, the discretion of the Court should be exercised by refusing the certiorari. R. v. Herrell (No. 2) (1899), 3 Can. Cr. Cas. 15 (Man.), per Dubuc, J.

A statute enacting that no conviction shall be removed by certiorari does not deprive the Court of jurisdiction to grant the writ where the magistrate acted without jurisdiction. R. v. Hoggard (1870), 30 U.C. Q.B. 152. But an erroneous finding on the evidence by the magistrate is not such a want of jurisdiction as warrants the issue of a certiorari. R. v. Wallace (1883), 4 O.R. 127. Certiorari cannot issue merely for the purpose of examining and weighing the evidence which was before the magistrate. R. v. Sanderson (1886), 12 O.R. 178.

When there has been a plain excess of jurisdiction, this remedy of certiorari would be accessible even if a statute had declared that certiorari should not issue, because that prohibition would not be held to apply where the justices had entertained a matter not within their jurisdiction. Hespeler v. Shaw (1858), 16 U.C.Q.B. 104.

Where certiorari is taken away by statute the Court will not look into the evidence to see if the date of the offence proved is subsequent to the date stated in the conviction, provided the magistrate had jurisdiction by virtue of a good information and summons. Ex parte Sarah McKinnon (1897), 33 C.L.J. 503 (N.B.).

Even though a statute purports to take away the right of certiorari, it may be granted where there has been improper conduct of the magistrate or the fundamental principle entitling the party to a fair trial has been overlooked. Re Sing Kee (1901), 5 Can. Cr. Cas. 86 (B.C.).

Where the same Court has jurisdiction both in appeal and upon certiorari and a summary conviction has been transmitted by the magistrate and filed in such Court under Code sec. 757, the writ of certiorari cannot be dispensed with for the purposes of a motion to quash the conviction. R. v. Gehrke, 11 Can. Cr. Cas. 109.

The superior Court of the Province of Quebec has jurisdiction to review by certiorari any decision rendered by a justice of the peace in a criminal matter. Leonard v. Pelletier (1903), 9 Can. Cr. Cas. 19.

But a writ of certiorari will not be granted to review the judgment of the Recorder's Court in the Province of Quebec where the law

permits an appeal from such judgment. O'Shaughnessy v. Montreal (1904), 9 Can. Cr. Cas. 44.

Application by Crown.—A writ of certiorari may be claimed by the Crown as a matter of right on application of the Attorney-General without the production of any affidavit. Re Ruggles (1902), 5 Can. Cr. Cas. 163, 35 N.S.R. 57.

Statutory Notice to Justices.—The Imperial statute, 13 Geo. II. ch. 8, sec. 5, is in force in British Columbia, and six days' previous notice of the motion for a certiorari must be given to the justices; and a rule *nisi* for a certiorari made returnable six days or more after service thereof is not a sufficient compliance with the statute. Re Plunkett (1895), 1 Can. Cr. Cas. 365.

By that Act it is provided as follows:—

(5) And for the better preventing vexatious delays and expense, occasioned by the suing forth writs of certiorari, for the removal of convictions, judgments, orders and other proceedings before justices of the peace, be it further enacted by the authority aforesaid that from and after the twenty-fourth day of June, which shall be in the year of our Lord one thousand seven hundred and forty, no writ of certiorari shall be granted, issued forth or allowed to remove any conviction, judgment, order or other proceedings had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter-sessions thereof, unless such certiorari be moved or applied for within six calendar months next after such conviction, judgment, order or other proceeding shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing for the same hath or have given six days' notice thereof in writing to the justice or justices, or to two of them (if so many there be) by and before whom such conviction, judgment, order, or other proceeding shall be so had or made, to the end that such justice or justices or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari.

The effect of the statute 13 Geo. II. ch. 18, sec. 5, is to imperatively require that six days' notice shall be given, and to make the giving of it a condition precedent to the issuing of the writ, and the convicting justices are not driven to make an independent application to quash the certiorari for the want of such notice, but can set up the defect in answer to the rule *nisi* obtained by the defendant to quash the conviction. R. v. McAllan (1880), 45 U.C.R. 402, 406.

The reason for giving the magistrate notice of the application for a certiorari is that he is exposed to an action if the conviction should be quashed. R. v. Peterman (1864), 23 U.C.Q.B. 516.

It is not necessary to serve notice of motion for a certiorari to remove a conviction on the private prosecutor; he has nothing to do

with the proceeding; if the writ be granted he will then be served with a rule *nisi;* it is that alone with which he is interested. Re Lake (1877), 42 U.C.Q.B. 206; R. v. Murray (1867), 27 U.C.Q.B. 134.

An affidavit of service of notice of motion for a certiorari to remove a conviction made by justices of the peace was held insufficient in that it did not indemnify the justices served as the convicting justices, but as the time for moving for the certiorari had not expired, the applicant was allowed to amend his affidavit in this respect. Re Lake (1877), 42 U.C.Q.B. 206.

Quashing the Certiorari.—Where it is desired to take objection to some irregularity in obtaining the allowance of the certiorari or to the issue of the writ itself, the proper course is to move to quash the writ or the allowance of it and not to shew the defect as cause against quashing a bad conviction. R. v. Hoggard (1870), 30 U.C.Q.B. 152. This is in order that the Court may, if it sees fit, direct an amendment.

In shewing cause to a rule *nisi* to quash a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it need not be made. Where, therefore, on an application made after notice to the convicting justices for a rule for a certiorari the rule was refused, and on a subsequent *ex parte* application on the same material the rule was obtained, it was held that the notice of the first application would not enure to the benefit of the defendant on his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged. R. v. McAllan (1880), 45 U.C.Q.B. 402.

When a whole term has elapsed without objection being made after the case has been brought up, a preliminary objection is then too late. R. v. Basingstoke (1849), 19 L.J.M.C. 28; R. v. Whittaker (1894), 24 Ont. R. 437.

Where the objection to the allowance of the certiorari is a substantial one, and the conviction not manifestly bad, there is no reason why the party should be precluded from raising it on the return of the rule to quash the conviction, instead of being driven to incur the expense of a special motion to quash the allowance. Where, on the other hand, the objection is of a trivial or merely technical character (R. v. Hoggard, 30 U.C.Q.B. 152), the party may well be told that he would not be heard to raise it except in a strictly formal and technical way; and *a fortiori* if the conviction was clearly bad and must inevitably be quashed, for in that case the recognizance would be no avail to the respondent. R. v. Cluff (1882), 46 U.C.Q.B. 565.

In Nova Scotia where no step has been taken within a year a rule absolute in the first instance will be granted to quash a certiorari. R. v. Renes (1884), 17 N.S.R. 87 (following City of Halifax v. Vibert, 3 R. & C. 54).

Where a party obtaining an order *nisi* for a certiorari was directed by the Judge to serve the prosecutor with copies of his affidavits and grounds on which the order was granted but neglected to do so, the order was discharged. Ex parte Doherty (1887), 26 N.B.R. 390.

A writ of certiorari not signed by the prothonotary will be quashed. R. v. Ward (1888), 21 N.S.R. 19.

The Court has the power to set aside any of its process improvidently issued, and a writ of certiorari may be superseded by the Court of its own motion if the proceedings are not a proper subject for certiorari although the motion for the writ was not opposed and no motion to quash had been made. Rex ex rel. Corbin v. Peveril (1903), 36 N.S.R. 275.

Preliminary objections to a writ of certiorari removing a conviction must be raised promptly, and objections to matters of form in the certiorari proceedings will not be entertained on the motion to quash the conviction when three months have elapsed since the return, without a substantial motion being made to quash the writ. Reg. v. Davidson (1900), 6 Can. Cr. Cas. 117.

Where an order *nisi* to quash a conviction has been issued, but before service of same upon the informant the latter died, the proceedings do not lapse and can be properly continued by serving the magistrates. R. v. Fitzgerald (1898), 1 Can. Cr. Cas. 420 (Ont.).

Where an application for a writ of certiorari has been dismissed, the Court will not entertain another application for the same purpose, although the first was dismissed on a preliminary objection. R. v. Geiser (No. 2), 7 Can. Cr. Cas. 172, 9 B.C.R. 503.

Return to Certiorari.—The return to the Court by a convicting magistrate under a certiorari is conclusive, and the Court cannot go behind it. R. v. Strachan (1870), 20 U.C.C.P. 182.

Where the first conviction drawn up and filed with the clerk of the peace was thought to be erroneous, and the justices drew up and returned an amended one, such amendment not being an amendment of the adjudication of punishment, but merely of the proceeding by which the payment of the fine adjudicated was to be enforced, it was held that the first conviction was amendable and that the amended conviction ought not to be quashed. R. v. Menary (1890), 19 Ont. R. 691.

A summary conviction which illegally imposes imprisonment with hard labour in default of payment of the fine, may be amended at any time before it is acted upon, by the return of an amended conviction omitting the words "with hard labour" but in other respects conforming to the adjudication. Such an amended conviction may be returned in answer to certiorari process although the first conviction has been transmitted by the magistrate, pursuant to a statutory requirement,

to the Court to which an appeal might be taken therefrom. R. v. McAnn (1896), 3 Can. Cr. Cas. 110 (B.C.).

A motion to quash the return to a certiorari will not be heard until after the disposal of a pending appeal from the order granting certiorari. R. v. Hurlburt, 26 N.S.R. 123, 2 Can. Cr. Cas. 331.

Justice's Findings of Fact.—Findings of fact by the magistrate are not open to review on motion to quash conviction in certiorari proceedings, if there was evidence from which he might draw the conclusion he did. Ex parte Coulson (1895), 1 Can. Cr. Cas. 31 (N.B.).

But a conviction cannot be sustained without any evidence. The evidence required to support it is that which the Court can see, does and may reasonably support it. If there be evidence which may support it, if considered in one view, the conviction will be maintained, although the magistrate has formed an opinion very different from that which the Court would have formed, or although the Court may think the magistrate has come to a wrong conclusion. Per Wilson, J., in R. v. Howarth (1873), 33 U.C.Q.B. 537, 549.

In Nova Scotia it is held that the Court cannot entertain an objection that the magistrate erroneously found a fact which, though essential to the validity of his order, he was competent to try. R. v. Walsh (1897), 33 C.L.J. 537 (N.S.); R. v. McDonald, 19 N.S.R. 336, reversed.

In the Ontario case of R. v. Howarth, the defendant, a druggist of Toronto, sold five cents' worth of peppermint lozenges at his shop on a Sunday. The purchaser did not ask for them as medicine, he had no doctor's certificate, and he was asked no questions. It was shewn that peppermint lozenges were generally kept and sold by druggists as medicine. Defendant having been convicted on this evidence under C.S.U.C. ch. 104, and fined, the conviction was removed by certiorari. It was held that the finding of the magistrate as to whether the lozenges were or were not medicine was subject to review by the Court. R. v. Howarth (1873), 33 U.C.Q.B. 537.

It was held by the Queen's Bench Division in Ontario that a conviction bad on its face for uncertainty should be amended by the Court to which removed by certiorari, only when such Court can conclude on the evidence that an offence is thereby proved. R. v. Coulson (1893), 1 Can. Cr. Cas. 114 (Ont.); 24 Ont. R. 246.

But in a subsequent case of R. v. Coulson (1896), 27 Ont. R. 59, the same defendant, coming before the Common Pleas Division, dissent was expressed from the judgment above reported of the Queen's Bench Divisional Court. In the opinion of the common pleas Judges the evidence should be looked at, when the proceedings are removed by certiorari, in order to see if there was any evidence whatever to sustain the magistrate's finding, even if no defect appeared on the face of the conviction; and if there was any evidence of that character

the Court should not review all the evidence or find as to the propriety of the magistrate's conclusion. R. v. Coulson (1896), 27 Ont. R. 59.

Where a summary conviction is not on its face defective, and the justice had general jurisdiction over the subject-matter, the adjudication involved in the merits of the case, on the facts as distinguished from collateral facts upon which the justice's jurisdiction depends, is not reviewable on certiorari. R. v. Beagan (No. 1) (1902), 6 Can. Cr. Cas. 54 (N.S.).

An adjudication by a tribunal having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts therein stated; and the Court will not on certiorari quash an adjudication upon the ground that the fact, however essential, has been erroneously found. R. v. "The Troop," 29 Can. S.C.R., p. 673.

Lesser Punishment.—The fact that the punishment imposed is less than that which the law assigns will not invalidate the conviction. Code sec. 1125.

Where a statute imposes a definite penalty for an offence, a summary conviction awarding a lesser fine and, in default of payment, a lesser term of imprisonment than that specified, is bad and must be quashed in a case to which Code secs. 1124 and 1125 do not apply. R. v. Hostyn, 9 Can. Cr. Cas. 138.

Negativing Exceptions.—The omission to negative circumstances the existence of which would make the act complained of lawful, will not invalidate a conviction, whether such circumstances are stated by way of exception or otherwise in the section under which the offence is laid or are stated in a separate section. Code sec. 1125.

Under sec. 1124 amendments ought only to be made where the Court or Judge is satisfied from the depositions that if trying the defendant in the first instance, the Court or Judge would upon that evidence have convicted. R. v. Law Bow (1903), 7 Can. Cr. Cas. 468.

Where upon the return to a writ of certiorari the Court, upon perusal of the depositions, has no doubt as to the commission of the offence for which the defendant has been tried and convicted, but the conviction is defective in awarding a longer term of imprisonment than the statute permits, the Court has power to amend the conviction by reducing the term to the statutory limit. The merits of the defence as disclosed by the depositions may be enquired into upon the motion to amend, but the reference in sec. 1124 to the procedure on appeals from summary convictions does not imply that there shall be a trial *de novo* for the purpose of fixing an appropriate punishment. R. v. McKenzie (1907), 12 Can. Cr. Cas. 435 (N.S.).

Territorial Jurisdiction of Magistrate.—Upon a motion for a rule *nisi* to quash a summary conviction of the defendant by a stipendiary

magistrate for selling liquor without a license:—Held, that although the conviction did not shew on its face that the offence was committed at a place within the territorial jurisdiction of the magistrate, yet, as the warrant for the defendant's apprehension, which was returned upon certiorari, shewed the complaint to be that the defendant sold liquor at a place within the magistrate's jurisdiction, and it was to be inferred that the evidence returned was directed to that complaint, sufficient appeared to satisfy the Court that an offence of the nature described in the conviction was committed, over which the magistrate had jurisdiction, and therefore the conviction should not, having regard to sec. 1124 of the Criminal Code, be held invalid. R. v. McGregor, 26 O.R. 115, 2 Can. Cr. Cas. 410.

Where it does not appear upon the face of the conviction that the offence was committed within the territorial jurisdiction of the convicting justices, but it is clear upon the depositions that such was the fact, the defect will be cured by sec. 1124. R. v. Perrin (1888), 16 O.R. 446.

Defects Curable.—Where a perusal of the depositions returned on certiorari satisfies the Court that an offence was committed as stated in the conviction and of the date and place of same which had not been stated in the conviction, the irregularity in not stating such date and place is cured by Code sec. 1124 unless an excessive punishment has been imposed by the magistrate. R. v. Lewis, 6 Can. Cr. Cas. 499.

A conviction which varies from the minute of adjudication in omitting to provide for the payment of the costs and charges of the distress, in the event of the defendant being imprisoned for non-payment, may be amended if the costs of the distress are not in the discretion of the magistrate. Ex parte Conway (1892), 31 N.B.R. 405.

An omission to state *scienter* of the accused will not invalidate a conviction if the Court upon perusal of the depositions is satisfied that an offence of the nature described in the conviction has been committed. R. v. Crandall (1896), 27 Ont. R. 63.

Where it does not appear upon the face of the conviction that the offence was committed within the territorial jurisdiction of the convicting justices, but it is clear upon the depositions that such was the fact, the defect will be cured by this section. R. v. Perrin (1888), 16 O.R. 446.

But the powers of amendment conferred by this section do not apply where there is an inherent defect in procedure which has deprived the accused of a fair trial, *ex gr.*, a view of the *locus in quo* taken by the magistrate in the absence of the parties. Re Sing Kee (1901), 5 Can. Cr. Cas. 86 (B.C.).

To authorize the amendment of a conviction under this section the Court or Judge must from the depositions be satisfied that, if trying

the defendant in the first instance, the Court or Judge would have convicted upon that evidence. R. v. Herrell (1898), 1 Can. Cr. Cas. 510 (Man.).

Notwithstanding that the conviction is irregular, the Court may adjudicate *de novo* on the evidence given before the magistrate; but the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate. R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.); Ex parte Nugent (1895), 1 Can. Cr. Cas. 126.

Defects not Curable.—The omission of the word "knowingly" from both the information and the conviction in a prosecution under the Alien Labour Statutes is a matter of substance and not a mere matter of form, and the defect is not curable upon certiorari as an "irregularity, informality or insufficiency" under Code sec. 1124. R. v. Hayes, 6 Can. Cr. Cas. 357, 5 O.L.R. 198.

Semble, a conviction containing an adjudication far in excess of that which might lawfully have been imposed will not be amended upon certiorari. Leonard v. Pelletier, 9 Can. Cr. Cas. 19 (Que.).

It is essential in a conviction of a sailor under the Canada Shipping Act for continued wilful disobedience to state that the act charged was wilfully committed, and the omission to do so is fatal to the validity of the conviction. The defect is not cured by stating the offence in the conviction to be "unlawful" disobedience. R. v. Bridges (1907), 12 Can. Cr. Cas. 548, 13 B.C.R. 67.

Certiorari for Want of Jurisdiction.—A statute enacting that no conviction shall be removed by certiorari does not deprive the Court of jurisdiction to grant the writ where the magistrate acted without jurisdiction. R. v. Hoggard (1870), 30 U.C.Q.B. 152.

An erroneous finding on the evidence by the magistrate is not such a want of jurisdiction as warrants the issue of a certiorari. R. v. Wallace (1883), 4 O.R. 127. That case is a clear affirmance of the view that certiorari cannot issue merely for the purpose of examining and weighing the evidence which was before the magistrate. Per Osler, J.A., in R. v. Sanderson (1886), 12 O.R. 178.

When there has been a plain excess of jurisdiction, this remedy of certiorari would be accessible even if a statute had declared that certiorari should not issue, because that prohibition would not be held to apply where the justices had entertained a matter not within their jurisdiction. Hespeler v. Shaw (1858), 16 U.C.Q.B. 104.

Where certiorari is taken away by statute the Court will not look into the evidence to see if the date of the offence proved is subsequent to the date stated in the conviction, provided the magistrate had jurisdiction by virtue of a good information and summons. Ex parte Sarah McKinnon (1897), 33 C.L.J. 503 (N.B.).

Even though a statute purports to take away the right to certiorari, it may be granted where there has been improper conduct of the magistrate or the fundamental principle entitling the party to a fair trial has been overlooked. Re Sing Kee (1901), 5 Can. Cr. Cas. 86 (B.C.).

The improper refusal of the magistrate to allow the defendant to give evidence is a matter going to the jurisdiction. Ex parte Legere, 27 N.B.R. 292.

Costs Where Amended Conviction Returned.—Where the only record of conviction produced before the institution of certiorari proceedings to quash the same is bad, and a valid amended conviction is produced in such proceedings, the costs of opposing the motion to quash should not be awarded against the applicant. R. v. McAnn (1896), 3 Can. Cr. Cas. 110 (B.C.); R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

Costs on Certiorari in Ontario.—By rule of Court in Ontario, it is declared that subject to the express provisions of any statute heretofore or hereafter passed, the costs of and incidental to proceedings for or in relation to the quashing of convictions or orders shall be in the discretion of the Court of Judge and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid. Ontario Rule 1241 published in *Canada Gazette*, 2 July, 1904.

Apart from any effect which that rule of Court may have under the Code, as to which see sec. 576, the Court has no jurisdiction in Ontario to award costs in a criminal matter against the prosecutor.

Cases in which costs have been given against an unsuccessful applicant for a writ of certiorari, or to quash are to be distinguished, for in such cases the Court has jurisdiction to give costs against the applicant, either because of the recognizance which he has entered into to pay the costs, or of the inherent power which the Court possesses to give costs as a punishment for erroneously putting the jurisdiction of the Court in motion. R. v. Bennett (1902), 5 Can. Cr. Cas. 459; R. v. Crandall, 27 O.R. 63; R. v. Somers, 1 Can. Cr. Cas. 46. But the costs of quashing a conviction are recoverable as part of the damages in an action for malicious prosecution or false arrest where no order of protection is made. R. v. Somers (1893), 1 Can. Cr. Cas. 46 (Ont.).

Procedendo.—Where a conviction has been removed by certiorari and afterwards affirmed, the proper course is to send the record of the proceedings back to the magistrate in order that he may cause it to be enforced in the same way that he would have done if it had not been removed into the Court. R. v. Grimmer (1886), 25 N.B.R. 480. It is not necessary to take out a rule to take the return off the file before

applying for a *procedendo*, it being sufficient that leave has been granted to remove the return from the file. R. v. White & Perry (1886), 25 N.B.R. 483. Where a conviction has been removed by certiorari and affirmed, the Court will not on an application for a *procedendo* to the convicting justice examine into the validity of the conviction on grounds not taken on the motion to quash it. *Ibid.*

After the quashing of a writ of certiorari and the issue of a writ of *procedendo*, and the return of the conviction to the magistrate, a second writ of certiorari will not be granted. R. v. Nichols (1889), 21 N.S.R. 288.

If the writ of certiorari issued to remove a summary conviction into a superior Court was served only upon the clerk of the peace with whom the conviction was filed, and not upon the convicting magistrate, and the magistrate, having no knowledge that certiorari had been directed, thereafter enforced the conviction, he is not guilty of contempt of Court in so doing. R. v. Woodyatt (1895), 3 Can. Cr. Cas. 275 (Ont.).

No appeal lies in British Columbia to the full Court from the decision of a single Judge quashing a summary conviction under the Criminal Code on the return to a certiorari. R. v. Carroll, 14 Can. Cr. Cas. 338.

1. If there is any evidence upon which a summary conviction can be based, the Court, upon an application to quash in certiorari proceedings will not consider the weight of conflicting evidence, but will affirm the conviction if otherwise unobjectionable.

2. Where the magistrates hearing a prosecution under a liquor license law reserved judgment and sent for the license inspector, who was the informant and held a private conference with him as to the witness's costs, their conduct, although to be deprecated, is not sufficient to quash the conviction, but is ground for depriving not only the magistrates, but the informant, of their costs of opposing the certiorari proceedings. R. v. McArthur, 14 Can. Cr. Cas. 343.

Where the depositions in support of a summary conviction for keeping liquor for sale without a license fail to shew the time and place of the alleged offence or that the circumstances deposed to had reference to the time and place stated in the information, the conviction will be quashed for lack of evidence to support the same.

2. A town magistrate exercising jurisdiction outside of the town, but within the same county or district under the jurisdiction conferred by sec. 30 of the Ontario Police Magistrates Act, need only describe himself in such proceedings as police magistrate of the town without adding that he is *ex officio* a justice of the peace for the county or district.

3. An appointment of a police magistrate by the Lieutenant-

Governor in Council is effective from the date of the Order in Council unless the order provides otherwise. R. v. Reedy, 14 Can. Cr. Cas. 256.

Informality, irregularity or insufficiency in conviction or order shall, on certiorari be held invalid if Judge satisfied that offence has been committed, and punishment lawfully imposed. Code sec. 1124.

Irregularities, etc., Within Code sec. 1124.—See Code sec. 1125.

Conviction Affirmed on Appeal not to be Quashed on Certiorari When.—See Code sec. 1121.

"An" order of dismissal is not within this section. R. v. Laird (1899), 1 Terr. L.R. 179.

Where a summary conviction imposed both imprisonment and fine, and in default of payment of the latter, a further detention for a fixed term unless the fine were sooner paid, the omission from the warrant of commitment of the latter proviso as to payment during the term is a defect which is cured by Code sec. 1121 and the warrant is valid. R. v. Joseph McDonald (1898), 6 Can. Cr. Cas. 1 (N.S.).

Where the want of jurisdiction is apparent on the commitment, the prisoner is, of course, entitled to be discharged; but there is a distinction to be drawn between cases where the commitment itself shews on its face that the justice could have had no jurisdiction, and those cases where the justice may have had jurisdiction, but the commitment fails to recite such facts as would either establish or negative the same. A mere defect in a commitment will not make it void if (1) the commitment alleges that the defendant has been convicted, and (2) there is, in fact, a valid conviction. Cr. Code sec. 1121.

Commitment not Alleging a Conviction.—A prisoner detained under a warrant which is in form one of committal for trial but which charges an offence punishable only on summary conviction, will be discharged on habeas corpus. Although there may in fact have been a summary hearing and summary conviction thereon, if the warrant of commitment returned as the cause of detention is bad on its face in not alleging that the defendant has been convicted, a formal conviction cannot be received to remedy the defect as Code sec. 1121 applies only to cases in which the warrant alleges a conviction. R. v. Lalonde (1895), 9 Can. Cr. Cas. 501 (Alta.).

See also secs. 754, 1122, 1124 and 1129.

Certiorari not to lie When Appeal is Taken.—See Code sec. 1122.

Effect of Appeal Proceedings on Certiorari.—Where an appeal was taken from a summary conviction but lapsed because of the failure of the magistrate to return the conviction, a superior Court may afterwards issue a certiorari and quash the conviction notwithstanding the abortive appeal and Code sec. 1122, upon the ground that the magistrate had deprived the accused of a reasonable opportunity of making their defence and had acted collusively with the prosecutor. Ex parte Cowan, 9 Can. Cr. Cas. 454.

In exceptional cases the Court will grant a certiorari although another mode of reviewing the conviction is provided by statute, and this jurisdiction will be exercised where a gross perversion of justice has occurred through the misconduct of the magistrate. Ex parte Cowan, 9 Can. Cr. Cas. 454, 36 N.B.R. 503.

Where an appeal has been taken, the question of jurisdiction alone is open on a certiorari thereafter. R. v. Dunning (1887), 14 O.R. 52; R. v. Horning, 8 Can. Cr. Cas. 268 (Ont.).

In R. v. Starkey, 6 Man. R., p. 589, Taylor, C.J., said: "It is not necessary for the applicant to shew what has been done in the matter of the appeal. Even if an appeal is now pending and being proceeded with, his right to a writ of certiorari is not thereby affected. At all events, it is not so unless the question of jurisdiction is the one raised on the appeal." And in R. v. Starkey, 7 Man. R. 47, a case in which notice of appeal had been given before applying for the writ of certiorari and abandoned, the same Judge said: "By sec. 84 of the Summary Convictions Act, R.S.C. ch. 178, 'No writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law,' but it seems still open to the defendant to maintain the present proceeding upon any ground which impeaches the jurisdiction of the magistrates." See also R. v. Montgomeryshire, 15 L.T.N.S. 290; Paley on Convictions, 7th ed., pp. 358, 359.

If the notice of appeal be void for irregularity, certiorari is not taken away. R. v. Caswell (1873), 33 U.C.Q.B. 303; R. v. Becker (1891), 20 Ont. R. 676.

Even where an appeal is pending, a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. Re Ruggles (1902), 5 Can. Cr. Cas. 163 (N.S.).

Detention of Accused on Inquiry on Certiorari as to Legality of Imprisonment.—See Code sec. 1120.

(See also 7 & 8 Edw. VI. ch. 18, sec. 14 (amending Code sec. 1120.)

In R. v. Fife (1889), 17 Ont. R. 710, a warrant of commitment for trial, issued in a preliminary enquiry upon a charge of having "wilfully and maliciously" burned down a fence, was quashed by MacMahon, J., as insufficient because it did not charge also that the act was done "unlawfully." The prosecution was there taken under the Malicious Injury to Property Act, R.S.C. (1886) ch. 168, sec. 58, under which section the injury must have been done "unlawfully and maliciously" in order to constitute an offence thereunder.

The inclusion of the process of certiorari in Code sec. 1120 leads to the inference that the powers thereby conferred are to apply as well after as before the conviction and that a person convicted still remains a person "charged with an indictable offence."

No Conviction under Juvenile Offenders Part to be Reviewed upon Certiorari.—See Code sec. 1123.

General Order for Security by Recognizance on Writ of Certiorari.—See Code sec. 1126.

Nova Scotia Crown Rule No. 28 is a general order of Court as to security for costs on certiorari under Cr. Code sec. 1126, and a recognizance given thereunder may be enforced by attachment under Code sec. 1096.

Section 1126 of the Code applies as well to a recognizance required to be given on the application for the writ of certiorari, as to a recognizance given after returns made to the writ, if, upon the former, the Court may order that the conviction be quashed on the return of the writ without further order. R. v. Townsend (No. 5), 13 Can. Cr. Cas. 209.

Security for costs cannot be ordered against the petitioner for a writ of certiorari in a criminal case in the absence of a general rule of Court passed under Code sec. 1126.

Where a deposit of cash is made, under sec. 1126 of the Code, in lieu of a recognizance in certiorari proceedings to quash a summary conviction, it is not necessary that the applicant should file at the same time a written document setting forth the condition upon which the deposit is made. R. v. Davidson, 6 Can. Cr. Cas. 117.

Section 892 of the Criminal Code, 1892 (now sec. 1126 of the Criminal Code, 1906), as to recognizances in certiorari proceedings applied only to matters under the summary convictions clauses and not to summary trials by a magistrate or two justices under the summary trials clauses for certain indictable offences. R. v. Earley, 14 Can. Cr. Cas. 10.

Alberta and Saskatchewan.—It has been held by the Supreme Court of the Territories that a rule made under sec. 1126 is complied with if the sureties justify as being possessed of property of the amount specified in the rule, and swear that they are worth the amount over and above all their just debts and liabilities, and over and above all exemptions allowed by law. R. v. Ashcroft (1899), 2 Can. Cr. Cas. 385. The Ontario decision in R. v. Robinet (1894), 2 Can. Cr. Cas. 382, under which the surety must justify also above other sums for which he is surety was not followed.

A rule of Court required that no motion to quash a conviction should be entertained unless the defendant were shewn to have entered into and deposited a recognizance in $300 with one or more sufficient sureties, or to have made a deposit of $200. On a motion to make absolute a rule *nisi* to quash a certain conviction, a recognizance had been entered into and deposited, but without an affidavit of justification of the sureties or other evidence of their sufficiency. It was held follow-

ing R. v. Richardson, 17 O.R. 729, that the rule of Court had not been complied with and that therefore the rule *nisi* must be discharged. But $200 having been deposited a day or two before the return day of the rule *nisi*, with the view of complying with the rule of Court, the applicant was allowed to take a new rule *nisi* in the terms of the one discharged. R. v. Petrie (1889), 1 Terr. L.R. 191.

British Columbia.—See Crown rules of British Columbia, 1896, relating to certiorari.

Crown Rules in Ontario Governing Certiorari Practice.—At a meeting of the Supreme Court of Judicature for Ontario, held on 27th March, 1908, it was ordered that certain rules be adopted to come into force on confirmation thereof by a proposed amendment to the Criminal Code, which has not yet been made.

The requirements of the rule as to filing affidavits of justification are imperative and that leave to file such affidavits pending the motion to quash cannot be granted. McIsaac v. McNeil, 28 N.S.R. 424.

Practice as to Recognizance.—In Ontario a surety upon a recognizance filed on a motion to quash a summary conviction, must justify in the sum of $100 over and above any amount for which he may be surety as well as over and above his debts. R. v. Robinet (1894), 2. Can. Cr. Cas. 382.

In the absence of an affidavit of justification to the recognizance the Court cannot entertain motions to quash convictions. "The sufficiency of the suretyship is not shewn by the mere production of the recognizance; the Court must have some evidence upon which it can say that there were sufficient sureties." R. v. Richardson and R. v. Addison (1889), 17 O.R. 729.

Where there is a rule of Court that no motion "shall be entertained" to quash a conviction unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties to prosecute the certiorari (B.C. Crown Rules (1896), No. 5), there must be an affidavit of justification before the Court upon which it can judge of the sufficiency of the sureties and the Court cannot even adjourn the motion. R. v. Ah Gin (1892), 2 B.C.R. 207.

A second application for a writ of certiorari will not be entertained by the Court although the dismissal of the first was upon a preliminary objection that no recognizance had been filed, unless leave to renew was given. R. v. Geiser (No. 2), 7 Can. Cr. Cas. 172 (B.C.).

A recognizance given under the Ontario Crown rule of November, 1886, to prosecute certiorari proceedings, was held to be invalid if the principal cognizor enters into the recognizance before a justice of another country than that in which the conviction was made. R. v. Johnson (1904), 8 Can. Cr. Cas. 123.

No writ of Procedendo Necessary on Discharge of Motion to Quash.—See Code sec. 1127.

Proceedings in Lieu of Procedendo.—Where the Superior Court cannot enforce the execution of the judgment or cannot administer the same justice to the parties as the Court below, or where it appears that there was no good cause for removing it, the former practice was to order a writ of *procedendo* to issue to send the case back to the inferior Court. R. v. Ziekrick (1897), 11 Man. R. 452; R. v. Rushworth, 9 Jur. 161. This section dispenses with the necessity of that writ when the conviction is affirmed, but not otherwise. R. v. Zickrick (1897), 5 Can. Cr. Cas. 380, 11 Man. R. 452. It is limited also to convictions, orders or proceedings in criminal matters under Dominion jurisdiction (sec. 706), and applies to offences under provincial laws only in so far as provincial legislation has directed. Where a conviction was quashed on the ground that service of the summons had not been legally effected or waived, the information cannot be returned to the justice under this section to enable him to issue another summons even where it is too late for the prosecutor to lay a second information. R. v. Zickrick (1897), 11 Man. R. 452, 5 Can. Cr. Cas. 380.

After the quashing of a writ of certiorari and the return of the conviction to the magistrate, a second writ of certiorari will not be granted. R. v. Nichols (1889), 21 N.S.R. 288.

It would seem that where the return to the writ of certiorari in aid of a habeas corpus has not been actually filed in the Superior Court, a *procedendo* is not necessary on the remand of the accused to custody and quære whether Code sec. 1127 would not apply to dispense with a *procedendo* in such a case. R. v. Harrison (1907), 15 O.L.R. 321.

Conviction, etc., not to be Set Aside for Want of Proof of Order in Council or for Want of Form.—See Code secs. 1128, 1129.

Defects of Form.—Where a summary conviction is in the regular course returned to a Superior Court of criminal jurisdiction without a writ of certiorari, sec. 1129 of the Code will not operate to prevent the conviction being quashed for a defect of form, where there is no evidence to shew that the defendant has not appealed against the conviction or that, if he did appeal, the conviction was affirmed upon the appeal. R. v. Hostyn, 9 Can. Cr. Cas. 138.

In matters of summary conviction falling under the Criminal Code the depositions must be taken in writing, otherwise the conviction will be quashed. The irregularity is not a mere defect of form and is not cured by sec. 1129. Re Lacroix (1907), 12 Can. Cr. Cas. 297 (Que.).

While an Order in Council proclaiming the Canada Temperance Act in force in a county must be judicially noticed under Cr. Code sec. 1128, it must be shewn on a trial for an offence under the Act that the then current liquor licenses had expired, on that there were no

liquor licenses in the county, as the case may be, as by sec. 109 of the Canada Temperance Act if there were no licenses the statute becomes operative only after the expiry of thirty days from the date of the Order in Council, and if there were licenses, the statute is operative only from a future date, contingent upon the expiry of the licenses. R. v. Wallace, 14 Can. Cr. Cas. 427.

Proceedings Under Summary Trials Part not Quashed or Held Void for Want of Form.—See Code sec. 1130.

Section 1130 does not validate a defective commitment if it recites a conviction which is on its face invalid. R. v. Gibson (1898), 2 Can. Cr. Cas. 302, per Rose, J.

A conviction by a magistrate in respect of a charge in which he has jurisdiction only upon the consent of the accused to a summary trial, is not invalid merely because it omits to state that the accused so consented, if in fact the consent was given. The omission to state the consent in the conviction is a "want of form" which is cured by this section. R. v. Burtress (1900), 3 Can. Cr. Cas. 536 (N.S.).

Where a conviction by a police magistrate on a "summary trial" of the accused imposes a longer term of imprisonment than is authorized by law, the warrant of commitment cannot be amended under sec. 1130 as in such case there is not "a valid conviction to sustain the same." R. v. Randolph (1900), 4 Can. Cr. Cas. 165 (Ont.).

Where a return to a writ of habeas corpus, or to an order of the nature of such writ, specifies two warrants of commitment under the summary trials clauses for the same offence, and neither the second warrant nor such return declares the second warrant to be in substitution for or in amendment of the first which is irregular and bad, the prisoner should be discharged. R. v. Venot (1903), 6 Can. Cr. Cas. 209 (N.S.).

No Action Against Official when Conviction Quashed.—See Code sec. 1131.

The condition imposed as a term of quashing a justice's order under Code sec. 1131 is one which the applicant may accept or reject on the delivery of judgment, and, if it be rejected, the Court may dismiss the application with costs, although it finds that the justice exceeded his jurisdiction. R. v. Morningstar, 11 Can. Cr. Cas. 15, 11 O.L.R. 318.

Quære, however, whether the Court has not the power to make the conditional order to quash whether or not the applicant is satisfied with the form of the order. It is suggested in a vote in vol. II. Can. Cr. Cas., page 18, that the motion to quash is in itself a submission to the jurisdiction expressly conferred by sec. 1131 to provide protection to the convicting justice and to the officer enforcing the conviction, if the Court thinks that such protection should be given.

The section now applies to "a conviction, order or other proceeding," a phrase which will cover a search warrant. See R. v. Kehr, 11 Can. Cr. Cas. 52 and 61 (Ont.), decided before the addition of the words "or other proceeding."

Quære, whether further limitations on the right of civil action may not be imposed by provincial law.

Certain Proceedings not Void for Defect of Form.—See Code sec. 1132.

Part III. of the Code relates to the preservation of the peace in the vicinity of public works and consists of Code secs. 142-154 inclusive.

Crown Rules Relating to Certiorari Practice.—See Code sec. 576.

Sec. 3.—Present Modes of Appeal, Other than Preceding.

(*a*) *On Issues of Fact.*

New Trial—

(1) By order of Court of Appeal, after leave of Trial Court to apply for. Sec. 1021.

(2) By order of Minister of Justice. Sec. 1022.

(*b*) *On Issue Both of Law and Fact.*

(1) From conviction of trade conspiracy. Sec. 1012.

(2) From convictions under (*a*) and (*b*) of Code sec. 773. (See notes at pp. 2038*a*, *b*, *c*, *d*. Code secs. 797, 1013.

(*c*) *On Questions of Law Only.*

(1) Appeal in indictable offences other than trade conspiracy, and other than those tried under Code sec. 773 except (*a*) and (*b*) of said section. Sec. 1013.

(2) On questions reserved by trial Judge. Sec. 1014 (as amended 8 & 9 Edw. VII. ch. 9).

(3) On questions reserved by order of Court of Appeal. Sec. 1015.

(*a*) *New Trial by Order of Court of Appeal.*—See Code sec. 1021.

No Application by Crown.—There is no provision in the Code authorizing the granting of a new trial to the Crown on the ground that the verdict of acquittal is against the weight of evidence. R. v. Phinney (No. 2), 7 Can. Cr. Cas. 280.

Questions of Fact.—An objection to a verdict on the ground that it is against the weight of evidence can only be raised by obtaining leave from the Trial Court under sec. 1021 to apply to the Court of Appeal for a new trial. R. v. Carlin (No. 2), 6 Can. Cr. Cas. 507 (Que.).

Where on a case reserved or a case stated by direction of a Court of Appeal the sole question is whether there was evidence of guilt,

and no leave has been obtained to apply for a new trial on the ground that the verdict is against the weight of evidence, the finding of a jury, or of the trial Judge trying the case without a jury, cannot be disturbed as to conclusions or inferences justly capable of being drawn from the evidence, or as to the credibility of the witnesses. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.).

Leave to apply to the Court of Appeal for a new trial under sec. 1021 on the ground that the verdict is against the weight of evidence, should only be granted when the verdict is so clearly against the evidence as to amount to a denial of justice. R. v. Molleur (No. 2) (1905), 12 Can. Cr. Cas. 16 (Que.). A new trial should not be granted merely because the jury has disregarded the uncorroborated testimony of the accused as to alleged facts which might relieve him from liability. *Ibid.*

In deciding whether there should be a new trial on the ground that the verdict against the accused was against the weight of evidence, the question is whether or not the verdict is one which the jury, as reasonable men, ought not to have found. A new trial will not be granted merely because the trial Judge is dissatisfied with the verdict and favours an acquittal. R. v. Brewster (1896), 4 Can. Cr. Cas. 34 (N.W.T.).

The application to the Court under this section is authorized only upon the ground that the verdict was against the weight of evidence, and, as was said in Mellin v. Taylor, 3 Bing. N.C. 109, the Court ought to exercise not merely a cautious, but a strict and sure judgment before it sends the case to a second jury. R. v. Chubbs (1864), 14 U.C.C.P. 32, 43, per Richards, C.J. If the application be upon other grounds as for example the discovery of fresh evidence the application should be made to the Minister of Justice under sec. 1022. See R. v. Sternman, 1 Can. Cr. Cas. 1.

When there is divergence between the evidence adduced by the Crown and that adduced by the defence, and the jurors have exercised the discretion which is allowed to them by rejecting the evidence given on one side or on the other, and their verdict is supported by and founded on the evidence which they believed and accepted, the verdict is not against the weight of evidence. R. v. Harris (1898), 2 Can. Cr. Cas. 75 (Que.). In forming their opinion as to the credibility of the witnesses, the jurors are not bound to accept the evidence given on any side because there are more witnesses on that side than on the other. To oblige them to do so would infringe on their function to consider, weigh and pass upon any evidence adduced, and then to accept or to reject it in their discretion. *Ibid.*

The failure of the trial Judge *ex mero motu* to direct the Judge to give to the prisoner the benefit of any reasonable doubt, is not a

good ground for interfering with the verdict in a case where the evidence does not point to any reduced or lesser offence. R. v. Riendeau (1900), 3 Can. Cr. Cas. 293 (Que.).

Before verdict all presumptions will be in favour of the innocence of the prisoner, after a verdict of guilty all presumptions will be against it. The Court is not justified in setting aside the verdict unless it can say the jury were wrong in the conclusion they arrived at. It is not sufficient that the Appellate Court would not have pronounced the same verdict. R. v. Hamilton (1866), 16 U.C.C.P. 353.

Where the verdict is not perverse, nor contrary to law and evidence, though it may be somewhat against the Judge's charge, that is no reason for interfering if there be evidence to sustain the finding, because the jury are to judge of the sufficiency and weight of the evidence. R. v. Seddons (1866), 16 U.C.C.P. 389.

The former rule was that the Court would not in criminal cases grant a new trial unless the verdict was clearly wrong, even though the evidence on which a prisoner was convicted would equally justify his acquittal, for the jury are to judge of the preponderance of the evidence, and their finding will not be disturbed. R. v. McIlroy (1864), 15 U.C.C.P. 116, following R. v. Chubbs, 14 U.C.C.P. 32.

A new trial should be ordered, if the Judge's charge was so ambiguous that the jury may have been misled into thinking that a material issue of fact was withdrawn from their consideration as being a matter of law. R. v. Collins (1895), 1 Can. Cr. Cas. 48 (N.B.).

A new trial in a criminal case should not be granted unless after an examination of the evidence given at the trial, and of the grounds of the application, the Court sees some apparent reason for doubting the propriety of the conviction, especially where the Judge before whom the prisoner was convicted did not feel it necessary to reserve any question of law which arose at the trial for the consideration of one of the Superior Courts. R. v. Craig (1858), 7 U.C.C.P. 241.

Where affidavits were made by some of the jurors who tried the case that the jury were not in fact unanimous, but the belief among them was that unanimity was not necessary, and that a verdict could be given according to the opinion of the major part of them, they cannot be received and acted upon by the Court as ground for a new trial. R. v. Fellowes and others (1859), 19 U.C.Q.B. 48.

In R. v. Chubbs, 14 U.C.C.P. 32, in which the prisoner had been convicted of a capital offence, Wilson, J., said, "In passing the Act, giving the right to the accused to move for, and the Court to grant, a new trial, I do not see that it was intended to give Courts the power to say that a verdict is wrong, because the jury arrived at conclusions which there was evidence to warrant, although from the same state of

facts other and different conclusions might fairly have been drawn and a contrary verdict honestly given." Richards, C.J., before whom the case had been tried, said, "If I had been on the jury, I do not think I should have arrived at the same conclusions, but as the law casts upon them the responsibility of deciding how far they will give credit to the witnesses brought before them, I do not think we are justified in reversing their decision, unless we can be certain that it is wrong."

In R. v. Greenwood, 23 U.C.Q.B. 255, a case in which the prisoner had been convicted of murder, Hagarty, J., said, "I consider that I discharge my duty as a Judge before whom it is sought to obtain a new trial on the ground of the alleged weakness of the evidence, or of its weight in either scale, in declaring my opinion that there was evidence proper to be submitted to the jury; that a number of material facts and circumstances were alleged properly before them—links, as it were, in a chain of circumstantial evidence—which it was their especial duty and province to examine carefully, to test their weight and adaptability each to the other. . . . To adopt any other view of the law would be simply to transfer the conclusion of every prisoner's guilt or innocence from the jury to the Judges."

R. v. Hamilton, 16 U.C.C.P. 340, was also a case in which the prisoner had been convicted of murder. Richards, C.J., who delivered the judgment of the Court, said, "We are not justified in setting aside the verdict, unless we can say the jury were wrong in the conclusion they arrived at. It is not sufficient that we would not have pronounced the same verdict; before we interfere we must be satisfied they have arrived at an erroneous conclusion." So, in R. v. Seddons, 16 U.C.C.P. 389, it was said, "The verdict is not perverse, nor against law and evidence; and although it may be somewhat against the Judge's charge, that is no reason for interfering, if there be evidence to sustain the finding, because the jury are to judge of the sufficiency and weight of the evidence."

In R. v. Slavin, 17 U.C.C.P. 205, the law on the subject was thus stated: "We do not profess to have scanned the evidence with the view of saying whether the jury might or might not, fairly considering it, have rendered a verdict of acquittal. We have already declared on several occasions that this is not our province under the statute. It is sufficient for us to say that there was evidence which warranted their finding."

All that the Court is required to do is to see if there is any evidence to support the finding of the jury. R. v. Riel (No. 2) (1885), 1 Terr. L.R. 23, per Taylor, J.; *sed quære* per Killam, J., *ibid.*, page 63.

Where no Substantial Wrong Occasioned Conviction Stands and no New Trial Granted.—See Code sec. 1019.

"Substantial Wrong or Miscarriage."—A statement by the Crown counsel in his address to the jury that the prisoner's counsel "took the very best and wisest course in not having the prisoner go on the witness stand," and that he, the Crown counsel, thinks it was wise for the prisoner himself, is a comment unfavourable to the accused on his failure to testify on his own behalf and is within the prohibition of sec. 4 of the Canada Evidence Act. Where comment has been made in contravention of the Canada Evidence Act, upon the failure of the accused to testify, the same is a substantial wrong to the prisoner and entitles him to a new trial. R. v. Charles King, 9 Can. Cr. Cas. 426 (N.W.T.).

A new trial was refused in a murder case, where the application was based solely on an affidavit of a witness that he had misapprehended a question put to him, which had led to his answer producing a wrong impression. R. v. Crozier (1858), 17 U.C.Q.B. 275.

Comment by the prosecuting counsel before the jury in respect of the failure of prisoner's wife to testify is error entitling the prisoner to a new trial. R. v. Corby (1898), 1 Can. Cr. Cas. 457 (N.S.). The rule is to be applied, notwithstanding a subsequent withdrawal of the comment and notwithstanding the Judge's direction to the jury to disregard it. The objection is not waived, because not taken at the time, and it is sufficient if drawn to the attention of the trial Judge after the jury have retired to deliberate. *Ibid.*

The improper reception of evidence before a county Judge trying a case without a jury under the speedy trials clauses will not entitle the prisoner to a new trial upon a case reserved, if the county Judge certifies therein that apart from the evidence objected to there was sufficient evidence to compel him to find the prisoner guilty. R. v. Tutty (1905), 9 Can. Cr. Cas. 544.

Where the accused charged with murder goes into the witness box on his own behalf, and then and there for the first time makes known his claim that he was a mere eye-witness of the murder, and that the principal witness for the prosecution had committed the deed, the trial Judge may properly direct the jury that they may draw inferences from the prisoner's previous silence on the matter of such claim, and consider whether the facts in evidence shewed the motive for such silence to be founded on a consciousness of innocence, *ex gr.*, that he would thereby the better establish his innocence, or to be a design founded on a knowledge of guilt to advance a false defence at the last moment, and to take the prosecution by surprise. Even if the charge were erroneous in that respect, a new trial should not be granted if there was ample evidence of guilt apart from that question, and if, in the opinion of the Court of Appeal, no substantial wrong or miscarriage was occasioned by the error. R. v. Higgins (1902), 7 Can. Cr. Cas. 68, 36 N.B.R. 18.

Where a conviction has been made without the legal proof required by law of an essential part of the crime, such defect is a "substantial wrong or miscarriage" at the trial within this section and the conviction must be set aside. R. v. Drummond, 10 Can. Cr. Cas. 340.

The reception of opinion testimony as to the illegality of the transactions in question was improper, but as a case against the accused was sufficiently made out without that testimony, and the trial was without a jury, the conviction should stand. R. v. Harkness (No. 2), 10 Can. Cr. Cas. 199.

If upon a case reserved, the Appellate Court finds that important depositions were improperly received in evidence, and is unable to say that no substantial wrong or miscarriage was occasioned by the irregularity, the conviction should be quashed notwithstanding subsec. (*f*), but a new trial may be ordered. R. v. Brooks, 11 Can. Cr. Cas. 188.

On a trial for murder where the evidence is circumstantial, it is for the jury alone to pronounce on the question of the truth of the alleged circumstances deposed to, and also as to what inferences which the facts would warrant shall be drawn from the circumstantial evidence. And it is error and ground for a new trial for the trial Judge to instruct the jury that they cannot doubt that certain inferences are to be drawn on points material to the issue. R. v. Collins, 12 Can. Cr. Cas. 402 (N.B.).

On a charge of aiding and abetting another to commit rape if it appears that a man called as a witness for the prosecution had immediately prior to the offence been in the company of the prosecutrix under circumstances making it probable that he had had illicit connection with her, and that the man accused of the rape had taken the prosecutrix away from the witness, the witness may be cross-examined as to his relations with the prosecutrix for the purpose of shewing prejudice against the accused, and for this purpose is bound to answer whether he had had connection with the prosecutrix on that occasion. And where the witness refused to answer as to his connection with the prosecutrix and the trial Judge upheld his refusal and the prosecutrix also refused to answer as to same, but the guilt of the accused was corroborated by independent testimony, Code sec. 1019 may be applied to uphold the conviction on the ground that no substantial wrong has been occasioned by the ruling. R. v. Finnessey, 10 Can. Cr. Cas. 347, 11 O.L.R. 338.

Although evidence of threats made by the prisoner to another person was improperly admitted, if in the circumstances, no substantial wrong or miscarriage of justice was occasioned on the trial by reason of the evidence, the conviction should not be set aside or a new trial directed. R. v. Sunfield (1907), 13 Can. Cr. Cas. 1 (Ont.).

The intention is that the improper admission of evidence shall not in itself constitute a sufficient reason for granting a new trial, and that it is not necessarily a "substantial wrong or miscarriage." R. v. Woods (1897), 2 Can. Cr. Cas. 159 (B.C.).

On a trial for murder, if the trial Judge directs the jury that imminent peril of the prisoner's own life or of the lives of his family is a ground of justification for killing, in defence of his household, one of a party committing an unprovoked assault upon him, but does not direct them that a reasonable apprehension of immediate danger of grievous bodily harm to the prisoner or to his wife and family is an equal justification, such omission constitutes a substantial wrong or miscarriage occasioned in the trial, and a new trial should be ordered, where the circumstances shewn in evidence are such as to point much more to the latter ground of justification than to the former. R. v. Theriault (1894), 2 Can. Cr. Cas. 444 (N.B.).

If a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury by the Judge's charge, the conviction cannot stand, although the prisoner's counsel did not ask at the trial for any other or fuller direction. *Ibid.*

The strictness of the rule applied in civil cases in some of the provinces by which an objection not raised at a time when it could have been remedied, cannot afterwards be allowed, should not be applied to cases of misdirection in criminal cases. (R. v. Fick (1866), 16 U.C.C.P. 379, disapproved.) *Ibid.*

Where a deposition of a deceased witness taken on an enquiry before a magistrate has been improperly admitted in evidence at the trial, and is of such a nature that it must have influenced the jury in their verdict, its improper admission is a "substantial wrong" entitling the accused to a new trial. R. v. Hamilton (1898), 2 Can. Cr. Cas. 390 (Man.).

Where an alleged confession is received in evidence after objection by the accused, and the trial Judge before the conclusion of the trial reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury impanelled. R. v. Sonyer (1898), 2 Can. Cr. Cas. 501.

If the trial Judge refuses to impanel a new jury in such a case, a new trial will be ordered by a Court of Appeal; but the Court of Appeal will not determine the question of the admissibility of the alleged confession. *Ibid.*

An accused person has the right to have his case submitted to the jury without any comment on his failure to testify being made by the trial Judge, and although such comment is afterwards withdrawn, the making of same is a substantial wrong to the accused, and if he is

convicted he is entitled to a new trial by reason thereof. R. v. Coleman (1898), 2 Can. Cr. Cas. 523 (Ont.).

Misdirection.—The general rule in civil cases where there is a jury is not to entertain a motion for a new trial upon a ground of misdirection or nondirection, unless the particular point in controversy was raised at the trial and pressed upon the consideration of the Judge. The rule has been held in Ontario to be as much applicable to a criminal as a civil trial, especially when the parties to the litigation are represented by counsel. R. v. Fick, 16 U.C.C.P. 379; R. v. Wilkinson (1878), 42 U.C.Q.B. 492, 500; R. v. Seddons, 16 U.C.C.P. 389. But see *contra* R. v. Theriault (1894), 2 Can. Cr. Cas. 444, 460 (N.B.), and R. v. Bain (1877), 23 L.C. Jur. 327.

It is misdirection entitling the accused to a new trial for the trial Judge to charge the jury that the onus is upon the accused to prove an alibi set up in defence by a preponderance of testimony. R. v. Myrshall (1901), 8 Can. Cr. Cas. 474 (N.B.).

1. On a motion for a new trial in a criminal case made to the Court of Appeal under Code sec. 1021 by leave of the trial Judge, the same rule applies as in civil cases, namely, that a new trial will not be granted on the ground that the verdict is against the weight of evidence if the Appellate Court is of opinion that the verdict is one which a jury might reasonably find.

2. In the consideration of circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, in order to justify the inference that he is guilty. R. v. Jenkins, 14 Can. Cr. Cas. 221.

The improper reception of evidence before a county Judge trying a case without a jury under the Speedy Trials Clauses will not entitle the prisoner to a new trial upon a case reserved, if the county Judge certifies therein that a part from the evidence objected to there was sufficient evidence to compel him to find the prisoner guilty. R. v. Inthy, 9 Can. Cr. Cas. 309, 544.

A new trial will be ordered on the ground of the wrongful admission of evidence of an alleged prior similar offence. R. v. Pollard, 15 Can. Cr. Cas. 75.

A new trial was refused in a murder case, where the application was based solely on an affidavit of a witness that he had misapprehended a question put to him, which had led to his answer producing a wrong impression. R. v. Crozier (1858), 17 U.C.Q.B. 275.

Circumstantial Evidence.—In cases where there is direct and positive evidence of the fact charged, and that evidence is contradicted, it may be said that no question but the credibility of the witness is presented, and that as credibility and weight of evidence are entirely

questions for the jury, their decision may well be deemed final, unless the Judge who tried the case should express himself to be dissatisfied with the verdict; but that where the evidence is merely circumstantial there is, first, the question whether the facts relied upon were established by the evidence; and second, whether the fact of guilt was properly inferable from them; and that in the latter case the Court should review the correctness of the deduction of the jury. It was held, however, in the murder case of R. v. Greenwood (1864), 23 U.C.Q.B. 255, that there is no reason for applying a different rule where the evidence is circumstantial. Admitting that "they must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion" (Tay. Ev. sec. 60), where they have so decided it certainly cannot present a less obstacle to the interference of the Court than where they have simply decided that they give credit to the witnesses for the prosecution, and not to those for the defence. Per Draper, C.J. R. v. Greenwood (1864), 23 U.C.Q.B. 255.

New Evidence.—An application on the ground of the discovery of new evidence would seem not to be warranted under this section. R. v. McIlroy (1864), 15 U.C.C.P. 116. In R. v. Oxentine (1858), 17 U.C.Q.B. 295, it was held that that such an application was not upon a "question of fact" and the latter phrase was construed as meaning only a question of fact arising from or suggested by the evidence which was given. But an order for a new trial on that ground may be made by the Minister of Justice under sec. 1022. R. v. Sternaman (1898), 1 Can. Cr. Cas. 1.

Co-defendants.—It is the established practice in criminal cases where all the defendants have been convicted, and it is found that one or more of them have a just claim to a new trial, that a new trial shall be granted to all, in order that the whole case may be tried as at first. R. v. Fellowes and others (1859), 19 U.C.Q.B. 48; see also R. v. Saunders, [1899] 1 Q.B. 490.

Second Trial.—Upon a new trial, everything must be begun *de novo*, and the prisoner asked to plead again. "There is no Court continuing all the time before which he has pleaded; there must be a new Court established for the trial of each charge, and the proceedings upon the first trial cannot be incorporated with those upon the second." Per Killam, J., in R. v. Riel (No. 2) (1885), 1 Terr. L.R., at p. 60.

It has been held that when a new trial has been ordered under Code sec. 1018 by the Court of Appeal, upon an appeal from a trial with a jury, the prisoner is not entitled to re-elect in favour of a speedy trial without a jury; and that sec. 828(2) of the Code does not apply to such a case. R. v. Coote (1903), 7 Can. Cr. Cas. 92.

As to the use on the second trial for the prosecution of the depositions taken on the first trial, in case of the death, illness or absence

from Canada of the witness whose deposition it is desired to use. See sec. 999.

Re-sentence on Appeal.—The Court of Appeal hearing a case reserved as to the validity of the sentence has power under sec. 1018(*c*) to correct a sentence in excess of that authorized by law and should in such case reduce the same to the maximum limit. R. v. Dupont (1900), 4 Can. Cr. Cas. 566 (Que.).

When a prisoner is convicted, on a summary trial before a police magistrate of theft, he cannot be sentenced, under sub-sec. 2 of sec. 386 of the Criminal Code, to more than seven years' imprisonment, although he has been previously convicted of theft, unless such previous conviction has been charged in the information by analogy to sec. 851 and proved in accordance with sec. 963, and, where in such case a greater punishment is inflicted, the Court of Appeal, upon an application under sub-sec. 2 of sec. 1016 of the Code, will set aside the sentence and pass what it considers a proper sentence. R. v. Edwards (1907), 17 Man. R. 288.

Evidence for Court of Appeal on Application for New Trial.—See Code sec. 1017.

Remitting the Evidence and Finding.—The Judge reserving or stating a case for the Court of Appeal as to the sufficiency of the evidence to sustain a conviction should either state the effect of the evidence given or extract the material parts of it, and not send up the whole body of the evidence with a question as to its sufficiency. R. v. Cohon, 6 Can. Cr. Cas. 386 (N.S.).

The forwarding of the whole of the evidence taken at the trial does not dispense with the necessity for the trial Judge to certify his findings of fact and to specify the points of law as to which he entertains the doubt. R. v. Giles (1894), 31 Can. Law Jour. 33; R. v. Létang (1899), 2 Can. Cr. Cas. 505 (Que.).

(*a*2).—*By Order of Minister of Justice.*

New Trial by Order of Minister of Justice.—See Code sec. 1022.

Before the adoption of the Code the Minister of Justice in Canada had substantially the same powers as are exercised by the Home Secretary in Great Britain under the English Constitution. This is now enlarged by sec. 1022 of the Code (formerly sec. 748).

A new trial was granted by the Minister of Justice under this section on the discovery of new evidence in R. v. Sternaman (1898), 1 Can. Cr. Cas. 1.

(*b*1).—*Appeal from Conviction for Trade Conspiracy.*—Code sec. 1012.

Trade Conditions.—The right of appeal where the defendant elects trial without a jury is limited to an appeal from the conviction, and the Crown has no appeal from an acquittal on other counts of the indictment. R. v. Elliott, 9 Can. Cr. Cas. 505.

On an appeal both on the facts and the law under Code sec. 1012 in a trade combine case tried without a jury, the Court of Appeal is to decide whether the judgment below should have been for the accused or whether there was evidence on which the judgment against him could reasonably be supported. R. v. Clarke (No. 2), 14 Can. Cr. Cas. 57.

Appeals from convictions for (*a*) or (*b*) of Code sec. 773. Code secs. 797, 1013. (See notes on "Appeals Generally," on p. 2038*a*.)

(*c*) 1 *and* 2.—*On Questions of Law Only.*

Appeals From Convictions for Indictable Offences Other Than Trade Conspiracies or Those Tried Summarily Under Code sec. 773.—Code sec. 1013.

Reservation of Question of Law.—Code sec. 1014.

"*The Court May Reserve.*"—The words of sec. 1014(2) are that "the Court before which any accused person is tried" may reserve a case. It would seem from a dictum in R. v. Trepanier, 4 Can. Cr. Cas. 259, 261, that if the Judge who presided at the trial is unable to state and send up the case on the question of law which has been reserved or for which leave to appeal has been granted, any Judge of the same Court may do so.

Question of Law Arising, etc.—It was held under a prior statute which dealt with questions which had "arisen" on the trial that it was not essential that the point should have been raised on the trial; what was meant was that the question took its rise at the trial. R. v. Bain (1877), 23 Lower Canada Jurist 327.

Where the sole question referred to the Appellate Court on a case reserved has no bearing on the facts proved in evidence, the case should be quashed. R. v. McKay (1900), 6 Can. Cr. Cas 151, 34 N.S.R. 540.

The Court of King's Bench (Que.) sitting as a Court for the hearing of cases reserved by Criminal Courts, has jurisdiction only to pronounce upon a question of law, under facts proved and mentioned in the reserved case. Consequently, where the question stated in the reserved case was whether the use of a particular apparatus constituted a mixed game of chance and skill, or only a game of skill, and did not submit the question whether, under facts proved, and stated in the reserved case, the game was one which came within the prohibition of the Criminal Code, the Court declared that it was without jurisdiction in the matter. R. v. Fortier (1903), 7 Can. Cr. Cas. 417, 13 Que. K.B. 308.

An objection to a trial and verdict on the ground that one of the jurors was not indifferent but had stated before the trial that if he were selected he would send the accused to gaol, raises a question

of fact and not a question of law, and a Court of criminal appeal has no jurisdiction to grant leave to appeal in respect thereof. And an objection to a verdict on the ground that it is against the weight of evidence can only be raised by obtaining leave from the trial Court under Code sec. 1021 to apply to the Court of Appeal for a new trial. R. v. Carlin (No. 2), 6 Can. Cr. Cas. 507.

A question may properly be reserved as to whether or not there was any legal evidence to support the conviction; but as to the weight of evidence and the inferences to be drawn from it by the jury the case can only come before the Court of Appeal on a motion for a new trial. R. v. McCaffery (1900), 4 Can. Cr. Cas. 193 (N.S.).

When a reserved case has been granted upon certain questions of law, the appellant will not be allowed to appeal on further questions which were not submitted to the Judge below. R. v. Breckenridge (1903), 7 Can. Cr. Cas. 116 (Que.).

Failure to instruct the jury in a trial for murder upon the distinction between murder and manslaughter is a ground for ordering a new trial. And a Court of criminal appeal should direct a new trial upon a case reserved by the trial Judge after the trial in respect of such omission in the Judge's charge to the jury, although no objection thereto was taken by the defendant's counsel during the trial. R. v. Wong On (No. 3) (1904), 8 Can. Cr. Cas. 423 (B.C.).

Evidence.—On a trial for murder by shooting, where the evidence for the prosecution was of a deliberate shooting and the accused giving evidence on his own behalf claimed that the shooting was accidental and there was no evidence of provocation a verdict of guilty will not be set aside on the ground that the trial Judge withdrew from the jury the question of manslaughter by instructing them that their verdict on the evidence must be either one of guilty of murder or one of acquittal. R. v. Barrett, 14 Can. Cr. Cas. 464.

A reserved case may be granted at any time, however remote from the date of the trial or judgment, if it is still possible that some beneficial result may accrue to the prisoner by a decision in his favour. R. v. Paquin (1898), 2 Can. Cr. Cas. 134; R. v. McGuire, 9 Can. Cr. Cas. 554.

Whether or not the Judge presiding at the trial had jurisdiction to summarily try the defendants is a "question of law" and may be the subject of a reserved case. *Ibid.*

A reserved case should not be granted by the trial Judge unless he has some doubt in the matter upon which it is suggested that a question be reserved for the opinion of the Court of Appeal. R. v. Letang (1899), 2 Can. Cr. Cas. 505 (Que.); R. v. Brindamour, 11 Can. Cr. Cas. 315.

A question depending upon the weight of evidence cannot properly

be made the subject of a reserved case. R. v. McIntyre (1898), 3 Can. Cr. Cas. 413 (N.S.).

But if the evidence merely points to a suspicion of guilt and lacks the material ingredients necessary to constitute proof of the offence, this is not a question of weight of evidence, but of want of evidence, and a conviction will be quashed if there is no legal evidence to support it. R. v. Winslow (1899), 3 Can. Cr. Cas. 215 (Man.).

Where on a case reserved or a case stated by direction of a Court of Appeal the sole question is whether there was evidence of guilt, and no leave has been obtained to apply for a new trial under sec. 1021 on the ground that the verdict is against the weight of evidence, the finding of a jury, or of the trial Judge trying the case without a jury cannot be disturbed as to conclusions or inferences justly capable of being drawn from the evidence, or as to the credibility of the witnesses. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.).

Nor is the question as to the order of addresses to the jury by counsel at the close of the evidence a question of law proper to be reserved for the opinion of a Court of Appeal under sec. 1014. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

Whether the Judge cautions the jury that the evidence of an accomplice requires to be corroborated or not, is not a matter for the Court to review, as it is not a question of law, but one of mere practice. R. v. Stubbs (1855), Dears. 555, 7 Cox C.C. 48, cited by Cameron, C.J., in R. v. Andrews (1886), 12 Ont. R. 184.

On the hearing of a reserved case it is not necessary that the prisoner should be present, and he may be kept in gaol, while his case is being argued. R. v. Glass (1877), 1 Montreal Leg. News 212.

A case reserved at the instance of the accused may at his request be amended during the argument thereon by adding the evidence taken at the trial. R. v. Ross (1884), Montreal L.R. 1 Q.B. 227.

An objection to the regularity of the warrant of arrest on the ground that no law stamp had been affixed under the provincial tariff is made too late when first raised at the hearing under the Speedy Trial Clauses, after a committal for trial and subsequent arraignment and election of trial without a jury. R. v. Rodrigue, 13 Can. Cr. Cas. 249.

A statement made by a Judge, in charging the jury in a criminal case, that the evidence of a witness for the Crown is wholly uncontradicted, is not a comment on the failure of a person charged to testify, within the prohibition of the Canada Evidence Act, sec. 4(5). R. v. Guerin, 14 Can. Cr. Cas. 424.

The sufficiency of an indictment upon a motion to quash it is a question of law which arises in a proceeding preliminary to the trial and not on the trial. R. v. Gibson (1889), 16 Ont. R.704.

But there is no power to review questions of fact upon the application of the Crown. Section 1021 gives that right to a defendant only. R. v. Phinney (No. 1), 6 Can. Cr. Cas. 469, per Graham, E.J.

In R. v. Phinney (No. 1) (1903), 6 Can. Cr. Cas. 469, a motion was made on behalf of the accused to quash a case reserved at the instance of the Crown. The question reserved was whether there was evidence of insanity to support the jury's verdict of not guilty upon that ground. The Supreme Court of Nova Scotia refused to quash the case reserved, on the ground that if there is "any evidence" is a question of law.

An objection to a trial and verdict on the ground that one of the jurors was not indifferent but had stated before the trial that if he were selected he would send the accused to gaol, raises a question of fact and not a question of law, and a Court of Criminal Appeal has no jurisdiction to grant leave to appeal in respect thereof under Code sec. 1014. R. v. Carlin (No. 2), 6 Can. Cr. Cas. 507 (Que.).

A case can be reserved only upon a question of law and will not be entertained upon the ground of improper statements alleged to have been made by the sheriff to the jury, as to which the evidence is wholly upon conflicting affidavits which the trial Judge referred to the Court of Appeal without himself deciding the fact. R. v. Barnes, 13 Can. Cr. Cas. 301.

1. On a reserved case the Court of Appeal may properly assume that each question submitted was considered by the trial Judge as materially affecting the conviction.

2. On being applied to for a reserved case, the trial Judge should not grant it upon any question not relevant to the verdict or judgment. R. v. Walkem, 14 Can. Cr. Cas. 122.

Upon a trial and conviction for theft the fact that evidence was admitted for the Crown in respect of a transaction between the complainant and the accused which had been the subject of a prior indictment against the accused for theft, on which prior indictment the accused had been acquitted, will not invalidate the conviction, if the jury were informed of such acquittal and instructed in accordance with the prior verdict that the first transaction was in fact a loan repayable on the date of the offence now charged; and the Court will decline leave to appeal under such circumstances. R. v. Menard (1903), 8 Can. Cr. Cas. 80.

Bail Pending a Reserved Case.—Where under sub-sec. 5 the accused was admitted to bail, the condition of the recognizance taken being that the accused would appear at the next sittings of the Court "to receive sentence," the condition of the recognizance is not broken if the accused fails to appear after judgment is given on the reserved case quashing the conviction and ordering a new trial. The conviction having been set aside, the accused was entitled to presume that he

would not be called for sentence, and the sureties were not bound for his appearance for any other purpose than to receive sentence. R. v. Hamilton (1899), 3 Can. Cr. Cas. 1 (Man.).

British Columbia.—All appeals from the verdict, judgment, or ruling of any Court or Judge having jurisdiction in criminal cases, or from the conviction, order, or determination of a justice under the summary convictions part of the Criminal Code shall be by case stated, except where otherwise provided by statute. B.C. Rule 56. Order XXXIV. of the Supreme Court Rules, as far as the same is applicable, shall apply to a special case under these rules. B.C. Rule 57.

Appeal from Refusal to Reserve Question.—See Code sec. 1015.

Leave to Appeal.—Leave to appeal to the Court of Appeal under sec. 1015, should not be granted to a private prosecutor except under exceptional circumstances. R. v. Burns (No. 1) (1901), 4 Can. Cr. Cas. 324 (C.A. Ont.). Leave to appeal will not be granted to a private prosecutor from the decision of a police magistrate holding a summary trial by consent, merely upon the ground that the magistrate erred in rejecting certain evidence which was properly admissible but corroborative only. *Ibid.*

Where the trial Judge has refused to reserve a case upon a question of law and the Court of Appeal is then applied to for leave to appeal under sec. 1015, leave cannot be granted in respect of another question of law in respect of which a reserved case had not been asked of the trial Judge. R. v. Carlin (No. 2), 6 Can. Cr. Cas. 507.

Upon an application for leave to appeal after the refusal of a reserved case, ample notice of the application should be given to the Attorney-General, and the notice of motion should set forth the grounds relied upon. R. v. Lai Ping, 8 Can. Cr. Cas. 467, 11 B.C.R. 102.

Leave to appeal will not be granted on the ground of the admission of irrelevant evidence, if in the opinion of the Court the reception of such evidence did not occasion any substantial wrong or miscarriage on the trial. R. v. Callaghan, 8 Can. Cr. Cas. 143.

Case to be Stated if Leave Granted.—See secs. 1016 and 1017.

(*d*) *Appeal from Convictions in Other Indictable Offences.*—Code sec. 1013.

Court Having Jurisdiction in Criminal Cases.—A magistrate trying a charge of theft of goods of the value of less than $10 under the summary trials procedure (Code secs. 773 and 778) with the consent of the accused, but not having authority to proceed under sec. 777 is not a "Court or Judge having jurisdiction in criminal cases" within sec. 1013 allowing an appeal by way of a case reserved. R. v. Hawes (1900), 4 Can. Cr. Cas. 529 (N.S.).

Case Stated After Leave Granted.—On granting leave to appeal the Court of Appeal may direct that the Court below shall state a

case as if the questions have been reserved. R. v. Sam Chak (No. 1) (1907), 12 Can. Cr. Cas. 495 (N.S.).

Section 1016 would seem to place upon the Trial Court a statutory duty to formulate a proper case such as would have been reserved had the trial Judge granted the application for a reserved case instead of refusing it.

If the case so stated does not correctly and fully cover the points of law on which the reserved case was originally asked and on which leave to appeal was granted, the Court of Appeal may send the case back to be amended or re-stated. Section 1017(3). Inferentially this seems to include a jurisdiction in the Appellate Court to specify the amendments and so dictate the precise terms of the "stated case," if an order is made under sec. 1017 sending the case back to be re-stated.

And while the general practice is to leave the form of the case to be stated to be settled by the Court below when an order has been made granting leave to appeal, the Court of Appeal for Ontario in one case exercised their jurisdiction to require the Court below to state the case in the form set forth in the order. R. v. Coleman (1898), 2 Can. Cr. Cas. 523, 539.

Certifying Evidence for Court of Appeal.—See Code sec. 1017.

The Judge reserving or stating a case for the Court of Appeal as to the sufficiency of the evidence to sustain a conviction should either state the effect of the evidence given or extract the material parts of it and not send up the whole body of the evidence with a question as to its sufficiency. R. v. Cohon, 6 Can. Cr. Cas. 386 (N.S.).

The forwarding of the whole of the evidence taken at the trial does not dispense with the necessity for the trial Judge to certify his findings of fact and to specify the points of law as to which he entertains the doubt. R. v. Giles (1894), 31 Can. Law Jour. 33; R. v. Létang (1899), 2 Can. Cr. Cas. 505 (Que.).

Suspension of Sentence in Case of Appeal.—See Code sec. 1023.

Respited Sentence—Enforcement.—Where the conviction and sentence of a prisoner tried under the Speedy Trials Part is respited pending the hearing of an appeal by way of case reserved, and the conviction is affirmed on the appeal, another Judge may, in the absence of the trial Judge from the province, give effect to the respited judgment by virtue of sec. 831. R. v. Brooks, 5 Can. Cr. Cas. 372.

(*c*3).—*By Order of Court of Appeal.*

Court of Appeal May Order New Trial.—See Code sec. 1018(*b*), (*d*).

The Court has power to quash a conviction against a prisoner even though no question as regards that prisoner has been raised in the case reserved, and the Court will exercise this power where it is

quite clear that the law applicable to the question raised in the case is equally applicable to such prisoner. R. v. Saunders (1899), 1 Q.B. 490.

No Re-election on New Trial.—When a new trial has been ordered under Code sec. 1018 by the Court of Appeal, upon an appeal from a trial with a jury, the prisoner is not entitled to re-elect in favour of a speedy trial without a jury. Section 828(2) of the Code does not apply to such a case. R. v. Coote (1903), 7 Can. Cr. Cas. 92 (B.C.).

Where on a case reserved or a case stated by direction of a Court of Appeal the sole question is whether there was evidence of guilt, and no leave has been obtained to apply for a new trial under sec. 1021 on the ground that the verdict is against the weight of evidence, the finding of a jury, or of the trial Judge trying the case without a jury cannot be disturbed as to conclusions or inferences justly capable of being drawn from the evidence, or as to the credibility of the witnesses. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.).

The Court of Appeal hearing a Crown case reserved and answering the questions reserved adversely to the accused is not bound to direct a new trial. R. v. Karn, 5 O.L.R. 704, 6 Can. Cr. Cas. 479.

In R. v. Williams, 3 Can. Cr. Cas. 9, it was held that notice of the application by the Crown for a new trial and of the hearing of a case reserved on the Crown's application where the accused had been acquitted on the trial should be served on the accused personally, no doubt being there suggested as to the right to grant a new trial after acquittal.

Upon an appeal by the Crown, by leave of the Court of Appeal, from the judgment acquitting the accused and withdrawing the case from the jury on the ground that there was no corroborative evidence under sec. 1002, the Court of Appeal, on reversing such ruling, should direct a new trial. Section 1018 is permissive and not obligatory as to the granting of a new trial upon reversing a judgment of acquittal, and the Appellate Court has a discretion to grant or refuse a new trial, or to make such other order as justice requires. R. v. Burr (1906), 12 Can. Cr. Cas. 103, 13 O.L.R. 485.

3. Upon an indictment containing two counts, one for the major charge and the other for the minor charge, the Appellate Court, on a case reserved after conviction upon both counts tried together, may direct a new trial upon both charges if of opinion that there was such fundamental error upon the trial of the major charge as to cause a mistrial as to both. R. v. Walkem, 14 Can. Cr. Cas. 122.

Upon an appeal by the Crown, by leave of the Court of Appeal, from the judgment acquitting the accused and withdrawing the case from the jury on the ground that there was no corroborative evidence under sec. 1002, the Court of Appeal, on revising such ruling, should

direct a new trial. Sec. 1018 is permissive and not obligatory, as to the granting of a new trial upon reversing a judgment of acquittal, and the Appellate Court has a discretion to grant or refuse a new trial, or to make such other order as justice requires. R. v. Burr (1906), 12 Can. Cr. Cas. 103, 13 O.L.R. 485.

In British Columbia it has been held that if the certificate is directed to the officer of the Speedy Trials Court, but the Judge of that Court is absent from the province, any Judge of the Supreme Court of the province may act in his stead under sec. 831. R. v. Brooks (1902), 5 Can. Cr. Cas. 372.

The general rule in civil cases where there is a jury is not to entertain a motion for a new trial on the ground of misdirection or non-direction, unless the particular point in controversy was raised at the trial and pressed upon the consideration of the Judge. The rule has been held in Ontario to be as much applicable to a criminal as a civil trial, especially when the parties to the litigation are represented by counsel. R. v. Fick, 16 U.C.C.P. 379; R. v. Wilkinson (1878), 42 U.C.Q.B. 492; R. v. Seddons, 16 U.C.C.P. 389. But see *contra* R. v. Theriault (1894), 2 Can. Cr. Cas. 444, 460 (N.B.), and R. v. Bain (1877), 23 L.C. Jur. 327.

It is misdirection entitling the accused to a new trial for the trial Judge to charge the jury that the onus is upon the accused to prove an alibi set up in defence by a preponderance of testimony. R. v. Myrshall (1901), 8 Can. Cr. Cas. 474 (N.B.).

The improper reception of evidence before a county Judge trying a case without a jury under the Speedy Trials Clauses will not entitle the prisoner to a new trial upon a case reserved, if the county Judge certifies thereon that apart from the evidence objected to there was sufficient evidence to compel him to find the prisoner guilty. R. v. Tutty, 9 Can. Cr. Cas. 309, 544.

Appeals to Supreme Court of Canada.—See Code sec. 1024.

Appeals to Supreme Court of Canada.—The right of appeal in criminal cases to the Supreme Court of Canada from the decision of a Court of criminal appeal is restricted to cases where the conviction has been affirmed by the Court of Appeal, and then only in case one or more of the Judges of the latter Court has dissented from the decision of the majority of the Court. R. v. Cunningham, Cassels' Supreme Court Digest 107. If by the decision of the Court of Appeal, the conviction is set aside and a new trial ordered, there is no appeal therefrom to the Supreme Court of Canada. Viau v. R., 2 Can. Cr. Cas. 540 (S.C.C.).

The dissent from the "opinion" of the majority (Code sec. 1013) by any of the Judges of the Court of Appeal, which is necessary in order to confer the right of a further appeal to the Supreme Court

of Canada, has reference to the "decision" or "judgment" of such majority in affirmance of a conviction (Code sec. 1024); and where a majority of the Court of Appeal in directing a new trial also expressed their concurrence (two of them dissenting) with that part of the decision appealed from by which it was held that certain evidence was properly admitted, the latter decision is not reviewable by the Supreme Court of Canada. Viau v. R. (1898), 2 Can. Cr. Cas. 540 (S.C. Can.).

In Michaelmas Term, 1877, certain questions of law reserved, which arose on the trial of the appellants, were argued before the Court of Queen's Bench for Ontario, composed of Harrison, C.J., and Wilson, J., and in February, 1878, the said Court composed of the same Judges delivered judgment affirming the conviction of the appellants for manslaughter. The full Court of Queen's Bench for Ontario was composed of a Chief Justice and two puisne Judges. On appeal to the Supreme Court of Canada it was held that the conviction of the Court of Queen's Bench, although affirmed by only two Judges, was unanimous, and therefore not appealable. R. v. Amer (1878), 2 Can. S.C.R. 592.

Where the Court of Appeal is unanimous in affirming the conviction as to one of the grounds of appeal, but there is a dissent as to another ground, a further appeal to the Supreme Court of Canada can be based on the latter only, and the appeal cannot be dealt with as to the ground on which the Court of Appeal was unanimous. McIntosh v. R., 5 Can. Cr. Cas. 254, 23 Can. S.C.R. 180.

The control exercised by provincial Courts over their own records and their own officers should not, as a general rule, be interfered with by the Supreme Court of Canada on appeal from a provincial Court. Attorney-General v. Scully (1902), 6 Can. Cr. Cas. 381.

The Supreme Court Act, R.S.C. (1906), ch. 139, declares that the Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada. (Section 35.) And that except as thereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest Court of final resort now or hereafter established in any province of Canada, whether such Court is a Court of Appeal or of original jurisdiction, in cases in which the Court of original jurisdiction is a Superior Court: Provided that, (*a*) there shall be no appeal from a judgment in any case of proceedings for or upon a writ of habeas corpus, certiorari or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of habeas corpus, arising out of any claim for extradition made under any treaty; and, (*b*) there shall be no appeal in a criminal case except as provided in the Criminal Code.

Where the decision is in favour of the prisoner the Supreme Court of Canada, exercising the ordinary appellate powers of the Court,

may give the judgment which the Court whose judgment is appealed from ought to have given, and may order prisoner's discharge. R. v. Laliberté (1877), 1 Can. S.C.R. 117.

An appeal to the Supreme Court of Canada from the decision of a Court of Appeal on a case reserved at the trial is governed by sec. 1024 of the Criminal Code without regard to the statute of 1897, 60-61 Vict. (Can.) ch. 34, now sec. 48 of the Supreme Court Act, R.S.C., ch. 139, respecting leave to appeal from the Ontario Court of Appeal, and the latter statute does not apply to criminal appeals. Rice v. R. (1902), 5 Can. Cr. Cas. 529, 32 Can. S.C.R. 480.

Leave to Appeal in Collateral Proceeding.—In Attorney-General v. Scully (1902), 6 Can. Cr. Cas. 381, the application was on behalf of the Attorney-General for Ontario for special leave to appeal from the Court of Appeal for Ontario to the Supreme Court of Canada, under Canada Statutes (1897), 60 & 61 Vict. ch. 34, sec. 1(*e*), now sec. 48 of the Supreme Court Act, R.S.C., ch. 139. The decision sought to be appealed from had declared the right of the respondent to a prerogative writ of mandamus to the clerk of the peace to furnish the respondent Scully with an exemplification of the record in criminal proceedings taken against him in a Court of General Sessions in Ontario, upon which the respondent had been acquitted. (6 Can. Cr. Cas. 167.)

It was held that where an appeal lies from the Court of Appeal for Ontario to the Supreme Court of Canada only where special leave is obtained from either of said Courts, leave should be refused unless special reasons are shewn apart from the alleged error in the decision sought to be reviewed. Attorney-General v. Scully, 6 Can. Cr. Cas. 381.

Contempt.—Contempt of Court is a criminal proceeding and, unless the Court appealed from was not unanimous in affirming the conviction, an appeal does not lie to the Supreme Court of Canada from a judgment in proceedings therefor. Ellis v. R. (1893), 22 Can. S.C.R. 7; O'Shea v. O'Shea, 15 P.D. 59. And it is questionable whether a contempt in respect of the publication of improper newspaper comment on a pending cause is an "indictable offence" under this section so as to permit an appeal in any case. Strong, J., in Ellis v. R. (1893), 22 Can. S.C.R., at p. 12.

Extension of Time for Notice of Appeal.—The power given by sec. 1024 to a Judge of the Supreme Court of Canada to extend the time for service on the Attorney-General of notice of an appeal in a Crown case reserved may be exercised after the expiration of the time for the service of such notice. Gilbert v. R. (No. 1) (1907), 12 Can. Cr. Cas. 124, 38 Can. S.C.R. 207.

Habeas Corpus Proceedings in Supreme Court.

Section 62 of the Supreme Court Act, R.S.C. (1906), ch. 139, is as follows: "Every Judge of the Court shall except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the Courts or Judges of the several provinces to issue the writ of habeas corpus *ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada. If the Judge refuses the writ or remands the prisoner, an appeal shall lie to the Court."

In any habeas corpus matter before a Judge of the Supreme Court, or on any appeal to the Supreme Court in any habeas corpus matter, the Court or Judge shall have the same power to bail, discharge or commit the prisoner or person, or to direct him to be detained in custody or otherwise to deal with him as any Court, Judge or justice of the peace having jurisdiction in any such matters in any province of Canada. (Section 63, Supreme Court Act.)

On any appeal to the Court in any habeas corpus matter the Court may by writ or order direct that any prisoner or person on whose behalf such appeal is made shall be brought before the Court. Unless the Court so direct it shall not be necessary for such prisoner or person to be present in Court but he shall remain in the charge or custody to which he was committed or had been remanded, or in which he was at the time of giving the notice of appeal, unless at liberty on bail, by order of a Judge of the Court which refused the application or of a Judge of the Supreme Court. (Section 64, Supreme Court Act.)

An appeal to the Supreme Court in any habeas corpus matter shall be heard at an early day, whether in or out of the prescribed sessions of the Court. (Section 65, Supreme Court Act.)

A writ of certiorari may, by order of the Court or a Judge thereof, issue out of the Supreme Court to bring up any papers or other proceedings had or taken before any Court, Judge or justice of the peace, and which are considered necessary with a view to any inquiry, appeal or other proceeding had or to be had before the Court. (Section 66, Supreme Court Act.)

A Judge of the Supreme Court of Canada, sitting in Chambers, on the return to a writ of habeas corpus, if a proper commitment is returned, may remand the prisoner, or, if the prisoner appears to be only committed for trial, and if the depositions can be got before him without a writ of certiorari (which there is no jurisdiction to issue to bring up the proceedings before a single Judge), may order the prisoner to be bailed, but that is the limit of the jurisdiction under a writ of habeas corpus so issued. Per Strong, J., in Re Trepanier (1885), 12 Can. S.C.R. 111, 129.

The jurisdiction of a Judge of the Supreme Court of Canada in matters of habeas corpus in any criminal case under any statute of Canada is limited to an inquiry into the cause of commitment as disclosed by the warrant of commitment. Ex parte Macdonald (1896), 3 Can. Cr. Cas. 10 (Can.).

Its jurisdiction in matters of habeas corpus is not an appellate jurisdiction over provincial Courts, nor does it extend further than to give such Judge equal and co-ordinate power with a Judge of the provincial Court. R. v. Patrick White (1901), 4 Can. Cr. Cas. 430, per Sedgewick, J. (S.C. Can.).

Where the only ground is that the magistrate erred on the facts and that the evidence did not justify the conclusion as to the guilt of the prisoner arrived at by the magistrate, the Supreme Court of Canada has no jurisdiction to go behind the conviction and inquire into the merits of the case by the use of the writ of habeas corpus. Re Trepanier (1885), 12 Can. S.C.R. 113. But if the conviction shews a want of jurisdiction, or if it be shewn that the magistrate had no jurisdiction, it would be a nullity, and the Court would discharge the prisoner, because, in such a case, he could not be held by process of any legal tribunal. *Ibid.*

A commitment on conviction for an offence against Part II. of the Canada Temperance Act is a commitment in a criminal case and a Judge of the Supreme Court of Canada has power to issue a writ of habeas corpus. On application to a Judge of the Supreme Court of Canada for a writ of habeas corpus he may refer the same to the full Court which has jurisdiction to hear and dispose of it. Re Richard (1907), 12 Can. Cr. Cas. 205.

Appeals to Privy Council Abolished.—See Code sec. 1025.

Section 6 of the Interpretation Act, R.S.C. 1906, ch. 1, declares that "no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby."

Quære, whether the judicial committee may not grant special leave to appeal from a Canadian Court in a criminal matter notwithstanding sec. 1025, but such leave will not be granted unless the judgment below is attended with sufficient doubt to justify the granting of special leave. R. v. Townshend (No. 4) (1907), 12 Can. Cr. Cas. 509, also reported *sub nom.* Townsend v. Cox, [1907] A.C. 514.

Section 1025 was contained in the Criminal Code of 1892 as sec. 751, which was in turn taken from the Dominion Statute, 51 Vict. ch. 43, sec. 1.

As shewn in the argument of the application for special leave in Townsend's Case, 12 Can. Cr. Cas. 509, it is a debatable question

whether the Canadian Parliament has authority to curtail the prerogative of granting special leave of appeal to the King in Council which is exercised by the judicial committee.

It may be further noted that the context of the present sec. 1025 both in the Revised Code and in the Code of 1892 affords room for doubt whether the term "in any criminal case" is not to be limited so far as sec. 1025 is concerned to cases in which an indictable offence is charged. The limited appeal to the Supreme Court of Canada which is dealt with by the preceding section (1024) is given to a person "convicted of any indictable offence."

Section 1013 provides for an appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases or if a magistrate proceeding under sec. 777, "on the trial of any person for an indictable offence."

Furthermore none of the other sections under the same general heading of "sentence, arrest of judgment and appeal" which precedes sec. 1004, appear to have any application to matters of certiorari from a summary conviction such as were raised in Townsend's Case.

Special leave was granted by the Privy Council in Wentworth v. Mathieu (1900), 3 Can. Cr. Cas. 429, and so far as appears without any question being raised as to sec. 1025 (then sec. 751) of the Code being a bar, but the case dealt with summary convictions under the Temperance Act of 1864 and not with an indictable offence.

CHAPTER THE FIFTH.

COSTS IN CRIMINAL CASES.

SECT. I.—GENERAL PROVISIONS.

Preliminary.—The law as to payment of costs in criminal cases rests wholly upon statute and on rules and regulations made under statutory authority.

By 27 Geo. II. c. 3, 18 Geo. III. c. 19, and 58 Geo. III. c. 70, provisions were made for reimbursing the expenses of witnesses in criminal prosecutions for felony. These statutes were repealed by sect. 32 of the Criminal Law Act, 1826 (7 Geo. IV. c. 64). By the last-named Act and the numerous other enactments specified *post*, pp. 2045–7, provisions were made for payment of the costs of prosecuting all felonies but treason felony and many misdemeanors (*a*).

Present Law.—The substance of the statute law relating to costs in indictable cases in England has been consolidated with considerable amendment in the Costs in Criminal Cases Act, 1908 (8 Edw. VII. c. 15). The law as to the costs of criminal appeals is stated *ante*, p. 2026.

Payments of Costs out of Local Funds.—Sect. 1, '(1) The following courts, namely—

(a) a court of assize or a court of quarter sessions before which any indictable offence is prosecuted or tried, (*b*) and

(b) a court of summary jurisdiction by which an indictable offence is dealt with summarily under the Summary Jurisdiction Acts, and

(c) any justice or justices before whom a charge not dealt with summarily is made against any person for an indictable offence (in this Act referred to as the examining justices),

may on any such proceedings by order direct the payment of the costs of the prosecution or defence or both in accordance with the provisions of this Act out of the funds of the county or county borough out of which they are payable under this Act (in this Act referred to as local funds) (*c*).

'(2) The costs which may be so directed to be paid are such sums as, subject to the regulations of the Secretary of State under this Act (*d*), appear to the court reasonably sufficient to compensate the prosecutor for the expenses properly incurred by him in carrying on the prosecution (*e*)

(*a*) For the history of the subject, see Parl. Pap. 1903, c. 1650, 1651.

(*b*) These words seem to empower an order before actual trial; *e.g.* in cases where the trial is adjourned. See R. *v.* Wilson, 12 Cox, 622, on the former enactments. This section does not extend to proceedings at coroner's inquests.

(*c*) Framed from 7 Geo. IV. c. 64, s. 22; 29 & 30 Vict. c. 35, s. 5; 42 & 43 Vict. c. 49, s. 28.

(*d*) *Vide* s. 5, *post*, p. 2042.

(*e*) See R. *v.* Lewen, 2 Lew. 161, on the words of 7 Geo. IV. c. 64, 'otherwise carrying on the prosecution.'

and to compensate any person properly (*g*) attending to give evidence for the prosecution or defence, or called to give evidence at the instance of the court, for the expense, trouble, or loss of time properly incurred in or incidental to the attendance and giving of evidence, and the amount of any costs so directed to be paid shall be ascertained as soon as practicable by the proper officer of the court (*h*).

'(3) Where it has been certified that a prisoner ought to have legal aid under the Poor Prisoners Defence Act, 1903 (*i*), the costs which may be directed to be paid under this section shall, subject to the regulations of the Secretary of State under this Act, include the fees of solicitor and counsel, the costs of a copy of the depositions, and any other expenses properly incurred in carrying on the defence.

'(4) No expenses to witnesses, whether for the prosecution or defence, shall be allowed at a court of assizes or quarter sessions before which any indictable offence is prosecuted or tried, if such witnesses are witnesses to character only, unless the court shall otherwise order.'

By sect. 2, 'As soon as the amount due to any person in respect of costs directed by a court of assize or a court of quarter sessions to be paid out of local funds has been ascertained, the proper officer shall make out and deliver to that person, or to any person who appears to the proper officer to be acting on behalf of that person, an order upon the treasurer of the county or borough (*k*) out of the funds of which the costs are payable under this Act for the payment of that amount' (*l*).

By sect. 3, '(1) (*m*) As soon as the amount due to any person in respect of costs directed by a court of summary jurisdiction or by examining justices (*n*) to be paid out of local funds has been ascertained, the proper officer—

(a) shall pay to that person the amount due forthwith, if the amount is due for travelling or personal expenses in respect of his attendance to give evidence; and

(b) so far as the amount is not due in respect of attendance to give evidence, shall forward a certificate of the amount in the case of a committal to the proper officer of the court to which the defendant is committed, and in any other case to the clerk of the peace of the county or place for which the court or justices act.

'(2) Any amount so paid by the proper officer to any person in respect of his attendance to give evidence shall be reimbursed to that officer by the treasurer of the county or borough (*o*) out of the funds of which that sum is payable under this Act, and the treasurer shall be allowed any amount so reimbursed in his account.

(*g*) The former Acts had 'attending on recognisance or subpœna.'

(*h*) 7 Geo. IV. c. 64, s. 22; 30 & 31 Vict. c. 35, s. 5; 42 & 43 Vict. c. 49, s. 28. Under the repealed enactments the Court could not include the costs of arresting the prisoner in Scotland (R. *v.* Seaton, 6 Cox, 78 n.; or abroad (R. *v.* Barrett, 6 Cox, 78); or of taking a prisoner (in custody on another charge) to the assizes for trial. R. *v.* Waters, 8 Cox, 350, Channell, B., after consulting Keating, J.

(*i*) 3 Edw. VII. c. 38, *post*, p. 2048.

(*k*) *i.e.* county borough. *Vide* s. 1 (1), *supra*.

(*l*) Framed from 7 Geo. IV. c. 64, s. 24; 30 & 31 Vict. c. 35, s. 5.

(*m*) Framed from 7 Geo. IV. c. 64, s. 22; 14 & 15 Vict. c. 55, s. 6; 29 & 30 Vict. c. 52; 42 & 43 Vict. c. 49, s. 28.

(*n*) *Vide* s. 1 (1) (c), *supra*.

(*o*) *i.e.* county borough. *Vide* s. 1 (1), *supra*.

'(3) The certificate so forwarded shall be laid in the case of a certificate forwarded to the officer of the court to which the defendant is committed before that court, and in the case of a certificate forwarded to the clerk of the peace before the next court of quarter sessions, and in either case the court shall consider the certificate and cause an order to be made on the treasurer of the county or borough (*oo*) out of the funds of which the amount is payable for the payment of the amount so certified, or of any less amount which the court considers should have been allowed in the circumstances under this Act.

'Where a certificate is forwarded to the officer of a court to which a defendant is committed for trial, the officer shall when practicable include the amount payable in respect of the costs so certified in the order for payment of any costs directed to be paid by the court to which the defendant is committed for trial.'

By sect. 4, '(1) Costs in the case of offences committed or supposed to have been committed in a county borough, whether the court directing the payment is held in the borough or not, are payable under this Act out of the borough fund or borough rate of the county borough, and costs in the case of other offences are payable under this Act out of the county fund of the administrative county in which the offence is committed or is supposed to have been committed (*p*).

'For the purposes of this provision, offences committed within the jurisdiction of the Admiralty of England shall be deemed to have been committed in the place where the offender is prosecuted or tried, or, where the offender is tried at the Central Criminal Court, in the county of London; but any costs paid in the case of those offences out of the funds of any county or county borough shall be repaid out of moneys provided by Parliament (*q*).

'(2) The treasurer of any county or county borough on whom an order is made for payment of any sum on account of costs under this Act shall, upon sight of the order, pay out of the county fund or borough fund or rate, as the case may be, to the person named therein or his duly authorised agent the sum specified in the order, and shall be allowed the sum in his accounts (*r*).

'(3) The council of every county and of every county borough shall cause their treasurer, or some other person on his behalf, to attend

(*oo*) *i.e.* county borough. *Vide* s. 1 (1), *supra*.

(*p*) Based on 7 Geo. IV. c. 46, ss. 24, 25; 30 & 31 Vict. c. 35, s. 5; 45 & 46 Vict. c. 50, ss. 151, 169; 51 & 52 Vict. c. 41, ss. 32 (3), 35 (5), 38, 100. As to the costs of prosecution for offences in detached parts of counties, see 2 & 3 Vict. c. 82, s. 2, and *ante*, Vol. i. pp. 22, 23.

(*q*) Under 7 Geo. IV. c. 64, s. 27, orders for costs might be made on the Admiralty in the case of prosecutions for certain felonies and misdemeanors. 7 & 8 Vict. c. 2, s. 1, extended this provision to all offences committed within the Admiralty Jurisdiction. These enactments were repealed by 45 & 46 Vict. c. 55, s. 10 and replaced by s. 9 of that Act, which was repealed in 1894 and replaced by 57 & 58 Vict. c. 60, s. 701, of which this paragraph of s. 4 is a re-enactment.

(*r*) Based on 7 Geo. IV. c. 64, s. 24; 29 & 30 Vict. c. 52, s. 2; 30 & 31 Vict. c. 35, s. 5; 42 & 43 Vict. c. 49, s. 28. Under the superseded enactments a treasurer was not bound to pay unless the whole order was served on him. R. *v.* Jones, 2 Mood. 171. But if he refused to pay on a proper and valid order he was liable to indictment (R. *v.* Jeyes, 3 A. & E. 416), or mandamus (R. *v.* Oswestry (Treasurer), 12 Q.B. 239; s.c. as R. *v.* Hayward, 2 C. & K. 234, and as R. *v.* Jones, 1 Den. 166.) R. *v.* Exeter (Treasurer), 5 M. & Ry., 167).

at every court of assize or quarter sessions at which any indictable offence in respect of which an order can be made under this Act on the treasurer is to be tried for the purpose of paying any orders so made, and to remain in attendance for that purpose during the sitting of the court, or until such hour as the court shall direct' (*s*).

Subsect. 4 deals with the adjustment adjusting financial relations between counties and boroughs, which may become necessary by virtue of the provisions of the Act.

By sect. 5, 'A Secretary of State may make regulations generally for carrying into effect this Act and in particular with respect to the following matters, namely :—

(a) the rates or scales of payment of any costs which are payable out of local funds under this Act and the conditions under which any such costs may be allowed ; and

(b) the manner in which an officer of the court making any payment on account of costs to any person in respect of his attendance to give evidence is to be reimbursed out of local funds ; and

(c) the form of orders, certificates and notices under this Act, and the furnishing of information when certificates are forwarded under this Act by officers of courts of summary jurisdiction or of examining justices' (*t*).

SECT. II.—ORDER FOR PAYMENT OF COSTS BY DEFENDANT OR PROSECUTOR.

By sect. 6, '(1) The court by or before which any person is convicted of an indictable offence may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred in or about the prosecution and conviction, including any proceedings before the examining justices, as taxed by the proper officer of the Court (*u*).

'(2) Where a person is acquitted on any indictment or information by a private prosecutor for the publication of a defamatory libel, or for any offence against the Corrupt Practices Prevention Act, 1854, or for the offence of any corrupt practice within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883 (*v*), or on an indictment for an offence under the Merchandise Marks Acts, 1887 to 1894, or on an indictment presented to a grand jury under the Vexatious Indictments Act, 1859 (*w*), in a case where the person acquitted has not been committed to or detained in custody or bound by recognizance to answer the indictment, the court before which the person acquitted is tried may order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, including any proceedings before the examining justices, as taxed by the proper officer of the court (*x*).

'(3) Where a charge made against any person for any indictable

(*s*) Based on 4 & 5 Will. IV. c. 36, s. 12 ; 51 & 52 Vict. c. 41, s. 67.

(*t*) Based on 14 & 15 Vict. c. 55, s. 5.

(*u*) See also Probation of Offenders Act, 1907, *ante*, Vol. i. p. 227.

(*v*) *Ante*, Vol. i. pp. 636 *et seq.* Corrupt and illegal practices at municipal elections are not specifically referred to. As to costs in such cases see R. *v.* Law [1900], 1 Q.B. 605 ; 69 L. J. Q.B. 348.

(*w*) 22 & 23 Vict. c. 17, *ante*, p. 1927.

(*x*) Sub-sect. 1, 2, substitute a general rule. For former particular provisions, see 24 & 25 Vict. c. 100, s. 74 ; 33 & 34 Vict. c. 23, s. 3 ; 48 & 49 Vict. c. 69, s. 18 ; 6 & 7 Vict. c. 96, s. 8 ; 17 & 18 Vict. c. 102, s. 12 ; 30 & 31 Vict. c. 35, s. 2 ; 46 & 47 Vict. c. 51, s. 53 ; 50 & 51 Vict. c. 28, s. 14.

offence (not dealt with summarily) is dismissed by the examining justices, the justices may, if they are of opinion that the charge was not made in good faith, order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, but if the amount ordered to be paid exceeds *twenty-five pounds* the prosecutor may appeal against the order to a court of quarter sessions in manner provided by the Summary Jurisdiction Acts, and no proceedings shall be taken upon the order until either the time within which the appeal can be made has elapsed without an appeal being made, or in case an appeal is made, until the appeal is determined or ceases to be prosecuted.

'(4) An order under this section for the payment of costs by the person convicted or by the prosecutor may be made in addition to an order directing payment of costs out of local funds, and where an order is made directing payment out of local funds, the costs shall primarily be payable out of local funds in accordance with this Act (*y*), but notice of any order under this section for the payment of costs by the person convicted or by the prosecutor shall be sent to the council of the county or borough out of the funds of which they are so payable.

'(5) Any order under this section may be enforced as to any costs primarily paid out of local funds, by the council of the county or borough out of the funds of which they have been so paid, and as to any other costs by the person to whom the costs are ordered to be paid, in the same manner as an order for the payment of costs made by the High Court in civil proceedings, or as a civil debt in manner provided by the Summary Jurisdiction Acts, and in the case of costs which a person convicted is ordered to pay, out of any money taken on his apprehension from the person convicted, so far as the court so directs.'

SECT. III.—SUPPLEMENTAL PROVISIONS.

Costs where no Indictment preferred after Committal.—Sect. 7. 'Where a person has been committed for trial for an indictable offence and is not ultimately tried, the court to which he is committed shall have power to direct or order payment of costs under this Act in the same manner as if the defendant had been tried and acquitted' (*z*).

Sect. 8. 'Nothing in this Act shall affect the operation of any enactment for the time being in force which provides for the payment of the costs of the prosecution or defence of an indictable offence out of any assets, money, or fund other than local funds, or by any person other than the prosecutor or defendant' (*a*).

Definitions, &c.—By sect. 9, '(1) In this Act the expression "indictable offence" includes any offence punishable on summary conviction when that offence is under the Summary Jurisdiction Acts deemed to be as respects the person charged an indictable offence (*aa*), and the expression

(*y*) Cf. 33 & 34 Vict. c. 23, s. 3; 48 & 49 Vict. c. 69, s. 18.

(*z*) This section is new law. It has been applied to a prosecution for libel where the grand jury ignored the bill, 44 L. J. (Newsp.) 164.

(*a*) See 17 & 18 Vict. c. 102, s. 11. Probation of Offenders Act, 1907, *ante*, Vol. i. pp. 227 *et seq.*, and the provisions authorizing guardians of the poor to incur costs out of the poor law funds. 7 & 8 Vict. c. 101, s. 59; 28 & 29 Vict. c. 79, s. 9 (general poor law); 24 & 25 Vict. c. 100, s. 73; 8 Edw. VII. c. 67, s. 34 (ill-treatment of children and apprentices), *ante*, Vol. i. p. 921.

(*aa*) 42 & 43 Vict. c. 49, s. 17 (1).

"prosecutor" includes any person who appears to the court to be a person at whose instance the prosecution has been instituted, or under whose conduct the prosecution is at any time carried on.

'(2) Any reference in this Act to a person committed for trial shall include a reference to a person whom a prosecutor is bound over to prosecute under the Vexatious Indictments Act, 1859 (*b*), and any reference to the court to which a person is committed shall in such a case be construed as a reference to the court at which the prosecutor is so bound over to prosecute.

'(3) This Act shall not apply in the case of an offence in relation to the non-repair or obstruction of any highway, public bridge, or navigable river, and costs in any such case may be allowed as in civil proceedings as if the prosecutor or defendant were plaintiff or defendant in any such proceedings.

'(4) This Act shall apply in a case of a person committed as an incorrigible rogue under the Vagrancy Act, 1824 (5 Geo. IV. c. 83), as if that person were committed for trial for an indictable offence, and in the case of any appeal under that Act as if the hearing of the appeal by the court of quarter sessions were the trial of an indictable offence.

'(5) For the purpose of sect. 13 of the Criminal Appeal Act, 1907 (*c*) (which relates to the costs of appeal), the hearing of a case stated under the Crown Cases Act, 1848 (*d*), shall be deemed to be an appeal, and the person in relation to whose conviction the case is stated shall be deemed to be an appellant, and the provisions of this Act giving power to direct the payment of the costs of the prosecution and defence shall not apply to the hearing of any case so stated.

'(6) A reference to the payment of costs out of local funds under this Act shall be substituted for any reference to the payment of expenses in the case of an indictment for felony, or in cases of felony, or in the case of a misdemeanor under the Criminal Law Act, 1826 (*e*), or any like reference in sect. 1 of the Inebriates Act, 1899 (*f*), or in sect. 13 of the Criminal Appeal Act, 1907 (*c*), or in any other enactment.'

The following enactments not repealed by this Act contain provisions as to payment of the costs of prosecution :—

Central Criminal Court Act, 1856 (19 & 20 Vict. c. 16), s. 13; Jurisdiction in Homicides Act, 1862 (25 & 26 Vict. c. 65), s. 11; Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), s. 17; Highways Act, 1878 (41 & 42 Vict. c. 77).

By sect. 23 of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), the question whether the costs of prosecution of a misdemeanor are payable or not payable out of the local rate is made the test whether bail by justices is discretionary or compulsory.

Repeals, &c.—By sect. 10 of the Act of 1908, '(1) The enactments

(*b*) *Ante*, p. 1927.

(*c*) *Ante*, p. 2026.

(*d*) *Ante*, p. 2007. For former doubts as to power to give costs on a case reserved, see Arch. Cr. Pl. (23rd ed.) 278.

(*e*) 7 Geo. IV. c. 64.

(*f*) 62 & 63 Vict. c. 35, *ante*, Vol. i. p. 245. By section 13 'the expenses of the prosecution on indictment under sect. 2 of the Inebriates Act, 1898 (61 & 62 Vict. c. 60, *ante*, Vol. i. p. 245), shall be payable as in the case of an indictment for felony.'

specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule (*i.e. the second column as printed below*) :

' Provided that without prejudice to the general application of sect. 38 of the Interpretation Act, 1889 (*g*), with regard to the effect of appeals—

(a) Any regulations made by a Secretary of State under sect. 5 of the Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), shall continue to have effect as if they had been made under the powers given by this Act (*h*) ; and

(b) Where in determining the amount of any fees to be paid to counsel or solicitors or any other matter which may be, but is not at the time of the passing of this Act (Aug. 1, 1908), regulated by regulations made by the Secretary of State, regard is had under the practice as existing at the time of the passing of this Act to any rates or scales of payment authorized by a court of quarter sessions, those rates and scales of payment shall have effect as if they were contained in regulations made by the Secretary of State under this Act (*i*) ; and

(c) The repeal of any enactment which imposes an obligation to pay a fee to any officer shall not affect the salary paid in lieu of fees to any person who is such an officer at the time of the passing of this Act.

' (2) This Act shall come into operation on the *first day of January nineteen hundred and nine.*

' (3) This Act may be cited as the Costs in Criminal Cases Act, 1908.

' (4) This Act shall not extend to Scotland or Ireland.'

SCHEDULE—REPEALS.

Short Title, Session, and Chapter.	Extent of Repeal.
Counties of Cities Act, 1798, 38 Geo. III. c. 52.	The words ' the expenses of the prosecution and of the witnesses and of ' in section eight.
Vagrancy Act, 1824, 5 Geo. IV. c. 83.	Section nine, from ' and the justices of the peace ' to ' allowed the same in his account.'
Criminal Law Act, 1826, 7 Geo. IV. c. 64.	Sections twenty-two, twenty-three, twenty-four, and twenty-five.
Central Criminal Court Act, 1834, 4 & 5 Will. IV. c. 36.	Section twelve.
Highway Act, 1835, 5 & 6 Will. IV. c. 50.	Section ninety-five from ' and the costs ' to ' shall be situate ' and section ninety-eight.
Parkhurst Prison Act, 1838, 1 & 2 Vict. c. 82.	Section fourteen, from ' and the expenses ' to the end of the section.

(*g*) *Ante*, Vol. i. p. 5.

(*h*) The regulations applying under the repealed enactments made in 1904 (St. R. & O. 1904, No. 1219), are printed in Archb. Cr. Pl. (23rd ed.) 249.

(*i*) The scales in use in 1903 are stated Parl. Pap. 1903, c. 1650, 1651.

SCHEDULE—*continued.*

Short Title, Session, and Chapter.	Extent of Repeal.
Libel Act, 1843, 6 & 7 Vict. c. 96.	Section eight.
Treason Felony Act, 1848, 11 & 12 Vict. c. 12.	Section ten.
Poor Law Amendment Act, 1850, 13 & 14 Vict. c. 101.	Section nine, from 'and shall' to the end of the section (*j*).
Prevention of Offences Act, 1851, 14 & 15 Vict. c. 19.	Section fourteen.
Criminal Justice Administration Act, 1851, 14 & 15 Vict. c. 55.	Section two. Section five, from 'to prosecutors' to 'prosecutions and,' and from 'and also' to 'certificates relate.' Section six, from 'payment to any prosecutor' to 'loss of time, or order,' and from 'and where' to the end of the section.
Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102.	Section ten, from the beginning of the section down to 'provided always that,' and sections twelve and thirteen (*k*).
Larceny Act, 1861, 24 & 25 Vict. c. 96.	Section one hundred and twenty-one.
Malicious Damage Act, 1861, 24 & 25 Vict. c. 97.	Section seventy-seven.
Forgery Act, 1861, 24 & 25 Vict. c. 98.	Section fifty-four.
Coinage Offences Act, 1861, 24 & 25 Vict. c. 99.	Section forty-two.
Offences against the Person Act, 1861, 24 & 25 Vict. c. 100.	Sections seventy-four, seventy-five, and seventy-seven.
Highway Act, 1862, 25 & 26 Vict. c. 61.	Section nineteen from 'and the costs' to the end of the section.
Criminal Law Amendment Act, 1867, 30 & 31 Vict. c 35	Sections two and five.
Debtors Act, 1869, 32 & 33 Vict. c. 62.	Section seventeen.
Clerks of Assize, &c., Act, 1869, 32 & 33 Vict, c. 89.	Sections nine, ten, and eleven.
Forfeiture Act, 1870, 33 & 34 Vict. c. 23.	Section three.
Ballot Act, 1872, 35 & 36 Vict. c. 33.	Section twenty-four, from 'and the costs' to 'in cases of felony.'
Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49.	In subsection (1) of section seventeen, the words 'and the expenses of the prosecution shall be payable as in cases of felony.'

(*j*) This act is extended by 14 & 15 Vict. c. 105, s. 18, to all officers included in the Poor Law Act, 1834, and to any person acting in aid of such officer.

(*k*) See R. v. Law [1900], 1 Q.B. 605; 69 L. J. Q. B. 348; and 17 & 18 Vict. c. 102, s. 11.

SCHEDULE—*continued.*

Short Title, Session, and Chapter.	Extent of Repeal.
Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49—*continued.*	Section twenty-eight except so far as that section is applied by section one of the Inebriates Act, 1899, or any other Act.
Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50	The word 'prosecution' in section one hundred and fifty-one, and section one hundred and sixty-nine.
Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51.	The words 'twelve and thirteen' in section fifty-three, and subsection (2) of section fifty-seven.
Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69.	Section eighteen.
Merchandise Marks Act, 1887, 50 & 51 Vict. c. 28.	Section fourteen.
Local Government Act, 1888, 51 & 52 Vict. c. 41.	The words 'and all costs of prosecutions mentioned in section one hundred and sixty-nine of the Municipal Corporations Act, 1882, shall be paid out of the county fund' in subsection (5) of section thirty-five. Section sixty-seven, from 'and the county council' to the end of the section. The words 'but nothing shall require a quarter sessions borough to contribute towards the costs of prosecutions at assizes except in the case of persons committed for trial from the borough' in section one hundred.
Official Secrets Act, 1889, 52 & 53 Vict. c. 52.	Section four.
Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict. c. 69.	Section five.
Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60.	Section seven hundred and one.
Poor Prisoners Defence Act, 1903, 3 Edw. VII. c. 38.	Subsection (2) of section one.
Prevention of Cruelty to Children Act, 1904, 4 Edw. VII. c. 15.	Section twenty (*l*).
Prevention of Corruption Act, 1906, 6 Edw. VII. c. 34.	Subsection (4) of section two.

The rulings upon the repealed enactments are omitted as not affording any satisfactory guide to the interpretation of the Act of 1908 (*m*). The making of orders under the Act of 1908 appears to be in the discretion of

(*l*) This Act, except ss. 2, 3, is repealed by 8 Edw. VII. c. 67, which contains no general provisions as to costs.

(*m*) They are collected in Archb. Cr. Pl. (23rd ed.), 248, and Russell on Crimes (6th ed.), Vol. i. p. 98.

the Court (*n*) except perhaps in cases within sect. 19 of the Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100) *i.e.*, of prosecutions for perjury, &c., ordered by a competent Court or functionary (*o*).

Sect. IV.—Costs of Defence of Poor Prisoners.

By the Poor Prisoners Defence Act, 1903 (3 Edw. VII. c. 38), s. 1. '(1) Where it appears, having regard to the nature of the defence set up by any poor prisoner (*p*) as disclosed in the evidence given or statement made by him before the committing justices (*q*), that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, and that his means are insufficient to enable him to obtain such aid—

(a) The committing justices upon the committal of the prisoner for trial (*r*); or

(b) The judge of a court of assize or chairman (*s*) of a court of quarter sessions, at any time after reading the depositions

may certify that the prisoner ought to have such legal aid, and thereupon the prisoner shall be entitled to have solicitor and counsel assigned to him subject to the provisions of this Act.'

Sect. 1, sub-sect. 2 is repealed by the Costs in Criminal Cases Act, 1908, and by sect. 1, sub-sect. 3 of that Act (*ante*, p. 2040) provision is made as to what costs are to be.

By sect. 2, 'Rules for carrying this Act into effect may be made in the same manner and subject to the same conditions as Rules under the Prosecution of Offences Act, 1879 (*t*).

By sect. 4, This Act shall not extend to Scotland or Ireland.

The Criminal Appeal Act, 1907, empowers the Court of Criminal Appeal to assign to a person appealing against his conviction or sentence, solicitor and counsel or counsel only in proceedings preliminary to or incidental to an appeal, if legal aid seems desirable in the interests of justice and the appellant has not sufficient means to enable him to obtain it (*u*).

Sect. V.—Costs of Removed Indictments.

The transmission of an indictment by a court of quarter sessions to the assizes for trial (without *certiorari*) does not appear to affect the power of the court of assize to make orders as to costs (*v*).

The Acts of 1826, 1851 and 1867 (30 & 31 Vict. c. 35) seem not to have applied to indictments removed from sessions or assizes (*w*) into the King's Bench Division of the High Court.

(*n*) Cf. R. *v.* Rawson, 2 B. & C. 598.

(*o*) *Ante*, Vol. i. p. 481.

(*p*) Including a person committed for trial on bail (s. 3).

(*q*) Including a magistrate of the police courts of the Metropolis, and a stipendiary magistrate (s. 3).

(*r*) Defined 52 & 53 Vict. c. 63, s. 27, *ante*, Vol. i. p. 4.

(*s*) Including a deputy chairman or the recorder or deputy recorder of a borough (s. 3).

(*t*) *Ante*, p. 1924. The rules in force were made in 1903 (St. R. & O. 1903, No. 1150).

(*u*) See the enactments and rules set out, *ante*, p. 2026.

(*v*) See R. *v.* Paine, 7 C. & P. 135, decided on 7 Geo. IV. c. 64.

(*w*) Including the Central Criminal Court. As to cases removed to the Central Criminal Court, under 19 & 20 Vict. c. 16, see s. 13 of that Act.

In R. *v.* Johnson (*x*) it was held that in the case of an indictment for misdemeanor, removed by the prosecutor himself from the quarter sessions into the King's Bench, an order could not legally be made for any costs under 7 Geo. IV. c. 54.

Where six indictments for felony were removed by the prisoner, one of which only was tried, the Court of King's Bench refused to order the treasurer of the county of the city of Exeter to pay the prosecutor the expenses of the prosecution; as, if the costs of the prosecution could be granted at all, they ought to be granted by the judge who tried the prisoner (*y*).

Where in pursuance of a recognizance the prosecutor at the quarter sessions preferred an indictment for riot, and he afterwards removed it into the Court of King's Bench, it was held that the prosecutor was not entitled to his costs; and Lord Tenterden, C.J., said that the matter had been considered by the twelve judges, who were all of opinion that 7 Geo. IV. c. 64 did not apply to cases where the indictment had been removed into the Court of King's Bench by *certiorari* (*z*).

Where an indictment found at the Middlesex Quarter Sessions was removed *by the defendant* by *certiorari* into the Queen's Bench, and tried at the sittings after term, when Lord Denman, C.J., made an order for the payment to the prosecutor or his attorney of the expenses of the prosecution and the witnesses, and that order was afterwards made a rule of court; upon shewing cause against a rule to shew cause why that rule should not be discharged, it was contended that the words of the statute applied to any court, and that the reason of the decision in R. *v.* Jeyes (*a*) was, that the statute was passed to indemnify persons unable to bear the expense, and that inability was not likely to exist where the party voluntarily removed the indictment to the superior court, and that the view taken by Littledale, J., in R. *v.* Treasurer of Exeter (*b*), was incorrect. In support of the rule it was contended that the statute ceased to apply after a removal by *certiorari*, and that there was no distinction as to the party removing the indictment; the Court, however, did not express any opinion upon this point (*c*). In R. *v.* Gurney (*d*) the Court refused to grant costs under sect. 121 (rep.) of the Larceny Act, 1861 (24 & 25 Vict. c. 100), holding that the power did not exist where the indictment was removed by *certiorari*.

By the Crown Office Rules 1906 (*e*):—

(*x*) 1 Mood. 173, an indictment for riot. The same point was decided by the judges in R. *v.* Oates, mentioned in 1 Mood. 175.

(*y*) R. *v.* Treasurer of Exeter, 5 Man. & Ry. 167. Littledale, J., added, 'even the judge has no power where the case has been removed by *certiorari*. There is no difference in substance between an indictment removed by the prisoner and an indictment removed by the prosecutor.' 'The Act only applies to indictments tried before the Courts in which they were found.' This case seems to overrule R. *v.* Ellis, 1 Mood. 175, where a rule absolute was granted advising the city and county of Exeter to pay the expenses of the trial at *nisi prius* of a removed indictment for felony. The felony was committed while 58 Geo. III. c. 70, was in force, and was tried after 7 Geo. IV. c. 64, came into force.

(*z*) R. *v.* Richards, 8 B. & C. 420. It is not stated that the prosecutor or the witnesses attended the *trial* under subpœna or recognizance. Cf. R. *v.* Kelsey, 9 Dowl. Pr. Cas. 481.

(*a*) 3 A. & E. 416.

(*b*) *Supra.*

(*c*) Anon. 8 A. & E. 589.

(*d*) Finlayson's Report, and Short and Mellor Cr. Pr. (2nd ed.) 136.

(*e*) These take the place of 16 & 17 Vict. c. 30, s. 5; repealed in 1892 (S. L. R.).

Rule 14. No writ of *certiorari* for the removal of an indictment into the King's Bench Division at the instance of a defendant or defendants before trial had, shall be allowed by the Court to whom it may be directed, unless the defendant or defendants at whose instance the writ of *certiorari* shall have been awarded, shall have entered into a recognizance before a judge of the High Court, or before the Court before whom such defendant or defendants shall stand indicted, or before one or more justices of the peace of the county or place in which such indictment may be found, or in which such defendant or defendants reside, in such sum and with such sufficient sureties as the Court or judge awarding the writ shall by endorsement on the writ, order or direct conditioned to appear and plead (and in cases of felony in open court) to the said indictment, and give notice of trial, and proceed to trial of the indictment at the next assizes to be held for the county wherein the indictment was found, or if in London or Middlesex forthwith at the sittings of the High Court of Justice, and personally to appear from day to day at the trial of such indictment, and if necessary in the King's Bench Division of the High Court of Justice, and not depart till he or they shall be discharged by the Court, and to pay the costs of the prosecution subsequent to the removal of the indictment, if he or they be convicted.

Rule 15. No writ of *certiorari* for the removal of an indictment into the King's Bench Division at the instance of any prosecutor (other than the Attorney-General acting on behalf of the Crown or the prosecutor of an indictment against a body corporate) shall be allowed by the Court to whom it may be directed unless the prosecutor at whose instance the writ of *certiorari* shall have been awarded, shall before the allowance of such writ by the Court to whom it may be directed, enter into a recognizance in the manner and for such sum as in the preceding rule, provided and directed, conditioned on the return of such writ, to make up the record and give notice of trial and proceed to trial of the indictment at the next assizes to be held for the county wherein the indictment was found, or if in London or Middlesex forthwith at the sittings of the High Court of Justice, and to pay the costs of the defendant subsequent to the removal of the indictment, if he be acquitted.

Rule 16. If the person at whose instance any writ of *certiorari* for the removal of an indictment shall have been awarded, shall not before the allowance thereof enter into a properly conditioned recognizance, the Court to which such writ or order may be directed shall proceed to the trial of the indictment, as if such writ had not been awarded.

Rule 17. The provisions of Rules 12, 13, 14, 15 and 16 shall in like manner apply in the case of a removal of an indictment into the King's Bench Division before trial had by order without writ of *certiorari* when such writ may not be required or used.

Where a defendant was convicted on some of the counts of an indictment which had been removed by *certiorari* and acquitted on others, it was held that she had not been acquitted upon the indictment within the meaning of 16 & 17 Vict, c. 30, sect. 5 (*f*).

(*f*) R. *v.* Bayard [1892], 2 Q.B. 181.

CHAPTER THE SIXTH.

REWARDS AND COMPENSATION.

Rewards.—By the Criminal Law Act, 1826 (7 Geo. IV. c. 64), s. 28 (*a*), 'Where any person shall appear to any court of oyer and terminer, gaol delivery, *superior criminal court of a county palatine, or court of great sessions*, (*b*) to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen; every such court is hereby authorized and empowered in any of the cases aforesaid to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the Court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the Court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such Court shall have power to order compensation to such person in the same manner as the other courts hereinbefore mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation as courts are by this Act empowered to allow to prosecutors and witnesses respectively' (*c*).

By Sect. 30, 'If any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned, it shall be lawful for the Court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married,

(*a*) The provisions of s. 8 of the Counties of Cities Act, 1798 (38 Geo. III. c. 52), as to ordering rewards where city cases are tried at county assizes, must apparently be read as referring to rewards under this Act.

(*b*) These Courts have been abolished.

(*c*) S. 29 provided that such order shall be paid by the sheriff, who may obtain immediate re-payment on application to the treasury. By 51 & 52 Vict. c. 41, s. 100, the costs of assizes and sessions are defined as including: 'the costs of rewards ordered to be paid by the Court.' The costs of assizes and sessions are a general county purpose.

or to his child or children, in case his wife shall be dead, or to his father or mother, in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the Court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the Court; and every such order shall be paid by and repaid to the sheriff in the manner hereinbefore mentioned' (*d*).

By the Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 5, 'It shall be lawful for one of His Majesty's Principal Secretaries of State to make regulations as to the rates or scales of payment of all or any costs, expenses, and compensations to be allowed or ordered to be paid under the said Act (7 Geo. IV. c. 64, *supra*), or any other Act or this Act . . . (except as hereinafter mentioned), to persons who may have been active in or towards the apprehension of persons charged with offences . . .' (*e*).

By Sect. 6, When an order is made to compensate a person active towards apprehension, the amount of the costs, expenses, and compensation is to be ascertained by the proper officer of the Court under the regulations.

Sect. 7. (*f*) 'Provided always that nothing in this Act or in any regulations under this Act shall interfere with, or affect the power of any court to order payment to any person who may appear to such Court to have shown extraordinary courage, diligence, or exertion in or towards any such apprehension as hereinbefore mentioned of such sum as such court shall think reasonable and adjudge to be paid in respect of such extraordinary courage, diligence, or exertion.'

Sect. 8. After reciting the Criminal Law Act, 1826, *supra*, proceeds to enact that 'When any person appears to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment mentioned which such sessions may have power to try, such court of sessions shall have power to order compensation to be paid to such person in the same manner as the other Courts in the said enactment mentioned: provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the Court unto such person without fee or payment for the same.'

Provision is made by the Central Criminal Court Act, 1856 (*g*), and the Jurisdiction in Homicides Act, 1862 (*h*), for ordering payment of rewards in cases removed under these Acts. As to rewards for prosecuting convicts found at large during a term of penal servitude, see 5 Geo. IV. c. 84, s. 22 (*i*).

(*d*) See R. *v.* Platel [1903], Cent. Crim. Ct. Archb. Cr. Pl. (23rd ed.), 262, where compensation was given to the widow of a man killed in trying to arrest a man who had shot a police officer.

(*e*) The omitted parts are repealed by 8 Edw. VII. c. 15, *ante*, p. 2046. No scale has been prescribed.

(*f*) Ss. 2, 5, & 6, relating to costs, are repealed and superseded by 8 Edw. VII. c. 15, *ante*, p. 2046.

(*g*) 19 & 20 Vict. c. 16, s. 13.

(*h*) 25 & 26 Vict. c. 65, s. 11.

(*i*) R. *v.* Emmons, 2 M. & Rob. 279. R. *v.* Ambury, 6 Cox, 79.

Sect. 28 of the Act of 1826, does not authorize the court to award compensation to persons who have been active in and towards the apprehension of a person guilty of sacrilege (*j*). And upon the authority of this case, Bolland, B., refused to allow compensation in a similar case; though, in the absence of such authority, both he and Parke, J., would have been disposed to put a different construction upon the statute (*k*). But a person who has been active in the apprehension of a prisoner charged with stealing a cow has been held entitled to a reward, as the words bullock-stealing, horse-stealing, and sheep-stealing are intended to describe the kind or class of offences in connection with which rewards were to be allowed (*l*), and it has been held that cutting is not limited to cutting with a knife (*m*). Where the prosecutrix's brother-in-law, who lived in her house, was attacked and wounded in bed by some burglars, but he made a gallant resistance and got outside the door of his room and shut it, keeping the burglars inside, and shouting aloud for assistance, and some neighbours came and secured the prisoners, who were still in the room; Talfourd, J., held that, the case was within sect. 28, and ordered a reward accordingly (*n*). Where a prisoner was indicted for an attempt to murder her child by suffocating it, and an application was made to allow the extra expenses incurred by the constable in apprehending the prisoner, and for his loss of time, Patteson, J., held that the case was within the spirit and intention of sect. 28, though not within the words, and allowed the expenses (*o*). Stealing from the person has been held not to be within the words, 'robbery from the person' (*p*).

The rewards which may be given under this section are not confined to cases where the party has been caused expense or loss of time, but have been ordered to be paid to persons who have displayed great courage in the apprehension of offenders, although they have neither been put to expense nor loss of time. On a trial for robbery where it appeared that the prosecutor had displayed great courage in apprehending the prisoner; Parke, B., ordered him to be paid a reward, under the word 'exertions' (*q*). And they have been granted where the person has apprehended the prisoner in the actual commission of a burglary (*r*); and also where the party came downstairs when a burglary was committed, but did not apprehend the prisoners, who were three in number, but was able to give such a description of them as caused their apprehension (*s*).

Where it does not appear upon the evidence given on the trial that the party has been active in the apprehension, an affidavit is necessary

(*j*) R. *v.* Robinson, 1 Lew. 129. Hullock, B., said that 'The word "sacrilege," if used alone in a statute, would not be construed to come within the words "burglary," or "housebreaking"; and that, wherever, in a penal statute, churches are intended to be included, the word "sacrilege" is introduced.'

(*k*) Anon. 1 Lew, 130.

(*l*) R. *v.* Gilbrass, 7 C. & P. 444, Law, Recorder.

(*m*) R. *v.* Platt [1905], 69 J. P. 424.

(*n*) R. *v.* Dunning, 5 Cox, 142.

(*o*) R. *v.* Durkin, 2 Lew. 163.

(*p*) R. *v.* Thompson, 1 Cox, 43, Maule, J. Rosc. Crim. Ev. (13th ed.), 209.

(*q*) R. *v.* Womersly, 2 Lew. 162.

(*r*) R. *v.* Barnes, 7 C. & P. 166, Coleridge, J.

(*s*) R. *v.* Blake, 7 C. & P. 166, Williams, J. Rewards were ordered in a similar way at the Bristol Special Commission. See 7 C. & P. 167.

to be laid before the judge, in order to induce him to grant a reward (*t*). Thus where in a case of horse-stealing a constable had used great exertions in apprehending the prisoner, and establishing the case against him, and had gone various journeys and been at considerable expense; Campbell, C.J., held that the application must be founded on an affidavit of the party, stating the amount of money actually expended, &c. (*u*).

(*t*) R. *v.* Jones, 7 C. & P. 167, Park, J.

(*u*) R. *v.* Haines, 5 Cox, 114. R. *v.* Barratt, 6 Cox, 78.

CANADIAN NOTES.

COSTS IN CRIMINAL CASES.

Sec. 1.—*Costs Payable out of Official Funds.*—See Code sec. 1044(4).

Sec. 2.—*Order for Payment of Costs by Defendant or Prosecutor.*

Costs and expenses of prosecution, allowance for loss of time, etc., may be ordered to be paid by the party convicted. See Code sec. 1044.

Where judgment is given for defence in cases of libel, the defendant recovers costs from prosecutor. See Code sec. 1045.

Origin of Enactment.—The same provision was contained in the Criminal Procedure Act, R.S.C. 1886, ch. 174, secs. 153 and 154, and originated in the Criminal Libel Act (Can.) (1874), 37 Vict. ch. 38, secs. 12 and 13.

Costs from the Prosecutor.—The mere fact that the Crown prosecutes by a counsel it appoints for the purpose will not necessarily make it a proceeding not carried on by or for a private prosecutor, within the proper meaning of the statute, otherwise every criminal prosecution in Ontario would be a Crown prosecution, and this enactment be of no kind of use. Adam Wilson, J., in R. v. Patteson (1875), 36 U.C.Q.B. 129, 150.

Taxation.—In a Quebec case the plaintiff had been prosecuted by defendant in a Criminal Court for defamatory libel and acquitted. No demand was made when the verdict was given for a condemnation of defendant for costs, but plaintiff afterwards sought to recover them by action. After hearing the cause in the Superior Court, the presiding Judge discharged the *délibéré* to enable the plaintiff to have his costs taxed before the Judge who presided at the criminal trial, which was done, and the cause was reheard. It was held that plaintiff could claim his costs and disbursements from defendant by an ordinary action, though he had not asked for a condemnation against defendant therefor at the time of the verdict; also that the Judge who presided at the criminal trial could, even after proceedings in such action, tax such costs and disbursements. Mackay v. Hughes (1901), 19 Que. S.C. 367 (Sup. Ct.); and see sec. 1047.

In British Columbia, following the practice there in civil cases, the costs of taking evidence under commission abroad on behalf of the defendant in a prosecution for criminal libel cannot be taxed against

the prosecutor unless such evidence was used at the trial. In British Columbia, following the practice there in civil cases, the costs of abortive trials of an indictment for criminal libel cannot be taxed under Cr. Code secs. 1045 and 1047, against the party who ultimately fails in the litigation. R. v. Nichol, 6 Can. Cr. Cas. 8.

Where the accused, after his acquittal in a criminal libel action, proceeded to tax his costs and moved before the trial Judge for certain costs, and on obtaining an order with which he was dissatisfied abandoned the taxation and commenced a civil action against the prosecutors for his costs, the civil action will be allowed to proceed only on terms of the plaintiff undertaking to abide by such order as may be made therein as to the costs of the abandoned taxation in the criminal case. Nichol v. Pooley, 6 Can. Cr. Cas. 12, and 6 Can. Cr. Cas. 269.

The Attorney-General may exercise the power conferred by Code sec. 723 of entering a *nolle prosequi* to an indictment for criminal libel, although the proceedings were instituted by a private prosecutor. And the discharge of the accused upon the entry of a *nolle prosequi* by the Attorney-General to an indictment for criminal libel is a judgment for the defendant entitling him under Code sec. 1045 to his costs against the private prosecutor. R. v. Blackley, 8 Can. Cr. Cas. 405, 13 Que. K.B. 472.

The private prosecutor, in taking the initial step to prosecute for libel, assumes the risks both of the incidents and the accidents of that procedure. *Ibid.*, page 407; R. v. Latimer, 15 Q.B.D. 1077.

The costs of shewing cause to a rule *nisi* for a criminal information for libel are within this enactment. R. v. Steel, 13 Cox C.C. 159.

Defamatory Libel.—Other special provisions as to this offence are contained in secs. 317-334, 888, 910, 911, 956 and 1047.

Costs of prosecutions under Part VII. of the Code, relating to forgery of trade marks, and the fraudulent marking of merchandise, etc., may be ordered paid to the defendant by the prosecutor or vice versa. See Code sec. 1040.

Where costs of prosecution are to be borne by the Government of Canada. See Code sec. 1038(1(*b*)).

Imprisonment may be ordered in default of payment of costs by accused on conviction for assault. Code sec. 1046.

Sec. 5.—Costs of Removed Indictments.

Costs on Certiorari Proceedings.—Where the only record of conviction produced before the institution of certiorari proceedings to quash the same is bad, and a valid amended conviction is produced in such proceedings, the costs of opposing the motion to quash should not be awarded against the applicant. R. v. McAnn (1896), 3 Can. Cr. Cas. 110 (B.C.); R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

Costs on Certiorari in Ontario.—By rule of Court in Ontario, it is declared that subject to the express provisions of any statute heretofore or hereafter passed, the costs of and incidental to proceedings for or in relation to the quashing of convictions or orders shall be in the discretion of the Court or Judge and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid. Ontario rule 1241 published in Canada *Gazette*, 2nd July, 1904.

Apart from any effect which that rule of Court may have under the Code, the Court has no jurisdiction in Ontario to award costs in a criminal matter against the prosecutor.

Cases in which costs have been given against an unsuccessful applicant for a writ of certiorari or to quash are to be distinguished, for in such cases the Court has jurisdiction to give costs against the applicant, either because of the recognizance which he has entered into to pay the costs, or of the inherent power which the Court possesses to give costs as a punishment for erroneously putting the jurisdiction of the Court in motion. R. v. Bennett (1902), 5 Can. Cr. Cas. 459; R. v. Crandall, 27 O.R. 63; R. v. Somers, 1 Can. Cr. Cas. 46.

But the costs of quashing a conviction are recoverable as part of the damages in an action for malicious prosecution or false arrest where no order of protection is made. R. v. Somers (1894), 1 Can. Cr. Cas. 46 (Ont.).

Costs in Civil Actions Against Persons Administering the Criminal Law.—See Code sec. 1147.

Costs on Summary Convictions.—See Code secs. 735, 736, 737, 738, 739.

Costs on Appeals from Summary Convictions.—See Code secs. 755, 758, 759, 760.

Costs of Prosecutions of Juvenile Offenders.—See Code secs. 819, 820, 821.

Taxation.

Taxation and Scale of Costs.—See Code sec. 1047.

The person filling the office of commissioner of the Dominion police has, as such, no legal capacity to represent and act on behalf of the Crown, and in laying an information in which he designated himself as such commissioner of the Dominion police he acted as a private individual and not as the legal representative of the Crown, although he declared that he was acting as such commissioner on behalf of the Sovereign. The accused having been discharged, and the commissioner having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the grand jury having thrown out the bill of indictment, the commissioner was held to be personally liable under sec. 595 for the costs incurred

by the accused on the preliminary enquiry and before the Court of Queen's Bench. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141 (Que.). The costs allowed were not the fees and disbursements paid by the accused to his counsel, such payment being a matter between client and counsel, but such costs as were held by analogy with the costs allowed in civil suits to be costs recoverable from a losing party. Such costs should be taxed according to a tariff made for criminal proceedings, and in the absence of such tariff they are to be taxed in the discretion of the Judge, by implication, according to the spirit of the provisions contained in this section. *Ibid.*

The taxation of costs against an unsuccessful private prosecutor who has at his own request been bound over to prefer an indictment, is controlled by sec. 1047, and the scale of costs in the absence of a tariff for criminal proceedings is the lowest scale in civil suits in the Court in which the indictment is tried. R. v. Gouilliould, 7 Can. Cr. Cas. 432.

By the Proper Officer.—It may be that there is no appeal from the decision of the "proper officer" to a Judge. Reg. v. Newhouse (1858), 22 L.J.Q.B. 127.

In British Columbia.—In all proceedings under these rules the party entitled to costs shall tax the same according to the scale in force in the Supreme Court, and if no provision is made for work done under these rules, then the taxing officer shall allow such reasonable amount according to scale in force, or as near thereto as circumstances will admit of. B.C. Rule 61.

District of Montreal.—The practice in Montreal is to tax costs under this section on the tariff of the "fourth class" of civil appeals.

Court May Order Compensation for Loss of Property in Addition to Payment of Costs.—Code sec. 1048.

Court May Order Compensation to Bonâ Fide Purchasers of Stolen Property.—Code sec. 1049.

Restitution.

Restitution of Stolen Property.—See Code sec. 1050.

The expression "property" includes not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise, and all deeds and instruments relating to or evidencing the title or right to any property or giving a right to recover or receive any money or goods. Code sec. 2(32).

To entitle the aggrieved party to an order for the restitution to him of money found on the prisoner convicted of stealing money from the person, proof must be adduced identifying the money so

found as the money which was so stolen. R. v. Haverstock (1901), 5 Can. Cr. Cas. 113, per Wallace, Co. J., at Halifax.

Where the accused was convicted of the theft of bank notes but there was no evidence to identify the same with the bank notes found on and taken from the prisoner at the time of arrest, and no application was made immediately after the conviction for an order of compensation to the prosecutor for his loss, an order may be properly made *ex parte* for the restoration to the prisoner of the money so taken from him. *Ibid.*

Where it is impossible to identify the money found on the prisoner as the stolen money, and the prisoner claims the money as his own, the proper course for the prosecutor to take is to apply, under sec. 1048, immediately after the conviction of the prisoner, for compensation for loss of property, and thus obtain an order that the money of the prisoner shall be paid to him to such extent as will compensate him for the loss sustained.

It will be noted that sec. 1050 does not include the offence of obtaining money or goods by false pretences, but recourse may be had in such cases to an order for compensation under secs. 1048 and 1049 or to a civil action. Restoration of goods not connected with charge to accused.

A court of criminal jurisdiction may order the restoration to an accused person committed for trial of articles taken possession of by the police which are not connected with the offence charged and are not required for the purpose of evidence. Ex parte McMichael, 7 Can. Cr. Cas. 549; R. v. McIntyre, 2 P.E.I. Rep. 154.

Where money taken from a prisoner on his arrest is admitted by the Crown authorities not to be required for the purpose of evidence at the trial the Court may order it to be restored to the prisoner. R. v. Harris, 1 B.C.R., pt. 1, p. 255.

Protection of Innocent Purchaser.—Where the property stolen has been transferred by the thief or the guilty receiver to an innocent purchaser for value who has acquired a lawful title thereto, the Criminal Court shall not award restitution. This is not to be construed as a declaration that the innocent purchaser for value has a lawful title. The protection of sub-sec. 3 is afforded to the innocent purchaser only in the event of his acquisition of a lawful title which fact could be ascertained only by reference to the civil law of the province.

In Vezina v. Brosseau (1906), 30 Que. S.C. 493, the person from whom a horse was stolen took civil proceedings to recover the horse from the man to whom the purchaser from the thief had sold it. The last sale was pleaded as giving a lawful title under the Que. Civil Code, sec. 1489, on the ground that the sale to the defendant was made by a "dealer trading in similar articles," but the plea was not sustained as it appeared that although the second vendor may have occasionally sold horses, such was not his real or ostensible business.