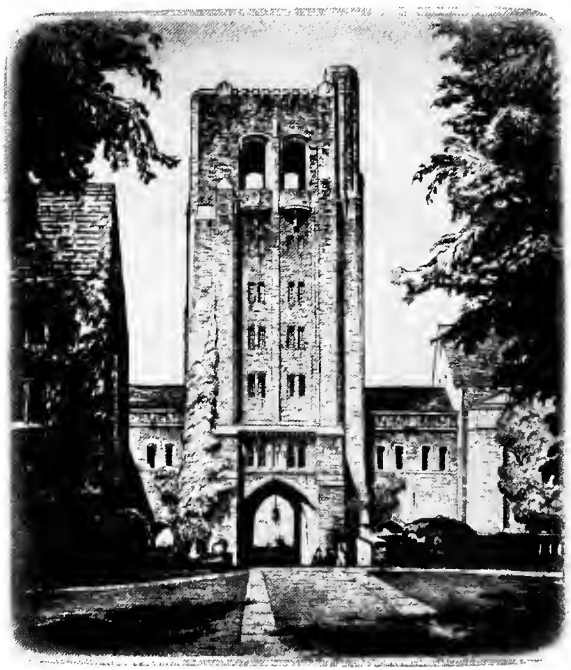

THE LAW OF CRIMES.

To accompany this volume:

A COLLECTION OF CASES ON THE CRIMINAL LAW. By H. W. CHAPLIN.

THE LAW OF CRIMES.

BY

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SECOND EDITION.

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PREFACE TO THE SECOND EDITION.

In preparing a second edition of May's Criminal Law, it seemed best for the sake of completeness to treat certain subjects which had not been considered by the author. The original plan of the work included no discussion of the subjects of Criminal Pleading and Practice; but it was found that it would be better adapted for the use of students if those subjects were briefly considered, and this has accordingly been done. Much has also been added to the first chapter, which contains the general principles underlying the criminal law.

No attempt has been made by the editor to treat the subjects he has introduced in an exhaustive manner, or to make a complete collection of authorities. He has endeavored, in adding to the text, to imitate the clearness and conciseness of the author; and in citing new cases, he has intended to include only such as illustrate principles not before stated.

The alphabetical arrangement of crimes, adopted by the author after some misgivings, has proved inconvenient, and is now abandoned; and the second part of the work has been rearranged according to

what is hoped to be a more satisfactory method. The arrangement is in the main that of Blackstone and of Bishop.

The numbering of the sections is of course entirely changed. For the purpose of comparison, a table is given by which the section of this edition may be found which corresponds with each section of the first edition. It was impracticable to note the additions of the editor in the text itself; but a list of the chief additions has been prepared, so that it is easy to discover which of the statements of law are supported by the authority of Judge May.

Thanks are due to Professor Robinson of the Yale Law School for kind suggestions. Much assistance has been obtained from Mr. H. W. Chaplin's excellent collection of Cases on Criminal Law.

PREFACE TO THE FIRST EDITION.

In the following pages the author has endeavored to state briefly the general principles underlying the Criminal Law, and to define the several common law crimes, and such statutory crimes — *mala in se*, and not merely *mala prohibita* or police regulations [1] — an may be said to be common statute crimes.

The brevity of this treatise did not admit of a history of what the law has been, nor a discussion of what it ought to be; but only a statement of what it is. In the cases cited will be found ample learning upon the first of these points. Digressions upon the second would be out of place in a book designed as a lawyer's and student's hand-book.

The alphabetical arrangement has been adopted in the second chapter, as on the whole more convenient for the practising lawyer. The student, however, will perhaps find it to his advantage, on first perusal, instead of reading consecutively, to pursue the more

[1] On the question of the limitation of this power of police regulation, see 2 Kent's Com. 340; Com. *v.* Alger, 7 Cush. (Mass.) 53; Thorp *v.* R. & B. Railroad Co., 27 Vt. 149; Slaughter-House Cases, 16 Wall. (U. S.) 36.

scientific method of grouping the titles; taking first, for instance, crimes against the person, — as Assault, Homicide, and the other crimes where force applied to the person is a leading characteristic; then crimes against property, — as Larceny, Embezzlement, Cheating, False Pretences, and the like, where fraud is a leading characteristic; to be followed by Robbery, Burglary, Arson, and Malicious Mischief; and concluding with such crimes as militate against the public peace, safety, morals, good order, and policy, — as Nuisances generally, Treason, Blasphemy, Libel, Adultery, and the like.

If the author has succeeded in his design, the practising lawyer may readily find within the compass of these few pages the law which he seeks, and the authorities in its support.

J. W. M.

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CRIMINAL LAW.

CHAPTER I.

OF THE DEFINITION OF CRIME, AND OF CERTAIN GENERAL PRINCIPLES APPLICABLE THERETO.

§ 1. Crime defined.
6. The Criminal Act.
26. The Criminal Intent.
35. Criminal Capacity.
§ 53. Intent in Statutory Crimes.
58. Justification for Crime.
69. Classification of Criminals.
77. Locality and Jurisdiction.

CRIME DEFINED.

§ 1. **Crime** is a violation or neglect of legal duty, of so much public importance that the law, either common or statute, takes notice of and punishes it.[1]

§ 2. **By what Law defined.** — Crimes are defined both by the common and by the statute laws, — the common law prevailing, so far as it is applicable and not abrogated by statute, in most of the States of the Union.[2] The general maxims and precepts of Christianity constitute a part of the common

[1] See 4 Bl. Com., p. 4, and note by Christian (Sharswood's ed., 1860); Rex *v.* Wheatly, 2 Burr. 1125; s. c. and notes, 1 Lead. Cr. Cas. 1–34; 1 Bish. Cr. Law, § 32.

[2] Com. *v.* Knowlton, 2 Mass. 530; State *v.* Danforth, 3 Conn. 112; Com. *v.* Chapman, 13 Met. (Mass.) 68.

law.[1] The law of nations, also, is part of the common law.[2]

§ 3. **Statutory Crimes.** — A large part of the criminal law of the jurisdictions in this country consists of statutes. Every statute relating to crime must be interpreted in the light of the common law of crime;[3] and the repeal of a statute, not substituting other provisions in the place of those repealed, revives the pre-existing law.[4]

Statutes, in general, can have no retroactive efficacy; and, especially in the United States, all *ex post facto* laws, or laws which make criminally punishable an act which was not so punishable at the time it was committed, or punish an offence by a different kind of punishment, or in a different manner, not diminishing the punishment, from that by which it was punishable before the statutes were passed, are prohibited by the Constitution of the United States.[5]

On the other hand, when the common law or a statute creating an offence is repealed, or expires before judgment in a criminal case, judgment cannot be entered against the prisoner, unless by a saving clause in the statute excepting pending cases; and in such cases, if the statute expires after judgment

[1] People *v.* Ruggles, 8 Johns. (N. Y.) 290; Updegraph *v.* Com., 11 S. & R. (Pa.) 394; Rex *v.* Wodston, 2 Stra. 834; Vidal *v.* Girard's Executors, 2 How. (U. S.) 127; State *v.* Chandler, 2 Har. (Del.) 553; *Ex parte* Delaney, 43 Cal. 478.

[2] United States *v.* Smith, 5 Wheat. (U. S.) 153.

[3] United States *v.* Carll, 105 U. S. 611.

[4] Com. *v.* Churchill, 2 Met. (Mass.) 118.

[5] Hartung *v.* People, 26 N. Y. 167; 28 N. Y. 400; Calder *v.* Bull, 3 Dall. (U. S.) 386; State *v.* Kent, 65 N. C. 311.

and before execution, the judgment will be reversed or execution stayed.[1] But laws changing the rules of evidence or of procedure[2] do not come under the category of *ex post facto* laws.

If a statute define a new offence, or prohibit a particular act, without providing any mode of prosecution or punishment, the common law steps in and supplies the mode, by indictment; and the punishment, by fine and imprisonment.[3]

§ 4. **Criminal Law of the United States.** — Under the government of the United States there are, strictly speaking, no common law crimes. That government has never adopted the common law.[4] Its criminal jurisdiction depends entirely upon statutory provision authorized by the Constitution; and where the statute makes punishable a crime known to and defined by the common law, but does not itself define the crime, the common law is resorted to for the definition.[5]

Crimes committed within its exclusive jurisdiction within the States are by statute to be punished in the

[1] Com. *v.* Marshall, 11 Pick. (Mass.) 350; Hartung *v.* People, 22 N. Y. 95; United States *v.* Finlay, 1 Abb. (C. Ct. U. S.) 364; State *v.* Daley, 29 Conn. 272; Taylor *v.* State, 7 Blackf. (Ind.) 93; Com. *v.* Pa. Canal Co., 66 Pa. 41.

[2] Stokes *v.* People, 53 N. Y. 164; People *v.* Mortimer, 46 Cal. 114.

[3] Com. *v.* Chapman, 13 Met. (Mass.) 68; State *v.* Fletcher, 5 N. H. 257; State *v.* Patton, 4 Ired. (N. C.) 16; Com. *v.* Piper, 9 Leigh (Va.) 657; Keller *v.* State, 11 Md. 525.

[4] United States *v.* Hudson, 7 Cranch (U. S.) 32; United States *v.* Coolidge, 1 Wheat. (U. S.) 415. In Ohio and Iowa the same theory prevails. Mitchell *v.* State, 42 Oh. St. 383; Estes *v.* Carter, 10 Ia. 400. In Indiana, the common law, so far as it creates crimes, is abolished by statute.

[5] United States *v.* Hudson, 7 Cranch (U. S.) 32; 1 Bish. Cr. Law § 194.

same manner as such crimes are punished by the laws of the particular States where they are committed.[1]

§ 5. **Act and Intent must coexist.**— Every common law crime consists of two elements: first, the voluntary commission of an act which is declared by law to be criminal; second, the existence in the offender of a state of mind which is declared by law to be consistent with criminality. This principle is more briefly expressed in the rule that for the commission of a crime a criminal act must be done with criminal intent. These elements must coexist.

THE CRIMINAL ACT.

§ 6. **Difference between Wrong and Crime.** — Not every act which is legally wrong is a crime. Private wrongs are redressed by suits *inter partes*. In a criminal prosecution the government itself is a party; and the government moves only when the interest of the public is involved. The basis of criminality is therefore the effect of the act complained of upon the public.[2]

§ 7. **Moral Obliquity not Essential.** — It follows from this that moral obliquity is not an essential element of crime, except so far as it may be involved in the very fact of the violation of law. What, therefore, is criminal in one jurisdiction may not be criminal in another; and what may be criminal at a particular period is often found not to have been criminal at a different period in the same jurisdiction. The general opinion of society, finding expression through the common law or through special statutes, makes

[1] United States *v.* Paul, 6 Pet. (U. S.) 141.

[2] Rex *v.* Wheatly, 2 Burr. 1125.

an act to be criminal or not according to the view which it takes of the proper means of preserving order and promoting justice. Adultery is a crime in some jurisdictions; while in others it is left within the domain of morals. Embezzlement, which was till within a comparatively recent period a mere breach of trust, cognizable only by the civil courts, has been nearly, if not quite, universally brought by statute into the category of crimes as a modified larceny. The sale of intoxicating liquors is or is not a crime, according to the differing views of public policy entertained by different communities.

§ 8. **Trifling Offences not Indictable.**— Some violations of legal duty are said to be so trifling in their character, or of such exclusive private interest, that the law does not notice them at all, or leaves them to be dealt with by the civil tribunals.[1]

§ 9. **Three Classes.** — Crimes are classified as *treasons*, *felonies*, and *misdemeanors*, the former being regarded as the highest of crimes, and punished in the most barbarous manner, as it is a direct attack upon the government, and disturbs the foundations of society itself. It is primarily a breach of the allegiance due from the governed to the government. It is active disloyalty against the State; and because it is against the State, it is sometimes called *high* treason, in contradistinction to *petit* treason, which, under the early English law, was the killing of a superior toward whom some duty of allegiance is due from an inferior, — as where a servant killed his master, or an ecclesiastic his lord or ordinary.

[1] See Regina *v.* Kenrick, per Ld. Denman, 5 Q. B. 62, in comment ing upon Rex *v.* Turner, 13 East, 228.

Now, however, this distinction is done away with both in this country and in England, and such offences belong to the category of homicide.[1]

§ 10. **Felonies** at common law were such crimes as upon conviction involved the forfeiture of the convict's estate.[2] They were also generally, but not always, punishable with death. These tests have long since been abolished in England, and what constitutes felony is now to a great extent, both there and in this country, determined by statutory regulation. Whenever this is not the case, the courts look to the history of the particular offence under consideration, and ascertain whether it was or was not regarded by the common law as a felony. The more usual statutory test in this country is that the offence is punishable with death, or imprisonment in the state prison.[3] The term is now significant only as indicating the "degree or class" of the crime committed.[4] What was felony at common law, unless the statute has interposed and provided otherwise, is still regarded as felony in all the States of the Union, with the possible exception of Vermont,[5] without regard to the ancient test or to the mode of punishment.

§ 11. **Misdemeanors** include all other crimes, of whatever degree or character, not classed as treasons or felonies, and however otherwise punishable.[6] It is for the most part descriptive of a less criminal class of acts. But there are undoubtedly some misdemeanors which involve more turpitude than some

[1] 4 Bl. Com. 75, 92.
[2] 4 Bl. Com. 94.
[3] 1 Bish. Cr. Law, § 618.
[4] 1 Russ. on Crimes, 40.
[5] State *v.* Scott, 24 Vt. 127.
[6] 1 Russ. on Crimes, 43.

felonies, and may, for this reason, be visited with greater severity of punishment, though not of the same kind. What was not felony by the common law, or is not declared to be by statute, or does not come within the general statutory definitions, is but a misdemeanor, though, in point of criminality, it may be of a more aggravated character than other acts which the law has declared to be felony.[1] When a question arises whether a given crime is a felony or a misdemeanor, and the question is at all doubtful, the doubt ought to be resolved in favor of the lighter offence,[2] in conformity to the rule of interpretation in criminal matters, that the defendant shall have the benefit of a doubt.

§ 12. **What Acts are Criminal.**— For reasons that we have already stated, it is impossible to draw an exact line between offences that are criminal and those which are mere civil wrongs; nor is an exact classification of all criminal acts possible. The more important crimes, including felonies, are clearly defined; but the lesser offences can neither be exhaustively described nor even named. Only the general principles can be stated, and it must be left to the court to apply these principles to the facts of each particular case as it arises.[3] Much of the difficulty is removed by statutes, which commonly define such minor offences as are likely to arise. Many of the smaller common law offences are comprised under the crimes of nuisance, malicious mischief, and conspiracy.

[1] Com. *v.* Newell, 7 Mass. 245.
[2] Com. *v.* Barlow, 4 Mass. 439.
[3] Com. *v.* Callaghan, 2 Va. Cas 460.

§ 13. **Offences against the Government.** — Offences of a sort to affect the public collectively, that is, to interfere with the proper maintenance of the different departments of the government, are criminal acts. Thus the embezzlement of public moneys[1] and the destruction of trees upon public land[2] are indictable offences; as are the disturbance of a town-meeting,[3] and fraudulent voting at a town election.[4] Corruption in public office is criminal, whether the office be executive,[5] or judicial[6]; and it is equally a criminal act to interfere, as by bribery,[7] or subornation of perjury,[8] with the execution of the duties of any department of government. And an indictment will lie for a failure by a public officer to discharge the duties devolved upon him by law.[9]

§ 14. **Offences against Public Security and Tranquillity.** — The government protects not only itself, but the health, security, and tranquillity of the public at large; and an act which endangers either of these is a criminal act. Thus, knowingly exposing a small-pox patient in the public street, so as to endanger the public,[10] keeping explosive substances in a town,

[1] Respublica *v.* Teischer, 1 Dall. (Pa.) 335.
[2] Com. *v.* Eckert, 2 Browne (Pa.) 249.
[3] Com. *v.* Hoxey, 16 Mass. 385.
[4] Com. *v.* Silsbee, 9 Mass. 417.
[5] Com. *v.* Callaghan, 2 Va. Cas. 460.
[6] People *v.* Coon, 15 Wend. 277.
[7] Regina *v.* Bunting, 7 Ont. 524.
[8] 1 Hawk. P. C., c. 69, § 10.
[9] Gearhart *v.* Dixon, 1 Pa. St. 224 (*semble*); State *v.* Hall, 97 N. C. 474.
[10] Rex *v.* Vantandillo, 4 M. & S. 73; Rex *v.* Burnett, 4 M. & S. 272.

so as to create danger of an explosion,[1] openly carrying about a dangerous weapon, so as to alarm the public,[2] and making outcries on the public street, in such a way as to annoy passers,[3] are all indictable acts.

§ 15. **Offences against Religion, Morality, and Decency.** — Offences against religion, morality, and decency are criminal if they are committed publicly, or in such a way as to affect the public. Thus, disturbing public worship is a criminal act;[4] so is blasphemy or profane swearing in public.[5] Public obscenity in word[6] or action[7] is criminal; and an indictment will lie for maintaining an indecent public exhibition.[8] Open public cohabitation of a man and woman without marriage is criminal,[9] though a secret cohabitation is not.[10] Common public drunkenness is indictable,[11] and so, it has been held, is public cruelty to animals.[12] And casting a human corpse into a river is criminal, being an outrage on the public

[1] Regina *v.* Lister, D. & B. 209; but see People *v.* Sands, 1 Johns. (N. Y.) 78.

[2] State *v.* Huntly, 3 Ired. (N. C.) 418.

[3] Com. *v.* Oaks, 113 Mass. 8.

[4] State *v.* Jasper, 4 Dev. (N. C.) 323.

[5] People *v.* Ruggles, 8 Johns. (N. Y.) 290; State *v.* Brewington, 84 N. C. 783; State *v.* Powell, 70 N. C. 67; Young *v.* State, 10 Lea (Tenn.) 165.

[6] Barker *v.* Com., 19 Pa. 412; State *v.* Appling, 25 Mo. 315.

[7] Sedley's Case, 1 Keb. 620; State *v.* Rose, 32 Mo. 560.

[8] Queen *v.* Saunders, 1 Q. B. D. 15; Com. *v.* Sharpless, 2 S. & R. (Pa.) 91.

[9] State *v.* Cagle, 2 Humph. (Tenn.) 414.

[10] State *v.* Moore, 1 Swan (Tenn.) 136; Delany *v.* People, 10 Mich. 241.

[11] Tipton *v.* State, 2 Yerg. (Tenn.) 542.

[12] United States *v.* Logan, 2 Cr. C. C. (D. C.) 259; United States *v.* Jackson, 4 Cr. C. C. (D. C.) 483. See Anon., 7 Dane Abr. 261.

feeling of decency.[1] In short, whatever tends to the corruption of the public morals is a criminal act;[2] for the court, in administering the criminal law, is *custos morum populi.*[3]

§ 16. **Offences against Individuals.** — The greatest difficulty arises in connection with offences against the persons or property of individuals. So far as the party injured is concerned, his wrong is righted by a civil action. The public is not called upon to interfere, so long as an injury is private; nor can a plaintiff be allowed to turn a declaration into an indictment.[4] The question to be settled in all cases of the sort, therefore, is this: Has the public security been endangered by the offence? In all cases where the public peace has been endangered there is clearly a criminal offence; and this principle covers all cases of violence to the person. It covers also all cases where the personal safety of an individual is threatened; for the public is bound to protect the personal safety of its individual members. So an act, though it fall short of personal violence, is criminal if its natural effect is to cause serious personal injury. Infecting drinking water by throwing the carcass of an animal into a well is criminal for this reason;[5] as is putting cow-itch on a towel in order to communicate the disease to a person using the towel.[6] Entering a house at night and disturbing the inmates so that a woman therein was made

[1] Kanavan's Case, 1 Me. 226.
[2] Com. *v.* Sharpless, 2 S. & R. (Pa.) 91.
[3] Rex *v.* Delaval, 3 Burr. 1434.
[4] Rex *v.* Osborn, 3 Burr. 1697.
[5] State *v.* Buckman, 8 N. H. 203.
[6] People *v.* Blake, 1 Wheel. (N. Y.) 490.

ill has been held indictable.[1] It was also held a criminal act to come into the porch of a house where only women were, and shoot dogs lying in the yard, so as to cause great fright to the women.[2] And where the defendant was shooting wild fowl near a house, and a girl in the house was thrown into fits at the sound of a gun, but the defendant, though warned of this fact, wantonly discharged the gun and injured the girl, he was held guilty of a criminal act.[3]

§ 17. **Offences against Property.**— The public is not, generally speaking, concerned with transactions between individuals, or interested in protecting private property from spoliation. Forcible acts of depredation are violations of the public peace; therefore forcible entry on land, and robbery of chattels, are criminal. It is also the duty of the public to protect individuals when they cannot protect themselves, as during sleep. In the performance of this duty, the criminal law forbids breach of a man's dwelling in the night-time, or burning it at any time, and the taking of his chattels from his possession against his will; these acts constituting the crimes of burglary, arson, and larceny. But where a man is in condition to protect himself, he is not generally afforded the additional protection of the criminal law. Accordingly, cheating is not generally criminal, but it becomes so if accomplished by means of false weights, measures, or tokens, against which a man cannot protect himself, or by a corrupt

[1] Com. *v.* Taylor, 5 Binn. (Pa.) 277.
[2] Henderson *v.* Com., 8 Gratt. (Va.) 708.
[3] Com. *v.* Wing, 9 Pick. (Mass.) 1.

combination of two or more persons, by which the most careful man might be deceived.[1] For a similar reason, it is not criminal at common law to convert to one's own use goods of another, of which one has the posession; for it is merely a breach of the trust imposed by the owner, who has thus had an opportunity to protect himself. These acts have, however, been made criminal by statutes, and now constitute respectively the crimes of obtaining by false pretences, and embezzlement.

Real property is at common law accorded even less protection by the public than chattels; probably because the danger of depredation is less, and the public interest is therefore involved to a less degree. No trespass on real property which falls short of forcible entry is criminal.[2] Many injuries to real property have been made criminal by statute.

§ 18. **Attempts.** — An attempt is an act done in part execution of a design to commit a crime.[3] There must be an intent that a crime shall be committed, and an act done, not in full execution, but in pursuance, of the intent.[4] An attempt to commit a crime, whether common law or statutory, is in itself a crime, — usually a misdemeanor, unless expressly made a felony by statute.[5] But if the act, when accomplished, would be a violation of neither statute

[1] Rex *v.* Wheatly, 2 Burr. 1125; s. c. 1 W. Bl. 273; Com *v.* Warren, 6 Mass. 72.

[2] Rex *v.* Storr, 3 Burr. 1698; Rex *v.* Atkins, 3 Burr. 1706; Brown's Case, 3 Me. 177; Com. *v.* Edwards, 1 Ashm. (Pa.) 46.

[3] Smith *v.* Com., 54 Pa. 209.

[4] Rex *v.* Wheatly, 2 Burr. 1125; s. c. 1 B. & H. Lead. Cr. Cas., 1 and note.

[5] Regina *v.* Meredith, 8 C. & P. 589; Rex *v.* Roderick, 7 C. & P. 795; Smith *v.* Com., 54 Pa. 209.

nor common law, — as, for instance, the procuring an abortion with the consent of the mother, she not being then quick with child, — the attempt is no crime.[1]

§ 19. **Solicitations and Misprisions.** — A solicitation to commit a crime is not an attempt, being a mere act of preparation; and a solicitation to commit a small crime is not regarded as of enough public importance to be punished as a crime. But solicitation to commit a felony or other aggravated crime is a criminal act;[3] and for this purpose any act which tends to a breach of the peace, or a corruption of public justice or duty, is a sufficiently aggravated crime.[4]

Misprision of felony, that is, the concealment of the commission of a felony, is a criminal act.[5]

§ 20. **Failure of the Criminal Act.** — It is evident that, however criminal the intent of a party, if his act failed to become a criminal one, he cannot be convicted of crime. Thus, if one takes his own watch *animo furandi*, thinking it to be another's, he cannot be convicted of larceny. And where A. obtained property by the conveyance of land, which he represented as unencumbered, though he believed there was an encumbrance on it, yet if the encumbrance was invalid he is not guilty of obtaining by false pretences.[6]

[1] State *v.* Cooper, 2 Zab. (N. J.) 52; Com. *v.* Parker, 9 Met. (Mass.) 263.

[2] Smith *v.* Com., 54 Pa. 209; Cox *v.* People, 82 Ill. 191.

[3] Rex *v.* Higgins, 2 East, 5; Com. *v.* Flagg, 135 Mass 545; Com *v.* Randolph, 146 Pa. 83; s. c. 33 Atl. Rep. 388.

[4] Whart. Cr. Law, § 179; Walsh *v.* People, 65 Ill. 58.

[5] 1 Hawkins P. C., ch. vii.

[6] State *v.* Asher, 50 Ark. 427; s. c. 8 S. W. Rep. 177.

§ 21. **Effect of Individual Action.**— In certain classes of criminal acts,— offences, namely, against the persons or property of individuals,— the injury is done primarily to the individual; and the act is a criminal one only because it is for the public interest to protect individuals against such offences. But in the criminal prosecution the public is concerned, and not the injured individual; consequently, if the elements of crime are present, the public cannot be affected by any act of the individual. Thus, no forgiveness by the injured party,[1] or restitution by the offender, can affect the public right to punish the offence; nor can any act of the injured individual before the offence is consummated prevent a conviction, provided the elements of crime are present.

§ 22. **Effect of Acquiescence for Detection.** — Where the injured individual afforded an opportunity for the commission of a criminal act for the sake of detecting the criminal, the acquiescence of the individual, such as it is, does not prevent the act from being punishable.[2] Thus, where a thief proposed to A.'s servant to steal A.'s property, and the servant, having informed A., was ordered to proceed in the act proposed, and thereupon the act was committed and the thief apprehended upon the spot, he was held to be guilty of larceny.[3] But it must be plain that the act was in no sense induced by the injured party; for if he was active in the commission of the offence, it

[1] Com. *v.* Slattery, 147 Mass. 423.

[2] Regina *v.* Williams, 1 C. & K. 195; State *v.* Anone, 2 N. & McC. (S. C.) 27; Alexander *v.* State, 12 Tex. 540.

[3] Rex *v.* Eggington, 2 East P. C. 494, 666; s. c. 2 B. & P. 508.

is his own act, and no injury to him. If the individual is not harmed, there is no public injury.[1]

The distinction is brought out clearly in two cases stated in Foster's Crown Law. In the first case, one procured himself to be robbed by strangers, that he might apprehend them and gain the reward; and this was held no crime.[2] In the second, one went out on the highway and put himself in the way of being robbed, with the intention of capturing the highwayman; and here the robbery was held to be a crime.[3]

A somewhat common case is where the servant of the person whose house it is designed to enter is approached, and, by advice of the master, consents to assist the burglars, his purpose being to secure their arrest and conviction. If in such a case the servant himself opens the door for the thieves, the latter cannot be held guilty of burglary; at most, their offence is larceny.[4]

§ 23. **Effect of Consent.**— Consent on the part of the individual to the act complained of will generally prevent the act from being a crime, provided the consent is not exceeded. There are, however, certain cases where the law forbids, or rather makes void, consent; and in such cases the consent will not avail the offender. A young girl, for instance, cannot give a valid consent to carnal connection.[5] The

[1] Rex *v.* Eggington, 2 East P. C. 666; State *v.* Donglass, 44 Kan. 618.

[2] McDaniel's Case, Fost. C. L. 121.

[3] Norden's Case, Fost. C. L. 129.

[4] Rex *v.* Eggington, 2 East P. C. 666; State *v.* Jansen, 22 Kan. 498; State *v.* Hayes, 105 Mo. 76.

[5] People *v.* Gordon, 70 Cal. 467.

age at which she becomes capable of consenting is generally fixed by statute.

If the consent is to an act which may cause serious bodily harm, it is clearly void;[1] for such harm is of itself a public injury. Innocent manly sports are to be encouraged, and injury which results in the course of such sports, fairly and honestly carried on, cannot be the basis of a criminal prosecution. But sports which are likely to cause serious injury or breach of the peace are not regarded as lawful; and where a criminal prosecution is founded upon an injury inflicted in the course of such sports, the consent of the injured party is no defence.[2]

§ 24. **Effect of Contributory Negligence.**— Though the negligence of the injured party contributed to the injury, the defendant is none the less punishable; for the injury was nevertheless caused by his criminal act.[3] If indeed the negligence of the injured party might fairly be regarded as the sole active cause of the injury, the defendant is to be acquitted, because he has not in fact done the act charged;[4] but such negligence is not properly described as contributory.

For the same reason, negligence by the injured party in caring for a wound will not make the offender the less chargeable with the ultimate effect of the wound, nor will refusal by the injured party

[1] Regina *v.* Bradshaw, 14 Cox C. C. 83.

[2] Foster's C. L. (3d ed.) 259; Regina *v.* Bradshaw, 14 Cox C. C. 83; Com. *v.* Collberg, 119 Mass. 350; State *v.* Underwood, 57 Mo. 40.

[3] Regina *v.* Kew, 12 Cox C. C. 355 (but see Regina *v.* Birchall, 4 F. & F. 1087); Crum *v.* State, 64 Miss. 1; s. c. 1 So. 1; Belk *v.* People, 125 Ill. 584.

[4] Crum *v.* State, 64 Miss. 1; s. c. 1 So. 1; Belk *v.* People, 125 Ill. 584.

to submit to an operation that would have saved his life; and improper treatment of the wound by the surgeon is equally unavailing to purge the offender's guilt.[1]

§ 25. **Effect of Guilty Participation by the Injured Party.** — The fact that the injured party was injured while himself engaged in an illegal act against the defendant does not lessen the criminality of the offence; for the public wrong is equally great, though the individual may have suffered no more than he deserved. Thus, where the injured party was cheated while himself endeavoring to cheat the defendant, the latter is guilty.[2] Where a servant absconds with money given him for the master for an illegal purpose, he is nevertheless guilty of embezzlement.[3] And where the defendant gave a girl a counterfeit coin, knowing it to be counterfeit, as a consideration for illicit intercourse, he was held guilty of uttering the coin.[4]

THE CRIMINAL INTENT.

§ 26. **Motive Immaterial.** — Like immorality of act, immorality of purpose is not an element of crime. The motive with which an act was done is immaterial in deciding the question of its criminality: a crime may be committed with a good motive, while an act done from a sinful motive is not necessarily criminal. Motive may, it is true, sometimes

[1] Com. *v.* Hackett, 2 All. (Mass.) 136.

[2] Regina *v.* Hudson, 8 Cox C. C. 305; Com. *v.* Morrill, 8 Cush (Mass.) 571. See, however, *contra*, McCord *v.* People, 46 N. Y. 470.

[3] Rex *v.* Beacall, 1 C. & P. 454.

[4] Queen *v.* ——, 1 Cox C. C. 250.

be shown in evidence; but it is merely as evidence of intent.

Motive must not be confounded with intent. The intent applies to and qualifies the act. Motive is that which leads to the act. And while it is essential in common law crimes that the intent to commit the crime should appear, either expressly or by implication, no such necessity exists as to motive, and it need not be proved.[1]

If, therefore, the intent to violate the law exists, the motive, as has been said, is immaterial. For example, it is an indictable offence at common law to enter, without the consent of the owner, an unconsecrated burial-ground, and dig up and carry away a corpse buried there, though it be done openly, decently, and properly by a relative, and from a sense of filial duty and religious obligation.[2] Nor will it be any justification for a person who intentionally does an act which the law prohibits, — voting, for instance, — that he conscientiously believed he had a right to vote, notwithstanding the statute;[3] nor that the act would be harmless;[4] nor that it would be for the public benefit.[5] Nor can polygamy[6] or obscenity[7] be excused on the ground that the

[1] Com. *v.* Hudson, 97 Mass. 565; Baalam *v.* State, 17 Ala. 451; People *v.* Robinson, 1 Park (N. Y.) C. R. 649.

[2] Regina *v.* Sharpe, 7 Cox C. C. 214.

[3] United States *v.* Anthony, 11 Blatch. C. Ct. 200. See also same case, 2 Green's Cr. Law Rep. 208, and note.

[4] United States *v.* Bott, id. 346; s. c. 2 Green's Cr. Law Rep. 239.

[5] Respublica *v.* Caldwell, 1 Dall. (Pa.) 150; Com. *v.* Belding, 13 Met. (Mass.) 10.

[6] Reynolds *v.* United States, 98 U. S. 145.

[7] United States *v.* Harmon, 45 Fed. Rep. 414; Regina *v.* Hicklin, L. R. 3 Q. B. 360.

offender acted from the highest motives of religion or morality. And one is guilty of crime who refuses to obey a statutory duty to call in medical aid for a child, though he thought it irreligious to call in such aid.[1] Nor is it of avail that the real purpose is other than to violate the law, the natural result of the act being to violate the law; as where one assaults an officer in the discharge of his duty, the purpose not being to hinder the officer in the discharge of his duty, but to inflict upon him personal chastisement, on account of some private grief. If the act results in the obstruction of the officer in the discharge of his duty, the offender is guilty of the latter offence.[2]

§ 27. **Intent presumed from the Unlawful Act.** — When one does an unlawful act, he is by the law presumed to have intended to do it, and to have intended its ordinary and natural consequences, on the ground that these must have been within his contemplation, if he is a sane man, and acts with the deliberation which ought to govern men in the conduct of their affairs.[3] He is none the less responsible for the natural consequences of his criminal act because, from ignorance, or carelessness, or neglect, precautionary measures are not taken to prevent those consequences.[4] In some cases of statutory crimes, as we shall see, this presumption is conclusive as to

[1] Regina *v.* Downes, 13 Cox C. C. 111.

[2] United States *v.* Keen, 5 Mason C. Ct. 453.

[3] Com. *v.* Webster, 5 Cush. (Mass.) 305; Rex *v.* Mazagora, R. & R. 291; United States *v.* Taintor, 11 Blatch. C. Ct. 374; s. c. 2 Green's Cr. Law Rep. 241, and note.

[4] State *v.* Bantley, 44 Conn. 537; Com. *v.* Hackett, 2 Allen (Mass.) 136; Regina *v.* Holland, 2 M. & Rob. 351; Rex *v.* Reading, 1 Keb. 17.

the intended consequences, and cannot be met by counter proof. As a general rule, however, in those cases where an act in itself not criminal becomes so only if done with a particular intent, there the intent must be proved by the prosecution; while in those cases where the act is in itself criminal the law implies a criminal intent, and leaves it open to the defendant to excuse or justify.[1] But the unlawfulness of the act is a sufficient ground upon which to raise the presumption of criminal intent.[2] It is, of course, always open to proof that there was no intention to do any act at all, whether lawful or unlawful; as that the person charged was insane, or was compelled to the act against his will, or was too young to be capable of entertaining a criminal intent. So, at least when the act is criminal in its nature and not peremptorily prohibited by the statute, it may be shown that it was done through mistake; as where one drives off the sheep of another, which are in his own flock without his knowledge,[3] or, intending to shoot a burglar, by mistake shoots one of his own family.[4]

§ 28. **Constructive Intent.**—The criminal intent need not be an intent to commit the exact offence actually complained of. A defendant may have intended to do one criminal act, and may in fact have done another; for instance, intending to inflict severe bodily harm, he may have killed the person he intended only

[1] Rex *v.* Woodfall, 5 Burr. 2667; State *v.* Goodenow, 65 Me. 30; 3 Greenl. Ev. § 13.

[2] Com. *v.* Randall, 4 Gray (Mass.) 36; United States *v.* Taintor, 11 Blatch. C. Ct. 374.

[3] 1 Hale P. C. 507.

[4] Ibid., 42.

to injure. In such a case both the elements of a crime are present; the act which is criminal has been done with a wicked and criminal intent; the public has been wronged, and the offender is a fit subject for punishment. Yet it would be too severe a rule to punish him in every case of the sort, however unexpected the result of his act.

If the offender intended a mere civil wrong, an act which was not criminal, and without any negligence on his part a result happened which is in the nature of a criminal act, it is clearly not a crime, but an accident.[1] And so if the intention was merely to do a *malum prohibitum*, — to break a police regulation, such as an ordinance against fast driving, — and an unexpected result happened entirely without negligence, the offender should not be held a criminal because of the result. The offence he intended to do must at least be one which in itself was sinful.[2]

If the offender intended a crime of violence, and in the course of it committed another crime of the same sort, naturally growing out of it, he is responsible for the crime he committed. Thus, where one attempted suicide, and accidentally killed a man who attempted to prevent the suicidal act, he is guilty of homicide.[3] So where one intended to commit robbery, but in the course of it killed the victim, he is guilty of homicide.[4] It has even been held that one committing an act of violence is crim-

[1] Regina *v.* Franklin, 15 Cox C. C. 163.
[2] Com. *v.* Adams, 114 Mass. 323; Estell *v.* State, 51 N J. L. 182.
[3] Com. *v.* Mink, 123 Mass. 422.
[4] State *v.* Barrett, 40 Minn. 77.

inally responsible for all consequences, however unexpected. So where one assaulted a woman with intent to commit rape, and she, to ransom her honor, without demand gave him money, this was held to be robbery.[1] And there is no doubt that if one intended homicide he is guilty of murder, though he intended to kill A. and actually killed B.[2]

It would seem that, even if the result was unexpected, the defendant is guilty, if his intention was to commit a felony or other serious crime.

§ 29. **Accident. Negligence.** — Where an act happens through mere accident, there is necessarily an absence of criminal intent; and a mere accident, therefore, can never be a crime. But if the accident was caused by a breach of duty on the part of the accused, that breach of duty may have been so culpable as properly to be called criminal. Such a thing is not a mere nonfeasance; failure to do one's duty may often be regarded as a deliberate act, and if not deliberate it may at least be treated as voluntary, so as to be charged as committed with a criminal intent. A breach of duty so culpable as to be either deliberate or voluntary is called criminal negligence; and is a sufficient criminal intent to make an act a crime.

§ 30. **Negligence when Criminal.** — It has been said that, in order to give rise to a criminal prosecution, the duty infringed must have been a public duty; by which is meant a duty imposed by law. Thus, it is said, the duty of a parent to support his child, or of a

[1] Rex *v.* Blackham, 2 East P. C. 711.

[2] Saunders's Case, 2 Plowd. 473; Gore's Case, 9 Co. 81 *a*; Wynn *v.* State, 63 Miss. 260.

watchman at a railway crossing, who was required to be so placed by statute, would be of such a nature that the infringement of it would be criminal; but not so the negligence of a watchman at a railway crossing who was placed there, not in consequence of a statute, but by private liberality.[1] This position, however, appears not to be sound. Any duty which one undertakes ought so to be performed as not to injure the public; and culpable negligence in the performance of any duty, if its result is in its nature criminal, ought to be punished. Thus, where a workman in a mine is charged with the duty of putting a stage over the mouth of the shaft, and the omission so to do causes the death of a human being, he is gulity of homicide.[2] It is enough if the person injured had reason in fact to rely on the defendant's care, whether he had a legal right so to rely or not. So where one chooses to take care of a child of tender years, though bound neither by law nor by contract so to do, he is guilty of crime if his culpable negligence cause injury to the child.[3]

§ 31. **What Negligence is Culpable.** — Not every degree of negligence is sufficient for conviction of crime. It must be culpable negligence; such as may fairly be described as gross, wanton, or wicked.[4] A mere error of judgment in a matter on which reasonable men may differ, as in the proper sort of medical attendance to call in for a sick person,[5] or

[1] Regina *v.* Smith, 11 Cox C. C. 210.

[2] Regina *v.* Hughes, 7 Cox C. C. 301.

[3] Regina *v.* Nicholls, 13 Cox C. C. 75.

[4] Regina *v.* Nicholls, 13 Cox C. C. 75; Regina *v.* Wagstaffe, 10 Cox C. C. 530; State *v.* Hardister, 38 Ark. 605.

[5] Regina *v.* Wagstaffe, 10 Cox C. C 530.

the proper remedies to apply,[1] is not sufficient. B carelessness in handling a weapon that is dangero to life is criminal.[2]

§ 32. **Specific Intent.** — When a specific intent made an ingredient in crime, — as where one charged with an assault with intent to murder, to commit rape, or with a burglarious entering wi intent to steal, — the offence is not committed unle the accused is actuated by the specific intent charge The intent to commit another crime, though equal grade and of the same character with the o charged, will not constitute the offence charged.[3]

Such specific intent cannot be presumed. It mu be proved by the government as one of the necessa facts of the case; though the defendant's acts may shown as evidence from which the jury can find th he was actuated by the intent charged.

Instances of specific intent are malice, premed tation, intent to steal, to defraud, etc. In all cas where an act is not criminal, or is criminal in a le degree, unless committed in a certain state or cond tion of mind, express proof of this specific conditio of mind is necessary, and proof of general crimin intent is not enough.[4]

§ 33. **Malice.** — Although in a popular sense mali means hatred, hostility, or ill will, yet in a leg sense it has a much broader signification. In t latter sense it is the *conscious violation of the law the prejudice of another.* It is evil intent or di

[1] State *v.* Hardister, 38 Ark. 605.

[2] State *v.* Hardie, 47 Iowa, 647.

[3] Rex *v.* Boyce, 1 Moody C. C. 29; Note to United States *v* Taint 2 Green's Cr. L. Rep. 244.

[4] Com. *v.* Walden, 3 Cush. (Mass.) 558.

position, whether directed against one individual or operating generally against all, from which proceeds any unlawful and injurious act, committed without legal justification. Actions proceeding from a bad heart actuated by an unlawful purpose, or done in a spirit of mischief, regardless of social duty and the rights of others, are deemed by the law to be malicious.[1] The voluntary doing an unlawful act is a sufficient ground upon which to raise the presumption of malice. And so if the act be attended by such circumstances as are the ordinary symptoms of a wicked and depraved spirit, the law will, from these circumstances, imply malice, without reference to what was passing in the mind of the accused at the time when he committed the act.[2]

Envy and hatred both include malice; but the latter may exist without either, and is a more general form of wickedness. As to the proof of malice and the degree thereof necessary to constitute specific crimes, more will be said hereafter, as occasion requires.[3] Something will also be said under Homicide of the not now very material distinction between express and implied malice.

§ 34. **Constructive Specific Intent.** — The doctrine of constructive intent is clearly inapplicable in a case where a specific intent must be proved; for an express intent is necessary. Thus, where a statute punished malicious injury to property, and the defendant threw a stone intending to injure a human being, and in fact injured property, it was held that

[1] Foster Cr. Law, 256; Ferguson *v.* Kinnoull, 9 C. & F. 302, 321; Com. *v.* Webster, 5 Cush. (Mass.) 305; State *v.* Decklotts, 19 Iowa, 447

[2] State *v.* Smith, 2 Strobh. (S. C.) 77.

[3] See Arson, Homicide, and Malicious Mischief.

the specific malice required by the statute was not present;[1] and where a statute punished the malicious destruction of a vessel, and the defendant while stealing rum in a vessel accidentally set fire to it and destroyed it, he was held not guilty under the statute.[2] But the specific intent may be present, though the result is not precisely what was intended. Thus one may be convicted under a statute for maliciously injuring a person, though he maliciously struck at A. and in fact hit B. The specific intent here existed.[3]

CRIMINAL CAPACITY.

§ 35. **Who may become Criminal.**— No person can be guilty of a crime, unless he has both mental and physical capacity.

§ 36. **Infants**, therefore, are not amenable to the criminal law until they have reached that degree of understanding which enables them to appreciate the quality of the act. The law fixes this limit arbitrarily, for the sake of convenience, at the age of seven years, and will not listen to evidence that a person below this age is capable of understanding the quality of his act. Between the ages of seven and fourteen, with some exceptions, the presumption is that the infant lacks discretion or criminal capacity, and the burden of proof that he has such capacity is upon the prosecutor.[4] If there be no evidence upon this point, the prosecution fails. There are

[1] Regina *v.* Pembliton, 12 Cox C. C. 607.

[2] Regina *v.* Faulkner, 13 Cox C. C. 550.

[3] Regina *v.* Latimer, 17 Q. B. D. 359; s. c. 16 Cox C. C. 70.

[4] Com. *v.* Mead, 10 Allen (Mass.) 398; Angelo *v.* People, 96 Ill. 209; State *v.* Doherty, 2 Overt. (Tenn.) 80.

two generally admitted exceptions to this rule, — a female under the age of ten years being conclusively presumed to be incapable of consenting to sexual intercourse, and a male under fourteen being conclusively presumed to be incapable of committing rape.[1] In Ohio this presumption is held to be disputable;[2] and in Massachusetts it has been held by a divided court that a boy under the age of fourteen may be guilty of an assault with intent to commit rape, on the theory that penetration only is necessary to the consummation of the crime.[3] In California, by statute, all infants under fourteen are incapable.[4]

After the age of fourteen, the presumption is that the infant has criminal capacity, and the presumption is sufficient, if not met by counter proof, to warrant the jury in finding the fact. But the defendant may prove his incapacity.[5] An exception to this last rule, in the nature of physical incapacity, is where an infant over fourteen fails in some public duty, as to repair a highway. In this case he is held incapable, as he has not command of his fortune till he arrives at his majority.[6]

[1] Regina *v.* Philips, 8 C. & P. 736; Regina *v.* Jordan, 9 C. & P. 118. Except, indeed, by being present aiding and abetting. Law *v.* Com., 75 Va. 885.

[2] Williams *v.* State, 14 Ohio, 222.

[3] Com. *v.* Green, 2 Pick. (Mass.) 380. But see also, upon this point, Com. *v.* Lanigan, 2 Boston Law Reporter, 49, Thatcher, J.; People *v.* Randolph, 2 Parker C. R. (N. Y.) 174; State *v.* Sam, Winston (N. C.) 300; Rex *v.* Eldershaw, 3 C. & P. 396.

[4] Rev. Stat. 1852, c. 99.

[5] Rex *v.* Owen, 4 C. & P. 236; Marsh *v.* Loader, 14 C. B. N. S. 535; Rex *v.* York, and note, 1 Lead. Cr. Cas. 71; Regina *v.* Smith, 1 Cox C. C. 260; People *v.* Davis, 1 Wheeler (N.Y.) C. C. 230; Com. *v.* Mead, 10 Allen (Mass.) 398; State *v.* Learnard, 41 Vt. 585.

[6] 1 Hale P. C. 20.

§ 37. **Coercion. Fraud.** — Married women are presumed to be so far under the control and coercion of their husbands, that in many cases they are not held responsible for crimes committed in their presence.[1] But this presumption is only *prima facie*, and may be rebutted by evidence that the woman was not coerced, but acted voluntarily, according to her own pleasure.[2] There are exceptions to this incapacity of married women, upon which, however, the authorities are not agreed. She seems to be responsible for treason and murder, by the general consent of the authorities, and perhaps for robbery, perjury, and forcible and violent misdemeanors generally.[3] Where the husband is not present, there is no presumption of coercion.[4] But there are cases of a non-consenting will, as where one is compelled, by fear of being put to death, to join a party of rebels, or is entrapped into becoming the innocent agent of another, whereby a person unwittingly or unwillingly, rather than through incapacity, becomes the instrument of crime wielded by the hand of another. The will is constrained by fear or deceived by fraud into what is only an apparent consent.[5] The fact that the defendant was acting as the mere agent or servant of another in the commission of a crime will not excuse him.[6]

[1] 1 Hale P. C. 44; Com. *v.* Eagan, 103 Mass. 71.

[2] Regina *v.* Pollard, 8 C & P. 553; State *v.* Cleaves, 59 Me. 298; Com. *v.* Butler, 1 Allen (Mass.) 4; Rex *v.* Stapleton, Jebb C. C. 93; Miller *v.* State, 25 Wis. 384; 2 Green's Cr. Law Rep. 286, note.

[3] See the authorities collected in note to Com. *v.* Neal, 1 Lead. Cr. Cas. 81; 3 Greenl. Ev. § 7, 15th ed.

[4] Com *v.* Tryon, 99 Mass. 442.

[5] Foster Cr. Law, 14; 1 Hale P. C. 50; Steph. Dig. Cr. Law, art. 31; Rex *v.* Crutchley, 5 C. & P. 133.

[6] Com. *v.* Hadley, 11 Met. (Mass.) 66.

§ 38. **Corporations** being impersonal, and merely legal entities, without souls, as it has been said, though incapable of committing those crimes which can only proceed from a corrupt mind, may nevertheless be guilty of a violation not only of statutory but common law obligations, both by omission, and, by the greater weight of authority, by commission. They cannot commit an assault, though they may be held civilly responsible for a tort committed by their agent.[1] Nor can they commit any crime involving a criminal intent. But they may create a nuisance, through the acts of their agents, and by the very mode of their operations; in which case they are subject to indictment and punishment by fine, or even the abrogation of their charter,— the only punishments applicable to a corporation; the latter a sort of capital punishment, inflicted when the corporation has forfeited the right to live.[2]

A corporation is also indictable for negligence in the non-performance of the duties imposed upon it by its charter, or otherwise by law.[3] It has been held in some cases that a corporation is not indictable for a misfeasance,[4] — in opposition, however, to the great weight of authority.[5]

§ 39. **Insane Persons.**—Insanity, under which the law includes all forms of mental disturbance, whether

[1] Angell & Ames on Corporations, §§ 311, 387.

[2] Regina *v.* Railway Co., 9 Q. B. 315; Delaware Canal Co. *v.* Com., 60 Pa. 367; 1 Bish. Cr. Law, §§ 420, 422.

[3] Regina *v.* Railway Co., 3 Q. B. 223; People *v.* Albany, 11 Wend. (N. Y.) 539.

[4] State *v.* Great Works, &c., 20 Me. 41; Com. *v.* Swift Run, &c., 2 Va. Cas. 362.

[5] See Com. *v.* Proprietors, &c., 2 Gray (Mass.) 339; 1 Bish. Cr. Law, §§ 420, 422.

lunacy, idiocy, dementia, monomania, or however otherwise its special phenomena may be denominated, is another ground upon which persons are held incapable of committing a crime. Insanity is mental unsoundness. It exists in different forms and degrees. A higher degree of insanity is requisite to protect a person from the consequences of a criminal violation of law, than to relieve him from the obligation of a contract.

§ 40. **Test of Insanity. Knowledge of Right and Wrong.** — Various tests have been proposed by the courts for determining the fact of insanity. The one which most widely prevails is that laid down by the judges of England in M'Naghten's Case,[1] to wit: if the offender has sufficient mental capacity to know that the act which he is about to commit is wrong and deserves punishment, and to apply that knowledge at the time when the act is committed, he is not in the eye of the criminal law insane, but is responsible. All persons whose minds are diseased or impaired to the extent named, and all whose minds are so weak — *idiots*, *lunatics*, and the like[2] — that they have not the sufficiency of understanding and capacity before stated, come under the protection of irresponsibility. And in many jurisdictions this is the only test for insanity.[3]

[1] 10 Cl. & F. 200.

[2] State *v.* Richards, 39 Conn. 591.

[3] Regina *v.* Haynes, 1 F. & F. 666; State *v.* Shippey, 10 Minn. 223; State *v.* Brandon, 8 Jones (N. C.) 463; State *v.* Pike, 49 N. H. 399; Blackburn *v.* State, 23 Ohio St. 146; United States *v.* McGlue, 1 Curtis (U. S. C. Ct.) 8; State *v* Huting, 21 Mo. 464; Spann *v.* State, 47 Ga. 553; Brown *v.* Com., 78 Pa. 122; State *v.* Johnson, 40 Conn. 136; Flanagan *v.* People, 52 N. Y. 467.

§ 41. **Irresistible Impulse.**— Insanity also sometimes appears in the courts in the form of what is called an *irresistible impulse* to commit crime. And though, as we have seen, many jurisdictions do not recognize this as a form of insanity which will excuse from crime, yet in other jurisdictions it is recognized by the courts if it is the product of disease; since an act produced by diseased mental action is not a crime.[1] But an irresistible impulse is not a defence, unless it produced the act of killing. Yielding to an insane impulse which could have been successfully resisted is criminal.[2] The man who has a mania for committing rape, but will not do it under such circumstances that there is obvious danger of detection,[3] and the man who has a mania for torturing and killing children, but always under such circumstances as a sane man would be likely to adopt,[4] in order to avoid detection, are not entitled to its shelter. This plea is to be received only upon the most careful scrutiny.[5]

§ 42. **Emotional Insanity,** which is a newly discovered, or rather invented, phase of irresistible impulse, and is nothing but the fury of sudden passion driving a person, otherwise sane, into the commis-

[1] Com. *v.* Rogers, 7 Met. (Mass.) 500; State *v.* Felter, 25 Iowa, 67; State *v.* Windsor, 5 Harr. (Del.) 512; Smith *v.* Com., 1 Duv. (Ky.) 224; Dejarnette *v.* Com, 75 Va. 867; Parsons *v.* State, 81 Ala. 577.

[2] State *v.* Jones, 50 N. H. 369; State *v.* Felter, 25 Iowa, 67.

[3] See testimony of Blackburn, J., before the Parliamentary Committee on Homicide, cited in Wharton on Homicide, § 582, note.

[4] Com. *v.* Pomeroy, 117 Mass. 143.

[5] Com. *v.* Mosler, 4 Barr (Pa.) 264; United States *v.* Hewson, 7 Boston Law Reptr. 361 (U. S. C. Ct.), Story, J.; Scott *v.* Com. 4 Met. (Ky.) 227; Hopps *v.* People, 31 Ill. 385.

sion of crime, is utterly repudiated by the courts as a ground of irresponsibility.[1]

§ 43. **Moral Insanity,**[2] or that obliquity which leads men to commit crime from distorted notions of what is right and what is wrong, and impels them generally and habitually in a criminal direction, as distinguished from mental insanity, though appearing to have the sanction of the medical faculty as a doctrine founded in reason and the nature of things, is scouted by many of the most respectable courts as unfounded in law;[3] and although accepted to a limited extent by others, it is treated even by them as a doctrine dangerous in all its relations, and to be received only in the clearest cases.[4] It may also be observed, that moral insanity is sometimes confounded with, and sometimes distinguished from, irresistible impulse. In Pennsylvania, for instance, very recently, the existence of such a kind of insanity seems to have been recognized; but it was said to bear a striking resemblance to vice, and ought never to be admitted as a defence without proof that the inclination to kill is irresistible, and that it

[1] State *v.* Johnson, 40 Conn. 136; Willis *v.* People, 5 Parker C. C. (N. Y.) 621; People *v.* Bell, 49 Cal. 485; Parsons *v.* State, 81 Ala. 577. See also a very vigorous article upon the subject, 7 Alb. Law Jour. 273. Upon the general subject of insanity as a defence, see Com. *v.* Rogers, 1 Lead. Cr. Cas. 94 and note.

[2] The French call it "moral self-perversion."

[3] Humphreys *v.* State, 45 Ga. 190; Farrer *v.* State, 2 Ohio St. 54; State *v.* Brandon, 8 Jones (N. C.) 463; Choice *v.* State, 31 Ga. 424; People *v.* McDonell, 47 Cal. 134; United States *v.* Holmes, 1 Clifford (U. S. C. Ct.) 98; State *v.* Lawrence, 57 Me. 574; and cases before cited on the general topic, *ante*, § 39. See also Wharton on Homicide, § 583.

[4] See Wharton on Homicide, § 583 *et seq.*

does not proceed from anger or other evil passion.[1] Hence many cases appear to be in conflict which in fact are not irreconcilable. The absence of clear definitions is a serious embarrassment in the discussion of this subject.

§ 44. **Insanity at Time of Trial.** — An offender cannot be tried, sentenced, or punished for crime while insane. The test of insanity is, however, different in this case from the test in the ordinary case. Insanity which prevents a trial is not inability to distinguish right from wrong, but mental incapacity to make a rational defence, or to understand the meaning of punishment.[2]

§ 45. **Proof of Insanity.** — As a question of evidence, the burden of proof of sanity is upon the government in all cases. The act must not only be proved, but it must also be proved that it is the voluntary act of an intelligent person. Where the will does not co-operate, there is no intent. But as sanity is the normal state of the human mind, the law presumes every one sane till the contrary is shown; and this presumption, in the absence of evidence to the contrary, is sufficient to sustain this burden of proof. If, however, the defendant can, by the introduction of evidence, raise a reasonable doubt upon the question of sanity, he is to be acquitted. This is the better rule, supported by many authorities.[3]

[1] Com. *v.* Sayre (Pa.), 5 Weekly Notes of Cas. 424.

[2] Freeman *v.* People, 4 Denio (N. Y.) 9.

[3] Com. *v.* Pomeroy, 117 Mass. 143; People *v.* Garbutt, 17 Mich. 9; State *v.* Crawford, 11 Kan. 32; s. c. 32 Am. Law Reg N. S. 21, and note; Polk *v.* State, 19 Ind. 170; State *v.* Marler, 2 Ala. 43; Dove *v.*

In most of the States, however, it is held that, if the prisoner sets up insanity in defence, he must prove it by a preponderance of evidence, or it is of no avail. It is not enough for him to raise a reasonable doubt on the point.[1] In New York, the authorities seem to be conflicting.[2]

In New Jersey, it seems to be the law that the prisoner must prove the defence of insanity beyond a reasonable doubt.[3]

§ 46. **Voluntary Drunkenness,** as a rule, is not regarded by the law as an excuse for the commission of a crime while under its influence, since one who under such circumstances perpetrates a crime is deemed to have procured, or at least consented to, that condition of things by which the commission of the crime became more probable. Although intoxication, according to its degree, may cloud or eventually obscure the reason for the time being, and excite the passions of man, if it be the result of voluntary and temporary indulgence, it cannot be regarded either in excuse, justification, or extenuation of a criminal act. If privately indulged in, it may not be a crime

State, 3 Heisk. (Tenn.) 348; State *v.* Jones, 50 N. H. 369; Wright *v.* People, 4 Neb. 407; Chase *v.* People, 40 Ill. 352.

[1] Lynch *v.* Com., 77 Pa. 205; Kelley *v.* State, 3 S. & M. (Miss.) 518; State *v.* Felter, 32 Iowa, 49; People *v.* Best, 39 Cal. 690; State *v.* Lynch, 4 L. & Eq. Reptr. 653; Boswell *v.* Com., 20 Gratt. (Va.) 860; State *v.* Lawrence, 57 Me. 574; State *v.* Coleman, 27 La. Ann. 691; Boufanti *v.* State, 2 Minn. 123; State *v.* Huting, 21 Mo. 464; State *v.* Potts, 100 N. C. 457; State *v.* Strauder, 11 W. Va. 745, 823; State *v.* Bundy, 24 S. C. 439; Casat *v.* State, 40 Ark. 511; People *v.* Walter, 1 Ida. 386.

[2] Wagner *v.* People, 4 Abb. App. (N. Y.) 509; People *v.* McCann, 16 N. Y. 58 (*semble*); Flannagan *v.* People, 52 N. Y. 467.

[3] State *v.* Spenser, 1 Zab. (21 N. J. L.) 202.

in itself. It is nevertheless so far wrongful as to impart its tortious character to the act which grows out of it.[1] It was said by Coke,[2] and has been sometimes repeated by text-writers since, that the fact of intoxication adds aggravation to the crime committed under its influence; but this seems not to have the authority of any well adjudged case, nor to be well founded in reason. It cannot, for instance, aggravate an offence, which in law is only manslaughter if committed by a sober man, into murder if done by a drunken one; nor generally lift a minor offence into the category of a higher grade. If intoxication be a crime, it may be punished distinctively; but the punishment of intoxication should not be added to that of the crime committed under its influence. If this were permissible, greater responsibility would attach to the intoxicated than to the sober man, in respect of the particular offence.[3]

§ 47. **Intoxication. Specific Intent.**—When, however, in the course of a trial, a question arises as to the particular state of the mind of the accused at the time when he committed a crime, — as, for instance, whether he entertained a specific intent, or had express malice, or was acting with deliberation, — the fact of intoxication becomes an admissible element to aid in its determination; not as an excuse for the crime, but as a means of determining its degree. If a man be so drunk as not to know

[1] Beverley's Case, 4 Co. 123 *b*, 125 *a*; Com. *v.* Hawkins, 3 Gray (Mass.) 463; People *v.* Garbutt, 17 Mich. 9; Rafferty *v.* People, 66 Ill. 118; People *v.* Lewis, 36 Cal. 531; Flanigan *v.* People, 86 N. Y. 554.

[2] Coke Litt. 247.

[3] McIntyre *v.* People, 38 Ill. 514.

what he is doing, he is incapable of forming any specific intent.[1]

Thus proof of drunkenness may reduce murder from the first to the second degree;[2] or may show such absence of intent as to justify acquittal on a charge of attempt to kill,[3] burglary,[4] forgery,[5] larceny,[6] assault with intent to kill,[7] or other crime involving a specific intent.

But the presumption that a man intends the natural and probable consequences of his act is as applicable to the drunken as to the sober man; and the capacity to form the intent to shoot with a deadly weapon implies the capacity to form the intent to kill.[8]

§ 48. **Delirium Tremens. Mental Disease.**— Delirium tremens is rather a result of intoxication than intoxication itself, and is regarded by the law as a disease of the mind,— a temporary insanity. This, like any other mental disease induced by long and excessive indulgence, which impairs the mind or controls its operations to such an extent that the person afflicted cannot distinguish right from wrong, and has not the capacity to know what he does, may

[1] Jones *v.* Com., 75 Pa. 243; Roberts *v.* People, 19 Mich. 401; State *v.* Johnson, 40 Conn. 136; Malone *v.* State, 49 Ga. 210; McIntyre *v.* People, 38 Ill. 514; State *v.* Garvey, 11 Minn. 154; People *v.* Robinson, 2 Park. C. C. (N. Y.) 235; Schlencher *v.* State (Neb.), 8 Reptr. 207; State *v.* Bell, 29 Iowa, 316.

[2] Hopt *v.* People, 104 U. S. 631.

[3] Regina *v.* Doody, 6 Cox C. C. 463.

[4] State *v.* Bell, 29 Iowa, 316.

[5] People *v.* Blake, 65 Cal. 275.

[6] People *v.* Walker, 38 Mich. 156.

[7] Roberts *v.* People, 19 Mich. 401.

[8] Marshall *v.* State, 59 Ga. 154.

relieve from responsibility. Though one may voluntarily and of purpose become intoxicated, and so be held responsible for the natural consequences of the condition which he has sought, he does not intend to become delirious or demented.[1]

§ 49. **Involuntary Intoxication,** or that which is induced by the fraud or mistake of another, — as when one is deceived into drinking an intoxicating beverage against his will, or by the advice of his physician drinks for another purpose, — constitutes a valid excuse for crime committed while under its influence. So, doubtless, would one be held excusable who, without negligence, and with the intent to benefit his health or alleviate pain, and not merely to gratify his appetite, had, through misjudgment or mistake, drunk more than he intended, or than was necessary, to the extent of intoxication. In the absence of intent either to commit crime or to become intoxicated, the essential criterion of crime is wanting.[2]

But one cannot plead over-susceptibility as an excuse for the excessive indulgence of his appetite. And that degree of indulgence is in him excessive which produces intoxication, though the same amount of indulgence would not ordinarily produce intoxication in others. Voluntary indulgence carries with it responsibility for the consequences.[3]

§ 50. **Ignorance or Mistake of Fact.** — Ignorance or mistake of fact may prevent responsibility for a

[1] Maconnehey *v.* State, 5 Ohio St. 77; United States *v.* Drew, 5 Mason (U. S. C. Ct.) 28; People *v.* Williams, 43 Cal. 344; State *v.* McGonigal, 5 Harr. (Del.) 510; Cornwell *v.* State, 1 M. & Y. (Tenn.) 147.

[2] 1 Hale P. C. 32; Pearson's Case, 2 Lew. C. C. 144.

[3] Humphreys *v.* State, 45 Ga. 190.

common law crime. If the offender acted under a *bona fide* belief in a state of facts different from what actually existed, he is to be held responsible only for the act he supposed he was doing; unless that would have been criminal, he is not guilty of a crime. Thus where one was aroused at night by a cry of "Thieves!" and killed a servant, honestly and reasonably believing him to be a burglar, he was held not guilty of homicide.[1]

§ 51. **Ignorance of Law.** — Knowledge of the criminal law on the part of every person *capax doli* within its jurisdiction is conclusively presumed, upon grounds essential to the maintenance of public order. This fact, therefore, is always taken for granted. Ignorance of the law excuses no one. And this principle is so absolute and universal, that a foreigner recently arrived, and in point of fact not cognizant of the law, is affected by it.[2] It rests upon considerations of public policy, the chief of which is that the efficient administration of justice would become impracticable, were the government obliged to prove in every case that the defendant actually had knowledge of the law.

§ 52. **Same Subject. Specific Intent.** — There are cases, however, when there is doubt as to the interpretation of the law, in which it has been held that acting under a mistaken opinion as to its purport may be an excuse. Thus, it is said that when the act done is *malum in se*, or when the law which has been infringed is settled and plain, the maxim, *Ignorantia legis neminem excusat*, will be applied in

[1] Levet's Case, 1 Hale P. C. 42.

[2] *Ex parte* Barronet, 1 E. & B. 1; Rex *v.* Esop, 7 C. & P. 456.

its rigor; but when the law is not settled, or is obscure, and when the guilty intention, being a necessary constituent of the particular offence, is dependent on a knowledge of the law, or of its existence, — as where one takes property believed to be his own under a claim of right, in ignorance of the existence of a law which vests the property in another,[1] or takes illegal fees,[2] or illegally votes,[3] under a mistake as to the meaning of the law, — this rule, if enforced, would be misapplied. Whenever, therefore, a special mental condition constitutes a part of the offence charged, and such condition depends on the fact whether the party charged had certain knowledge with respect to matters of law, the fact of the existence of such knowledge is open to inquiry.

Thus, in a prosecution for maliciously setting fire to furze, proof of a mistaken belief in the offender's right to burn the furze is admissible, since it disproves malice.[4]

INTENT IN STATUTORY CRIMES.

§ 53. **Statute may ignore Intent.** — Doubtless, in the earlier history of the common law, only such acts were deemed criminal as had in them the vicious element of an unlawful intent, — acts which were *mala in se*, and indicated some degree of moral obliquity. But this quality has long since ceased to

[1] Rex *v.* Hall, 3 C. & P. 409; Regina *v.* Reed, C. & M. 306; Com. *v.* Stebbins, 8 Gray (Mass.) 492.

[2] Cutter *v.* State, 36 N. J. 125; People *v* Whalley, 6 Cow. (N. Y.) 661; Halstead *v.* State, 41 N J. L. 552.

[3] Com. *v.* Bradford, 9 Met. (Mass.) 268.

[4] Regina *v.* Towse, 14 Cox C. C. 327.

be essential, and at the present day *mala prohibita* — acts made criminal by statute, many of them unobjectionable in a moral aspect, except so far as doing an act prohibited by law may be deemed immoral — constitute no inconsiderable portion of the category of crimes.

To illustrate. The statute prohibits the sale of adulterated milk. A person who sells adulterated milk without knowing it to be adulterated, or even honestly believing it to be pure, is nevertheless guilty of a crime. There are many acts which the law, looking to the protection of the community, seeks to prevent; making it perilous, by making it criminally punishable, to do them. As every one is presumed to know the law, every one knows that the sale of adulterated milk is prohibited. No one is bound to sell milk; but if he do, he is bound to know whether it is adulterated or not; and if he intentionally sells milk without having correctly determined beforehand, as it is in his power to do, whether it is or is not of the character prohibited, he is so far at fault, and to that extent guilty of a neglect of legal duty.[1] For the same reason, the sale of a single glass of intoxicating liquor, even for a praiseworthy purpose, may or may not be criminal in different jurisdictions, and at different times in the same jurisdiction, according as the legislature, in the interest of the public good, may provide. The hardship of requiring that a person shall know a fact is no greater than to require that he shall know the law. In other words, where the statute clearly so intends, ignorance of a fact is no more an excuse

[1] Com. *v.* Waite, 11 All. (Mass.) 264.

than ignorance of law. The necessity of a criminal intent may be done away by the legislature, and the criminal act be made the sole element of a crime.[1]

§ 54. **Necessity of Intent a Question of Interpretation.** — The question becomes therefore one of interpretation of the criminal statute; and to aid us in this work we have the principle that a statute, other things being equal, is to be interpreted as a modification, not as a repeal, of the common law. On the other hand, however, the legislature has an undoubted right to make the commission of any act, even without criminal intent, a crime. Several theories have been put forward as to the proper interpretation of criminal statutes. According to one theory, the commission of any act forbidden by statute would be a crime, though it was done without criminal intent, unless the statute required such intent.[2] This theory is, however, usually regarded as too harsh. Another theory, put forward by Brett, J., in Regina *v.* Prince,[3] is that the guilty intent must always be

[1] *Ex parte* Barronet, 1 E. & B. 1; Rex *v.* Bailey, R. & R. C. C. 1; Com. *v.* Boynton, 2 Allen (Mass.) 160. Upon the general subject, see, in addition to the cases already cited, Judge Bennett's note to Rex *v.* Wheatly, 1 Lead. Cr. Cas. 1; United States *v.* Anthony, and Mr. Green's note, 2 Cr. L. R. 215; Queen *v.* Mayor, &c., L. R. 3 Q. B. 629; State *v.* Smith, 10 R. I. 258; Barnes *v.* State, 19 Coun. 398; Ulrich *v.* Com., 6 Bush (Ky.) 400; Regina *v.* Prince, L. R. 2 C. C. R. 154; s. c. 1 Am. Cr. Rep. 1; Steph. Dig. Cr. L., art. 34; State *v.* Goodenow, 65 Me. 30; Lawrence *v.* Com., 30 Gratt. (Va). 845; McCutcheon *v.* People, 69 Ill. 601. There are cases to the contrary (Stern *v.* State, 53 Ga. 229; Birney *v.* State, 8 Ohio, 230; Marshall *v.* State, 49 Ala. 21; Williams *v.* State, 48 Ind. 306), which Mr. Bishop approves. But by the settled law of England, and the great weight of authority in this country, the doctrine of the text is the better law. See 12 Am. Law Rev. 469.

[2] Com. *v.* Mash, 7 Met. (Mass) 472.

[3] 13 Cox C. C. 138; L. R. 2 C. C. 154.

shown, even in statutory offences, unless the necessity is expressly done away in the statute. This theory is usually regarded as too narrow.

The true theory seems to lie between these two. The facts of each case should be looked at, and the intention of the legislature, as applied to those particular facts, should be determined by the court. This can be done by a consideration of the general scope of the act, and of the nature of the evils to be avoided.[1]

§ 55. **By-Laws and Police Regulations.** — In accordance with this theory, the courts almost universally hold that such minor provisions of the criminal statutes as are adopted for the regulation of the conduct of men in the ordinary affairs of life, such as city by-laws or ordinances and police regulations, are to be interpreted strictly, and infractions of them punished, even if committed without guilty intent. For instance, a guilty intent has been held not necessary to prove in prosecutions for wrongfully selling liquor,[2] or oleomargarine,[3] for selling adulterated or diseased articles of food or drink,[4] or for permitting a minor to remain in a billiard saloon.[5] So an infraction of the building laws would be held

[1] 2 Steph. Hist. Cr. Law, 117; Wills, J., in Regina *v.* Tolson, 23 Q. B. D. 168.

[2] United States *v.* Leathers, 6 Sawy. (U. S. Circ. Ct.) 17; Com. *v.* Boynton, 2 All. (Mass.) 160; Barnes *v.* State, 19 Conn. 398; McCutcheon *v.* People, 69 Ill. 601. See, *contra*, Williams *v.* State, 48 Ind. 306.

[3] Com. *v.* Weiss, 139 Pa. 247; State *v.* Newton, 50 N. J. L. 534.

[4] Com. *v.* Farren, 9 All. (Mass.) 489; State *v.* Smith, 10 R. I. 258; State *v.* Stanton, 37 Conn. 421. See, *contra*, Teague *v.* State, 25 Tex. App. 577.

[5] State *v.* Probasco, 62 Iowa, 400. See, *contra*, Stern *v.* State, 53 Ga. 229; Marshall *v.* State, 49 Ala. 21.

punishable, though the owner of the building was ignorant of it.[1] Upon the same principle, one may be convicted on an indictment for receiving lunatics into his house without a license, though he did not know them to be lunatics.[2]

§ 56. **Immoral Acts.** — When the offender was engaged in an act which is in itself immoral, but is made criminal by statute only under certain circumstances, he is guilty if the circumstances exist, though he believed they did not. Thus, upon an indictment for unlawfully taking an unmarried girl under the age of sixteen from her father's possession, a *bona fide* belief that the girl was over sixteen will not protect the defendant, the act itself being an immoral one.[3]

§ 57. **Intent in other Cases generally required.** — Where the act forbidden by statute is not in its nature immoral, and the statute is more than a mere regulation of the every-day business of life, the tendency of the authorities is to require a criminal intent, unless the statute expressly does away with such requirement.[4] The burden of producing evidence of lack of intent is of course on the accused, since intent is ordinarily inferred from the act itself; but if evidence of lack of intent is introduced, the burden of proving it is on the government. Thus, upon an indictment for bigamy, a *bona fide* belief

[1] Wills, J., in Regina *v.* Tolson, 23 Q. B. D. 168.

[2] Regina *v.* Bishop, 14 Cox C. C. 404, 5 Q. B. D. 259.

[3] Regina *v.* Prince, 13 Cox C. C. 138, L. R. 2 C. C. 154; State *v.* Ruhl, 8 Iowa, 447.

[4] Regina *v.* Tinkler, 1 F. & F. 513; Anon., Foster Cr. L. (3d ed) 439; United States *v.* Beaty, Hempst. (U. S. Circ. Ct.) 487; Lee *v* Lacey, 1 Cr. C. C. (D. C.) 263; Birney *v.* State, 8 Ohio, 230.

upon reasonable grounds that the defendant's wife was dead at the time of the second marriage is by the better view regarded as entitling the defendant to acquittal.[1]

JUSTIFICATION FOR CRIME.

§ 58. **Matters of Justification.**— Though an act has been intentionally committed, which is in its nature punishable, by one who is answerable for his acts, it may nevertheless not be punishable as a crime. The soldier who intentionally shoots an enemy, the sheriff who hangs a condemned murderer or seizes property on execution, are committing acts which are in their nature criminal; yet the act, so far from being punishable, is done in execution of a public duty. It becomes therefore necessary to consider under what circumstances a man may be excused for the commission of what would otherwise be a crime. It will be found that these circumstances are comprehended in the following classes: public authority, defence, and necessity.

§ 59. **Execution or Enforcement of Law.** — Any act done by an officer of the law in execution of a writ or warrant issued by a court of competent jurisdiction is justifiable, whether it be to hang or imprison a man, or to seize his property. And even a private person is justified in preventing by force, even if necessary by taking life, the commission of treason, or of a felony by the use or the threat of violence;[2] or in arresting and keeping in custody such a traitor

[1] Regina *v.* Tolson, 23 Q. B. D. 168; Squire *v.* State, 46 Ind. 459. See, *contra*, Com. *v.* Mash, 7 Met. (Mass.) 472.

[2] Foster C. L. 273; 1 East P. C. 271.

or felon, or even in killing him if necessary to prevent his escape.[1]

§ 60. **Authorization by Government.** — Every man is justified in obeying the lawful commands of the government within the jurisdiction of which he is; therefore no act done in pursuance of such command can be a crime. But this justification is good only so long as the party justifying is within the territorial jurisdiction of the government. Thus the master of an English vessel may justify taking a man on board his vessel at a Chilean port, by order of the Chilean government; but he cannot justify any restraint put upon the man after leaving Chilean territory.[2]

§ 61. **Public Policy.** — Certain other acts may no doubt be justified upon the rather vague ground of public policy. Thus one may justify the destruction of public property in time of conflagration or pestilence, or the forcible entry on land in time of hostile invasion.[3] So, no doubt, it would be justifiable to disobey a police regulation which forbade all persons to leave their horses unattended in the public street, if the attendant left the horse in order to save life. So the publication of obscenity is in some cases justifiable, as when it is done in good faith in the promotion of morality, science, or art, as, for instance, by the publication of a medical treatise or of a literary classic;[4] and public officials may justify the burning of plague-infected clothing, though it causes such discomfort in the neighbor-

[1] 1 East P. C. 298.
[2] Regina *v.* Leslie, 8 Cox C. C. 269.
[3] Cooley, Const. Limit., 5th ed. 739.
[4] Steph. Dig. Cr. L., art. 172.

hood as amounts to a public nuisance, if it is a proper and reasonable means to prevent contagion.[1] Justification of this sort has seldom been set up, probably because common sense usually prevents a prosecution in such a case; and the extent to which courts would go in allowing such a defence cannot be determined.

§ 62. **Authority of a Parent or Master.**— Of a similar nature is the right of a parent or master to govern and correct his child or apprentice. Any act done in proper correction of a son, scholar, or apprentice is justifiable. It is only for excess of force, or for causeless and cruel punishment, that a criminal prosecution can be brought.[2]

§ 63. **Defence.** — In defending person or property against an unlawful attack, certain acts are justifiable; but it must in all cases appear that they are both reasonable and necessary. A mere attempt to commit larceny does not justify the owner of the property attacked in killing the offender; nor, if a felon can easily be captured, is it justifiable to kill or maim him. This principle is to be borne in mind in all cases of defence.

The force used in defence must be continued only so long as is necesary. The right of self-defence will not justify one in continuing an affray.[3]

§ 64. **Self-defence.** — In order to defend himself from death or serious bodily harm, one may use such force as is necessary, and even kill as a last resort.[4]

[1] State *v.* Mayor & Aldermen of Knoxville, 12 Lea (Tenn.) 146.

[2] 1 East P. C. 261; Steph. Dig. Cr. L., art. 201.

[3] Regina *v.* Knock, 14 Cox C. C. 1.

[4] State *v.* Burke, 30 Iowa, 331; Foster C. L. 273.

But all other reasonable means should be exhausted before killing. If a retreat in safety is possible, it should be tried.[1] In the old phrase, the party attacked must "retreat to the wall."

If however, one is the aggressor in an affray, he will not be justified in doing any act in the course of the affray, even if it is done in self-defence.[2] But he may withdraw from the affray in good faith, and if he is then pursued and attacked by the other party he may defend himself.[3]

If an attack on a person is not of such violence as to threaten severe bodily harm, his resistance must stop short of injury to life or limb. For instance, one may not take life to prevent an unlawful arrest.[4] A case may, however, be imagined where even the taking of life would be justifiable in resisting an unlawful arrest, as when the arrest is threatened by outlaws or savages. The danger of such an arrest would be as grave as that of bodily harm.

The assaulted party is not required to make defence to an attack that seems to threaten bodily harm at the risk of himself being guilty if he is mistaken. If the apprehension of bodily harm is reasonable, the party attacked is justified in doing all that is necessary to avoid the apparent danger, even though no severe harm was in fact intended.[5]

§ 65. **Defence of Another Person.**— Such force as a man may use in defence of himself, he may also use in defence of one dependent on him for protection; as a parent or child, wife, master, or servant.[6]

[1] Duncan *v.* State, 49 Ark. 543.
[2] State *v.* Gilmore, 95 Mo. 554.
[3] Parker *v.* State, 88 Ala. 4.
[4] Creighton *v.* Com., 84 Ky. 103.
[5] Shorter *v.* People, 2 N. Y. 193.
[6] Regina *v.* Rose, 15 Cox C. C. 540

§ 66. **Defence of Property.** — One may use such reasonable force as is necessary to defend one's property, which is in one's possession, from attack. Thus, reasonable force may be used to oust an intruder from real estate,[1] or to repel an unlawful attempt to seize a chattel.[2] And if possession of such property has been unlawfully taken, the owner has the right of immediate recapture.

But the defence of property must stop short of killing or severe bodily harm. No one merely to defend his property has the right to endanger life.[3]

§ 67. **Defence of the "Castle."** — The law allows a certain protection to one's dwelling-house which is not given to ordinary property; and some acts of defence are allowable in one's dwelling-house which could not be lawfully committed outside. For instance, where one is attacked and retreats, he need retreat no farther than the threshold of his dwelling. Any force, even to killing, is allowable to keep out of one's dwelling an assailant who threatens death or severe bodily harm.[4] And one who is attacked while in his dwelling-house by an assailant outside is justified in keeping his assailant outside the house by the use of any necessary force.[5]

It has been said in the authorities that any force, even death, is justifiable in putting out of one's dwelling-house one who has entered peaceably, though unlawfully, and, having entered, makes a forcible

[1] Com. *v.* Clark, 2 Met. (Mass.) 23.

[2] Com. *v.* Kennard, 8 Pick. (Mass.) 133.

[3] State *v.* Zellars, 7 N. J. L. 220; Storey *v.* State, 71 Ala. 338.

[4] 1 Hale P. C. 486; State *v.* Middleham, 62 Iowa, 150; Bledsoe *v.* Com., 7 S. W. Rep. 884 (Ky.).

[5] State *v.* Patterson, 45 Vt. 308.

attack on the owner.[1] It would seem, however, that all other means short of killing should be tried; and that if it is practicable to defend the occupants by other means short of killing, as by the imprisonment of the assailants in the house, this should be done, though the assailant still remains within the house against the owner's will. The case is not now one of defence of the castle, but only of the occupants.

The right of defence of a dwelling-house does not extend to the land about it. One may not kill in order to prevent an aggressor from entering the door-yard.[2]

§ 68. **Necessity.** — It has been said that the pressure of circumstances may be so great as to justify one for an act which, but for such pressure, would be a crime; as where a council, without authority, depose and imprison a governor, to prevent irreparable mischief to the State;[3] or one of two persons swimming in the sea supported by a plank thrusts the other off, if by so doing one would be saved, and by not so doing both would be lost.[4]

The exact limits of this doctrine, even if it is sound, cannot be fixed.[5] It certainly does not justify a party of shipwrecked sailors in killing the weakest of their number, though it seemed the only way to preserve their lives.[6] It would seem that

[1] 1 Hale P. C. 486.

[2] Lee *v.* State, 9 So. Rep. 407 (Ala.).

[3] Rex *v.* Stratton, 21 St. Tr. 1041.

[4] Bacon's Maxims, No. 5. See also United States *v.* Holmes, 1 Wall Jr. (U. S. Circ. Ct.) 1.

[5] Steph. Dig. Cr. L., art. 32.

[6] Regina *v.* Dudley, 14 Q. B. D. 273; s. c. 15 Cox C. C. 624.

merely on the ground of necessity the killing of another can never be justified. If circumstances threaten one man's life, there is no principle of law which could justify him in shifting the danger to another man. If, to be sure, one man has secured a *tabula in naufragio*, and another attempts to share it, so endangering the life of the former, he may protect himself; but it is a case not of necessity, but of self-defence. The same would seem to be true in the case put, of deposing a tyrannical governor. In other cases, the principle of public policy, already stated, may justify a crime. Apart from these principles, it is doubtful whether there is any justification in the fact that a crime was committed through so called necessity, that is, by reason of extreme pressure of circumstances. If it is shown, in defence to an indictment for larceny of bread, that it was stolen to save the defendant's life, the question would seem to be whether it is for the interest of the public that such a fact should justify larceny. It might well be held for the public interest, in order to prevent the increase of crime, that a man under such circumstances should be held to a choice of evils, starvation or crime, and should not be allowed legally to shift his misfortune to the owner of the bread. If this view were taken, the facts of the case ought not to justify the larceny; though they should doubtless be considered in assessing the punishment.

CLASSIFICATION OF CRIMINALS.

§ 69. **Principals and Accessories.** — Criminals guilty of felony are classified by the common law, ac-

cording to the nearness or remoteness of their connection with the crime committed, into *principals* and *accessories*. In high treason all are principals, on account, it is said, of the heinousness of the crime; and in misdemeanors all are principals, because it is beneath the dignity of the law to distinguish the different shades of guilt in petty crimes.[1] And of principals, in felony, we have those of the *first* and *second degrees*.

A principal in the first degree is the perpetrator of the act which constitutes the crime, whether he does it with his own hand, or by the hand of an innocent third person, — the third person being ignorant of the character of the act perpetrated;[2] where, for instance, a parent puts poison into the hands of his son not yet arrived at the age of discretion, and directs him to administer it, — or one person, by fraud, force,[3] threats, or otherwise, induces another to take poison[4] or to steal, — the fact that the instigator is not actually present is immaterial, if the connection between him and the act be direct, or the crime be committed under such circumstances that no one but the instigator can be indicted as principal. Otherwise, a crime might be committed, and no one would be guilty as principal.[5]

When several persons participate in an act, each doing a part and neither the whole, as where several

[1] 4 Bl. Com. 35.

[2] State *v.* Shurtliff, 18 Me. 368; Bishop *v.* State, 30 Ala. 34; Regina *v.* Bannen, 2 Moo. C. C. 309.

[3] Collins *v.* State, 3 Heisk. (Tenn.) 14; 1 Hale P. C. 514; Regina *v.* Michael, 2 Moo. C. C. 120.

[4] Blackburn *v.* State, 23 Ohio St. 146.

[5] 1 Hale P. C. 514; Vaux's Case, 4 Coke, 44.

take part in a single burglary, all are principals in the first degree.[1]

Principals in the second degree are those who, without actually participating in the act itself, are present aiding and encouraging the party who commits the act; as where one undertakes to watch to prevent the principal from being surprised, or to aid him to escape, or in some other way to be of immediate and direct assistance to him in the promotion of his enterprise.[2] The principal of the second degree need not be actually on the spot where the crime was committed. Thus where one, in pursuance of a plan, enticed the owner of a shop to a place at some distance, and kept him there while his confederates broke into the shop, he was held guilty of burglary as principal.[3]

In this way one may be guilty as principal of a crime which he could not commit; for instance, a woman present aiding and abetting may be guilty of rape.[4]

This distinction of the old law, however, between principals of the first and principals of the second degree, is not now regarded with any favor, and in fact it has in many, if not most, of the States become practically obsolete.[5] Some statutes, however, recognize it, and in some the punishment is based upon the distinction.

[1] Rex *v.* Kirkwood, 1 Moo. C. C. 304.

[2] 4 Bl. Com. 36; Rex *v.* Owen, 1 Moo. C. C. 96; Com. *v.* Knapp, 9 Pick. (Mass.) 496.

[3] Breese *v.* State, 12 Ohio St. 146; and see State *v.* Hamilton, 13 Nev. 386.

[4] State *v.* Jones, 83 N. C. 605.

[5] 1 Bish. Cr. Law, § 648.

§ 70. **Accessories** are divided into two classes, — those *before* and those *after* the fact. An accessory *before* the fact is one who, without being present aiding or abetting, procures, advises, or commands another to commit the crime.[1] An accessory after the fact is one who, knowing the fact that a felony has been committed, receives, relieves, comforts, or assists the felon.[2] These distinctions grew out of the rule of the common law, that every offence should be particularly described, so that the party charged might know with reasonable certainty to what he was to answer. The tendency of the modern law is to disregard the distinction, so far as it can be done consistently with the observance of the rules of pleading.[3]

The offences of advising another to commit a felony, the adviser not being present at its commission, and of receiving and concealing stolen goods, are, so far as the circumstantial description is concerned, different from the felonies themselves, and in several of the States the latter has been by statute made a distinct and substantive offence, punishable whether the principal felon has or has not been tried and convicted, though under the ancient common law the accessory could be put upon his separate trial only in case the principal had been tried and convicted. This rule was adopted to avoid the absurdity of convicting an accessory and afterwards acquitting the principal. And where now the acces-

[1] 4 Bl. Com. 63.

[2] 4 Bl. Com. 37.

[3] People *v.* Newberry, 20 Cal. 439 Ch. 94, § 2, 24 & 25 Vict., makes accessories before the fact and principals in the second degree indictable as if they alone had committed the act, although any other party to the crime may have been acquitted.

sory may be tried before or after the principal is convicted, if afterwards, before sentence, the principal be tried and acquitted, the accessory, already convicted, on proof of the acquittal of the principal, will be entitled to his discharge, the statute modifying the common law rule only so far as to allow of the trial of an accessory before or after the conviction of the principal, but not after his acquittal.[1]

An accessory before the fact in one State to a felony committed in another State is amenable to the courts of the State where he became accessory, although the principal can only be tried where the felony was committed.[2]

It matters not how remote the accessory be from the principal. If A. through one or more intermediate agents procures a person to commit a felony, he is accessory to the latter as principal; and one may be an accessory after the fact to an accessory before the fact, by aiding and concealing him.[3]

It is also a principle of the common law that the offence of the accessory cannot be greater than that of the principal.[4]

§ 71. **Commission of a different Crime.** — A person who advises or assists in the commission of a particular crime cannot be held as principal in the second degree, or as accessory to a principal, who commits a substantially different crime, unless the

[1] McCarty *v.* State, 44 Ind. 214; s. c. 2 Green's Cr. Law Rep. 715. A substantially similar statute exists in most of the States, as well as in England. See *post*, § 73.

[2] State *v.* Chapin, 17 Ark. 561. See also Adams *v.* People, 1 Comst. (N. Y.) 173; State *v.* Ricker, 29 Me. 84; Com. *v.* Smith, 11 Allen (Mass.) 243; Holmes *v.* Com., 25 Pa. 221; 2 Burr's Trial, 440.

[3] 2 Hawk. P. C., c. 29, § 1. [4] Ibid.

latter is the natural result of the effort to commit the one advised.[1] Thus, if a person advises another to beat a third, he is accessory to the beating and its natural consequences, but he is not accessory to the different and additional crime of rape committed by the principal.[2] Where one entered a house to commit rape, and his confederate outside, in order to prevent discovery, killed one who attempted to enter, the one who entered is guilty of the homicide;[3] but the confederate would not be guilty of homicide in case the one who had entered killed the girl by throwing her out of the window, to prevent detection, after his purpose was accomplished.[4] Murder in the course of robbery or burglary is not an unexpected result, and all confederates are guilty of it;[5] and the same is true of murder committed in the course of an attempt to escape from jail, the confederates being armed.[6] The rule has been stated generally in England by Lush, J., at Nisi Prius, that, if several persons agree together to commit a criminal act in a particular way, each is responsible for the acts of the others done in the way agreed on, but not for acts done in any other way. If, for instance, A. and B. agree to assault C. with their fists, each is responsible for the consequences of an assault by the other with the fists. But A. is not responsible, if B.,

[1] 2 Hawk. P. C., c. 29, § 18; Lamb *v.* People, 96 Ill. 73; State *v.* Lucas, 55 Iowa, 321.

[2] 2 Hawk. P. C., c. 29, § 18; Watts *v.* State, 5 W. Va. 532.

[3] Mercersmith *v.* State, 8 Tex. App. 211.

[4] People *v.* Knapp, 26 Mich. 112.

[5] Ruloff *v.* People, 45 N.Y. 213; State *v.* Johnson, 7 Ore. 210; State *v.* Davis, 87 N. C. 514.

[6] State *v.* Allen, 47 Conn. 121.

without his knowledge, uses a knife, for the consequences of any injury by the knife.[1] But it may be doubted if this is sound law.[2]

§ 72. **No Accessories in Misdemeanors.** — In misdemeanors all are principals, and so the common law seems to have held of treason. To felonies, therefore, the distinction is confined.[3]

§ 73. **Accessories in Manslaughter.** — At common law it was once held that one could not be accessory before the fact to manslaughter, because that offence was in its nature sudden and unpremeditated.[4] But it has been said by high authority that Lord Hale in thus stating the law alludes only to cases of killing *per infortunium*, or in self-defence, and that in other cases of manslaughter there seems to be no reason why there may not be accessories.[5] However this may be, the question becomes unimportant in those States which do not favor the distinction between principals in the first and second degree, and principal and accessory before the fact; and there a man indicted as accessory before the fact to murder may be convicted, though his principal may have been convicted of manslaughter only, or even if he have been acquitted.[6]

[1] Regina *v.* Caton, 12 Cox C. C. 624.

[2] See 4 Bl. Com. 37; Foster Crim. Law, 369.

[3] Regina *v.* Greenwood, 2 Den. C. C. 453; Com. *v.* Ray, 3 Gray (Mass.) 441; Ward *v.* People, 6 Hill (N. Y.) 144; Williams *v.* State, 12 S. & M. (Miss.) 58; State *v.* Goode, 1 Hawks (N. C.) 463; Com. *v.* McAtee, 8 Dana (Ky.) 28.

[4] 1 Hale P. C. 437.

[5] Erle, J., Regina *v.* Gaylor, 7 Cox C. C. 253; Regina *v.* Taylor, 13 Cox C. C. 68. See also State *v.* Coleman, 5 Port. (Ala.) 32; Rex *v.* Greenacre, 8 C. & P. 35.

[6] People *v.* Newberry, 20 Cal. 439. See *ante*, § 70.

Where one employs a second to procure a third person to commit a felony, the first two are accessories to the third principal. And this is true, although the first knows not who the third may be.[1] So one may be accessory after the fact by procuring another to assist the principal.[2] And where one would become an accessory if the offence instigated should be committed, yet, if before its commission he countermands his advice and withdraws from the enterprise, he is not accessory to any act done after notice actually given of the withdrawal.[3] He is only accessory to the act which has been committed when the aid is rendered. Thus, where one renders aid after a mortal stroke, but before the consequent death, he is not accessory to the death.[4]

§ 74. **Husband and Wife.** — By the common law the duty of a wife to succor and harbor her husband prevented her from incurring the guilt of an accessory after the fact thereby. But no other relationship was a protection.[5] By statute, however, in some of the States, other relationships have been made a protection. But though the wife cannot be an accessory after the fact to her husband as principal, and it is said that for the same reason — relationship and duty to succor and protect — the husband cannot be accessory after the fact to the wife,[6] (against the opinion, however, of the older authorities,[7]) yet

[1] Rex *v.* Cooper, 5 C. & P. 535.

[2] Rex *v.* Jarvis, 2 M. & R. 40; State *v.* Engeman, 23 Atl. Rep. 676, 678 (N. J.).

[3] 1 Hale P. C. 618.

[4] 1 Hale P. C. 602.

[5] 2 Hawk. P. C., c. 29, § 34.

[6] 1 Deac. Cr. Law, 15.

[7] 4 Bl. Com. 38; 1 Hale P. C. 621; 2 Hawk. P. C., c. 29, § 34.

either may be accessory before the fact to the other as principal.[1]

§ 75. **Assistance must be Personal.** — By a very nice distinction, it is held that he who buys or receives stolen goods, though he may be guilty of a substantive misdemeanor, is not an accessory, because he does not receive or assist the thief personally, it being necessary to constitute an accessory after the fact that the act should amount to personal assistance to the principal;[2] while he who assists him in further carrying them away, after they have been stolen, is an accessory.[3] On the other hand, a person who is in fact absent and away from the place where the crime, by previous arrangement, is committed, — as where he entices and keeps away the owner of a store while his confederate robs it, this absence being in furtherance and part of the enterprise, — is not an accessory, but a principal.[4] So, if he watches for the purpose of giving information, or other aid if necessary.[5] Mere presence, however, without approval known to the principal, or other encouragement, evidenced by some act, does not make one an accessory.[6] Nor is one absent, though in some sense aiding, as the stakeholder to a prize-fight, to be regarded as an accessory.[7]

[1] Regina *v.* Manning, 2 C. & K. 903; Rex *v.* Morris, R. & R. 270.

[2] 4 Bl. Com., 38; Loyd *v.* State, 42 Ga. 221; People *v.* Cook, 5 Park. (N. Y.) C. R. 351; Regina *v.* Chapple, 9 C. & P. 355.

[3] Rex *v.* King, R. & R. 339; Norton *v.* People, 8 Cow. (N. Y.) 137.

[4] Breese *v.* State, 12 Ohio St. 146.

[5] Doan *v.* State, 26 Ind. 495.

[6] United States *v.* Jones, 3 Wash. Circ. C. 223; State *v.* Hildreth, 9 Ired. (N. C.) 440; Clem *v.* State, 33 Ind. 418.

[7] Regina *v.* Taylor, 13 Cox C. C. 68.

§ 76. **An Accomplice** is one who shares in the commission of the crime in such manner that he may be indicted with the principal as a participator in the offence. Therefore, under a statute for unlawfully administering a drug to a pregnant woman with intent to procure a miscarriage, the woman is not an accomplice.[1] Nor is a person who enters into a pretended confederacy with another to commit a crime, and aids him therein for the purpose of detecting him, having himself no criminal intent, either an accessory or an accomplice.[2] Nor is one who entraps another into the commission of a crime for a like purpose.[3] So, under an indictment for betting at ten-pins, one who merely takes part in the game, but does not bet, is not an accomplice.[4]

The question whether one is an accomplice usually arises in the course of a trial, as a question of evidence, and is to be determined by the jury, under instructions from the court as to what constitutes an accomplice.[5] Being *particeps criminis*, his evidence may be regarded as that of a criminal. And it is the usual practice of the courts to advise not to convict upon the uncorroborated testimony of an accomplice.[6]

[1] State *v.* Hyer, 39 N. J. 598; Com. *v.* Boynton, 116 Mass. 343.

[2] Rex *v.* Despard, 28 How. St. Trials, 346; State *v.* McKean, 36 Iowa, 343.

[3] Com. *v.* Downing, 4 Gray (Mass.) 29; State *v.* Anone, 2 N. & McC. (S. C.) 27; People *v.* Barric, 49 Cal. 342; Alexander *v.* State, 12 Tex. 540.

[4] Bass *v.* State, 37 Ala. 469.

[5] Com. *v.* Glover, 111 Mass. 395; State *v.* Schlagel, 19 Iowa, 169.

[6] See *post*, § 130.

LOCALITY AND JURISDICTION.

§ 77. **Territorial Jurisdiction.**— As a rule, an offence against the laws of one sovereignty is no offence against the laws of another; and one sovereignty has no jurisdiction over, and will not undertake to punish, crimes committed in another. The jurisdiction of a country extends only to its boundaries, unless it is bounded by the high seas. In case it is so bounded, the government has a quasi territorial jurisdiction over the sea for a distance of three miles from the shore.[1]

The jurisdiction of the court in which an indictment is found commonly extends only over a single county, or a smaller division of territory, and in such case it is necessary, in order to show jurisdiction in the court, to prove not only that the crime was committed within the jurisdiction of the sovereignty, but also within that portion of it over which the court has jurisdiction.

In many, if not all of the States, it is provided that, whenever a crime is committed within a certain distance of a county line, the courts of either county may have jurisdiction, — a provision rendered necessary to prevent a failure of justice, from inability to prove beyond reasonable doubt the exact spot where the crime was committed.

It is further to be noted, that jurisdiction to try for the commission of a crime is conferred by the law, and not by the consent of parties.[2]

[1] Regina *v.* Keyn, 13 Cox C. C. 403.

[2] People *v.* Granice, 50 Cal. 447.

§ 78. **Jurisdiction on the High Seas.** — For the purposes of jurisdiction, a private vessel upon the high seas is to be regarded as a part of the sovereignty whose flag she carries, and crimes committed on board of her while at sea are cognizable only by that sovereignty,[1] even though committed by a foreigner.[2] When, however, such vessel comes within the jurisdiction of another civilized power, crimes committed on board of her are cognizable by the power into whose limits she has come,[3] if they are a breach of the peace of that sovereignty. The sovereignty of the flag still, however, has concurrent jurisdiction.[4]

Where a crime is committed on the high seas by outlaws, that is, by pirates, any civilized government which captures the pirates has jurisdiction to punish the crime.[5]

§ 79. **Locality of Crime.** — When a crime is committed, its locality is the place where the public is injured, that is, where the act takes effect. Thus, where a force is set in motion in one State or foreign sovereignty, and by continuity of operation takes effect in another, the courts of the latter have jurisdiction to punish the crime as if all the *res gestæ* had taken place within its territory. If, for instance, a man standing on one side of the boundary between two States intentionally discharges a gun at a person standing on the other side of the boundary, and

[1] Regina *v.* Armstrong, 13 Cox C. C. 184.

[2] Regina *v.* Lopez, 7 Cox C. C. 431.

[3] Wildenhus's Case, 120 U. S. 1; People *v.* Tyler, 7 Mich. 161 8 Mich. 320.

[4] Regina *v.* Anderson, 11 Cox C. C. 198.

[5] The Marianna Flora, 11 Wheat. (U. S.) 1.

injures him, the offence may be punished at the domicil of the injured party.[1] So, if a man resident in one sovereignty sends an innocent agent into another, who by means of false pretences obtains money from a person resident in the latter, the principal is guilty of an offence in the latter, and may be punished by its tribunals, if the offender be found within the limits of their jurisdiction.[2]

But it is the act, and not the result of the act, which makes a crime; consequently, the crime of murder is committed where the blow is struck, not where the victim dies.[3]

It may happen that an attempt to commit a crime may be indictable in one place, while the crime consummated must be indicted in another; as where one encloses a forged note in a letter, and deposits it in one post-office directed to another, the depositing may be indicted at the former place as an attempt to utter, while the consummated crime may be indicted in the latter place.[4] On the other hand, a person may be convicted of embezzlement by the tribunals of the State in which he was intrusted with the property embezzled, although the fraudulent conversion took place in another State.[5]

[1] Com. *v.* Macloon, 101 Mass. 1. See also 1 Bish. Cr. Law, § 112 et seq., for some observations tending to limit the doctrine of Com. *v.* Macloon.

[2] Adams *v.* People, 1 Comst. (N. Y.) 173; State *v.* Chapin, 17 Ark. 561; Johns *v.* State, 19 Ind. 421.

[3] United States *v.* Guiteau, 1 Mack. (D. C.) 498; Green *v.* State, 66 Ala. 40; State *v.* Gessert, 21 Minn. 369.

[4] People *v.* Rathbun, 21 Wend. (N. Y.) 509; William Perkins's Case, 2 Lew. C. C. 150; United States *v.* Worrall, 2 Dall. (U. S.) 384; Regina *v.* Burdett, 3 B. & Ald. 717; 4 B. & Ald. 95.

[5] State *v.* Haskell, 33 Me. 127.

§ 80. **Continuing Crime.** — Where a thief steals goods in one county and brings the goods into another, where he is taken with them, he may be indicted for larceny in the county in which he is taken. A robber, however, in one county becomes merely a thief in another, by taking his stolen goods into the latter.[1] The doctrine has been explained on the rather doubtful ground that there is a continuing trespass, and therefore a new taking and larceny in every jurisdiction into which the goods are brought. The true explanation is probably an historical one.

This rule has never been applied in England to a taking in one sovereignty and bringing into another. It must be proved both that the goods were stolen and that the thief was apprehended within the jurisdiction of some English court.[2]

In this country the courts of some States have applied to the States the analogy of the counties of England, rather than of the several countries under the jurisdiction of the English sovereign. So it has been held that a larceny of goods in one jurisdiction is a larceny in every jurisdiction where the thief may be found with the stolen goods.[3] But in other States the contrary view is held, it would seem more correctly.[4] And an indictment against a receiver of stolen goods alleged to have been stolen in Massachusetts was upheld upon proof that the goods were stolen in New York, and taken by a New York re-

[1] 1 Hale, P. C. 507, 508; 2 Hale, P. C. 163.

[2] Rex *v.* Prowes, 1 Moo. C. C. 349; Regina *v.* Carr, 15 Cox C. C. 131, note.

[3] Com. *v.* Holder, 9 Gray (Mass.) 7; Com. *v.* Cullins, 1 Mass. 116; State *v.* Underwood, 49 Me. 181.

[4] Stanley *v.* State, 24 Ohio St. 166, where the cases are collected.

ceiver into Massachusetts, and there sold to the indicted receiver,[1] — a decision the soundness of which cannot be said to be free from doubt.

It has even been held in Vermont that where goods stolen in a foreign country, as for instance Canada, are brought by the thief into one of the States of this country, he may here be indicted for larceny.[2] This however is not the general rule.[3]

§ 81. **Statutory Jurisdiction of Crime.** — The question is sometimes raised how far a certain jurisdiction has power, by statutory enactment, to punish an act committed on the territory of another jurisdiction. An act which, though done outside a State, yet has a disturbing effect on the people of the State, may doubtless be punished by statute. Thus a State may by statute punish forgery outside the State of a deed to land within it.[4] There is more doubt whether a State has power by statute to punish homicide when the fatal stroke was given in another jurisdiction, but the death occurred within the jurisdiction attempting to punish it. In Massachusetts such power has been held to exist;[5] but in other States it has been denied.[6]

§ 82. **Jurisdiction of the United States Courts.** — Where lands within the territorial limits of a State are ceded to the United States, exclusive legislative and judicial authority is vested in the United States government, by the Constitution; and they

[1] Com. *v.* White, 123 Mass. 430. [2] State *v.* Bartlett, 11 Vt. 650.
[3] Com. *v.* Uprichard, 3 Gray (Mass.) 434.
[4] Hanks *v.* State, 13 Tex. App. 289.
[5] Com. *v.* Macloon, 101 Mass. 1.
[6] State *v.* Carter, 27 N. J. L. (3 Dutch.) 499; State *v.* Kelly, 76 Me. 331.

may exercise it, unless the State, by the act of cession, reserves rights inconsistent with the exercise of such authority.[1]

The United States have jurisdiction, also, over crimes of such a nature that they interfere with the due execution of the laws of the United States; for instance, over embezzlement of pension money,[2] and fraudulent voting for members of Congress.[3] They have jurisdiction also over crimes committed against their officers in the course of their duty,[4] and have a certain power to protect from the criminal process of a State any officer who is indicted for an act done in the pursuance of his duty.[5]

§ 83. **Concurrent Jurisdiction.** — The same act — counterfeiting, for instance — may be an offence against two sovereignties, and punishable by both.[6] So a bank officer, under the national bank law of the United States, may be punished by the United States for wilful misappropriation of the funds of the bank, and also, under the common law, for larceny, or for embezzlement, if the statute make it embezzlement, by the State in which the act is done.[7] Doubtless, however, a prosecution in good faith by one government would be taken into consideration by the other.[8]

[1] Mitchell *v.* Tibbetts, 17 Pick. (Mass.) 298; Wills *v.* State, 3 Heisk. (Tenn.) 141; United States *v.* Ward, 1 Wool. C. Ct. 17.

[2] United States *v.* Hall, 98 U. S. 343.

[3] *In re* Coy, 127 U. S. 731.

[4] United States *v.* Logan, 45 Fed. Rep. 872.

[5] Tennessee *v.* Davis, 100 U. S. 257; *In re* Neagle, 135 U. S. 1.

[6] Fox *v.* Ohio, 5 How. (U. S.) 410; Phillips *v.* People, 55 Ill. 429; Moore *v.* Illinois, 14 How. (U. S.) 13.

[7] Com. *v.* Barry, 116 Mass. 1.

[8] United States *v.* Amy, 14 Md. 149.

§ 84. **Extradition.**— In case of the flight of a criminal from the jurisdiction in which he committed the crime, he is not punishable where he is found, for he committed no crime against that sovereignty; yet the government which he offended cannot arrest and punish him. In the absence of compact between the two sovereignties he is therefore dispunishable. He has, however, no claim to impunity; he has gained no right of asylum, and justice will be furthered if some means are found of punishing him. This can be done only by mutual arrangement between the sovereignties, that is, by treaty. The process of obtaining the surrender of a fugitive from justice to the sovereignty whose laws he has broken is called extradition, and the treaty by which the surrender is guaranteed an extradition treaty.

§ 85. **Foreign Extradition.** — The surrender of fugitives from justice to foreign governments, being a matter of foreign intercourse, is by the Constitution of the United States committed to the Federal government exclusively; it is therefore unconstitutional for a State to surrender a fugitive to a foreign government under any circumstances.[1]

An application for extradition under a treaty is made to the President of the United States, who thereupon issues a mandate, directed to a judge or commissioner of the United States, or to the judge of any court of record of any of the States. Under this mandate a complaint is made by the representative of the foreign government to any officer named in the mandate, and a warrant of arrest is thereupon issued, and the accused is brought before the court for examination.

[1] United States *v.* Rauscher, 119 U. S. 407.

This examination is not a trial, and sufficient evidence for conviction is not required. The accused may testify on his own behalf, and the evidence should be sufficient to justify a holding for trial according to the law of the forum.[1] The finding is certified to the Secretary of State, and thereupon the President issues his warrant of extradition. He has, however, discretion to refuse to issue the warrant.[2]

Any error of law in the extradition proceedings may be reviewed and corrected by means of a writ of *habeas corpus*, which will lie even after the President has issued his warrant.[3] The decision of the commissioner or court on the questions of fact involved cannot, however, generally be reversed. If any legal evidence was shown which would justify a holding for trial, the finding on questions of fact is final.[4]

An offender brought into a country by extradition proceedings can be tried only for the offence with which he was charged, until a reasonable time has been given him to return to the country from which he was extradited.[5]

Where one is forcibly abducted in a foreign country and brought into one of the States of the Union, and there tried, no federal question is involved. The extradition treaties do not guarantee an asylum in the foreign country; and the kidnapper therefore violated only the laws of the foreign country, not of

[1] *In re* Farez, 7 Blatch. C. Ct. 345.

[2] *In re* Stupp, 12 Blatch. C. Ct. 501; Spear on Extradition, 1st ed. 214.

[3] *In re* Farez, 7 Blatch. C. Ct. 345.

[4] *In re* Oteiza, 136 U. S. 330; Benson *v.* McMahon, 127 U. S. 457.

[5] United States *v.* Rauscher, 119 U. S. 407.

the United States. Whether the State court will try an offender so brought within its jurisdiction is a question solely for the State to determine; but the better view appears to favor the right of the State to prosecute.[1]

§ 86. **Inter-state Extradition.** — The Constitution of the United States[2] provides for the surrender by any State of fugitives from justice from another State. This makes the surrender of such fugitives the absolute duty of the State in which they have taken refuge; a duty, however, which must be left to the moral sense of the Executive of such State, since there is no power in the Federal government to compel the Executive of a State to the performance of his official duty, nor to inflict punishment for the neglect of it.[3] Extradition may be had under the Constitution for anything which is made criminal by the laws of the demanding State, though it was not a crime when the Constitution was formed, and is not a crime in the State of refuge.[4]

Since the judicial proceedings of one State are to have full faith and credit in every other,[5] it is not necessary to institute judicial proceedings in the State of refuge; the proceedings in the demanding State are enough. Accordingly, the process of inter-state extradition is simpler than that of foreign extradition. The procedure is established by act of Congress.[6] An application is made to the Governor

[1] Ker *v.* Illinois, 119 U. S. 436, 444.
[2] Art. 4, § 2.
[3] Kentucky *v.* Dennison, 24 How. (U. S.) 66.
[4] Ibid.
[5] Const. U. S., art. 4, § 1.
[6] Stat. 1793, c. 7, § 1; Rev. St. U. S. § 5278.

of the State of refuge by the Governor of the demanding State, accompanied by a copy, certified by the Governor to be authentic, of an indictment found, or complaint made to a magistrate, in the demanding State. If satisfied that the accused is a fugitive from justice, the Governor of the State of refuge issues his warrant to the agent of the demanding State, who thereupon arrests and removes the fugitive.

The question of the guilt of the accused is not in issue. It is enough if he is legally charged with crime, according to the law of the demanding State.[1] Whether he is properly charged, the indictment duly certified and the demand legally made, is a question of law, reviewable by the court on a writ of *habeas corpus*.[2]

The question whether the accused is a fugitive from justice is, however, a question of fact, to be decided by the Governor of the State of refuge. His decision, if reviewable, is so only if the evidence is utterly insufficient to justify a finding that the accused is a fugitive.[3] To be a fugitive from justice, it is not necessary that the accused should have left a State to avoid prosecution; it is enough that, having committed a crime, he left that jurisdiction, and when sought for prosecution was found in another,[4] even though when found he was in the State of his domicil.[5] One is not however a fugitive from jus-

[1] *In re* Clark, 9 Wend. (N. Y.) 212; Wilcox *v.* Nolze, 34 Oh. St. 520; Kingsbury's Case, 106 Mass. 223.

[2] Robb *v.* Connolly, 111 U. S. 624.

[3] *Ex parte* Reggel, 114 U. S. 642.

[4] Roberts *v.* Reilly, 116 U. S. 80, 97.

[5] Kingsbury's Case, 106 Mass. 223.

tice who did not leave the State in which he is found. Thus, where one commits a crime in another State by letter or by innocent agent, always remaining in the State of his domicil, he cannot be extradited.[1]

A warrant of extradition may be revoked by the Governor, or his successor, for any cause, even after the accused is in the hands of the agent of the demanding State.[2]

There is much controversy upon the question whether an offender who has been extradited for one offence may be tried for another. The weight of authority seems to be that this is allowable, provided the extradition was procured in good faith, and the offence for which the trial is had is one for which the offender might have been extradited.[3] Many respectable authorities, however, hold that an offender can be tried only upon the indictment on which he was extradited, until he has had an opportunity to return to the State of refuge.[4]

[1] Jones *v.* Leonard, 50 Iowa, 106; Hartman *v.* Aveline, 63 Ind. 344; *In re* Mohr, 73 Ala. 503.

[2] Work *v.* Corrington, 34 Oh. St. 64.

[3] State *v.* Stewart, 60 Wis. 587.

[4] State *v.* Hall, 40 Kan. 338; *In re* Cannon, 47 Mich. 481.

CHAPTER II.

OF CRIMINAL PROCEDURE.

§ 87. Process of a Criminal Prosecution.
98. Criminal Pleading.—The Indictment.
§ 111. Joinder of Counts and Offences.
117. Double Jeopardy.
124. Evidence in Criminal Cases.

PROCESS OF A CRIMINAL PROSECUTION.

§ 87. **Arrest.** — The first step in a criminal suit is generally the arrest of the accused. This is ordinarily accomplished by means of a warrant, issued by a magistrate upon a complaint under oath. The warrant is thereupon executed by the proper official. In making the arrest, the officer may use all necessary force. He may after request break down the door even of a third party, upon reasonable belief that he will find the accused there;[1] especially if the accused has been lawfully arrested, and has escaped.[2]

The officer must be prepared to show his warrant on demand;[3] though he need not show it, if the accused or the owner of the house into which he comes has seasonable notice that he is an officer acting under a warrant.[4]

[1] Com. *v.* Reynolds, 120 Mass. 190; 2 Hale P. C. 117.

[2] Cahill *v.* People, 106 Ill. 621; Com. *v.* McGahey, 11 Gray (Mass.) 194.

[3] Codd *v.* Cabe, 1 Ex. Div. 352.

[4] Com. *v.* Irwin, 1 All. (Mass.) 587.

§ 88. **Arrest without Warrant.** — Under certain circumstances an arrest may be made at once, without first obtaining a warrant. A private person is justified in making an arrest only if felony has been committed; but an officer may arrest upon reasonable suspicion of felony, or for a breach of the peace committed in his view.[1] The power of an officer to break down doors, and to use all necessary force, would seem to be equally great, if he is justified in making an arrest, whether he has or has not a warrant; but a private person can break down doors only while following a felon on fresh pursuit.[1]

§ 89. **Commitment.** — After being arrested, whether with or without a warrant, the prisoner must be taken before the proper court or magistrate as soon as possible;[2] and meanwhile he is in the custody of the officer who arrested him. His personal property cannot be interfered with except that any article which might prove the crime, or which is described in the complaint as stolen, may be taken and preserved till the trial.[3] But a watch or money belonging to the prisoner must be left in his possession.[4]

When the prisoner is brought before the court or magistrate, he is entitled to a speedy investigation of the charge against him. If the crime is one within the jurisdiction of the judge, an immediate trial may be had. If, however, the prisoner must be tried in a court of higher jurisdiction, evidence is intro-

[1] 4 Bl. Com. 292.

[2] Tubbs *v.* Tukey, 3 Cush. (Mass.) 438.

[3] Houghton *v.* Bachman, 47 Barb. (N. Y.) 388; Rex *v.* Burgiss, 7 C. & P. 488.

[4] Rex *v.* Kinsey, 7 C. & P. 447; Rex *v.* O'Donnell, 7 C. & P. 138.

duced only for the purpose of proving a *prima facie* case; and if that is found, the prisoner is committed to await further proceedings.

The commitment is either to jail or to bail. Every prisoner must at common law be allowed bail upon a commitment, unless he is charged with a capital crime.[1]

§ 90. **Accusation.** — The formal accusation of the accused may be made in three ways: by indictment, by information, or by complaint. A complaint is an accusation by a private person, under oath, and is generally allowed only in case of small misdemeanors. An information is an accusation by the Attorney General under his own oath. This is not a common form of procedure, except in a few States of the Union. The common form of accusation is by indictment, which is found by the grand jury upon its oath.

An indictment may be found against one who has already been arrested and committed, or against one who is still at large; in the latter case, a warrant for arrest issues at once on the indictment being found, and is served in the same way as a warrant issued on complaint under oath.

§ 91. **Grand Jury.** — The grand jury is a jury of at least twelve men, and of no more than twenty-three; a majority of the jury, and at least twelve jurors, must join in finding a true bill.[2]

Upon assembling, the jury is charged by the court, and then retires for consultation. No one may be present at its deliberations except the witnesses, and,

[1] 4 Bl. Com. 296.

[2] Clyncard's Case, Cro. Eliz. 654.

in this country, the public prosecuting attorney.[1] The jury chooses a foreman, and then proceeds to consider the matters that may come before it.

The grand jury can act only upon certain lines. Its chief duty is to consider and pass upon the bills, that is, the formal written charges of crime, prepared by the prosecuting attorney. Such bills being presented to it, the evidence in support of the prosecution is heard. It is the duty of the prosecuting attorney to see that none but legal evidence is allowed to go to the grand jury. He may open the case, but must take no part in the discussion, and express no opinion. If twelve jurors find that there is reasonable cause for believing the charge stated in a bill to be a true one, the words "true bill" are indorsed upon it, and certified by the foreman; and at the end of the jury's sitting the foreman hands all "true bills" to the clerk. Bills so indorsed and presented to the court are called indictments. As an indictment cannot be found originally except by the grand jury, so it can be amended only by that body.

Besides the bills prepared by the prosecuting attorney for the consideration of the grand jury, it may inquire into certain other matters; namely, matters called to its attention by the court, or such public offences as come to light while it is considering other matters, or as may have come to the knowledge of individual jurors.[2] If upon inquiry these matters seem to require prosecution, the grand jury states them in the form of a presentment, and it is there-

[1] McCullough *v.* Com., 67 Pa. 30.
[2] Ibid.

upon the duty of the prosecuting attorney to frame an indictment for the crime thus presented.

§ 92. **Arraignment and Pleading.** — An indictment having been found, the prisoner must be set at the bar of the court; it is then read to him, and he is required to answer to it. This is called the arraignment. Except in the case of small misdemeanors, where the punishment is only by fine, the prisoner must be personally at the bar to plead.

If the prisoner would not plead, but stood mute, it was formerly necessary to empanel a jury and find whether the prisoner stood mute by visitation of God,[1] and if not, to compel the prisoner to plead by the use of force,[2] at least in case of felony. Now, however, the plea of not guilty is everywhere entered, by statute, in such a case.

§ 93. **Trial and Verdict.** — If the prisoner pleads not guilty, an issue is joined, and must be tried by a jury. The prisoner ~~must~~ may be present during the trial; a privilege, however, which he may waive, except in capital cases. If there is no such waiver, the jury must be empanelled, and the evidence, charge, and verdict must be given, in the presence of the prisoner. Motions may, however, be made and argued by counsel in his absence. If the prisoner pleads guilty, or *nolo contendere*, no issue is joined, and there is therefore no trial; and sentence may be at once imposed.

The prisoner may be convicted not merely of the offence with which he is charged, but of any lesser offence that can be carved out of his indictment.

[1] State *v.* Doherty, 2 Overton (Tenn.) 80.

[2] 1 Steph. Hist. Cr. Law, 297.

At common law, however, he cannot, on an indictment for felony, be convicted of a misdemeanor; but this has been generally changed by statute.

§ 94. **Nolle Prosequi and Quashing.** — The prosecuting attorney may, in his discretion, put an end to the prosecution of an indictment by entering a *nolle prosequi*. This can be done in some States only by consent of the court.

If the indictment is defective, it may be quashed on motion of either party, or by the court on its own motion. An indictment may be quashed at any stage of the prosecution if it is apparent on the face of it that no judgment upon it could be supported. For certain formal defects, however, an indictment can be quashed only before plea.

§ 95. **Benefit of Clergy** was an old common law right which the clergy had, when they were charged with crime, of having their causes transferred to the ecclesiastical tribunals, or, after conviction, of pleading certain statutes in mitigation of sentence. Of its specific character and its limitations it is not proposed to speak, as it is doubtful if it is a right which can now be successfully asserted in any State of the Union.[1]

§ 96. **Sentence.** — The only remaining step in a criminal prosecution is the judgment and sentence of the court. The defendant should be sentenced in presence of the court; but this is a privilege he may ordinarily waive. In case of capital crimes, however, the prisoner must be present, in order that he may state any reason why sentence should not be

[1] See for these particulars 1 Bish. Cr. Law, § 38, and the authorities by him cited.

passed upon him. This is a matter of great importance to the State itself, which is interested in preserving the lives of its citizens; and the prisoner is therefore not allowed to waive the privilege.

§ 97. **Pardon.** — The executive branch of the government has power to pardon an offence, — a power which is defined and regulated in most of our constitutions. In the absence of constitutional limitation, a pardon may be granted at any time after an offence has been committed, whether or not prosecution has begun. The effect of a pardon is to remove all the consequences of a crime, not merely to remit the sentence.[1]

A pardon may be conditional; as that the offender will permanently leave the country, or will submit to a lesser punishment. In this case, if the offender breaks the condition the original sentence may be enforced.[2] This may be done by immediate arrest and return to prison;[3] though in Michigan it is held that one accused of violating the condition of his pardon is entitled to a trial.[4]

A temporary stay of execution of the sentence is called a reprieve.[5]

CRIMINAL PLEADING. — THE INDICTMENT.

§ 98. **Requisites of Indictment.** — The indictment is the formal charge upon which the entire suit is based; and it must set forth the crime of which the defendant is accused fully, plainly, substantially,

[1] 4 Bl. Com. 401.
[2] 1 Bish. Crim. Law, 7th ed. § 914.
[3] State *v.* Barnes, 32 S. C. 14.
[4] People *v.* Moore, 62 Mich. 496.
[5] 4 Bl. Com. 394.

and formally.[1] It should contain a description of the facts which constitute the crime, without ambiguity or inconsistency; and except where, as in indictments for felony, certain formal words, such as *feloniously*, *burglariously*, *with malice aforethought*, etc., must be used,[2] the language may be such as is ordinarily used and understood; so long as the meaning is clear and unambiguous, the language is immaterial.[3]

Since judgment must be given on the indictment, this must state facts which are incompatible with the innocence of the accused. If it is capable of a meaning which would not necessarily import a crime it is insufficient,[4] and may be attacked on this ground by demurrer.

Two and sometimes three sets of allegations are necessary to complete a charge of crime. It must first be shown what right the prosecuting government has to complain; that is, an obligation toward the government must be shown to have been infringed. For this purpose, it is ordinarily enough to show that the act was committed within the jurisdiction of the government prosecuting. If the crime is one against the property of an individual, the existence of this individual right must also be alleged in addition to the public right. The right or rights having thus been set up, an infringement by the accused must finally be charged.

Where an indictment is made up of two or more

[1] Mass. Bill of Rights, art. 12; **Com. v. Davis, 11 Pick. (Mass.) 432**

[2] 2 Hawk. P. C., c. 25, § 55.

[3] King *v.* Stevens, 5 East, 244, 259.

[4] **Com. *v.* Grey, 2 Gray (Mass.) 501.**

distinct charges of crime, each charge is called a count of the indictment. Every count must in itself, without reference to the others, be sufficient as an indictment.

§ 99. **Elements of Crime.** — The indictment must contain all the elements of the crime charged. Thus, where a specific intent is one element of a crime, this intent must be alleged in the indictment.[1] So where the punishment is greater for a second offence, a former conviction must be alleged in the indictment in order to justify the infliction of the greater punishment.[2]

§ 100. **Particularity.** — The particularity which is necessary in framing an indictment is governed by the rights of the accused. Any one accused of crime has a right to be informed of the charge against him, so as to prepare for his defence. He has a right also to have the record so full that he may avail himself of the proceedings if he is again prosecuted for the same acts. There are therefore two tests of the particularity of an indictment: first, does it furnish sufficient information and particulars to enable the accused properly to prepare his defence; secondly, is it sufficiently precise to protect him from a second prosecution.[3]

§ 101. **Surplusage.** — Where allegations are made in the indictment which are unnecessary to the offence charged, they may be treated as surplusage;

[1] Com. *v.* Shaw, 7 Met. (Mass.) 52.

[2] Larney *v.* Cleveland, 34 Oh. St. 599; Com. *v.* Harrington, 130 Mass. 35.

[3] Com. *v.* Ramsey, 1 Brewst. (Pa.) 422; Fink *v.* Milwaukee, 17 Wis. 26.

and so long as the offence is sufficiently described without them, they may be neglected, and a failure to prove them will not prevent a conviction.

It is very different, however, when a *material* allegation is made unnecessarily precise,[1] as when a horse is described as white, or a person is alleged to be a resident of a certain place. For in preparing his defence the accused, knowing that the allegation must be proved, would prepare to meet it as it was made, and, if he could prove it untrue, would be justified in resting his case. Therefore, where an indictment alleges that the accused suborned J. S. of W. to commit perjury, it is not proved by showing that he suborned J. S. of X.; though the indictment would have been sufficient if it had not alleged the residence of J. S.[2] So where the indictment describes the special marks on timber alleged to have been stolen, these marks must be proved;[3] and where a burial-ground alleged to have been desecrated is described in the indictment by metes and bounds, the description must be proved.[4] And in like manner, where a woman is unnecessarily described as a widow, she must be proved to be a widow.[5]

§ 102. **Jurisdiction and Venue.** — As has been seen, facts must be stated which show the right of the court to try and punish; that is, there must be an allegation of jurisdiction on the part of the sover-

[1] Shearm *v.* Burnard, 10 A. & E. 593, 596.
[2] Com. *v.* Stone, 152 Mass. 498.
[3] State *v.* Noble, 15 Me. 476.
[4] Com. *v.* Wellington, 7 All. (Mass.) 299.
[5] Rex *v.* Deeley, 1 Moo. C. C. 303.

eignty prosecuting. This is ordinarily done by alleging that the act was against the peace of that sovereignty. If, however, one sovereignty succeeds another, — as happened for instance where the State of Maine was separated from Massachusetts, — an act committed before the change, but prosecuted after it, must be alleged to have been against the peace of the former government.[1]

Not only must there be an allegation of jurisdiction on the part of the State; jurisdiction over the crime must also be shown on the part of the court in which the indictment is found. This is done by laying the venue of the crime within the county or other district over which the court has jurisdiction. It is generally provided that a crime committed within a certain distance of the boundary of two counties may be tried in either county. In such a case, in order to show jurisdiction on the record, the act must be alleged to have been committed in that county in which the court is sitting.[2]

§ 103. **Names.** — The indictment must contain the name of the accused, and of any one whose person or property he is charged with having injured. These names must be absolutely correct; otherwise, if the accused were a second time prosecuted, he could not avail himself of the former judgment. Therefore the transposition of two Christian names,[3] or the omission of one,[4] is a fatal misnomer.

Not every slight error in a name is however fatal.

[1] Damon's Case, 6 Me. 148.
[2] Com. *v.* Gillon, 2 All. (Mass.) 502.
[3] Queen *v.* James, 2 Cox C. C. 227.
[4] Com. *v.* Perkins, 1 Pick. (Mass.) 388.

The important question is, whether it would be impossible to doubt the identity; and if the name as written sounds the same as the true name, or, in technical language, if the two are *idem sonantia*, the indictment is sufficient. Thus in an indictment for forging the name McNicole, a forgery of the name McNicoll may be shown.[1] The question whether two names are *idem sonantia* is for the jury.[2]

If the name of the injured person is unknown to the grand jury, it may be so stated, and the indictment is sufficient; though if this is done, and it transpires that the name was known, the allegation is bad.[3] There is more difficulty where the accused refuses to give his name. In such a case, he should be described in the indictment as a person whose name is unknown, but who was personally brought before the jurors by the keeper of the jail.[4]

If one is described by a name by which he is actually known, it is sufficient, though it is not his true name.[5] If however a person is known by two names, the ordinary and safer course is for both to be alleged; as, John Jones, *alias* John Smith.

A variance in the name of a person other than the defendant is fatal, and entitles the defendant to an acquittal on the indictment. A variance in the name of the defendant is not, however, a fatal defect, since the fact tried is the guilt of the prisoner

[1] Queen *v.* Wilson, 2 Cox C. C. 426.

[2] Com. *v.* Donovan, 13 All. (Mass.) 571.

[3] Com. *v.* Morse, 14 Mass. 217.

[4] Rex *v.* ——, Russ. & Ry. 489.

[5] Com. *v.* Desmarteau, 16 Gray (Mass.) 1, 17; Rex *v.* Norton, Russ. & Ry. 510.

actually at the bar. In order to avail himself of such a defect, the defendant must plead the misnomer in abatement.[1]

§ 104. **Time.** — It is necessary that the time of the offence should be alleged in the indictment; but it is not generally necessary to prove the time as laid. It is enough if some time is proved before the date of the indictment, and within the period set by the statute of limitations.[2] The time of a continuing offence may be charged on a certain day, and continuing from that day to the day of receiving the complaint.[3]

If however time is material, it must be accurately stated; for instance, where the crime is against a Sunday law,[4] or where it is part of the description, as the date of a newspaper in which a libel was published.[5] And so where the punishment of an offence is changed by statute, one cannot, on an indictment laying the offence before the new statute, be convicted of an offence after it.[6] So the time laid must not be impossible or absurd; as, for instance, a time later than the complaint or indictment,[7] or a time before the period of limitation.

§ 105. **Place.** — As has been seen, the place of the offence must be stated, in order to show the venue of the court. It is not, however, generally necessary to prove the place precisely as alleged; any

[1] Turns *v.* Com., 6 Met. (Mass.) 224, 235.
[2] People *v.* Stocking, 50 Barb. (N. Y.) 573.
[3] Com. *v.* Frates, 16 Gray (Mass.) 236.
[4] State *v.* Caverly, 51 N. H. 446.
[5] Com. *v.* Varney, 10 Cush. (Mass.) 402.
[6] Com. *v.* Maloney, 112 Mass. 283.
[7] Com. *v.* Doyle, 110 Mass. 103.

place may be proved which is within the venue of the court.[1]

If however the place is material, as, for instance, in the case of burglary, the place must be alleged and proved with the greatest accuracy.[2] And so in every case where the act is local; such as maintaining a nuisance.[3] The place is also material when an act is a crime only when committed in a certain place, as within ten feet of the highway.

Every act alleged in the indictment must be laid at a certain time and place. When the acts were simultaneous, the ordinary method is to allege that they were done *then and there.* This form of words is not necessary; but such language must be used as will state some time with absolute certainty.[4]

§ 106. **Description.** — A sufficient description must be given of everything as to which a material allegation is made in the indictment. Thus, all property must be described as owned by some one, either the general or the special owner.[5] The name ordinarily used to describe a thing is sufficient; but if it is ordinarily known by a specific name, it is not enough to describe it by the name of the material of which it is made. For instance, an ingot of tin or a bar of iron may be described as tin or iron, but cloth must be called cloth, not wool; and a coin or a cup must be so described, and not as such a weight of silver.[6]

[1] Com. *v.* Tolliver, 8 Gray (Mass.) 386.
[2] Rex *v.* Napper, 1 Moo. C. C. 44.
[3] Com. *v.* Heffron, 102 Mass. 148.
[4] Arch. Crim. Plead., 19th ed. 51.
[5] Com. *v.* Morse, 14 Mass. 217.
[6] Regina *v.* Mansfield, Car. & M. 140.

§ 107. **Words.** — Whenever an offence consists of words written or spoken, those words must be stated in the indictment with exactness; any omission is a defect of substance.[1] A mere literal variance, however, which does not affect the meaning, is not fatal; such, for instance, as the misspelling of a name, where the two forms are *idem sonantia.*

Where the words are obscene, it is held in this country that they need not be spread upon the records; it is enough to describe them in general terms, and explain the reason of omitting them.[2] In England, however, this is not allowed.[3]

The rule applies to spoken as well as to written words, where they are the *gist* of the offence. But where words complained of are not the *gist* of the offence but only the means of committing it, as in the case of a prosecution for threats, they need not be set out with technical accuracy.[4]

§ 108. **Contracts and Written Instruments.** — When it is material in the course of an indictment to allege the making or the existence of a contract, or of any written instrument, the writing or the contract must be set out exactly; and if it is an instrument that has a specific name, that name must be given to it, otherwise the indictment is repugnant, and fatally defective.[5]

§ 109. **Indictments upon Statutes.** — Where an indictment is brought for breach of a criminal statute,

[1] Bradlaugh *v.* Queen, 3 Q. B. Div. 607, 616, 617.

[2] Com. *v.* Holmes, 17 Mass. 336.

[3] Bradlaugh *v.* Queen, 3 Q. B. Div. 616.

[4] Com. *v.* Murphy, 12 All. (Mass.) 449; Com. *v.* Goodwin, 122 Mass. 19, 33.

[5] Com. *v.* Lawless, 101 Mass. 32.

it must conclude with the allegation that the act was against the form of the statute (*contra formam statuti*) in that case made and provided.[1] If the indictment states a common law crime, the allegation that it is *contra formam statuti* may be rejected as surplusage.[2] It is therefore always safe to conclude with that allegation.

Where the enacting clause of a criminal statute describes the offence and makes certain exceptions, it is necessary in the indictment to negative the exceptions; but where exceptions are contained in a separate clause or proviso, they need not be mentioned in the indictment.[3]

It is not always sufficient for the indictment to follow the language of the statute. As has been seen, the statute must be interpreted with relation to the common law; and may omit certain elements of the crime which the common law supplies.[4] Again, a certain specific intent is sometimes required in statutory crimes, though not mentioned in the statute. This intent must be alleged in the indictment. So where a statute forbade the removal of a human body from a grave, this was held to mean a removal for purposes of dissection, and that purpose must be alleged in the indictment;[5] and an indictment for keeping open shop on the Lord's day must allege that the shop was kept open for business.[6]

[1] Com. *v.* Springfield, 7 Mass. 9.

[2] Com. *v.* Reynolds, 14 Gray (Mass.) 87.

[3] United States *v.* Cook, 17 Wall. (U. S.) 168; Beasley *v* People, 89 Ill. 571; Jefferson *v.* People, 101 N. Y. 19; Com. *v.* Maxwell, 2 Pick. (Mass.) 139.

[4] United States *v.* Carll, 105 U S. 611.

[5] Com. *v.* Slack, 19 Pick (Mass.) 304.

[6] Com. *v.* Collins, 2 Cush. (Mass.) 556.

In many cases statutes have been framed with the evident purpose of extending to the realty that protection which the common criminal law extended to personalty. In these cases the indictment must show that the property alleged to have been interfered with was part of the realty. Thus, an indictment upon a statute forbidding the removal of gravel from land must allege that the gravel was part of the realty;[1] and where the statute forbids the malicious destruction of glass in a building, the indictment must allege that the glass was part of the building.[2]

§ 110. **Statutory Forms of Indictment.** — The legislature often prescribes a shortened and simplified form of indictment; and such action is often salutary, especially in the case of indictments for felony, where much useless verbiage has become or has seemed to be necessary. But care must be used that in shortening the form of indictment no necessary allegations are omitted; for, at least under our Constitutions, an indictment, though authorized by statute, is bad if every necessary element of crime is not stated in it. Thus, a statutory form of indictment is unconstitutional if it omits the allegation of a specific intent,[3] or if it charges the defendant with perjury before a certain court without alleging in what respect he swore falsely.[4] So it is unconstitutional to provide that one may be more heavily punished for a second offence, though

[1] Bates *v.* State, 31 Ind. 72.
[2] Com. *v.* Bean, 11 Cush. (Mass.) 414.
[3] State *v.* Learned, 47 Me. 426
[4] State *v.* Mace, 76 Me. 64

the former conviction is not alleged in the indictment.[1]

It is perfectly constitutional, however, to provide for a charge of crime by the use of its legal name, without a full description of it. So it is constitutional to indict one for committing perjury before a certain court by giving certain testimony, without alleging that the testimony was false; for perjury is necessarily false swearing.[2]

JOINDER OF COUNTS AND OFFENCES.

§ 111. **Duplicity.** — Only one crime must be stated in a single count. If the elements of more than one crime are included in a count, it is uncertain which crime is charged, and the accused cannot prepare his defence.[3]

Where, however, one or more smaller crimes are merged in a greater crime when the latter is committed, the indictment for the greater crime is not double because it states such elements of the smaller crimes as also exist in the greater. So an indictment for homicide may and must include a charge of assault and of battery; and an indictment for burglary may contain a charge of larceny, and must include one of attempt to commit larceny.[4]

Whether duplicity is a defect of form or of substance is doubtful. The better opinion seems to be that it is a defect of form only, and therefore that it cannot be taken advantage of after verdict. In some jurisdictions, however, it is held that where

[1] Com. *v.* Harrington, 130 Mass. 35.
[2] State *v.* Corson, 59 Me. 137.
[3] Rex *v.* Marshall, 1 Moo. C. C. 158.
[4] Com. *v.* Tuck, 20 Pick. (Mass.) 356.

the punishment for the two offences which are joined is different, duplicity is a fatal defect, even after verdict.[1]

§ 112. **Conviction of Lesser Offence.** — When the crime charged necessarily embraces a lesser offence as part and parcel of it, and the latter is described in the indictment with such distinctness that it would constitute a good separate indictment for that offence, the accused, under the indictment charging the greater and the lesser, may be found guilty of the latter. Thus, on an indictment for an assault with intent to murder, the assault being well charged, and the intent not being proved, the defendant may be found guilty of an assault. This was the common law when both offences were of the same grade, and is now the law by statute in England, and very generally in the United States, when the offences are of different grades.[2]

§ 113. **Joinder of Counts for same Offence.** — It is allowable for the pleader to state the same offence in different ways, in as many different counts to one indictment, even though the punishment is different, provided the counts are all for felony or all for misdemeanor.[3] At common law, two counts could not be joined in the same indictment where one was for a felony and the other for a misdemeanor; for the incidents of trial — as to challenges of jurors, for instance — were different in the two classes of crime. By statute, however, this has almost everywhere been

[1] Reed *v.* People, 1 Park. (N. Y.) 481; People *v.* Wright, 9 Wend. (N. Y.) 193.

[2] Regina *v.* Bird, 5 Cox C. C. 20; Com. *v.* Roby, 12 Pick. (Mass.) 496, 1 Bish. Cr. Law, 7th ed., § 809.

[3] Beasley *v.* People, 89 Ill. 571.

done away with, and felony and misdemeanor may be joined.[1]

When a trial is had on an indictment containing several counts for the same offence, a general verdict of guilty is good; or the defendant may be found guilty on one count and not guilty on the rest. He may not, however, be found guilty on two counts, and not guilty on others; for such a verdict would be inconsistent, and would make two offences out of one.[2]

A misjoinder of counts is cured by a verdict for the defendant on the counts improperly joined.[3] And where one of the counts is bad, a general verdict of guilty will stand, so long as there is a valid count to support it.[4]

§ 114. **Joinder of Offences.** — Two or more counts may be joined in the same indictment, even for different offences, provided they are of the same general nature, and subject to the same sort of punishment; and, in the absence of statute, provided they are all felonies or all misdemeanors.[5] This liberty is liable to abuse; for where a great number of offences are joined in a single indictment, too great a burden is put on the defendant in preparing his defence. There exists no remedy for this abuse, however, except the discretion of the court to order the prosecution to elect on which count or counts it

[1] So in Pennsylvania by the common law: Stevick *v.* Com., 78 Pa. 460

[2] Com. *v.* Fitchburg R. R. Co., 120 Mass. 372.

[3] Com. *v.* Chase, 127 Mass. 7.

[4] Claasen *v.* United States, 142 U. S. 140, and cases cited.

[5] Com. *v* Mullen, 150 Mass. 394; Com. *v.* O'Connell, 12 Allen (Mass) 451.

will proceed.[1] This is more often done in the case of felony than of misdemeanor. In fact, it seems to follow of course in England that the court, on request of the defendant, should compel an election in case of felony; but it is never a matter of course in a case of misdemeanor.[2]

§ 115. **Cumulative Sentence.** — Where an indictment charges different offences in different counts, the question of punishment is a difficult one. In England in such a case each count is held to be a separate charge of crime; and sentence is imposed upon each count, that on the second count to begin upon the termination of the sentence on the first count.[3] In New York, however, a cumulative sentence, where the punishment of each crime was imprisonment, was held void.[4] The argument on which this decision is based would seem to hold equally good where the punishments are all fines; yet every court would probably hold it proper to impose a separate fine on each count of an indictment. The English decision would seem to be supported by the most valid arguments.

§ 116. **Joinder of Defendants.** — Where two or more join in the commission of a crime, each may be separately indicted, or all may be joined in a single indictment; and in that case they may be tried together, and one found guilty while another is acquitted.[5] The defendants must, however, all be

[1] Com. *v.* Mullen, 150 Mass. 394, 397.
[2] Castro *v.* Queen, 6 App. Cas. 229, 244.
[3] Castro *v.* Queen, 6 App. Cas. 229.
[4] People *v.* Liscomb, 60 N. Y. 559.
[5] 2 Hawk. P. C., c. 25, § 89.

guilty of the same offence; therefore, all must be principals or all accessories.

It lies in the discretion of the court, where two defendants are jointly indicted, to try them separately; and a defendant cannot object to the exercise of this discretion, or the refusal to exercise it.[1]

DOUBLE JEOPARDY.

§ 117. **No One Twice to be put in Jeopardy.** — It is a well settled and most salutary principle of criminal law that no person shall be put upon trial twice for the same offence. This old doctrine of the common law has found its way into the Constitution of the United States, and into that of most or all of the States, in different forms of expression, substantially that no person shall be put twice in jeopardy of life or limb for the same offence. The meaning of this is, that when a person has been in due form of law put upon trial upon a good and sufficient indictment, and convicted or acquitted, that conviction or acquittal may be pleaded in bar to a subsequent prosecution, within the same jurisdiction, for the same offence.[2] And even if the indictment be insufficient and the proceedings be irregular, so that a judgment thereupon might be set aside upon proper process, yet if the sentence thereunder has been acquiesced in by and executed upon the convict, such illegal and voidable judgment constitutes a good plea in bar.[3] So if the prisoner be sentenced to an illegal punishment, — as, for instance, to fine and imprison-

[1] 1 Bish. Crim. Proc., 3d ed., § 1018

[2] United States *v.* Gibert, 2 Sumn. (U. S. C. Ct.) 19.

[3] Com. *v.* Loud, 3 Met. (Mass.) 328.

ment, where the law authorizes only one,— after part execution of either, he cannot afterwards, upon a revision of the sentence, even during the same term of court, be punished by the imposition of the lawful punishment.[1]

The trial and jeopardy begin when the accused has been arraigned and the jury empanelled and sworn.[2]

Though from the words "jeopardy of life or limb" it has been contended that the rule is applicable, where such words or their equivalent are used, only to such crimes as are punished by injury to life or limb, yet it is very generally, if not universally, held by the courts that it is applicable to all grades of offences.[3] It is not only for the interest of society that there should be an end of controversy, but it is a special hardship that an individual should be indefinitely harassed by repeated prosecutions for the same offence. Where, however, the same act constitutes two offences, there may be a punishment for each offence.[4] But if the same act is made an offence by two statutes, creating different offences in name but designed to prevent the same crime, the offender cannot be convicted under both statutes.[5]

§ 118. So firmly is this doctrine established, that the government will not be allowed to institute a second prosecution, or put the prisoner to a new trial, even though his acquittal is consequent upon

[1] *Ex parte* Lange, 18 Wall. (U. S.) 163, Clifford and Strong JJ., dissenting.

[2] Com. *v.* Tuck, 20 Pick. (Mass.) 356; Bryans *v.* State, 34 Ga. 323; Ferris *v* People, 48 Barb (N. Y.) 17.

[3] 1 Bish. Cr Law, § 990.

[4] State *v.* Inness, 53 Me 536; Com. *v.* McShane, 110 Mass. 502.

[5] Wemyss *v.* Hopkins, L. R. 10 Q. B 378.

the judge's mistake of law, or the jury's disregard of fact. If, however, he be convicted by a misdirection of the judge in point of law, or misconduct on the part of the jury, he may by proper process have the verdict set aside; in which case, the trial not having been completed, and the verdict having been set aside at his request, the accused may be again set to the bar.[1]

To give the accused, therefore, a good plea that he has once been put in jeopardy, it must appear that he was put upon trial in a court of competent jurisdiction, upon an indictment upon which he might have been lawfully convicted of the crime charged, and before a jury duly empanelled, and that, without fault on his part, he was convicted or acquitted, or that, if there was no verdict, the jury were unlawfully discharged. And the jury may be discharged before verdict is rendered when, in the judgment of the court, there is a clear necessity therefor, or the ends of justice will otherwise be defeated; as where the term of court expires before a verdict is reached; or the jury, after sufficient deliberation, of which the court is the judge, cannot agree; or the trial is interrupted by the sickness or death of judge or juror; or the jury is discharged by the consent of the prisoner.[2] So much of the learned opinion of

[1] Regina *v.* Drury, 3 Car. & K. 193; Regina *v.* Deane, 5 Cox C. C. 501; People *v.* M'Kay, 18 Johns. 212; Com. *v.* Green, 17 Mass. 515; Com. *v.* Sholes, 13 All. (Mass.) 554.

[2] See *Ex parte* Lange, 18 Wall. (U. S.) 163; Regina *v.* Bird, 5 Cox C. C. 20; Com. *v.* Roby, 12 Pick. (Mass.) 496; Guenther *v* People, 24 N Y. 100; Hines *v.* State, 24 Ohio St. 134; State *v.* Jefferson, 66 N. C. 309, State *v.* Wilson, 50 Ind. 487; State *v.* Vaughan, 29 Iowa, 286; McNeil *v.* State, 47 Ala. 498; Simmons *v* United States, 142 U S. 148.

Judge Story, in United States *v.* Gibert,[1] as holds that no new trial can be had in cases of felony, is now generally, if not universally, regarded as unsound law.[2] If the accused procure a conviction by fraud, it will not avail him as a plea in bar, this being, within the above rule, by his fault.[3] So if, after a trial, the prisoner fails to appear when the jury return with their verdict, and no verdict is rendered, no trial is completed, and the accused may be put on trial again. And if the court before whom the accused was formerly tried had no jurisdiction, there has been no jeopardy.[4]

§ 119. **Prosecution by another Sovereignty.** — The rule does not protect from prosecution by another sovereignty, if the same act is a violation of its law, as the laws of a country, and especially the criminal laws, have no extra-territorial efficacy. If, therefore, one sovereignty has punished an act which was also a violation of the law of another sovereignty, the latter has the right, in its discretion, also to punish the act.[5] Doubtless, however, in such case, the fact of prior punishment would have great weight in determining whether the guilty party should be again punished at all, or, if punished, to what degree.[6]

[1] 2 Sumner C. Ct. 19.

[2] *Ex parte* Lange, *ubi supra,* dissenting opinion of Clifford, J.

[3] Com. *v.* Dascom, 111 Mass. 404, State *v.* Cole, 48 Mo. 70; State *v.* Lowry, 1 Swan (Tenn.) 34; State *v.* Battle, 7 Ala. 259; Com. *v* Alderman, 4 Mass. 477.

[4] Com. *v.* Peters, 12 Met. 387; Regina *v.* Bowman, 6 C. & P. 337; People *v.* Barrett, 1 Johns. 66.

[5] State *v.* Brown, 1 Hayw. (N. C.) 100; United States *v.* Amy, 14 Md. 149, n.; Com. *v.* Green, 17 Mass. 515, Phillips *v.* People, 55 Ill. 429; *ante,* § 83.

[6] United States *v* Amy, 14 Md. 149, n.

It has been said by high authority,[1] that a conviction under one sovereignty of piracy, which is an offence against all sovereignties, would doubtless be recognized in all other civilized countries as a good plea in bar to a second prosecution. When there are two sovereignties having jurisdiction within the same geographical limits, there can be no doubt that one act may constitute a crime against both, and be punishable by both. Thus, an assault upon an officer of the United States, while acting in the discharge of his duty within the limits of a State, may be punished by the State as an assault, and by the United States as an assault upon its officer in the discharge of his duty, — a higher offence.[2] So it has been held that the same act may be a violation of a city charter and the penal law of the State.[3] But the better view seems to be that in such a case there is only one offence, and can be but one punishment.[4]

§ 120. **What is the same Offence.** — Where there has been an acquittal for variance, a new indictment will lie, in which the crime is correctly described. The two offences are not identical.[5] So where formerly the venue was wrongly stated;[6] or the property alleged to have been injured was wrongly described;[7] or a murder was alleged to have been committed by shooting, where the evidence showed it was done by

[1] United States *v.* Pirates, 5 Wheat. (U. S.) 184.
[2] Moore *v.* Illinois, 14 How. (U. S.) 13.
[3] Ambrose *v.* State, 6 Ind. 351.
[4] State *v.* Thornton, 37 Mo 360; Preston *v.* People, 45 Mich. 486.
[5] Com. *v.* Chesley, 107 Mass. 223.
[6] Com. *v.* Call, 21 Pick. (Mass.) 509.
[7] Com. *v.* Wade, 17 Pick. (Mass.) 395.

beating.[1] The same is true where the act is described as a different crime, having been wrongly described before; as where one acquitted of larceny is indicted for receiving stolen goods,[2] or one acquitted of a crime as principal is indicted as accessory.[3] The test is this: whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction.[4]

§ 121. **Prior Conviction of less Degree of same Offence.** — Where one is tried on an indictment consisting of several counts, and is acquitted on some counts and convicted on others, and secures a new trial, he cannot again be tried on those counts on which he has been acquitted.[5] Where he is found guilty of a less degree of crime than that charged, as when on an indictment for murder he is found guilty of manslaughter, and secures a new trial, he cannot, according to the weight of authority, be again convicted of a higher crime than that of which he was formerly convicted; for conviction of the lower crime involves an acquittal of the higher.[6]

§ 122. **Greater or Less Offence.** — As to the effect of a former acquittal of an offence which includes, or is part of, another offence, there is some confusion,

[1] Guedel *v.* People, 43 Ill. 226.

[2] Com. *v.* Tenney, 97 Mass. 50.

[3] Rex *v.* Plant, 7 C. & P. 575; Reynolds *v.* People, 83 Ill. 479.

[4] 2 East P. C. 522; 1 Bish. Crim. Law, 7th ed., § 1052; Rex *v.* Taylor, 3 B. & C. 502; United States *v.* Nickerson, 17 How. (U. S.) 204.

[5] State *v.* Kattlemann, 35 Mo. 105.

[6] Slaughter *v.* State, 6 Humph. (Tenn.) 410; State *v.* Belden, 33 Wis. 120. *Contra*, State *v.* Behimer, 20 Ohio St. 572. See the authorities collected, Wharton, Crim. Plead., 9th ed., § 465.

not to say difference, amongst the authorities. But the following is believed to be a fair statement of the result. Where a person has been tried for an offence which necessarily includes one or more others of which he might have been convicted under the indictment, he cannot be afterwards tried for either of the offences of which he might have been convicted under the indictment on which he was tried.[1] Thus, if the trial is upon an indictment for assault and battery, it cannot be afterwards had upon an indictment for an assault. On an indictment for an offence which is part and parcel of a greater, a previous trial for the lesser is not a bar to a subsequent trial for the greater, unless some decisive fact is necessarily passed upon under the first indictment, in such a way as to amount to an effectual bar to the second.[2] A conviction or acquittal, in order to be a bar to a subsequent prosecution in such a case, must be for the same offence, or for an offence of a higher degree, and necessarily including the offence for which the accused stands a second time indicted. Thus, a conviction under an indictment for assault is no bar to an indictment for assault with intent to rob, because the prisoner has never been tried on an indictment which involves an issue conclusive upon the second charge. On the other hand, if one be acquitted on an indictment for manslaughter, he cannot afterwards be tried for murder, because the acquittal necessarily involves the finding the issue of killing, whether with or without malice, in

[1] Regina *v.* Gould, 9 C. & P. 364; People *v.* M'Gowan, 17 Wend. (N. Y.) 386.

[2] Regina *v.* Bird, 5 Cox C. C. 20.

favor of the defendant.[1] And this would be true, even if the judge should discharge the jury on the ground that the proof made the case one of murder.[2] And the same is true where the prisoner was formerly tried for a less serious degree of larceny or of house-burning than that now charged.[3] The offence is the same if the defendant might have been convicted on the first indictment by proof of the facts alleged in the second. The question is not whether the same facts are offered in proof to sustain the second indictment as were given in evidence at the trial of the first, but whether the facts are so combined and charged in the two indictments as to constitute the same offence. It is not sufficient that the facts on which the two indictments are based are the same. They must be so alleged in both as to constitute the same offence in degree and kind.[4]

A conviction or acquittal on a charge of larceny of one of several articles, all stolen at the same time, is a good plea in bar of any subsequent prosecution for the larceny of either or all of the other articles.[5]

[1] State *v.* Foster, 33 Iowa, 525; Scott *v.* United States, Morris, 142.

[2] People *v.* Hunckeller, 48 Cal. 331. See also upon the general subject, as involving the different views of different courts, Com. *v.* Hardiman, 9 Allen (Mass.) 487; State *v.* Nutt, 28 Vt. 598; State *v.* Inness, 53 Me. 536; Roberts *v.* State, 14 Ga. 8; Wilson *v.* State, 24 Conn. 57; State *v.* Pitts, 57 Mo. 85; State *v.* Cooper, 1 Green (N. J.) 361; and 1 Bish. Cr. Law, c. 63, where the whole subject is treated with great fulness.

[3] Com. *v.* Squire, 1 Met. (Mass.) 258.

[4] Com. *v.* Clair, 7 Allen (Mass.) 525; People *v.* Warren, 1 Park. (N. Y.) C. R. 338; Rex *v.* Vandercomb, 2 Leach (4th ed.) 708; Durham *v.* People, 4 Scam. (Ill.) 172.

[5] Jackson *v.* State, 14 Ind. 327. See also Guenther *v.* People, 24 N. Y. 100; Fisher *v.* Com., 1 Bush (Ky.) 211.

An exception, however, exists in the case of murder. Where the prisoner was formerly tried for an assault, and convicted, if the party assaulted afterwards dies from the assault, the prisoner may be tried for the murder, and his former jeopardy will not avail him.[1] And an acquittal of an assault with intent to kill the party who afterwards dies from the assault will not necessarily protect the accused, since murder may be committed without any intent to kill, and even without a criminal assault.[2]

§ 123. **Practice.** — If a plea of former acquittal or conviction to an indictment for a misdemeanor be found, on replication or demurrer, against the prisoner, he might be sentenced without a trial for the offence itself;[3] but upon the decision against the prisoner in such a case, on an indictment for felony, he might answer over, and have his trial upon the merits. This is not, however, the rule in this country, where the prisoner is usually allowed to have his trial in both cases, as a matter of right, if in his plea he reserves the right to plead over.[4] In Tennessee, it has been said to be a matter of discretion with the court.[5]

EVIDENCE IN CRIMINAL CASES.

§ 124. **Burden of Proof.** — The rules of evidence applicable in criminal cases are substantially the

[1] Regina *v.* Morris, 10 Cox C. C. 480; State *v.* Littlefield, 70 Me. 452; Com. *v.* Roby, 12 Pick. (Mass.) 496.

[2] Regina *v.* Salvi, 10 Cox C. C. 481, *n.*

[3] Regina *v.* Bird, 2 Eng. L. & Eq. 530; s. c. 5 Cox C. C. 20.

[4] Com. *v.* Goddard, 13 Mass. 455; Barge *v.* Com., 3 P. & W. (Pa.) 262; Ross *v.* State, 9 Mo. 696; State *v.* Dresser, 54 Me. 569; United States *v.* Conant, C. Ct. Mass., Sept., 1879.

[5] Bennett *v.* State, 2 Yerg. 472.

same as in civil cases, with the single exception that in a criminal case every essential allegation made by the prosecution must be proved beyond a reasonable doubt, in order to entitle the government to a verdict. If upon all the evidence introduced by the government and by the accused there results a reasonable doubt upon any essential allegation in the indictment or complaint, the criminal is entitled to an acquittal. Upon all these issues, therefore, he has only to raise a reasonable doubt. When, however, the accused sets up in defence a distinct and independent fact, not entering into these issues, he must prove it by a preponderance of evidence. Thus, if the defence be insanity, the better view is, that, since it is a part of the case of the prosecution that the accused was sane, it is necessary for the accused to produce, or that there should appear in the case upon all the evidence introduced, only so much evidence of insanity as to induce a reasonable doubt on the issue, in order to secure his acquittal. If, on the other hand, the defence be a former acquittal, since this is a new, distinct, and independent fact, in no way embraced in the allegations of the prosecution, the accused assumes the burden of proof, and must establish the fact by a preponderance of evidence. In civil cases, each party takes the burden of proof of the facts alleged essential to make out his case, and may establish them by a preponderance of proof.[1] Criminal cases to which the rule of proof beyond reasonable doubt applies are such only as are

[1] See 1 Greenl. Ev. (13th ed.), §§ 81 *a*, 81 *b*; 2 Greenl. Ev., § 29, n.; Steph. Dig. of the Law of Ev. (May's ed.), p. 40, n.; 10 Am. L. Rev., p. 642 et seq.; Kane *v.* Hibernia Ins. Co., 10 Vroom (N. J.) 697.

criminal in form, and cognizable by a court administering the criminal law. If the question whether a crime has been committed arises in a civil case, tried by a court administering the civil, as contradistinguished from the criminal law, the rule of evidence applicable in the civil courts prevails. Thus, in an indictment for an assault, the prosecution must prove the assault beyond a reasonable doubt; while, in a civil action for damages for the same assault, the plaintiff is only required to prove it by a preponderance of evidence.

The general test of a criminal case is that it is by indictment, and of a civil case that it is by action. But the decisions upon this point are not uniform.[1]

§ 125. **Doubt as to Interpretation.** — If it be fairly doubtful whether the crime charged comes within the purview of a statute, it has been frequently said, the prisoner is entitled to the benefit of the doubt.[2] But it has also been held that it is not the duty of the court to instruct the jury that, if they have a reasonable doubt as to the law or the applicability of the evidence, they must give the prisoner the benefit of the doubt.[3] And perhaps it is only a court of last resort, if any, which should give the prisoner that benefit.[4]

It is, however, a universal rule of construction, that all penal and criminal laws shall be construed strictly in favor of the life, liberty, and property of the citizen.[5]

[1] The cases are very fully collected in 1 Bish. Cr. Law, §§ 32, 33.

[2] United States *v.* Whittier, Dillon, J., 6 Reptr. 260, and cases there cited.

[3] O'Neil *v.* State, 48 Ga. 66.

[4] Cook *v.* State, 11 Ga. 53.

[5] Com. *v.* Barlow, 4 Mass. 439.

§ 126. **Corpus Delicti.** — There must be clear proof of the *corpus delicti*, that is, of the fact that a crime has been committed.[1] Were this not required, the danger of conviction in cases where no crime had in fact been committed would be great. But this fact, like any other, may be proved, by a proper amount of circumstantial evidence;[2] it must, however, be so proved beyond reasonable doubt.[3]

§ 127. **Testimony of Defendant.** — At common law the defendant was not allowed to testify in his own behalf. This has been changed in this country by statute, and a defendant may if he chooses testify on his own behalf. By all our Constitutions, however, a witness cannot be compelled to testify against himself; consequently the prosecution cannot call upon the defendant to take the stand.

It is provided in some States that, if the accused does not testify, no inference can be drawn against him. Even where this provision is not made, it would seem unfair to draw such an inference, especially in view of the constitutional provision.[4] It has however been held in such a case that the refusal of the accused to testify may be used against him.[5]

If the accused goes on the stand, the better view is that he has waived his constitutional privilege, and may be compelled to answer any questions pertinent

[1] 2 Hale P. C. 290; Best, Evid. (Chamberlayne's ed.), § 441; Rex *v.* Burdett, 4 B. & Ald. 95, 123, 162; State *v.* Davidson, 30 Vt. 377; Willard *v.* State, 27 Tex. App. 386; People *v.* Palmer, 109 N. Y. 110.

[2] Stocking *v.* State, 7 Ind. 326; United States *v.* Williams, 1 Cliff C. C. 5; State *v.* Cardelli, 19 Nev. 319.

[3] Lee *v.* State, 76 Ga. 498; Gray *v.* Com., 101 Pa. 380.

[4] People *v.* Tyler, 36 Cal. 522.

[5] State *v.* Bartlett, 55 Me. 200.

to the issue,[1] though not questions which are asked merely to affect the credibility of the witness.[2] Some authorities, however, hold that a defendant who has become a witness can claim his privilege at any time, though if he does so unfavorable inferences may be drawn.[3]

If the evidence of the defendant is weak and unsatisfactory, the same inferences may be drawn as in the case of any witness.[4]

§ 128. **Confessions.** — The genius of the common law looks with disfavor upon any attempt to prove one guilty of crime by his own testimony; and even a confession of guilt by the accused is received in evidence only under certain conditions. The confession must be entirely voluntary. If it was made under duress, or by reason of a threat or promise of favor by one in authority, it is not admissible.[5] Such confessions are not rejected because of the breach of faith, but because a confession gained by such means is untrustworthy.[6] It must appear, therefore, that the confession was induced by the threat or promise, and, it would seem, that the circumstances were such that the accused would be likely to tell an untruth from fear or hope induced by those in authority.[7]

[1] Com. *v.* Nichols, 114 Mass. 285; Com. *v.* Tolliver, 119 Mass. 312; Connors *v.* People, 50 N. Y. 240.

[2] People *v.* Brown, 72 N. Y. 571.

[3] Cooley, Const. Limit., *317.

[4] Stover *v.* People, 56 N. Y. 315.

[5] Warickshall's Case, 1 Leach C. C. 263.

[6] Regina *v.* Baldry, 2 Den. C. C. 430; Com. *v.* Knapp, 9 Pick. (Mass.) 495.

[7] Regina *v.* Jarvis, L. R. 1 C. C. 96; Regina *v.* Reeve, L. R. 1 C. C. 362; Com. *v.* Cuffee, 108 Mass. 285.

It seems to be doubtful whether court or jury is to decide on the question of threat or promise. As a question involving the admissibility of evidence, it would seem more properly to be a question for the court;[1] but it is often held that the question should be left to the jury.[2]

If the confession was in fact voluntarily made, it is admissible, though given without any reference to the present proceedings, and even under a misapprehension. Thus, testimony voluntarily given at a fire inquest,[3] or at a former trial,[4] is admissible; and so is a confession made to officers who had arrested the accused illegally.[5] And this is true, although the confession was made without knowledge of the constitutional rights of an accused, and without advice of counsel.[6]

If one receives a confession while pretending to be an officer, but in fact is not in authority, the better view would seem to be that the confession is admissible. So if a man's confession is overheard, or is obtained by a private person by cheat or drunkenness, it may be used.[7] And if in consequence of an inadmissible confession other evidence is discovered, as, for instance, if the weapon with which a murder was committed is found, such evidence may be introduced.[8]

The rule as to confessions does not apply to admis-

[1] Ellis *v.* State, 65 Miss. 44; Biscoe *v.* State, 67 Md. 6.
[2] Com. *v.* Piper, 120 Mass. 185.
[3] Com. *v.* Bradford, 126 Mass. 42.
[4] Com. *v.* Reynolds, 122 Mass. 454
[5] Balbo *v.* People, 80 N. Y. 484.
[6] State *v.* Garrett, 71 N. C. 85.
[7] Com. *v.* Howe, 9 Gray, 110.
[8] Com. *v.* James, 99 Mass. 438; State *v.* Garrett, 71 N. C. 85.

sions from conduct. Evidence of the conduct of the accused is always receivable; such, for instance, as the flight of the defendant,[1] or silence of the accused when damaging statements are made under such circumstances as call for denial.[2]

An uncorroborated confession is not enough to justify a conviction. The *corpus delicti*, or fact that a crime has been committed, must be at least plausibly shown by other evidence.[3]

§ 129. **Evidence of Character.** — The character of the accused cannot be shown in evidence by the prosecution;[4] but the defendant may introduce evidence of his own good character, which then may be controverted by the prosecution.[5] It has been sometimes said that proof of the good character of the defendant is available only in doubtful cases; but the better opinion is that it may be shown in any case, the weight of it being for the jury.[6] Character is to be proved by general reputation, not by special instances of good or bad conduct.[7]

In certain cases of offences against women, the woman's character for chastity may be shown, as bearing on the question of consent.[8]

[1] People *v.* Stanley, 47 Cal. 113 (*semble*).

[2] Kelley *v.* People, 55 N. Y. 565.

[3] Ruloff *v.* People, 18 N. Y. 179; State *v.* German, 54 Mo. 526; s. c. 14 Amer. Rep. 483, 486, n.; Matthews *v.* State, 55 Ala. 187; Gray *v.* Com., 101 Pa. 380.

[4] People *v.* Greenwall, 108 N. Y. 296.

[5] Com. *v.* Webster, 5 Cush. (Mass.) 295, 324.

[6] State *v.* Northrup, 48 Iowa, 583, and cases cited; State *v.* Daley, 53 Vt. 442; Com. *v.* Leonard, 140 Mass. 473.

[7] Com. *v.* O'Brien, 119 Mass. 342; State *v.* Bloom, 68 Ind. 54; People *v.* Greenwall, 108 N. Y. 296.

[8] Woods *v.* People, 55 N. Y. 515; Com. *v.* Kendall, 113 Mass. 210; State *v.* Reed, 39 Vt. 417.

§ 130. **Testimony of Accomplice.** — It is sometimes urged that a defendant should not be convicted upon the testimony of an accomplice without corroboration.[1] This, however, is not a rule of law. It is entirely within the discretion of the court whether it will caution the jury in this way; and a refusal so to do is no matter of exception.[2] The practice in England is more uniform in felonies than in misdemeanors, in which latter case it is sometimes refused.[3] In Georgia the rule is made applicable only in felonies.[4] But a conviction on the uncorroborated evidence of an accomplice is good at common law. The principle which allows the evidence to go to the jury at all necessarily involves the right to believe and act upon it.[5] But by statute in Iowa and Texas, and perhaps other States, there must be corroboration.[6]

§ 131. **Fresh Complaint.** — In rape cases, evidence is admissible that the woman made complaint of the ill usage as soon as she was able to do so; but not, in most jurisdictions, the particulars of the complaint.[7]

[1] See *ante*, § 76.

[2] State *v.* Litchfield, 58 Me. 267; Smith *v.* State, 37 Ala. 472.

[3] McClory *v.* Wright, 10 Ir. Com. Law, 514; 1 Greenl. Ev., § 382, n.

[4] Parsons *v.* State, 43 Ga. 197.

[5] Com. *v.* Bosworth, 22 Pick. (Mass.) 397; People *v.* Costello, 1 Denio (N. Y.) 83; United States *v.* Kessler, 1 Bald. C. Ct. 15; State *v.* Wolcott, 21 Conn. 272; Dawley *v.* State, 4 Ind. 128; State *v.* Prudhomme, 25 La. Ann. 522; State *v.* Hyer, 39 N. J. L. 598; Linsday *v.* People, 63 N.Y. 143; Hamilton *v.* People, 29 Mich. 173; Com. *v.* Holmes, 127 Mass. 424; s. c. 34 Amer. Rep. 391, 408, n.; Kilrow *v.* Com., 89 Pa. 480; State *v.* Holland, 83 N. C. 624; Collins *v.* People, 98 Ill. 584. *Contra*, People *v.* Ames, 39 Cal. 403.

[6] State *v.* Moran, 34 Iowa, 453; Lopez *v.* State, 34 Tex. 133; Smith *v.* State, 37 Ala. 472.

[7] Regina *v.* Walker, 2 M. & R. 212.

In some States, however, all the particulars of the complaint are allowed to be given in corroboration.[1]

§ 132. **Dying Declarations.** — In trials for homicide, declarations of the deceased made in contemplation of death are admissible to prove the circumstances of the killing, in favor of the prisoner as well as against him.[2] The declaration must be a statement of fact,[3] and it must appear that the deceased was conscious that he was at the point of death.[4] If he was so conscious, the declaration is admissible, though in fact he lived several days;[5] and if not so conscious, it is inadmissible, though he died at once.[6]

[1] State *v.* Kinney, 44 Conn. 153.

[2] Regina *v.* Scaife, 1 Moo. & R. 551.

[3] People *v.* Shaw, 63 N. Y. 36; Collins *v.* Com., 12 Bush (Ky.) 271; Whart. Crim. Ev., § 294.

[4] Sullivan *v.* Com., 93 Pa. 284; Com. *v.* Casey, 11 Cush. (Mass.) 417; State *v.* Wagner, 61 Me. 178.

[5] Com. *v.* Cooper, 5 All. (Mass.) 495.

[6] Regina *v.* Jenkins, L. R. 1 C. C. 187.

CHAPTER III.

OFFENCES AGAINST THE GOVERNMENT.

§ 134. Treason.
140. Bribery.
141. Extortion and Oppression.
143. Barratry. — Champerty. — Maintenance.
146. Embracery.
147. Perjury.
154. Contempt.
159. Rescue. — Escape. — Prison Breach.

§ 133. **Introductory.** — In the following chapters, the more important offences will be considered more at large. It is to be borne in mind that there is no sharply defined line between criminal and merely civil offences; the difference is only one of degree. There is no limit to the number of crimes. Those that will be described are only a few, which from their more frequent occurrence or their greater importance it has become possible to define with exactness.

The first class of crimes consists of offences against the public in its corporate capacity; against the government itself, or some department of it. The most heinous crime of this sort is treason. Other important crimes are bribery, extortion, and oppression; offences against justice, such as barratry, champerty, and maintenance, embracery, perjury, and contempt; and prison breach and kindred crimes.

TREASON.

§ 134. At common law there are two kinds of treason: first, disloyalty to the King, or a violation of the allegiance due him, which was of the highest obligation, and hence called *high* treason; and, secondly, a violation of the allegiance or duty owed by an inferior to a superior, as of a wife to the husband, a servant to his master, or an ecclesiastic to his lord or ordinary, — either of which inferiors, if they should kill their superior, were held guilty of *petit* treason.[1] There is now, however, neither in England nor in this country any such classification of treasons, — *petit* treasons being everywhere punished as homicides.

§ 135. **Definition.** — By the ancient common law, the crime of treason was not clearly defined, whence arose, according to the arbitrary discretion of the judges and the temper of the times, a great number of modes by which it was held treason might be committed, not important to be here detailed. The inconvenience of such uncertainty as to the law led to the enactment of the Stat. 25 Edw. III. c. 2, which, confirmed and made perpetual by the 57th Geo. III. c. 6, defines the law of England upon the subject, enumerating a large number of specific acts which may constitute the offence. Only two of these, however, are treasonable in this country.[2]

By the Constitution of the United States,[3] treason is declared to consist only "in levying war against

[1] 4 Bl. Com. 75; Respublica *v.* Chapman, 1 Dall. (Pa.) 53.

[2] Stephen's Dig. Cr. Law, art. 51 et seq.

[3] Art. 3, § 3.

them, or in adhering to their enemies, giving them aid and comfort"; and this must be by a person owing allegiance to the United States.[1] Substantially the same definition is adopted by the several States, some of them, however, setting out, either in their constitutions or the statutes, at some length, the particular methods of adhesion and of giving aid and comfort which shall constitute treason.

§ 136. **War may be Levied,** not only by taking arms against the government, but under pretence of reforming religion or the laws, or of removing evil counsellors, or other grievances, whether real or pretended. To resist the government forces by defending a fort against them is levying war, and so is an insurrection with an avowed design to put down all enclosures, all brothels, or the like; the universality of the design making it a rebellion against the State and a usurpation of the power of government. But a tumult, with a view to pull down a particular house or lay open a particular enclosure, amounts at best to riot, there being no defiance of public government.[2] An insurrection to prevent the execution of an act of Congress altogether, by force and intimidation, is levying war;[3] but forcible resistance to the execution of such an act for a present purpose, and not for a purpose of a public and general character, does not amount to treason;[4] nor

[1] As to what constitutes allegiance, see 2 Kent Com. (12th ed.), p. 39 et seq.

[2] 4 Bl. Com. 81, 82; *post*, §§ 165, 166.

[3] United States *v.* Mitchell, 2 Dall. (Pa.) 348.

[4] United States *v.* Hoxie, 1 Paine C. Ct. 265; United States *v.* Hanway, 2 Wall. Jr. C. Ct. 139.

does the mere enlistment of men into service.[1] There must be, to constitute an actual levy of war, an assemblage of persons met for a treasonable purpose, and some overt act done, or some attempt made by them, with force, to execute, or towards executing, that purpose. There must be a present intention to proceed to the execution of the treasonable purpose by force. The assembly must be in a condition to use force, if necessary, to further, or to aid, or to accomplish their treasonable design. If the assembly is arrayed in a military manner for the express purpose of overawing or intimidating the public, and to attempt to carry into effect their treasonable designs, that will, of itself, amount to a levy of war, although no actual blow has been struck or engagement has taken place.[2] So, aiding a rebellion by fitting out a vessel to cruise against the government rebelled against in behalf of the insurgents, is levying war, whether the vessel sails or not.[3] So is a desertion to, or voluntary enlistment in, the service of the enemy.[4]

In England, "levying war" is held to mean:— 1st. Attacking, in the manner usual in war, the Queen herself or her military forces, acting as such by her orders in the execution of their duty; 2d. Attempting by an insurrection, of whatever nature, by force or constraint, to compel the Queen to change her measures or counsels, or to intimidate or overawe

[1] *Ex parte* Bollman, 4 Cranch (U. S.) 75.

[2] Burr's Trial, 401. See also 14 Law Reporter, p. 413.

[3] United States *v.* Greathouse, 2 Abb. C. Ct. 364.

[4] United States *v.* Hodges, 2 Wheeler's Cr. Cas. 477; Roberts's Case, 1 Dall. (Pa.) 39; McCarty's Case, 2 Dall. (Pa.) 86.

both Houses or either House of Parliament; and, 3d. Attempting, by an insurrection of whatever kind, to effect any general public object. But an insurrection, even conducted in a warlike manner, against a private person, for the purpose of inflicting upon him a private wrong, is not levying war, in a treasonable sense.

Adhering to the Queen's enemies is held to be active assistance within or without the realm to a public enemy at war with the Queen. Rebels may be public enemies, within the meaning of the rule.[1]

§ 137. **Who may Commit.** — Treason involves a breach of allegiance; a foreigner not in the country cannot therefore be guilty of the crime. But even an alien owes allegiance to the laws of the country in which he is, and is bound to abide by them. He may therefore be guilty of treason by giving aid and comfort to an enemy of that country.[2]

§ 138. **Misprision of Treason** is the concealment, by one having knowledge, of any treason committed or (in some of the States) contemplated, or the failure to make it known to the government.[3]

§ 139. **Evidence.** — The rule is incorporated into the Constitution of the United States, and into those of most of the States, that treason can only be proved by the evidence of two witnesses to the same overt act, or by confession in open court. Unless the overt act is so proved, all other evidence is irrelevant.[4] But an overt act being proved by two wit-

[1] Stephen's Dig. Cr. Law, arts. 53 and 54.

[2] Carlisle *v.* United States, 16 Wall. 147.

[3] See the Constitutions and statutes of the several States.

[4] United States *v.* Burr, 4 Cranch, 493.

nesses, all other requisite facts may be proved by the testimony of a single witness.[1]

The common law rule was that there must be two witnesses; but it was held sufficient if one testified to one overt act, and another to another. And this may be the rule now in those States whose constitutions or statutes do not contain the explicit language of the Constitution of the United States.[2] The ordinary rules of evidence generally prevail in the proof of misprisions.[3]

A confession not in court may be proved by the testimony of one witness, as corroborating other testimony in the case; but in those States prohibiting conviction unless upon confession in open court, it cannot be made the substantive ground of conviction.[4]

BRIBERY.

§ 140. **Bribery** is a misdemeanor at common law,[5] and has generally been defined as the offering or receiving any undue reward to or by any person whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and induce him to act contrary to the known rules of honesty and integrity.[6] But in more modern times the word has received a much broader interpretation, and is now held to mean the corruptly offering, soliciting, or receiving

[1] United States *v.* Mitchell, 2 Dall. (Pa.) 348.

[2] Stat. 7 Will. III. c. 3, § 2; R. S. New York, vol. ii. p. 890, § 15; 3 Greenl. Ev., § 246, and notes.

[3] 3 Greenl. Ev., § 247.

[4] Roberts's Case, 1 Dall. (Pa.) 39; McCarty's Case, 2 Dall. (Pa.) 86.

[5] 1 Hawk. P. C., bk. 1, c. 67, § 6.

[6] Coke, 3d Inst. 145; 3 Greenl. Ev., § 71.

of any undue reward as a consideration for the discharge of any public duty. Strictly speaking, an offer to give or receive a bribe is only an attempt,[1] and the receipt of a bribe is the consummated offence. But as long ago as 1678 a standing order of the House of Commons made it bribery as well to offer as to receive, and so at the present day either the offering or receiving is held to constitute the offence.

By undue reward is meant any pecuniary advantage, direct or indirect, beyond that naturally attached to or growing out of the discharge of the duty. Thus, voting is a public duty, and though no compensation is allowed, yet by the exercise of the right one may promote the public welfare, and thus indirectly his own. But if he sells or promises to sell his vote in consideration of any other private reward, it is an abuse of the trust, and an indictable offence;[2] as where A. votes for B. for one office, in consideration of B.'s vote for A. for another.[3] And bribery even of a member of the nominating convention of a political party seems criminal at common law.[4] And the buying or promising to buy the vote is equally an offence, though the person selling refuses to perform the contract,[5] or, if a legislator, has no jurisdiction in the premises,[6] or in point of fact has no right to vote.[7] So where a candidate for pub-

[1] Walsh *v.* People, 65 Ill. 58.

[2] Regina *v.* Lancaster, 16 Cox C. C. 737; State *v.* Jackson, 73 Me. 91.

[3] Com. *v.* Callaghan, 2 Va. Cas. 460.

[4] Com. *v.* Bell, 22 Atl. Rep. 641; s. c. 145 Pa. 374.

[5] Sulston *v.* Norton, 3 Burr. 1235; Henslow *v.* Fawcett, 3 Ad. & El. 51.

[6] State *v.* Ellis, 4 Vroom (N. J.) 102.

[7] Combe *v.* Pitt, 3 Burr. 1586.

lic office offered, in case of his election, to serve for less than the salary provided by law for the office, whereby the taxes would be diminished, this was held to be within the spirit of the law against bribery.[1] So conduct inducing or tending to induce corrupt official action, as the offer of money to one having the power of appointment to office, to influence his action thereon;[2] or to a sheriff or his subordinate having the custody of prisoners, to induce him to connive at their escape;[3] or to a customs officer, to induce him to forbear making a seizure of goods forfeited by violation of the revenue laws.[4] The theory of our government is that all public stations are trusts, and that those clothed with them are to be actuated in the discharge of their duties solely by considerations of right, justice, and the public good; and any departure from the line of rectitude in this behalf, and any conduct tending to induce such departure, is a public wrong.[5] The offer of money to induce a public officer to resign office, the intent being that the defendant might be appointed in his place, is criminal bribery.[6] Under the statute[7] which prohibits the payment of money to a voter to induce him to vote, it has been held to

[1] State *v.* Purdy, 36 Wis 213. But see Dishon *v.* Smith, 10 Iowa, 212, where giving a note to the county as an inducement to the people to vote for the removal of the county seat was held not to be bribery.

[2] Rex *v.* Vaughan, 4 Burr. 2494; Rex *v.* Pollman, 2 Camp. 229.

[3] Rex *v.* Beale, 1 East, 183.

[4] Rex *v.* Everett, 3 B. & C. 114. See also Caton *v.* Stewart, 76 N. C. 357.

[5] Trist *v.* Child, 21 Wall. (U. S.) 441.

[6] Regina *v.* Mercer, 17 Up. Can. Q. B. 602 (*semble*).

[7] 17 & 18 Vict. c. 102.

be an offence to pay the travelling expenses of the voter to and from the polling places.[1]

EXTORTION AND OPPRESSION.

§ 141. **Extortion** is the demanding and taking of an illegal fee, under color of office, by a person clothed by the law with official duties and privileges.[2] The fee is illegal, if demanded and taken before it is due, or if it be a greater amount than the law allows, and, of course, if not allowed at all by law. Thus, it is extortion for a justice of the peace to exact costs where they are not properly taxable, or from the party to whom they are not taxable;[3] or for a jailer to obtain money of his prisoner by color of his office;[4] or for a ferryman[5] or miller[6] to collect tolls not warranted by custom; or for a county treasurer to exact fees for acts required in the collection of taxes, but which had not been done;[7] or for a coroner[8] or sheriff to refuse to do their official duty unless their fees are prepaid;[9] or to demand and receive fees where none are by law demandable.[10] So it is extortion for an officer to avail himself of his official position to force others, by indirect means, to

[1] Cooper *v.* Slade, 6 H. L. C. 746.

[2] Miug *v.* Truett, 1 Mont. 322; Rex *v.* Baines, 6 Mod. 192.

[3] People *v.* Whaley, 6 Cow. (N. Y.) 661; Respublica *v.* Hannum, 1 Yeates (Pa) 71.

[4] Rex *v.* Broughton, Trem. P. C. 111.

[5] Rex *v.* Roberts, 4 Mod. 101.

[6] Rex *v.* Burdett, 1 Ld. Raym. 148.

[7] State *v.* Burton, 3 Ind. 93.

[8] Rex *v.* Harrison, 1 East P. C. 382.

[9] Hescott's Case, 1 Salk. 330; Com. *v.* Bagley, 7 Pick. (Mass.) 279; State *v.* Vasel, 47 Mo. 416, 444; State *v.* Maires, 4 Vroom (N. J.) 142.

[10] Simmons *v.* Kelley, 33 Pa. 190; Com. *v.* Mitchell, 3 Bush (Ky.) 25.

contribute to his pecuniary advantage to an amount and in a manner not authorized by law; as, for instance, for a sheriff to receive a consideration from A. for accepting A. as bail for C., whom he has arrested.[1] That the illegal fee is in the form of a present, or other valuable thing than money, is immaterial;[2] unless the gift be voluntary,[3] in which case there is no offence committed. By a very strict construction, the taking a promissory note for illegal fees is held not to constitute the offence, as the note is void, cannot be enforced, and is therefore of no value.[4] And the taking must be with a wrong intent,[5] and not through mistake of fact[6] or of law.[7]

§ 142. **Oppression** is such an abuse of discretionary authority by a public officer, from an improper motive, as consists in inflicting any other injury than extortion. Thus, where a judge inflicts an excessive sentence from unworthy motives, he is guilty of oppression.[8] So where a public officer refuses to issue a license to an inn-keeper because he does not vote as the officer wishes, the officer is guilty of oppression.[9] And so where a magistrate punishes a de-

[1] Stotesbury *v.* Smith, 2 Burr. 924; Rex *v.* Higgins, 4 C. & P. 247; Rex *v.* Burdett, 1 Ld. Raym. 148; People *v.* Calhoun, 3 Wend. (N. Y.) 420; Rex *v.* Loggen, 1 Stra. 73.

[2] Rex *v.* Eyres, 1 Sid. 307.

[3] Com. *v.* Dennie, Th. Cr. Cas. (Mass.) 165.

[4] Com. *v.* Cony, 2 Mass. 523. But see Empson *v.* Bathurst, Hut. 52; Com. *v.* Pease, 16 Mass. 91.

[5] Respublica *v.* Haunum, 1 Yeates (Pa.) 71; Cleaveland *v.* State, 34 Ala. 254; State *v.* Stotts, 5 Blackf. (Ind.) 460.

[6] Bowman *v.* Blythe, 7 E. & B. 26.

[7] State *v.* Cutter, 36 N. J. 125; People *v.* Whaley, 6 Cow. (N. Y.) 661.

[8] Steph. Dig. Cr. Law, § 119 (1).

[9] Rex *v.* Williams, 2 Burr. 1317.

fendant without pursuing the forms of law, he is guilty of oppression.[1]

BARRATRY. — CHAMPERTY. — MAINTENANCE.

§ 143. **Barratry**, **Champerty**, and **Maintenance** are kindred offences. The encouragement of strife was regarded by the common law as a matter of public concern, and it interposed to punish and prevent it. There were two special forms which this encouragement assumed: one, where a stranger in interest takes part in the promotion of a controversy under an agreement that he shall have part of the proceeds, is called *champerty*, because it is an agreement *campum partire*, — to divide the spoils; the other, where one officiously and without just cause intermeddles with and promotes the prosecution or defence of a suit in which he has no interest, is called *maintenance*.

Barratry is habitual champerty or maintenance, and is committed where one has become so accustomed to intermeddle in strifes and controversies in and out of court that he may be said to be a common mover, exciter, or maintainer of suits and quarrels; as one becomes a common scold by the too frequent and habitually abusive use of the tongue, or a common seller of liquor, by habitually selling it in violation of law. A single act is sufficient upon which to maintain an indictment either for champerty or maintenance; but a series of acts, not less than three, are necessary to constitute the habit, which is the gist of the crime of barratry.[2]

[1] Rex *v.* Okey, 8 Mod. 46.

[2] 4 Bl. Com. 134, 135; Com. *v.* Davis, 11 Pick. (Mass.) 432; Com

The offence of barratry may be committed by a justice of the peace who stirs up prosecutions to be had before himself for the sake of fees;[1] and, it seems, by one who unnecessarily, and for the purpose of opposing his adversary, brings numerous ungrounded suits in his own right.[2]

§ 144. **Interest.** — The intervention, in order to constitute the crime of maintenance, must be without interest. If one may be prejudiced by the result of the suit, or has a contingent interest therein, as if a vendee has warranted title to the vendor, he has an interest which justifies the intervention.[3] So if the party intermeddling has a special interest in the general question to be decided, though not otherwise in the result of the particular suit, his intervention is not unlawful.[4] In short, if the party have any interest, legal or equitable, though it be but a contingent interest, he may assist another in a lawsuit. Any substantial privity or concern in the suit will justify him.[5] So where a creditor of a bankrupt took an assignment of a right of action from the trustee in bankruptcy, agreeing to sue at his own expense and pay one fourth of what was realized to the trustee, is not champertous, since the creditor has an interest.[6]

v. McCulloch, 15 Mass. 227; Com. *v.* Tubbs, 1 Cush. (Mass.) 2; Case of Barretry, 8 Coke, 36, which contains much of the early learning on the subject.

[1] State *v.* Chitty, 1 Bail. (S. C.) 379.

[2] Com. *v.* McCulloch, 15 Mass. 227; 1 Hawk. P. C., c. 81, § 3.

[3] Master *v.* Miller, 4 T. R. 320; Goodspeed *v.* Fuller, 46 Me. 141; Williamson *v.* Sammons, 34 Ala. 691.

[4] Gowen *v.* Nowell, 1 Greenl. (Me.) 292; Davies *v.* Stowell, 47 N.W 370; s. c. 78 Wis. 334.

[5] Wickham *v.* Conklin, 8 Johns. (N. Y.) 220.

[6] Guy *v.* Churchill, 40 Ch. D. 481.

§ 145. **Officious.** — The intervention must also be officious, and without just cause. If, therefore, the relationship of the parties or their circumstances be such as to warrant the belief that the intervention is of a friendly kind, in the interest of justice, and to prevent oppression, it will not now — whatever may have been the extravagant notions of the old lawyers,[1] adopted under the pressure of the opinion that such intervention tended to the formation of combinations calculated to obstruct if not overawe the courts — be held to be criminal.[2] The intervention is not officious or unjustifiable, if prompted by personal sympathy growing out of relationship, or long association, as between master and servant,[3] or by motives of charity.[4] The common law of champerty and maintenance is still recognized in some of the States, though a much less degree of interest will now justify the intervention than formerly.[5] And in these States an agreement by an attorney to carry on a lawsuit, making no disbursements, and to look to a share of the proceeds for the compensation of his services, is held to be clearly champertous.[6] Other States, however, deny that the law of maintenance and champerty was ever applicable to this country, and refuse to recognize it as in force.[7]

[1] 1 Hawk. P. C., c. 83, § 4 et seq.

[2] Lathrop *v.* Amherst Bank, 9 Met. (Mass.) 489.

[3] Campbell *v.* Jones, 4 Wend. (N. Y.) 306; Thallhimer *v.* Brinkerhoff, 3 Cow. (N. Y.) 623.

[4] Perine *v.* Dunn, 3 Johns. Ch. (N. Y.) 508.

[5] Lathrop *v.* Amherst Bank, 9 Met. (Mass.) 489; Wood *v.* McGuire, 21 Ga. 576.

[6] Lathrop *v.* Amherst Bank, 9 Met. (Mass) 489. See also Elliott *v.* McClelland, 17 Ala. 206; Martin *v.* Clarke, 8 R. I. 389.

[7] Danforth *v.* Streeter, 28 Vt. 490; Bayard *v.* McLean, 3 Harr.

In point of fact, the tendency is to disregard the common law, except so far as it may have been adopted by statute;[1] and it may be doubted if any indictment would now be maintained for champerty or maintenance, not coming strictly within the limits of some precedent. The practices out of which originated the common and early English statute laws against the offences of champerty and maintenance — among which a common one was for a party litigant to interest some "great person" to come in and aid him to overwhelm his antagonist by giving him a share of the proceeds — are not now so common as to require the interposition of the aid of the criminal law. And it is, to say the least, very doubtful whether, at the present day, an indictment for either offence, pure and simple, and unattended by circumstances of aggravation which would amount to a hindrance or perversion of justice, would be sustained in any of our courts.[2]

Questions concerning them have usually arisen in civil actions, in which a champertous contract has been set up as a defence. And here the courts are inclined, without much regard to the old common law precedents, to hold such contracts as are clearly

(Del.) 139; Wright *v.* Meek, 3 Greene (Iowa), 472; Sherley *v.* Riggs, 11 Humph. (Tenn.) 53; Key *v.* Vattier, 1 Ohio, 132; Newkirk *v.* Cone, 18 Ill 449; Stanton *v.* Sedgwick, 14 N. Y. 289; Bentinck *v.* Franklin, 38 Tex. 458; Schomp *v.* Schenck, 40 N. J. 195; Richardson *v.* Rowland, 40 Conn. 565. See also note to the last cited case, 2 Green's Cr. Law Rep. 495, for some interesting details of the state of society out of which grew the law of maintenance and other analogous crimes.

[1] See note to Richardson *v.* Rowland, 14 Am. L. Reg. N. S. 78.

[2] Note to Richardson *v.* Rowland, 2 Green's Cr. Law Rep. 495; Maybin *v.* Raymond, 15 Nat. Bkr. Reg. (U. S. C. Ct., South Dist. Miss.) 354; 2 Bish. Cr. Law, 7th ed., §§ 125, 126.

against a sound public policy, and only such, as champertous.[1]

Thus, where an attorney agrees to carry on a suit at his own expense for a share of the proceeds, this seems generally held to be champertous;[2] but not where the expense is to be borne by the party.[3] And even in such case, if the suit is against the government, and there is no danger that a "great person" may bear down and oppress a weak defendant, the reason of the law failing, the rule itself fails; and accordingly it has been recently held that an agreement by an attorney to carry on a suit against the United States in the Court of Claims, at his own expense, for a portion of the proceeds, is not champertous.[4] Nor is an agreement to pay an attorney a fixed sum for his services "out of the proceeds of sales of the property [real estate], as such proceeds shall be realized."[5]

EMBRACERY.

§ 146. **Embracery** is an attempt, by corrupt means, to induce a juror to give a partial verdict. Any form of tampering with a jury, whether successful or not is immaterial, constitutes the crime.[6] The means most commonly resorted to are promises, en-

[1] Key *v.* Vattier, 1 Ohio, 132.

[2] Martin *v.* Clarke, 8 R. I. 389; Stearns *v.* Felker, 28 Wis. 594; Lancy *v.* Havender, 146 Mass. 615.

[3] Winslow *v.* Ry. Co., 71 Iowa, 197; Aultman *v.* Waddle, 40 Kan. 195.

[4] Maybin *v.* Raymond, 15 Nat. Bkr. Reg. 354. So of the Court of Alabama Claims: Manning *v.* Sprague, 148 Mass. 18.

[5] McPherson *v.* Cox, 96 U. S. 404.

[6] 1 Hawk. P. C., 8th ed. 466.

tertainments, presents, and the like. But any means calculated and intended to cause a juryman to swerve from his duty, if used, will make the person using them for that purpose indictable at common law. As the crime is in itself an attempt, it is complete whether successful or not in its purpose, whether the verdict be just or unjust, and even if there be no verdict.[1] A juror may be guilty of embracery, by the use of corrupt and unlawful methods of influencing his fellows, or of obtaining a position on the jury with intent to aid either party.[2]

PERJURY.

§ 147. "**Perjury**, by the common law, seemeth to be a wilful false oath, by one who, being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely, in a matter of some consequence, to the point in question, whether he be believed or not."[3] Modern legislation has allowed persons having conscientious scruples against taking an oath to substitute an affirmation for the oath.

An oath is a declaration of a fact made under the religious sanction of an appeal to the Supreme Being for its truth.

An affirmation is substantially like an oath, omitting the sanction of an appeal to the Supreme Being, and substituting therefor the "pains and penalties" of perjury.

[1] State *v.* Sales, 2 Nev. 268; Gibbs *v.* Dewey, 5 Cow. (N. Y.) 503.

[2] Rex *v.* Opie et al., 1 Saund. 301.

[3] 1 Hawk. P. C., 8th ed. 429; Com. *v.* Pollard, 12 Met. (Mass.) 225; State *v.* Wall, 9 Yerg. (Tenn.) 347; State *v.* Simons, 30 Vt. 620.

The proper form of administering either is that which is most binding on the conscience of the affiant, and in accordance with his religious belief. But the form is not essential, even though it be prescribed by statute, if there be a substantial compliance, — the prescription being regarded as directory merely.[1] And therefore, if a book other than the Evangelists be unwittingly used, it does not vitiate the oath.[2] Nor can a prosecution for perjury be sustained upon testimony given orally which the law requires to be in writing,[3] nor upon an affidavit not required by law.[4] But when the witness is sworn generally to tell the truth, instead of to make true answers, according to the usual practice, false testimony is still perjury.[5]

§ 148. **Lawfully required.** — But, to be valid, the oath must be administered by a court or magistrate duly authorized. If a court having no jurisdiction of the person or subject matter, or magistrate not duly authorized or qualified, administer the oath, it has no binding force or legal efficacy, and no prosecution for perjury can be predicated upon it. It is extra-judicial if the law does not require the oath, or, the oath being required, if an unauthorized person administers it.[6] But if jurisdiction and authority

[1] Com. *v.* Smith, 11 Allen (Mass.) 243; Rex *v.* Haly, 1 C. & D. (Ire.) 199.

[2] People *v.* Cook, 4 Seld. (N. Y.) 67; Ashburn *v.* State, 15 Ga. 246.

[3] State *v.* Trask, 42 Vt. 152; State *v.* Simons, 30 Vt. 620.

[4] Ortner *v.* People, 6 T. & C. (N. Y. S. C.) 548; People *v.* Gaige, 26 Mich. 30.

[5] State *v.* Keene, 26 Me. 33.

[6] People *v.* Travis, 4 Parker C. C. 213; State *v.* Hayward, 1 N. & McC. (S. C.) 546; Com. *v.* Pickering, 8 Gratt. (Va.) 628; Muir *v.*

exist, formal irregularities — as where the witness is sworn to tell the truth and the whole truth, omitting from the oath the words "and nothing but the truth,"[1] or there is error in some of the proceedings, of which the oath is a part[2] — are immaterial.

§ 149. "**Judicial Proceeding**" embraces not only the main proceeding, but also subsidiary proceedings incidental thereto; as a motion for continuance,[3] or an affidavit initiatory of a proceeding[4] or in aid of one pending,[5] or a motion for removal[6] or for a new trial,[7] or a hearing in mitigation of sentence[8] or for taking bail,[9] or on a preliminary inquiry as to the competency of a witness or juror.[10] It also embraces any proceeding wherein an oath is required by statute, if the oath is to an existing fact, and not merely promissory.[11] It has also been held to embrace a

State, 8 Blackf. (Ind.) 154; Pankey *v.* People, 1 Scammon (Ill.) 80; United States *v.* Babcock, 4 McLean (C. Ct.) 113; State *v.* Plummer, 50 Me. 217; State *v.* Wyatt, 2 Hay. (N. C.) 56; United States *v.* Howard, 37 Fed. Rep. 666; Lambert *v.* People, 76 N. Y. 220.

[1] State *v.* Gates, 17 N. H. 373.

[2] State *v.* Lavalley, 9 Mo. 824. See also United States *v.* Babcock, 4 McLean (C. Ct.) 113; State *v.* Hall, 7 Blackf. (Ind.) 25; State *v.* Dayton, 3 Zabr. (N. J.) 49; Van Steenbergh *v.* Kortz, 10 Johns. (N. Y.) 167.

[3] State *v.* Shupe, 16 Iowa, 36; Sanders *v.* People, 124 Ill. 218.

[4] Rex *v.* Parnell, 2 Burr. 806; Carpenter *v.* State, 4 How. (Miss.) 163.

[5] White *v.* State, 1 S. & M. (Miss.) 149; Rex *v.* White, M. & M. 271.

[6] Pratt *v.* Price, 11 Wend. (N. Y.) 127.

[7] State *v.* Chandler, 42 Vt. 446.

[8] State *v.* Keenan, 8 Rich. (S. C.) 456.

[9] Com. *v.* Hatfield, 107 Mass. 227.

[10] Com. *v.* Stockley, 10 Leigh (Va.) 678; State *v.* Wall, 9 Yerg. (Tenn.) 347.

[11] Rex *v.* Lewis, 1 Strange, 70; State *v.* Dayton, 3 Zabr. (N. J.) 49; O'Bryan *v.* State, 27 Tex. App. 339; Avery *v.* Ward, 150 Mass. 160.

proceeding required or sanctioned by "the common consent and usage of mankind." [1]

§ 150. **Wilfully False.** — The oath must be wilfully false to constitute the offence. If it be taken by mistake, or in the belief that it is true, or upon advice of counsel, sought and given in good faith, that it may lawfully be taken, the offence is not committed. [2]

Some authorities hold that one may commit perjury notwithstanding he believes what he swears to be true, if it be made to appear that he had no probable cause for his belief. [3] But it certainly cannot be considered as established law, that one who swears inconsiderately, or rashly, or even negligently, to what he believes, though upon very insufficient data, to be true, is guilty of perjury. [4]

Oaths of office, being in the nature of promises of future good conduct, and not affirming or denying the truth or falsehood of an existing fact within the knowledge of the affiant, do not come within the provision of the law of perjury. [5]

It is immaterial whether the witness gives his tes-

[1] State *v.* Stephenson, 4 McC. (S. C.) 165; Arden *v.* State, 11 Conn. 408.

[2] Tuttle *v.* People, 36 N.Y. 431; United States *v.* Conner, 3 McLean (C. Ct.) 573; Hood *v.* State, 44 Ala. 81; Cothran *v.* State, 39 Miss. 541.

[3] State *v.* Knox, Phil. (N. C.) 312; People *v.* McKinney, 3 Parker C. C. 510; Com. *v.* Cornish, 6 Binn. (Pa.) 249.

[4] Com. *v.* Brady, 5 Gray (Mass.) 78; United States *v.* Shellmire, 1 Bald. (C. Ct.) 370; State *v.* Lea, 3 Ala. 602; State *v.* Cockran, 1 Bailey (S. C.) 50; Com. *v.* Cook, 1 Rob. (Va.) 729; United States *v.* Atkins, 1 Sprague, 558; Jesse *v.* State, 20 Ga. 156; United States *v.* Stanley, 6 McLean (C. Ct.) 409; 1 Hawk. P. C., c. 69, § 2; State *v.* Chamberlain, 30 Vt. 559; Com. *v.* Thompson, 3 Dana (Ky.) 301.

[5] 1 Hawk. P. C., 8th ed. 431; State *v.* Dayton, 3 Zabr. (N. J.) 49.

timony voluntarily or under compulsion, if his testimony be required by law,[1] as when he voluntarily gives privileged testimony;[2] as also, it has been held, whether he is legally competent or incompetent to testify, if his testimony be actually taken.[3] But this last proposition is not universally accepted as sound. Thus, if a party to the record be sworn, the law not admitting him as a competent witness, false testimony by him is no perjury.[4] So it has been held that it is no perjury to swear falsely to a place of residence in obtaining a certificate of naturalization, the oath to that fact being voluntary and immaterial under the law.[5] So if an immaterial allegation of fact be introduced and sworn to in a petition to court.[6] Nor will a false answer in chancery, the bill not calling for a sworn answer, amount to perjury.[7] Swearing that a certain fact is true according to the affiant's knowledge and belief, is perjury, if he knows to the contrary, or if he believes to the contrary, even though the fact be true.[8] So, perhaps, if he have no knowledge or belief in the matter.[9]

§ 151. **Materiality.** — That is material which tends

[1] Com. *v.* Knight, 12 Mass. 274.

[2] Mackin *v.* People, 115 Ill. 312.

[3] Chamberlain *v.* People, 23 N. Y. 85; Montgomery *v.* State, 10 Ohio, 220; State *v.* Molier, 1 Dev. (N. C.) 263.

[4] State *v.* Hamilton, 7 Mo. 300.

[5] State *v.* Helle, 2 Hill (S. C.) 290.

[6] Gibson *v.* State, 44 Ala. 17. See also State *v.* Hamilton, 7 Mo. 300.

[7] Silver *v.* State, 17 Ohio, 365.

[8] State *v.* Crnikshank, 6 Blackf. (Ind.) 62; Patrick *v.* Smoke, 3 Strobh. (S. C.) 147; United States *v.* Shellmire, 1 Bald. (C. Ct.) 370; Wilson *v.* Nations, 5 Yerg. (Tenn.) 211; Rex *v.* Pedley, 1 Leach, 325.

[9] State *v.* Gates, 17 N. H. 373; 1 Hawk. P. C., 8th ed. 433.

to prove or disprove any fact in issue, although this fact be not the main fact in issue, but only incidental. Thus, where a woman was charged with larceny, and the defence was that the goods stolen belonged to her husband, falsely swearing by the alleged husband that he had never represented that she was his wife is perjury, whether she was or was not in fact his wife. And it is also material whether it has any effect upon the verdict or not.[1] So where three persons were indicted for a joint assault, and it was contended that it was immaterial, if all participated in it, by which certain acts were done, it was held that evidence attributing to one acts which were done by another was material.[2] So all answers to questions put to a witness on cross-examination, which bear upon his credibility, are material.[3] But substantial truth is all that is necessary, and slight variations as to time, place, or circumstance will not, in general, be material; as where one swears to a greater or less number, or a longer or shorter time, or a different place, or a different weapon, than the true one, — these circumstances not bearing upon the main issue.[4] A false statement as to the terms of a contract which is void by the Statute of Frauds, made in a proceeding to enforce the contract, has been held to be immaterial, and no perjury, whichever way the party swears, the contract being void;[5]

[1] Com. *v.* Grant, 116 Mass. 17; Wood *v.* People, 59 N. Y. 117; 1 Hawk. P. C., 8th ed. 433.

[2] State *v.* Norris, 9 N. H. 96.

[3] Regina *v.* Overton, C. & M. 655.

[4] 1 Hawk. P. C., c. 69, § 8.

[5] Rex *v.* Dunston, Ry. & M. 109.

while a like false statement in a proceeding to avoid the contract would be material.[1] And the fact that an indictment is bad, or that a judgment is reversed, does not affect the question of the materiality of the evidence given to sustain it;[2] nor does the fact that the evidence is withdrawn from the case.[3] Whether materiality is a question of law for the court, or of fact for a jury, is a point upon which the authorities are about equally divided.[4]

§ 152. **Evidence.** — In prosecutions for perjury, a single witness (contrary to the general rule of evidence) to the falsehood of the alleged oath is not sufficient to maintain the case, since this would be but oath against oath. There must be two witnesses to the falsity, or circumstances corroborating a single witness;[5] though all other material facts may be proved by a single witness, as in other cases.[6] Nor can a man be convicted of perjury by showing that he has sworn both ways. It must be shown which was the false oath.[7]

§ 153. **Subornation.** — Subornation of perjury is the procuring of perjured testimony. In order to the

[1] Regina *v.* Yates, C. & M. 132.

[2] Regina *v.* Meek, 9 C. & P. 513; Com. *v.* Tobin, 108 Mass. 426.

[3] Regina *v.* Phillpotts, 3 C. & K. 135.

[4] See the cases collected in 2 Greenl. Ev. (13th ed.), § 196, n.; also 2 Bish. Cr. Law, § 1039 *a*.

[5] State *v.* Raymond, 20 Iowa, 582; Com. *v.* Pollard, 12 Met. (Mass.) 225; State *v.* Molier, 1 Dev. (N. C.) 263; State *v.* Heed, 57 Mo. 252; State *v.* Peters, 107 N. C. 876; United States *v.* Hall, 44 Fed. Rep. 864.

[6] United States *v.* Hall, 44 Fed. Rep. 864.

[7] Regina *v.* Hughes, 1 C. & K. 519; Jackson's Case, 1 Lewin, 270; State *v.* J. B., 1 Tyler (Vt.) 269; State *v.* Williams, 30 Mo. 364; Schwartz *v.* Com., 27 Gratt. (Va.) 1025. But see People *v.* Burden, 9 Barb. (N. Y.) 467, which, however, is examined and denied to be law in Schwartz *v.* Com., *ubi supra*.

incurring of guilt under this charge, it must appear that the party procuring the false testimony knew, not only that the testimony would be false, but also that it would be corrupt, or that the party giving the testimony would knowingly, and not merely ignorantly, testify falsely.[1] And a conviction may be had upon the testimony of a single witness,[2] unless that witness be the party who committed the perjury; in which case he will need corroboration.[3] But a person cannot be convicted of attempted subornation of perjury by proof that he attempted to procure a person to swear falsely in a suit not yet brought, but which he intended to bring. There must be some proceeding pending, or the procured false testimony must constitute a proceeding in itself.[4]

CONTEMPT.

§ 154. **Contempt of Court** is a crime indictable at common law when it amounts to an obstruction of public justice, and it is also, in many cases, summarily punishable, without indictment, by the court, when its rules are violated, its authority defied, or its dignity offended.

It is the latter class of cases which constitute what are technically called contempts of court, and, though not well defined, may be said to embrace all corrupt acts tending to prevent the court from discharging its functions.

[1] Com. *v.* Douglass, 5 Met. (Mass.) 241; Stewart *v.* State, 22 Ohio St. 477.

[2] Com. *v.* Douglass, *ubi supra.*

[3] People *v.* Evans, 40 N. Y. 1.

[4] State *v.* Joaquin, 69 Me. 218; People *v.* Chrystal, 8 Barb. (N. Y. S. C.) 545. But see State *v.* Whittemore, 50 N. H. 245.

In the former case, it belongs to the category of crimes, though not bearing any specific name, and is included in the general class of offences against public justice.

In the latter case, it is not strictly a crime, — though substantially so, being punishable by fine and imprisonment, — but is noticed summarily by the courts as an infraction of order and decorum, which every court has the inherent power to punish, within certain limits, — a power necessary to their efficiency and usefulness, and resorted to in case of violation of their rules and orders, disobedience of their process, or disturbance of their proceedings.[1] Since it is not a crime, a party accused is not entitled to trial by jury.[2]

§ 155. **What are Contempts.** — All disorderly conduct, or conduct disrespectful to the court, or calculated to interrupt or essentially embarrass its business, whether in the court-room or out of it, yet so near as to have the same effect, — such as making noises in its vicinity,[3] refusal by a witness to attend court,[4] or to be sworn or to testify,[5] or of any officer of court

[1] *Ex parte* Robinson, 19 Wall (U. S.) 505; s. c. 2 Green's Cr. Law Rep. 135. In Pennsylvania it is held that a court not of record, as a justice of the peace, has not the power to proceed summarily to punish for contempt, the power not being necessary, as the justice may proceed immediately to bind over for indictment. But the case is unsupported elsewhere, and must stand, if it can stand at all, upon some peculiarity of the statutes of that State.

[2] McDonnell *v.* Henderson, 74 Iowa, 619; *In re* Deaton, 105 N. C. 59.

[3] State *v.* Coulter, Wright (Ohio) 421.

[4] Johnson *v.* Wideman, Dudley (S. C.) 70.

[5] Stansbury *v.* Marks, 2 Dall. (U. S.) 213; Lott *v.* Burrel, 2 Mill (S. C.) 167; *Ex parte* Stice, 70 Cal. 51.

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to do his duty,[1] or of a person to whom a *habeas corpus* is directed to make return,[2] — assaulting an officer of the court, or any other person in its presence,[3] or one of the judges during recess,[4] — improperly communicating with a juror,[5] or by a juror with another person,[6] — will usually be dealt with, upon their occurrence, *pendente lite*, in order to prevent the evil consequences of a wrongful interference with the course of justice.

In other cases, proceedings more or less summary will be had, whenever a corrupt attempt, by force, fraud, bribery, intimidation, or otherwise, is made to obstruct or impede the due administration of justice. Thus, the courts will take notice of, and punish in a summary way, the use by an attorney of contemptuous language in the pleadings,[7] or a resort to the public press in order to influence the proceedings in a pending case,[8] or any libellous publication, though indictable as such, relative to their proceedings, tending to impair public confidence and respect in them.[9] So the courts will intervene in like manner if attempts are made to bribe or intimi-

[1] Chittenden *v.* Brady, Ga. Dec. 219.

[2] State *v.* Philpot, Dudley (Ga.) 46.

[3] People *v.* Turner, 1 Cal. 152; *Ex parte* Terry, 128 U. S. 289.

[4] State *v.* Garland, 25 La. Ann. 532.

[5] State *v.* Doty, 32 N. J. 403.

[6] State *v.* Helvenston, R. M. Charlt. (Ga.) 48.

[7] State *v.* Keene, 11 La. 596.

[8] Matter of Darby, 3 Wheeler Cr. Cas. 1.

[9] State *v.* Morrill, 16 Ark. 384; State *v.* Earl, 41 Ind. 464; *In re* Sturock, 48 N. H. 428; Oswald's Case, 1 Dall. (Pa.) 319; People *v.* Freer, 1 Caines (N. Y.) 485; People *v.* Wilson, 64 Ill. 195; s. c. 1 Am. Cr. Rep 107; Regina *v.* Shipworth, 12 Cox C. C. 371; s. c. 1 Green's Cr. Law Rep. 121; *In re* Moore, 63 N. C. 397; *In re* Cheeseman, 49 N. J. L. 115.

date a judge, juror, or any officer of court, in relation to any matter pending before them, or upon which they are to act officially.[1] They will also punish the circulation of a printed statement of a pending case, before trial, by one of the parties to the prejudice of the other;[2] the publishing a report of the proceedings of a trial, contrary to the direct order of court;[3] or publishing such proceedings with comments calculated to prejudice the rights of the parties;[4] the preventing the attendance of a witness, after summons, or procuring his absence, so that he could not be summoned;[5] procuring of a continuance by a false pretence of illness;[6] and, generally, all such acts of any and all persons as tend substantially to interfere with their efficient service in the administration of justice for which they are established.

§ 156. **Contempt of Process.** — One is guilty of contempt, and punishable therefor, who, being served with process by a court of competent jurisdiction, wilfully and improperly refuses to obey the process.[7] Thus a refusal, after service of the writ or notice of the making of the order or decree, to obey an injunction,[8] a decree or order of court,[9] or a writ of pro-

[1] Charlton's Case, 2 M. & C. 316; Regina *v.* Onslow, 12 Cox C. C. 358; s. c. 1 Green's Cr. Law Rep. 110; State *v.* Doty, 32 N. J. 403.

[2] Rex *v.* Jolliffe, 4 T. R. 285; Cooper *v.* People, 13 Col. 337, 373; *In re* Crown Bank, 44 Ch. Div. 649.

[3] Rex *v.* Clement, 4 B. & Ald. 218.

[4] Regina *v.* O'Dogherty, 5 Cox C. C. 348.

[5] McConnell *v.* State, 46 Ind. 298; State *v.* Buck, 62 N. H. 670; *In re* Savin, 131 U. S. 267.

[6] Welch *v.* Barber, 52 Conn. 147.

[7] 2 Bish. Crim. Law, § 242.

[8] Winslow *v.* Nayson, 113 Mass. 411.

[9] Buffum's Case, 13 N. H 14; Mayor of Bath *v.* Pinch, 4 Scott, 299;

hibition or mandamus,[1] is contempt. It is likewise contempt for an inferior court to disobey the orders of a superior court;[2] or for an officer of court, as a receiver, to disobey the order of the court.[3]

§ 157. **Contempt of Jury.** — One may be punished for contempt by reason of misconduct before the grand jury,[4] or by publishing a libel on the grand or petit jury.[5] And it is contempt for a reporter to conceal himself in the jury room, and to report the deliberations of the jurors.[6]

§ 158. **Proceedings.** — When the contempt is committed in the presence of the court, the offender may be ordered into custody, and proceeded against at once.

But if the offence be not committed in presence of the court, the offender is usually proceeded against by an attachment preceded by an order to show cause, but without an order to show cause if the exigency demands it.[7]

Whether proceedings will be had, in the last class of cases, for a contempt whereby the proceedings in a particular case are improperly obstructed or otherwise interfered with after the case is concluded, is

Stuart *v.* Stuart, 123 Mass. 370; Kunckle *v.* Kunckle, 1 Dall. (Pa.) 364; Yates *v.* Russell, 17 Johns. (N. Y.) 461.

[1] Rex *v.* Edyvean, 3 T. R. 352; Rex *v.* Babb, 3 T. R. 579; Board of Commissioners of Leavenworth *v.* Sellew, 99 U. S. 624; State *v.* Judge of Civil District Court, 38 La. Ann. 43.

[2] Patchin *v.* Mayor of Brooklyn, 13 Wend. 664.

[3] Cartwright's Case, 114 Mass. 230.

[4] *In re* Gannon, 69 Cal. 541.

[5] *In re* Cheeseman, 49 N. J. L. 115; Little *v.* State, 90 Ind. 338.

[6] People *v.* Barrett, 56 Hun, 351.

[7] State *v.* Matthews, 37 N. H. 450; People *v.* Kelly, 24 N. Y. 74; Whittem *v.* State, 36 Ind. 196; Welch *v.* Barber, 52 Conn. 147

perhaps not perfectly clear; but the better opinion seems to be that they may, at any time before the adjournment of the court for the term at which the contempt is committed.[1] In a case apparently to the contrary[2] there was no contempt, and the dictum is not supported by the citation of any authority.

RESCUE. — ESCAPE. — PRISON BREACH.

§ 159. These are analogous offences under the general category of hindrances to public justice. Few cases at common law have occurred in this country, the several offences being generally matter of statutory regulation.

§ 160. **Rescue** is "the forcibly and knowingly freeing another from an arrest or imprisonment."[3] If, therefore, the rescuer supposes the imprisonment to be in the hands of a private person, and not of an officer, he is not guilty, as the imprisonment must be a lawful one.[4] It is essential that the deliverance should be complete, otherwise the offence may be an attempt merely.[5]

§ 161. **Escape** is the going away without force out of his place of lawful confinement by the prisoner himself, or the negligent or voluntary permission by the officer having custody of such going away.[6] The

[1] Regina *v.* O'Dogherty, 5 Cox C. C. 348; Clarke's Case, 12 Cush. (Mass.) 320; Johnson *v.* Wideman, Dudley (Ga.) 70.

[2] Robertson *v.* Bingley, 1 McCord (S. C.) Ch. 333.

[3] 4 Bl. Com. 131.

[4] State *v.* Hilton, 26 Mo. 199.

[5] State *v.* Murray, 15 Me. 100.

[6] Com. *v.* Sheriff, 1 Grant (Pa.) 187; State *v.* Doud, 7 Conn. 384; Riley *v.* State, 16 Conn. 47; Nall *v.* State, 34 Ala. 262; Luckey *v.* State, 14 Texas, 400.

escape must be from a lawful confinement. And if the arrest be by a private person without warrant, though legal, yet if the custody, without bringing the party before a magistrate, be prolonged for an unreasonable period, the escape will be no offence; and although it seems to have been held, in this country, that, after an arrest voluntarily made by a private person without warrant, he may let the prisoner go without incurring guilt, by the common law [1] such private person will be guilty if he do not deliver over the arrested party to a proper officer.[2] If the warrant on which the arrest is made be void, neither the prisoner nor the officer is liable for an escape.[3]

§ 162. **Prison Breach** is the forcible breaking and going away out of his place of lawful confinement by the prisoner. It is distinguished from escape by the fact that there must be a breaking of the prison. There must also be an exit,[4] in order to constitute the offence. The imprisonment must be lawful, but it is immaterial whether the prisoner be guilty or innocent.[5]

A prison is any place where a person is lawfully confined, whether it be in the stocks, in the street, or in a public or private house. Imprisonment is but a restraint of liberty.[6]

[1] Habersham *v.* State, 56 Ga. 61.

[2] 2 Hawk. P. C., c. 20, §§ 1–6.

[3] Housh *v.* People, 75 Ill. 487; Hitchcock *v.* Baker, 2 Allen (Mass.) 431; State *v.* Leach, 7 Conn. 452; Com. *v.* Crotty, 10 Allen (Mass.) 403.

[4] 2 Hawk. P. C., c. 18, § 12.

[5] Com. *v.* Miller, 2 Ash. (Pa.) 61; Habersham *v* State, 56 Ga. 61; Regina *v.* Waters, 12 Cox C. C. 390. Upon the general subject see 2 Hawk. P. C., c. 18–21; 1 Gab. Cr. Law, 305 et seq.

[6] 2 Hawk. P. C., c. 18, § 4.

At common law, the punishment of the several offences was the same as would have been inflicted upon the escaped or rescued prisoner.[1] It is now, however, generally a subject of special statute regulation.

[1] 2 Hawk. P. C., c. 19, § 22; Com. *v.* Miller, 2 Ash. (Pa.) 61.

CHAPTER IV.

OFFENCES AGAINST THE PUBLIC TRANQUILLITY, HEALTH, AND ECONOMY.

§ 164. Affray.
165. Riot. — Rout. — Unlawful Assembly.
167. Forcible Entry and Detainer.
171. Eavesdropping.
§ 172. Libel and Slander.
177. Engrossing. — Forestalling. — Regrating.
178. Nuisance.
183. Attempt.
186. Conspiracy.

§ 163. ALL offences against the public peace are criminal, as has been seen;[1] but the law protects not only the physical peace of the public, but also the established order and economy of the government. As part of this established order, the public trade seems to some extent to be protected; at least, against such combinations and conspiracies as individuals cannot protect themselves against.

Attempts and conspiracies are crimes of this class, being acts prejudicial to the general well-being of the State.

AFFRAY.

§ 164. **An Affray** is the fighting, by mutual consent, of two or more persons in some public place, to the terror of the people.[2] The meaning of the word

[1] *Ante*, § 14.

[2] Wilson *v.* State, 3 Heisk. (Tenn.) 278; Simpson *v.* State, 5 Yerg. (Tenn.) 356; 4 Bl. Com. 146.

is, that which frightens; and the offence consists in disturbing the public peace by bringing on a state of fear by means of such fighting, or such threats of fighting as are calculated to excite such fear, whether there be actual fear or not being immaterial. Mere wordy dispute, therefore, without actual or threatened violence by one party or the other, does not amount to an affray.[1] But if actual or threatened violence is resorted to by one who is provoked thereto by the words of the other, this will make the latter guilty.[2] It is sometimes held that consent is not essential.[3] But it is obvious that one who is assaulted, and merely uses such force as is necessary to beat off his assailant, is guilty of no offence. He is not fighting, in the sense of the definition, but is merely exercising his right of self-defence.[4]

The place must be a public one. A field, therefore, surrounded by a dense wood, a mile away from any highway or other public place, does not lose its private character by the casual presence of three persons, two of whom engage in a fight.[5] An enclosed lot, however, in full view of the public street of a village, thirty yards distant,[6] is a public place, though a highway itself is not necessarily a public

[1] State *v.* Sumner, 5 Strobh. (S. C.) 53; Hawkins *v.* State, 13 Ga 322; State *v.* Downing, 74 N. C. 184.

[2] State *v.* Sumner, 5 Strobh. (S. C.) 53; Hawkins *v.* State, 13 Ga. 322; State *v.* Downing, 74 N. C. 184; State *v.* Perry, 5 Jones (N. C.) 9; State *v.* Fanning, 94 N. C. 940. But see, *contra*, O'Neill *v.* State, 16 Ala. 65.

[3] Cash *v.* State, 2 Overt. (Tenn.) 198.

[4] See also Klum *v.* State, 1 Blackf. (Ind.) 377.

[5] Taylor *v.* State, 22 Ala. 15. See also State *v.* Heflin, 8 Humph. (Tenn.) 84.

[6] Carwile *v.* State, 35 Ala. 392.

place, because by disuse, or the undergrowth of trees, or otherwise, it may have become concealed from public view.[1] A fight begun in private, and continued till a public place is reached, becomes an affray.[2]

By the definition, it requires two to make an affray. If, therefore, one of two indicted persons be acquitted, the case fails as to the other.[3]

RIOT. — ROUT. — UNLAWFUL ASSEMBLY.

§ 165. **A Riot** is a tumultuous disturbance of the peace, by three or more persons assembling together of their own authority, with an intent to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself be lawful or unlawful.[4]

A Rout is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make a motion to execute. It is an attempt to commit a riot.

An Unlawful Assembly is a mere assembly of persons upon a purpose which, if executed, would make them rioters, but which they do not execute, or make any motion to execute.[5]

A like assembly for a public purpose, as where it is the intent of a riotous assembly to prevent the

[1] State *v.* Weekly, 29 Ind. 206.
[2] Wilson *v.* State, 3 Heisk. (Tenn.) 278.
[3] Hawkins *v.* State, 13 Ga. 322. See also § 165.
[4] 1 Hawk. P. C., 8th ed., 513, § 1; State *v.* Russell, 45 N. H. 83
[5] 1 Hawk. P. C., 8th ed., 513–516, §§ 1, 8, 9; 4 Bl. Com. 146.

execution of a law by force, or to release all prisoners in the public jail, is treason.[1]

It has been held that an unlawful assembly, armed with dangerous weapons, and threatening injury, to the terror of the people, amounts to a riot, even before it proceeds to the use of force.[2]

Two persons, it has also been held, with a third aiding and abetting, may make a riot.[3]

That the assembly is in its origin and beginning a lawful one is immaterial, if it degenerate, as it may, into an unlawful and riotous one.[4]

§ 166. **The Violence necessary** to constitute a riot need not be actually inflicted upon any person. Threatening with pistols, or clubs, or even by words or gestures, to injure if interfered with in the prosecution of the unlawful purpose, or any other demonstration calculated to strike terror and disturb the public peace, is a sufficient violence to constitute the assembly riotous.[5] So where several attempt by threats and menaces to rescue a lawful prisoner, they are guilty of a riot.[6] Indeed, it has been held that a trespass to property in the presence of a person in actual possession, though there is no actual

[1] 4 Bl. Com. 147; Judge King's Charge, 4 Pa. L. J. 29, an admirable paper.

[2] Com. *v.* Hershberger, Lewis Cr. L. (Pa.) 72; State *v.* Brazil, Rice (S. C.) 257.

[3] State *v.* Straw, 33 Me. 554.

[4] Judge King's Charge, 4 Pa. L. J. 31; State *v.* Snow, 18 Me. 346; Regina *v.* Soley, 2 Salk. 594; State *v.* Brooks, 1 Hill (S. C.) 361; 1 Hawk. P. C., 8th ed., 514, § 3. But see State *v.* Stalcup, 1 Ired. (N. C.) 30.

[5] State *v.* Calder, 2 McCord (S. C.) 462; State *v.* Jackson, 1 Speer (S. C.) 13; Bell *v.* Mallory, 61 Ill. 167; Rex *v.* Hughes, 4 C. & P. 373.

[6] Fisher *v.* State, 78 Ga. 258.

force, amounts to a riot.[1] The disturbance of the peace by exciting terror, is the gist of the offence.[2] To disturb another in the enjoyment of his lawful right is a trespass, which, if done by three or more persons unlawfully combined, with noise and tumult, is a riot; as the disturbance of a public meeting,[3] or making a great noise and disturbance at a theatre for the purpose of breaking up the performance, though without offering personal violence to any one;[4] or even the going in the night upon a man's premises and shaving his horse's tail, if it be done with so much noise and of such a character as to rouse the proprietor and alarm his family.[5]

Violent threatening, and forcible methods of enforcing rights, whether public or private, are not lawful.[6]

FORCIBLE ENTRY AND DETAINER.

§ 167. This, though not strictly a common law offence, was made so at an early date by statute in England; and is now in many of the States, by adoption, a part of their common law. It consists in "violently taking or keeping possession of lands and tenements, with menaces, force and arms, and without the authority of law."[7]

[1] State *v.* Fisher, 1 Dev. (N. C.) 504.

[2] State *v.* Renton, 15 N. H. 169; State *v.* Brooks, 1 Hill (S. C.) 361.

[3] State *v.* Townsend, 2 Harr. (Del.) 543; Com. *v.* Runnels, 10 Mass. 518; State *v.* Brazil, Rice (S. C.) 257; Judge King's Charge, 4 Pa. L. J. 29, 38.

[4] Clifford *v.* Brandon, 2 Camp. 358; State *v.* Brazil, Rice (S. C.) 257.

[5] State *v.* Alexander, 7 Rich. (S. C.) 5.

[6] Judge King's Charge, 4 Pa. L. J. 29, 31.

[7] 4 Bl. Com. 148.

§ 168. **Force and Violence.** — The entry or detainer must, in order to constitute an indictable offence, be with such force and violence, or demonstration of force and violence, threatening a breach of the peace or bodily harm, and calculated to inspire fear, and to prevent those who have the right of possession from asserting or maintaining their right, as to become a matter of public concern in contradistinction to a mere private trespass.[1] Such force as will tend to a breach of the peace may not be used; but only such force is permissible as would sustain a plea in justification of *molliter manus imposuit.*[2] That degree of force which the law allows a man to use in defence of his lawful possession, it does not allow him to use in recovering property of which he has been dispossessed, if it be tumultuous or riotous, or tends to a breach of the peace. It does not allow a breach of the peace to regain possession of property, or in redress of private wrongs.[3] Like circumstances accompanying the detention of the possession of real property will constitute a forcible detainer.[4]

It is immaterial how the intimidation is produced, whether by one or many, by actual force or by threats, or by tumultuous assemblies, or by weapons,

[1] Com. *v.* Shattuck, 4 Cush. (Mass.) 141; State *v.* Pearson, 2 N. H. 550; Com. *v.* Keeper, &c., 1 Ashm. (Pa.) 140; State *v.* Cargill, 2 Brev. (S. C.) 445; 1 Hawk. P. C., c. 28, § 27; Benedict *v.* Hart, 1 Cush. (Mass.) 487; Wood *v.* Phillips, 43 N. Y. 152.

[2] Fifty Associates *v.* Howland, 5 Cush. (Mass.) 214.

[3] Sampson *v.* Henry, 11 Pick. (Mass.) 379; Gregory *v.* Hill, 8 T. R. 299; Hyatt *v.* Wood, 3 Johns. (N. Y.) 239; 3 Bl. Com. 4; Davis *v.* Whitridge, 2 Strobh. (S. C.) 232.

[4] 1 Hawk. P. C., 8th ed., c. 28, § 30; People *v.* Rickert, 8 Cow. (N. Y.) 226; Com. *v.* Dudley, 10 Mass. 403.

or in whatever way it may be produced, provided it actually occurs, or might reasonably be expected to occur, if the parties entitled to possession should be present and in a position to be affected by it. And entry and detainer by such demonstrations of force and violence are equally indictable, although no one be actually present and in possession of the premises entered to be intimidated thereby.[1]

Nor need the display of force be upon the actual premises; for if the owner be seized and kept away, for the purpose of thwarting his resistance, and an entry be then made during such enforced absence, though peaceably, it will amount to a forcible entry and detainer.[2] And a peaceable entry followed by a forcible expulsion of the owner will also constitute the offence.[3] The threats of violence must be personal. No threats of injury to property will be sufficient.[4]

§ 169. **What may be entered upon or detained.** — Peaceable occupancy, without reference to title, is the possession which the law says shall not be taken away or detained by force.[5] And this possession may be constructive as well as actual; as where the owner of a building, which he does not personally occupy, but rents to tenants, while waiting for a new tenant, is forcibly kept out by a stranger and tres-

[1] People *v.* Field, 52 Barb. (N. Y.) 198; 1 Hawk. P. C., 8th ed., c. 28, §§ 26, 29.

[2] Ibid.

[3] 3 Bac. Abr., For. Entry (B).

[4] 1 Hawk. P. C., 8th ed., c. 28, § 28.

[5] Rex *v.* Wilson, 8 T. R. 357; People *v.* Leonard, 11 Johns. (N.Y.) 504; Beauchamp *v.* Morris, 4 Bibb (Ky.) 312; State *v.* Pearson, 2 N. H. 550; Com. *v.* Bigelow, 3 Pick. (Mass.) 31.

passer.[1] Mere custody, however, is not enough. Therefore, if a servant withholds possession against his employer, the latter is not guilty of the offence in asserting his right to the possession which is already his, and which the servant has not.[2] So if the owner has gained peaceable possession of the main house, this carries with it the possession of the whole; and he is not liable under the law for the forcible entry of a shed adjoining, in which a tenant had intrenched himself.[3]

One cotenant may be guilty of the offence as against another who is in peaceable possession and resists;[4] and so may a wife as against her husband.[5]

§ 170. **Personal Property. Forcible Trespass.** — These rules and principles are strictly applicable only to the forcible entry and detention of real property; and it has been said that the forcible detainer of personal property is not indictable.[6] But the seizure of personal property under like circumstances, and with similar demonstrations, may be indicted as a forcible trespass.[7] And there seems to be no reason why its forcible detention may not be also indictable by an analogous change in the description of the offence. It is not less a public injury. It has been suggested that the offence can only be committed when the

[1] People *v.* Field, 52 Barb. (N. Y.) 198.

[2] State *v.* Curtis, 4 Dev. & Bat. (N. C.) 222; Com. *v.* Keeper, &c., 1 Ashm. (Pa.) 140.

[3] State *v.* Pridgen, 8 Ired. (N. C.) 84.

[4] Regina *v.* Marrow, Cas. temp. Hardw. 174.

[5] Rex *v.* Smyth, 1 M. & R. 155.

[6] State *v.* Marsh, 64 N. C. 378.

[7] State *v.* Ray, 10 Ired. (N. C.) 39; State *v.* Widenhouse, 71 N C. 279.

party trespassed upon is present;[1] but upon principle as well as upon authority the reverse seems to be the better law.[2]

EAVESDROPPING.

§ 171. **Eavesdropping** is a kind of nuisance which was punishable at common law, and was defined to be a listening under the eaves or windows of a house for the purpose of hearing what may be said, and thereupon to form slanderous and mischievous tales, to the common nuisance.[3] The offence is no doubt one at common law in this country. It has, indeed, been expressly so held;[4] and it would seem that any clandestine listening to what may be said in a meeting of the grand jury, for instance, required by law to be secret, or perhaps any meeting which may lawfully be held in secret, with an intent to violate that secrecy, to the public injury or common nuisance,[5] would constitute the offence.

LIBEL AND SLANDER.

§ 172. **Definition.** — A general and comprehensive definition of libel is that of Lord Camden, cited by Hamilton in the argument in the case of The People *v.* Croswell,[6] which has been repeatedly approved by the courts of New York, and is as follows: "A censorious or ridiculing writing, picture, or sign, made

[1] State *v.* McAdden, 71 N. C. 207.

[2] *Ante*, § 168; State *v.* Thompson, 2 Overton (Tenn.) 96.

[3] 1 Hawk. P. C., Table of Matters to Vol. I., Eavesdropper.

[4] State *v.* Williams, 2 Overton (Tenn.) 108.

[5] State *v.* Pennington, 3 Head (Tenn.) 299; Com. *v.* Lovett, 6 Pa. L. J. Rep. 226.

[6] 3 Johns. Cas. 354.

with a mischievous or malicious intent, toward government, magistrates, or individuals."[1]

Within the scope of this definition, printed and published blasphemy is also indictable as a libel,[2] and so is printed obscenity or other immoral matter, — both on the ground that they tend to deprave or corrupt the public morals.[3] So is a publication against the government, tending to degrade and vilify it, and to promote discontent and insurrection;[4] or calumniating a court of justice, tending to weaken the administration of justice.[5] So libels upon distinguished official foreign personages have repeatedly been held in England punishable at the common law, as tending to disturb friendly international relations.[6] It remains to be seen whether the State courts (the United States courts having no jurisdiction) will in this country follow such a precedent.

But the more common and restricted definition of libel at common law, as against individuals, is, the malicious publication of any writing, sign, picture, effigy, or other representation tending to defame the memory of one who is dead, or the reputation of one who is living, and to expose him to ridicule, hatred, or contempt. It is punishable as a misdemeanor, on the ground that such a publication has a tendency

[1] Cooper *v.* Greeley, 1 Denio (N. Y.) 347.

[2] Com. *v.* Kneeland, 20 Pick. (Mass.) 211; People *v.* Ruggles, 8 Johns. (N. Y.) 290; *post*, § 194.

[3] Com. *v.* Holmes, 17 Mass. 336; Com. *v.* Sharpless, 2 S. & R. (Pa.) 91.

[4] Respublica *v.* Dennie, 4 Yeates (Pa.) 267.

[5] Rex *v.* Watson, 2 T. R. 199.

[6] Rex *v.* D'Eon, 1 W. Bl. 510; Peltier's Case, 28 Howell St. Tr. 529.

to disturb the public peace.[1] The libel is equally criminal if directed against a family, though it is not against any individual member of it.[2]

Words that would not be actionable as slanderous may nevertheless, if written and published, be indictable as libellous. Written slander is necessarily premeditated, and shows design. It is more permanent in its effect, and calculated to do much greater injury, and "contains more malice."[3] Thus, it is libellous to write and publish of a juror that he has misbehaved, as such, by staking the verdict upon a chance;[4] or of a stage-driver, that he has been guilty of gross misconduct and insult towards his passengers;[5] or that a bishop has attempted to convert others to his religious views by bribes;[6] or that a man is a "rascal";[7] or that "he is thought no more of than a horse-thief";[8] or to charge a lawyer with divulging the secrets of his client;[9] or to say of a member of a convention to frame a constitution, that he contended in the convention that government had no more right to provide for worship of the Supreme Being than of the Devil;[10] or to print of a

[1] 1 Hawk. P. C., 8th ed., 542, § 3; People *v.* Croswell, 3 Johns. Cas. (N.Y.) 337; Com. *v.* Clap, 4 Mass. 163; Giles *v.* State, 6 Ga. 276; State *v.* Henderson, 1 Rich. (S. C.) 179; Cooper *v.* Greeley, 1 Denio, 347; State *v.* Avery, 7 Conn. 266.

[2] State *v.* Brady, 44 Kan. 435.

[3] King *v.* Lake, Hardr. 470.

[4] Com. *v.* Wright, 1 Cush. (Mass.) 46.

[5] Clement *v.* Chivis, 9 B. & C. 172.

[6] Archbishop of Tuam *v.* Robeson, 5 Bing. 17.

[7] Williams *v.* Karnes, 4 Humph. (Tenn.) 9.

[8] Nelson *v.* Musgrave, 10 Mo. 648.

[9] Riggs *v.* Denniston, 3 Johns. Cas. (N. Y.) 198.

[10] Stow *v.* Converse, 3 Conn. 325.

man that he did not dare to bring an action in a certain county "because he was known there." [1] And it has even been held that it is libellous to charge a man with a gross want of feeling or discretion.[2] It is a criminal libel to write an indecent proposal to a woman.[3] If a portrait-painter paints the ears of an ass to a likeness he has taken, and exposes it to the public, this is a libel.[4] So is it to say of an historian that he disregards justice and propriety, and is insensible to his obligations as an historian.[5] So it is libellous to publish a correct account of judicial proceedings, if accompanied with comments and insinuations tending to asperse a man's character;[6] or for an attorney to introduce such matter into his pleadings.[7] So to say of a candidate for office that he would betray his trust from motives of political aggrandizement, or to accomplish some sinister or dishonest purpose, or to gratify his private malice, is a libel; but it is not a libel to publish the truth concerning his character and qualifications for the office he aspires to, with a view to inform the electors.[8]

The form of expression in charging is immaterial, whether interrogative or direct, or by innuendo, or ironical, or allegorical, or by caricature, or by any

[1] Steele *v.* Southwick, 9 Johns. (N. Y.) 214.

[2] Weaver *v.* Lloyd, 2 B. & C. 678. See also Barthelemy *v.* People, 2 Hill (N. Y.) 248.

[3] Regina *v.* Adams, 22 Q. B. D. 66.

[4] Mezzara's Case, 2 City Hall Rec. 113.

[5] Cooper *v.* Stone, 24 Wend. (N. Y.) 434.

[6] Thomas *v.* Croswell, 7 Johns. (N. Y.) 264.

[7] Com. *v.* Culver, 2 Pa. Law Jour. 359.

[8] Powers *v.* Dubois, 17 Wend. (N. Y.) 63; Com. *v.* Clap, 4 Mass. 163; State *v.* Burnham, 9 N. H. 34; Com. *v.* Odell, 3 Pitts. (Pa.) 449; Wilson *v.* Noonan, 23 Wis. 105.

other device whatever. The question always is, what is the meaning and intent of the author, and how will it be understood by people generally.[1]

§ 173. **Malicious.** — To constitute a malicious publication it is not necessary that the party publishing be actuated by a feeling of personal hatred or ill-will towards the person defamed, or even that it be done in the pursuit of any general evil purpose or design, as in the case of malicious mischief.[2] It is sufficient if the act be done wilfully, unlawfully, and in violation of the just rights of another, according to what, as we have seen,[3] is the general definition of legal malice. And malice is presumed as matter of law by the proof of publication.[4] Under modern statutes, and, in some cases, constitutional provisions, however, the whole question of law and fact, i. e. whether the matter published was illegal and libellous, and whether it was malicious or not, as well as whether it was written or published by the defendant, is left to the jury, they having in such cases greater rights than in other criminal prosecutions.[5]

It is not essential that the charge should be false or scandalous: it is enough if it be malicious. Indeed, the old maxim of the common law was, "The greater the truth, the greater the libel," on the ground

[1] Rex *v.* Lambert, 2 Camp. 398; State *v.* Chace, Walk. (Miss.) 384; Gathercole's Case, 2 Lewin, 237.

[2] See *post*, § 322.

[3] *Ante*, § 33.

[4] Com. *v.* Snelling, 15 Pick. (Mass.) 321; Smith *v.* State, 32 Texas, 594; Layton *v.* Harris, 3 Harr. (Del.) 406; Root *v.* King, 7 Cow. (N. Y.) 613; Com. *v.* Sanderson, 3 Pa. Law Jour. 269; Rex *v.* Harvey, 2 B. & C. 257.

[5] State *v.* Goold, 62 Me. 509; 2 Greenl. Ev., § 411; State *v.* Lehre, 2 Brev. (S. C.) 446.

that thereby the danger of disturbance of the public peace was greater. The truth, therefore, is no justification by the common law. But this rule has in some cases, in this country, been so far modified as to permit the defendant to show, if he can, that the publication under the circumstances was justifiable and from good motives, and then show its truth, in order to negative the malice and intent to defame.[1] And statutes in most if not all of the States now admit the truth in defence if the matter be published for a justifiable end and with good motives, and give the jury the right to determine these facts, as well as whether the publication be a libel or not.

§ 174. **Publication.** — The placing a libel where it may be seen and understood by one or more persons other than the maker is a publication, for the purposes of the criminal law, without reference to the question whether in fact it is seen or not,[2] or if seen whether or not it is understood.[3] It has been held that to send a libellous letter to the person libelled is a sufficient publication.[4] But it may be doubted, in the absence of statutory provision to that effect, if the mere delivery of a letter containing libellous matter to the libelled party is a technical publication, though doubtless the sending of such a letter is an indictable offence, as tending to a breach of the

[1] Com. *v.* Clap, 4 Mass. 163; Com. *v.* Blanding, 3 Pick. (Mass.) 304; Barthelemy *v.* People, 2 Hill (N.Y.) 248. See also State *v.* Lehre, 2 Brev. (S. C.) 446; Com. *v.* Morris, 1 Va. Cas. 176; Codd's Case, 2 City Hall Rec. 171.

[2] Giles *v.* State, 6 Ga. 276; Rex *v.* Burdett, 4 B. & Ald. 95, 126; Whitfield *v.* S. E. Ry. Co., E., B. & E. 115.

[3] Haase *v.* State, 20 Atl. 751 (N. J.).

[4] State *v.* Avery, 7 Conn. 266.

peace.[1] But there can be no doubt that a sealed letter addressed and delivered to the wife, containing aspersions upon her husband's character, is a publication.[2]

§ 175. **Privileged Communications.** — Certain publications are privileged, that is to say, are *prima facie* permissible and lawful. If the occasion and circumstances under which they are made rebut the inference of malice drawn from its libellous character, the publications are privileged and lawful, unless the complainant shows that the defendant was actuated by improper motives. But no one can intentionally injure under cover of a privileged communication; and if he avail himself of this course he is chargeable, although the matter published be true and privileged.[3] Thus, a fair and candid criticism, though severe, of a literary work, exposing its demerits, is privileged; but if the criticism is made the vehicle of personal calumny against the author aside from the legitimate purpose of criticism, it becomes libellous.[4] A communication made in good faith by a person in the discharge of some private duty, legal or moral, or in the conduct of his own affairs, and in matters wherein he is interested, is privileged.[5]

[1] Hodges *v.* State, 5 Humph. (Tenn.) 112; McIntosh *v.* Matherly, 9 B. Mon. (Ky.) 119; Fonville *v.* M'Nease, Dudley (S. C.) 303; Lyle *v.* Clason, 1 Caines (N.Y.) 581; Sheffill *v.* Van Deusen, 13 Gray (Mass.) 304.

[2] Schenck *v.* Schenck, 1 Spencer (N. J.) 208; Wenman *v.* Ash, 13 C. B. 836.

[3] Wright *v.* Woodgate, 2 C., M. & R. 573; Com. *v.* Blanding, 3 Pick. (Mass.) 304.

[4] Carr *v.* Hood, 1 Camp. 355.

[5] Bodwell *v.* Osgood, 3 Pick. (Mass.) 379; Toogood *v.* Spyring, 4 Tyrw. 582.

Therefore, one may write to a relation warning her not to marry a certain person, for special reasons affecting the character of that person;[1] or complain to a superior against an inferior officer in order to obtain redress;[2] or give the character of a servant in answer to a proper inquiry;[3] or report a servant's conduct to his master;[4] or tell the truth to defend his own character and interests;[5] or to enforce the rules of a society;[6] or to aid in the exposure or detection of crime, or protect the public or a friend from being swindled or otherwise injured.[7] These communications, and the like, though they may be to some extent false, are all privileged if made without malice, and for justifiable ends. Though a man is protected in making a libellous speech in a legislative assembly, if he publish it he is guilty of libel.[8] And fair reports of judicial and other proceedings, as matter of news, will be privileged, while if unfair, or interlarded with malicious comment, they will be punishable as libellous.[9] If, however, the matter published is in itself indecent, blasphemous, or contrary to good morals, it has been held, upon very careful consideration, to be indictable.[10]

[1] Todd *v.* Hawkins, 8 C. & P. 88.

[2] Fairman *v.* Ives, 5 B. & Ald. 642.

[3] Child *v.* Affleck, 9 B. & C. 403.

[4] Cockayne *v.* Hodgkisson, 5 C. & P. 543.

[5] Coward *v.* Wellington, 7 C. & P. 531.

[6] Remington *v.* Congdon, 2 Pick. (Mass.) 310; Streety *v.* Wood, 15 Barb. (N. Y.) 105.

[7] Com. *v.* Blanding, 3 Pick. (Mass.) 304 Lay *v.* Lawson, 4 A. & E. 795.

[8] Rex *v.* Creevey, 1 M. & S. 273.

[9] Clark *v.* Binney, 2 Pick. (Mass.) 113; Thomas *v.* Croswell, 7 Johns. 264; Lewis *v.* Walter, 4 B. & Ald. 605; Curry *v.* Walter, 1 B. & P. 525.

[10] Rex *v.* Carlile, 3 B. & Ald. 161.

§ 176. **Slander.** — No instance has been found of an indictment for mere verbal slander against an individual in this country, nor is it indictable in England, unless the individual sustained such a relation to the public, or the slander was of such a character, as to involve something more than a private injury, as where one was held indictable for calling a grand jury as a body a set of perjured rogues.[1]

ENGROSSING. — FORESTALLING. — REGRATING.

§ 177. These were severally offences at the common law, and describe different methods of speculation and artificial enhancement or depression of the prices of merchandise, by resort to false news, extraordinary combinations, and other indirect means outside of the regular action of the laws of trade. They were based upon early English statutes, and notably 5 and 6 Edward VI. c. 14, which are cited by Hawkins,[2] and of which a very good summary may be found in Bishop.[3] These statutes are now repealed in England, and the offences abolished. They were undoubtedly a part of the common law brought to this country, but seem, nevertheless, not to have been enforced, — perhaps on account of the greater freedom of trade, and the infrequency of the occurrence of the evils connected with them in a new country. There is no reason in principle, however, why they should not be applicable to many of the practices of the stock and other markets of the present day.[4]

[1] Rex *v.* Spiller, 2 Show. 207. See also 2 Bish. Cr. Law, 7th ed., § 945 et seq.

[2] 1 Hawk. P C, 8th ed. 646. [3] 1 Cr. Law, 7th ed., § 518 et seq.

[4] City of Louisville *v.* Roupe, 6 B. Mon. (Ky.) 591; 7 Dane, Abr.

NUISANCE.

§ 178. **A Nuisance** is anything that works hurt, inconvenience, or damage. If to the public, as the obstruction of a highway or the pollution of the atmosphere, it is a common nuisance, and punishable by indictment at common law. If the hurt is only to a private person or interest, the remedy is by civil proceedings.[1] And that is hurtful which substantially interferes with the free exercise of a public right, which shocks or corrupts the public morals, or injures the public health. And the hurt may be wrought as well by acts of omission as by acts of commission; as by failing to repair a road, or to entertain a stranger at an inn, both being regarded as disorderly acts.[2]

§ 179. **Obstruction and Pollution.** — Certain acts are said to be nuisances *per se*, because they are in violation of the public right. Thus, an obstruction in a street is a nuisance, because it may interfere with public travel, although it does not affirmatively appear that it certainly has interfered with it, or even if it appears that there has been no travel to obstruct since the obstruction was erected.[3] So of the obstruction of navigable waters, although the inconvenience may be inappreciable.[4] So the doing any

39. For the learning on this subject, in addition to the authorities already cited, see Rex *v.* Waddington, 1 East, 143; Rex *v.* Webb, 14 East, 402; Pratt *v.* Hutchinson, 15 East, 511; 2 Chitty Cr. Law, 527; Rex *v.* Rusby, Peake, Add. Cas. 189.

[1] 3 Bl. Com. 216; 4 Bl. Com. 166; State *v.* Schlottman, 52 Mo. 164.

[2] 4 Bl. Com. 167; State *v.* Madison, 63 Me. 546; State *v.* Morris Canal Co., 2 Zabr. (N. J.) 537; Hill *v.* State, 4 Sneed (Tenn.) 443.

[3] Knox *v.* New York City, 55 Barb. (N. Y.) 404.

[4] People *v.* Vanderbilt, 28 N. Y. 396; Woodman *v.* Kilbourn Mfg. Co., 1 Abb. (U. S.) 158; State *v.* Merrit, 35 Conn. 314.

act in the street or in a building adjoining the street, as the exhibition of pictures in a window,[1] or other exhibition near the street,[2] or the holding an auction sale on the street,[3] or erecting houses on a public square,[4] — or the delivering out of merchandise or other material, as of brewer's grain from a brewery, in such a manner as to cause the street to be constantly obstructed by men or vehicles, — will amount to a nuisance.[5] A mere transitory obstruction, however, resulting from the ordinary and proper use of a highway, as in the unloading of goods from a wagon, or the dumping coal into a street to be removed to the house, if the obstruction be not permitted to remain more than a reasonable time, does not amount to a nuisance.[6] The pollution of a stream of water, by discharging into it offensive and unwholesome matter, if the water be used by the public, is also indictable as a nuisance,[7] and all who contribute to such pollution are guilty.[8] So is the damming up of a stream, so as to make the water stagnant and pestiferous.[9] In New Hampshire, the prevention of the passage of fish by a dam constructed across a non-navigable stream is indictable at common law.[10]

[1] Rex *v.* Carlile, 6 C. & P. 636.

[2] Walker *v.* Brewster, L. R. 5 Eq. 25.

[3] Com. *v.* Milliman, 13 S. & R. (Pa.) 403.

[4] Com. *v.* Rush, 14 Pa. 186.

[5] People *v.* Cunningham, 1 Denio (N. Y.) 524; Rex *v.* Russell, 6 East, 427.

[6] Rex *v.* Carlile, 6 C. & P. 636; People *v.* Cunningham, 1 Denio (N. Y.) 524.

[7] State *v.* Taylor, 29 Ind. 517; State *v.* Buckman, 8 N. H. 203.

[8] State *v.* Smith, 48 N. W. 727 (Iowa).

[9] State *v.* Rankin, 3 S. C. 438.

[10] State *v.* Franklin Falls Co., 49 N. H. 240.

§ 180. **Obnoxious Business.**— Other acts may or may not be nuisances, according to the attendant circumstances. A lawful business conducted in a proper manner, in a proper place, and at a proper time, without inconvenience to the public, may be perfectly innocent; while the same business, if carried on in an improper manner, or at an improper place, or at an improper time, to the annoyance or injury of the public, will become abatable as a nuisance. The manufacturing of gunpowder, refining oils, tanning hides, and making bricks are examples of this class.[1] So the setting of spring-guns.[2] No act authorized by the legislature, however, can be punished as a nuisance, even though at common law a nuisance *per se*.[3] In the case of offensive odors, they become a nuisance if they make the enjoyment of a right — as of a passage along the highway, or of life elsewhere — uncomfortable, though the odors may not be unwholesome.[4] So a coal-shed in a thickly settled locality, which disturbs the neighborhood by reason of noise and dust, is a nuisance.[5]

§ 181. **Immoral Nuisances.**—Any business obnoxious to the public morals is a criminal nuisance. Such is the business of carrying on "bookmaking" in a

[1] Attorney General *v.* Steward, 20 N. J. Eq. 415; Wier's Appeal, 74 Pa. St. 230; State *v.* Hart, 34 Me. 36; Powder Co. *v.* Tearney, 131 Ill. 322.

[2] State *v.* Moore, 31 Conn. 479.

[3] Com. *v.* Boston, 97 Mass. 555; Danville, &c. R. R. *v.* Com, 73 Pa. 29; People *v.* New York Gas Light Co., 64 Barb. (N. Y.) 55.

[4] Rex *v.* White, 2 C. & P. 485, n.; State *v.* Payson, 37 Me. 361; State *v.* Purse, 4 McCord (S. C.) 472; Seacord *v.* People, 121 Ill. 623; Com. *v.* Perry, 139 Mass. 198.

[5] Wylie *v.* Elwood, 134 Ill. 281.

booth on a race-course,[1] or the singing of ribald songs on the public streets.[2] So profanity, or profane cursing and swearing, is a special form of nuisance, indictable at common law.[3] But it has been held that a single instance of swearing will not constitute the offence; there must be such repetition as to make the offence a common nuisance.[4] Eavesdroppers, common scolds, railers and brawlers, common drunkards, common barrators, and the like, persons guilty of open obscenity of conduct or language, of blasphemy, of profanity, or who keep disorderly houses, as for gaming or prostitution, or make disorderly and immoral exhibitions, or promote lotteries, or carry about persons affected with contagious disease, or make unseemly noises at improper times and places, may all be included under the general category of common nuisances, if the several acts work injury to the public, punishable at common law unless otherwise provided for by statute.[5]

§ 182. **Prescription. Public Benefit.** — The lapse of time does not give the right to maintain a nuisance. No one can prescribe against the State, against which the statute of limitations does not run, and which is not chargeable with laches. Nor is it any excuse that the public benefit is equal to the public

[1] McClean *v.* State, 49 N. J. L. 471.

[2] State *v.* Toole, 106 N. C. 736.

[3] State *v.* Powell, 70 N. C. 67.

[4] State *v.* Jones, 9 Ired. (N. C.) 38; State *v.* Graham, 3 Sneed (Tenn.) 134.

[5] 4 Bl. Com. 167 et seq., and notes, Sharswood's ed.; Barker *v.* Com., 19 Pa. 412; Rex *v.* Moore, 3 B. & Ad. 184.

inconvenience;[1] nor that similar nuisances have been tolerated.[2]

It has indeed been said by high authority, that where a useful trade or business has been established, away from population, it may be continued, notwithstanding the approach of population.[3] So, too, it has been held that a business established in a neighborhood where offensive trades already exist, which, though individually offensive, does not materially add to the already existing nuisance, may be permitted.[4] And in one case, at least, in this country the doctrine of the first case seems to have been accepted.[5] But it is questionable whether this is now the law in England.[6] And the very decided weight of authority in this country is to the contrary on both points.[7]

But an important qualification is to be noted. It is true that a business which is a nuisance cannot be defended by reason of lapse of time, or of the character of the surroundings; but in deciding whether in fact the business constitutes a nuisance, these facts are to be considered, along with the other cir-

[1] State *v.* Kaster, 35 Iowa, 221; Hart *v.* Albany, 9 Wend. (N. Y.) 571; Respublica *v.* Caldwell, 1 Dall. (Pa.) 150.

[2] People *v.* Mallory, 4 T. & C. (N. Y.) 567; Com. *v.* Deerfield, 6 Allen (Mass.) 449; Com. *v.* Perry, 139 Mass. 198.

[3] Abbott, C. J., Rex *v.* Cross, 2 C. & P. 483.

[4] Rex *v.* Watts, M. & M. 281.

[5] Ellis *v.* State, 7 Blackf. (Ind.) 534.

[6] Regina *v.* Fairie, 8 E. & B. 486.

[7] Taylor *v.* People, 6 Parker C. C. 347; Com. *v.* Upton, 6 Gray (Mass.) 473; People *v.* Cunningham, 1 Denio (N.Y.) 524; Com. *v.* Van Sickle, 1 Bright. (Pa.) 69; Ashbrook *v.* Com., 1 Bush (Ky.) 139; Douglass *v.* State, 4 Wis. 387; People *v.* Detroit White Lead Works, 82 Mich. 471.

cumstances of the case. What would be a nuisance in a country village, or in the residential quarter of a city, might not be a nuisance if established in a locality devoted to manufacturing. Therefore a refinery or a slaughter-house is not a nuisance, if established in a locality which is devoted to such business, and draws its prosperity from it.[1]

ATTEMPT.

§ 183. **Attempt, Preparation, and Intent.** — An attempt to commit a crime is distinguishable from preparation to commit it, and also from the intent to commit. The purchase of matches, for instance, with the intent to set fire to a house at some convenient opportunity, is not an attempt to set the fire. It is mere preparation, and, though the intent exists, there is no step taken in the perpetration of any crime to which the intent can attach. The law does not punish the mere entertainment of a criminal intent. To bring the law into action it is necesary that some act should be done in pursuance of the intent, immediately and directly tending to the commission of the crime,— an act which, should the crime be perpetrated, would constitute part and parcel of the transaction, but which does not reach to the accomplishment of the original intent, because it is prevented, or voluntarily abandoned.[2] What does immediately and directly so tend is to be determined by the circumstances of each particular case; and, as might be expected, courts which agree upon the prin-

[1] Com. *v.* Miller, 139 Pa. 77; Ballentine *v.* Webb, 84 Mich. 38.

[2] Steph. Dig. Crim. Law, art. 49; Lewis *v.* State, 35 Ala 380; Field, C. J., in People *v.* Murray, 14 Cal. 159.

ciple are not entirely consistent in its application. The dividing line between acts preparatory to and in execution of a crime is very shadowy. If the act preparatory be unequivocal and explicable only upon the theory that it was intended as a step in the commission of a crime, as in the procuring dies for making counterfeit coins, it seems to be held to be an attempt; although, if explicable as a lawful act, it might be otherwise.[1] So taking a false oath in order to procure a marriage license is an attempt to marry without a license.[2] So the taking an impression of a key to a storehouse and preparing a false key, with intent to enter and steal, has been held to be an attempt to steal.[3] On the other hand, the putting the finger on the trigger of a pistol at half-cock, or otherwise not in condition to be discharged, has been held not to constitute an attempt to shoot.[4] Sending an order for the purchase of liquor in San Francisco, to be shipped to Alaska, is not an attempt to introduce liquor into Alaska.[5] And the delivery of poison by A. to B., in order that the latter might deliver it to C., to be taken by the latter, is not an "attempt to poison" by A.[6] Nor is the actual administration of a substance supposed to be poisonous, but not so in fact.[7] But Regina *v.* Williams was a case under a statute; and it seemed to be agreed by all the judges, that, while they must confine statutory at-

[1] Rex *v.* Fuller, R. & R. C. C. 408; Regina *v.* Roberts, 7 Cox C. C. 39.
[2] Regina *v.* Chapman, 3 Cox C. C. 467.
[3] Griffin *v.* State, 26 Ga. 493.
[4] Rex *v.* Harris, 5 C. & P. 159.
[5] United States *v.* Stephens, 8 Sawy. C. Ct. 116.
[6] Regina *v.* Williams, 1 Den. C. C. 39.
[7] State *v.* Clarissa, 11 Ala. 57.

tempts strictly to the terms of the statute, a less intimate connection of the act done with the crime intended is requisite in common law attempts.[1]

§ 184. **Impossibility of Execution.** — In England, it was once held that, to constitute an attempt, the act committed must be of such a nature and under such circumstances that the actor has the power to carry his intention into execution, and that thrusting the hand into the pocket of another with intent to steal a pocket-book, or some other article of property, is no attempt, if there be at the time nothing in the pocket to steal.[2] But this doctrine has been abandoned even in England;[3] and the contrary is generally, if not universally, held in this country.[4] But though the execution of the intended act may not in fact be possible, the means adopted must be in themselves calculated to bring about the result finally desired; else the public tranquillity is not disturbed, and the act done is not criminal. Thus there must be some real object at which the act is aimed. Striking at a corpse, or shooting at a bush thinking it a man, is for this reason not an attempt to kill. And where a soldier, seeing a body of troops in the distance and thinking them hostile, rode toward them intending to desert, this was held not an at-

[1] Regina *v.* Roberts, 7 Cox C. C. 39. See the cases illustrative very fully collected and stated in 1 B. & H. Lead. Cr. Cas., note to Rex *v.* Wheatley, pp. 6–10; Regina *v.* Cheeseman, 9 Cox C. C. 100; People *v.* Murray, 14 Cal. 159.

[2] Regina *v.* Collins, 10 Jur. N. S. 686.

[3] Regina *v.* Brown, 38 W. R. 95; S. C. 24 Q. B. D. 357.

[4] Com. *v.* McDonald, 5 Cush. (Mass.) 365; People *v.* Jones, 46 Mich. 441; People *v.* Moran, 123 N. Y. 254; Clark *v.* State, 86 Tenn. 511; Harvick *v.* State, 49 Ark. 514.

tempt to desert when the troops in fact were friendly, not hostile.[1]

For the same reason, the means must be, to the apprehension of a reasonable man, calculated to effect the purpose. Using witchcraft for the purpose of killing an enemy is not an attempt to kill. "It is true, the sin and wickedness may be as great as an attempt or conspiracy by competent means; but human laws are made, not to punish sin, but to prevent crime and mischief."[2]

§ 185. **Solicitation.** — To incite, solicit, advise, or agree with another to commit a crime is in itself a crime in the nature of an attempt, although the contemplated crime be not committed.[3] But it has recently been said that the doctrine of these cases, if sound law, cannot be extended to the solicitation to commit a misdemeanor, a mere solicitation not amounting to an attempt.[4] It would seem, however, that if solicitation is an attempt in the case of felony, it is in that of misdemeanor. It is certainly something more than intent, and the doctrine of the last case can better be supported upon the failure of the indictment sufficiently to set forth the mode of solicitation, than upon the point that mere solicitation is not an act. An offer to give a bribe, and an offer to accept a bribe, have been held to be indictable offences;[5] and so have a chal-

[1] Respublica *v.* Malin, 1 Dall. (Pa.) 33.

[2] Pollock, C. B., in Attorney General *v.* Sillem, 2 H. & C. 431, 525.

[3] Regina *v.* Higgins, 2 East, 5; State *v.* Avery, 7 Conn. 266; 3 Greenl. Ev. (13th ed.), § 2, and note; Steph. Dig. Cr. Law, arts. 47, 48; 1 Bish. Cr. Law, § 767; State *v.* Sales, 2 Nev. 268.

[4] Smith *v.* Com., 54 Pa. 209.

[5] United States *v.* Worrall, 2 Dall. 384; Walsh *v.* People, 65 Ill. 58.

lenge to fight a duel,[1] and inviting another to send a challenge.[2]

Although suicide is not punishable, yet it is criminal,[3] and an unsuccessful effort at suicide is punishable as an attempt;[4] though in Massachusetts the phraseology of the statute, which makes attempts punishable by one half the penalty provided for the completed crime, has practically made the offence of an attempt to commit suicide dispunishable.[5] In some of the States, suicide is not regarded as a crime, but by statute it is made a felony to persuade another to commit suicide.[6]

CONSPIRACY.

§ 186. We see therefore that it is a crime for one person to solicit another to commit a crime. It is one step in a series of acts, which, if continued, will result in an overt act; and although it may be ineffectual, it is part and parcel of what, if consummated, becomes a complete and effectual crime. It therefore partakes of its criminality, and belongs strictly, perhaps, to that class of crimes which is included under "attempts." Mutual solicitation by two or more persons is, of course, upon the same grounds, equally criminal; and when this mutual solicitation has proceeded to an agreement, it is regarded by the law as a complete and accomplished

[1] State *v.* Farrier, 1 Hawks (N. C.) 487; Com. *v.* Whitehead, 2 Law Reporter, 148.

[2] Rex *v.* Philipps, 6 East, 464.

[3] Com. *v.* Mink, 123 Mass. 422.

[4] Regina *v.* Doody, 6 Cox C. C. 463.

[5] Com. *v.* Dennis, 105 Mass. 162.

[6] Blackburn *v.* State, 23 Ohio St. 146.

crime, which it denominates conspiracy, and defines to be "an agreement to do against the rights of another an unlawful act, or use unlawful means." It is immaterial that the end sought is lawful, provided the means by which it is to be sought are unlawful. Nor is it necessary that that which is agreed to be done should be criminal, or in itself indictable. It is sufficient if it be unlawful.[1]

§ 187. **In what Sense Unlawful.** — Yet perhaps not every unlawful act will support an indictment for conspiracy. Thus, it has been held in England that an agreement to trespass upon the lands of another, as to poach for game, is no conspiracy.[2] And this case has been followed in New Hampshire.[3] So it has been held that an agreement to sell an unsound horse with a warranty of soundness is not an indictable conspiracy.[4] And it has even been held in New Jersey that to support an indictment for conspiracy there must be indictable crime, either in the end proposed or the means to be used.[5] But all these are cases upon which later decisions have thrown great doubt, and neither perhaps would now be followed except upon its exact facts.[6]

[1] Regina *v.* Bunn, 12 Cox C. C. 316; s. c. 1 Green's Cr. Law Rep. 52; Regina *v.* Warburton, Law Rep. 1 C. C. 274; Com. *v.* Hunt, 4 Met. (Mass.) 111; State *v.* Mayberry, 48 Me. 218; State *v.* Rowley, 12 Conn. 101; People *v.* Mather, 4 Wend. (N. Y.) 229; Smith *v.* People, 25 Ill. 17; State *v.* Burnham, 15 N. H. 396.

[2] Rex *v.* Turner, 13 East, 228.

[3] State *v.* Straw, 42 N. H. 393.

[4] Rex *v.* Pywell, 1 Stark. 402.

[5] State *v.* Rickey, 4 Halst. 293.

[6] See Regina *v.* Kenrick, 5 Q. B. 49; Regina *v.* Rowlands, 5 Cox C. C. 466, 490; Lambert *v.* People, 9 Cow. (N. Y.) 578, in addition to cases cited *ante*, § 186.

It may be that some unlawful acts or means might be held too trivial to support a charge of conspiracy; but what they are, and how trivial, we have no means of determining.[1]

However that may be, it seems to be settled that all combinations to defeat or obstruct the course of public justice, as by the presentation of false testimony,[2] or tampering with witnesses,[3] or with jurors,[4] or with the making up of the panel, or preventing the attendance of witnesses,[5] or by destroying evidence,[6] or falsifying a public record,[7] — all agreements to cheat or injure the public or individuals, as by imposing upon the public a spurious article for the genuine,[8] or by running up the price of goods at an auction by means of false bids,[9] or by manufacturing false news or using coercive means to enhance or depress the price of property or labor,[10] or by unlawful means to compel an employer to increase,[11] or employees to reduce,[12] the rate of wages, — all agreements to injure or disgrace others in their

[1] See Regina *v.* Kenrick, *ubi supra.*

[2] Rex *v.* Mawbey, 6 T. R. 619.

[3] Rex *v.* Johnson, 1 Show. 16.

[4] Rex *v.* Gray, 1 Burr. 510.

[5] Rex *v.* Steventon, 2 East, 362.

[6] State *v.* De Witt, 2 Hill (S. C.) 282.

[7] Com. *v.* Waterman, 122 Mass. 43.

[8] Com. *v.* Judd, 2 Mass. 329.

[9] Regina *v.* Lewis, 11 Cox C. C. 404.

[10] Regina *v.* Blake, 6 Q. B. 126; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173; Levi *v.* Levi, 6 C. & P. 239; Rex *v.* De Berenger, 3 M. & S. 67.

[11] People *v.* Fisher, 14 Wend. (N. Y.) 9; Regina *v.* Bunn, 12 Cox C. C. 316; Com. *v.* Hunt, 4 Met. (Mass.) 111; State *v.* Donaldson, 32 N. J. 151.

[12] Rex *v.* Hammond, 2 Esp. 719.

character, property, or business, as by seducing a female,[1] or by abducting a minor daughter, for the purpose of marrying her against the wish of her parents,[2] or by hissing an actor or injuring a play,[3] or by destroying one's property or depreciating its value,[4] as by a conspiracy to stifle bidding at an auction,[5] or by falsely charging a man with being the father of a bastard child,[6] or by getting him drunk in order to cheat him,[7] — and, of course, all agreements to commit acts in themselves criminal, or to be accomplished by criminal means, and all acts *contra bonos mores*,[8] — are indictable conspiracies.

§ 188. **Agreement the Gist of the Offence.** — The law regards this unlawful combination of two or more evil-disposed persons as especially dangerous, since increase of numbers, mutual encouragement and support, and organization, increase the power for and the probability of mischief. And the conspiracy is punished to prevent the accomplishment of the mischief. It is, therefore, entirely immaterial whether the agreement be carried out, or whether any steps be taken in pursuance of the agreement. When the agreement is made, the crime is complete;[9] and it seems to be settled, without substantial dis-

[1] Smith *v.* People, 25 Ill. 17; Anderson *v.* Com., 5 Rand. (Va.) 627; State *v.* Savoye, 48 Iowa, 562.

[2] Mifflin *v.* Com., 5 W. & S. (Pa.) 461.

[3] Clifford *v.* Brandon, 2 Camp. 358.

[4] State *v.* Ripley, 31 Me. 386.

[5] Levi *v.* Levi, 6 C. & P. 239.

[6] Regina *v.* Best, 2 Ld. Raym. 1167.

[7] State *v.* Younger, 1 Dev. (N. C.) 357.

[8] State *v.* Buchanan, 5 H. & J. (Md.) 317; State *v.* Murphy, 6 Ala. 765; Young's Case, 2 T. R. 734 (cited).

[9] United States *v.* Cole, 5 McLean C. Ct. 513; State *v.* Noyes, 25

sent, that persons may be indictable for conspiring to do that which they might have individually done with impunity.[1]

If the conspiracy be executed, and a felony be committed in pursuance of it, the conspiracy disappears, being merged in the felony, and punishable as part of it.[2] It is otherwise, however, when a misdemeanor is committed. Here there is no merger, and the conspiracy is separately punishable.[3]

§ 189. **Intent.** — As in common law offences generally, there must be an actual wrongful intent in order to render the conspiracy criminal. Thus, if a person be deceived into becoming a conspirator, and is himself acting in good faith, he is not guilty.[4] So, if two parties conspire to procure another to violate a statute, in order that they may extort money from him by threats of prosecution, they are indictable. But if the object be to secure the detection and punishment of suspected offenders, they are not.[5]

§ 190. **All equally Guilty.** — All conspirators are equally guilty, whether they were partakers in its origin, or became partakers at a subsequent period of the enterprise; and each is responsible for all acts

Vt. 415; Regina *v.* Best, 2 Ld. Raym. 1167; Hazen *v.* Com., 23 Pa. 355; Com. *v.* Judd, 2 Mass. 329; Com. *v.* Ridgway, 2 Ashm. (Pa.) 247.

[1] State *v.* Buchanan, 5 H. & J. (Md.) 317; Regina *v.* Gompertz, 9 Q. B. 824; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. 173.

[2] Com. *v.* Blackburn, 1 Duv. (Ky.) 4; Com. *v.* Kingsbury, 5 Mass. 106; State *v.* Mayberry, 48 Me. 218.

[3] State *v.* Murray, 15 Me. 100; People *v.* Mather, 4 Wend. (N. Y.) 229, 265; People *v.* Richards, 1 Mich. 216; State *v.* Murphy, 6 Ala 765; State *v.* Noyes, 25 Vt. 415.

[4] Rex *v.* Whitehead, 1 C. & P. 67.

[5] Hazen *v.* Com., 23 Pa. 355.

of his confederates, done in pursuance of the original purpose.[1]

§ 191. **Effect of Local Laws.** — In determining what is indictable as a conspiracy, much depends upon the local laws of the place of the conspiracy. It may well be that in one jurisdiction that may be unlawful, and even criminal, which in another is not; and therefore it does not follow that because in one State or country where the common law is in force an agreement to do a particular act may be a conspiracy, the same would be true of another. This would depend upon local considerations. An indictment and conviction in one State may not be a precedent in another. Upon this point the following observations[2] are worthy of careful consideration: "Although the common law in regard to conspiracy in this Commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this State. The general rule of the common law is, that it is a criminal and indictable offence for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law in England and in this Commonwealth; and yet it must depend upon the local laws of each country to determine whether the purpose to be accomplished by the combination, or

[1] People *v.* Mather, 4 Wend. (N. Y.) 229; Ferguson *v.* State, 32 Ga. 658; Frank *v.* State, 27 Ala. 37; State *v.* Wilson, 30 Conn. 500.

[2] Shaw, C. J., Com. *v.* Hunt, 4 Met. (Mass.) 111.

the concerted means of accomplishing it, be unlawful or criminal in the respective countries. All those laws of the parent country, whether rules of the common law or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship, — not being adapted to the circumstances of our colonial condition, — were not adopted, used, or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the Constitution already cited. This consideration will do something towards reconciling the English and American cases, and may . . . show why a conviction in England, in many cases, would not be a precedent for a like conviction here."

CHAPTER V.

CRIMES AGAINST RELIGION, MORALITY, AND DECENCY.

§ 193. Apostasy.
194. Blasphemy.
195. Adultery.
196. Bigamy.
197. Seduction.
198. Abduction.
199. Kidnapping.
200. Abortion.
201. Lasciviousness.
202. Fornication.
203. Sodomy.

§ 192. The principal common law crimes of this class are comprehended under three heads: crimes against Christianity, such as apostasy and blasphemy; crimes against the family relation, such as adultery, bigamy, seduction, and abortion; and sexual crimes, such as lasciviousness, fornication, and sodomy.

APOSTASY.

§ 193. **Apostasy** stands at the head of the list of crimes against religion of which the ancient common law took cognizance, and is defined as a total renunciation of Christianity by one who has embraced it.[1] The Church of England was and is a State institution, and it has been deemed to be the duty of the State to protect it, and through it the State religion. Hence the common law punished whatever was calculated to injure or degrade it. Out of this view of state policy grew the common law crimes of

[1] 4 Bl. Com. 42.

Apostasy, *Heresy*, *Simony*, *Non-conformity*, *Reviling the Ordinances of the Church*, *Blasphemy*, and *Profane Cursing and Swearing*. None of these, it is believed, except the last two, have ever been, or are likely to be, here recognized as crimes against the State; for though, as has already been seen,[1] Christianity is a part of the common law in this country as well as in England, yet, as we have no established church and no established religion to which the State is bound to extend its protection, most of these offences are left to the discipline of the various religious bodies in which they may arise. *Blasphemy* and *profane cursing and swearing*, however, being offences against good morals as well as hostile to the spirit of Christianity, have, by exception, in this country been held indictable,[2] and will now be considered.

BLASPHEMY.

§ 194. **Blasphemy** is, literally, evil-speaking. But only that kind of evil-speaking which injuriously affects the public is taken notice of by the common law, and, under this particular head, only the evil-speaking of sacred things. The definitions of blasphemy differ, according to the different views entertained by different ages and countries as to what things are so sacred as to require, in the interest of public order, their protection against assault. Thus, in Spain it is held to be blasphemous to speak evil of the saints;[3] and in Woolston's Case[4] it was held

[1] *Ante*, § 2.
[2] See 1 Bl. Com., bk. 4, c. 4.
[3] Bouv. Dict., Blasphemy.
[4] 2 Stra. 834.

blasphemous at common law to write against Christianity in general, while it was intimated that learned men might dispute about particular controverted points. Though the common law is understood to prevail in this country relative to this crime, except so far as it has been abrogated by statute, yet it cannot be doubted that its application would, at the present day, be greatly restricted. No such discussion would now be regarded as blasphemous, unless executed in such a manner as to betray a malicious purpose to calumniate and vilify, and to such an extent as to become an injury to public morals. Good morals, being one of the strong foundations of social order, must be encouraged and protected. Whatever, therefore, tends essentially to sap such foundation is punishable, upon the same ground as is the publication of obscene writing or pictures.

No category of the sacred things with reference to which blasphemy may be committed has been given in any description or definition of the offence by the courts or text-writers. It has been held to be blasphemous to deny the existence of God, with the intent to calumniate and disparage;[1] so, to speak of the Saviour as a "bastard," with like intent,[2] or as an impostor and murderer;[3] so, with like intent, to speak of the Holy Scriptures as "a fable," and as containing "many lies,"[4] or otherwise maliciously to revile them.[5] Christianity is a part of the com-

[1] Com. *v.* Kneeland, 20 Pick. (Mass.) 206.

[2] State *v.* Chandler, 2 Harr. (Del.) 553; People *v.* Ruggles, 8 Johns. (N. Y.) 290.

[3] Rex *v.* Waddington, 1 B. & C. 26.

[4] Updegraph *v.* Com., 11 S. & R. (Pa.) 394.

[5] Rex *v.* Hetherington, 5 Jur. (1st ser.) 529.

mon law of this country, and its principles are so interwoven with the structure of modern society that whatever strikes at its root tends manifestly to the dissolution of civil government. "Blasphemy," says Chancellor Kent,[1] "according to the most precise definitions, consists in maliciously reviling God or religion," — as satisfactory a definition, perhaps, as can be given, taking religion to mean that body of doctrine and belief commonly accepted as Christianity.

Whether the words are spoken or written is immaterial. They must, however, if spoken, be heard by somebody, and, if written, be published.[2]

Many of the States have enacted statutes prescribing the punishment which shall be imposed in certain cases of blasphemy; but these statutes are not regarded as changing the common law, except so far as their special terms provide. What was blasphemy at common law is still blasphemy, subject to the modifications of the statute.[3]

Profanity is an offence analogous to blasphemy, which will be further treated under the head of Nuisance, of which both offences are special forms.[4]

ADULTERY.

§ 195. **Adultery** is the unlawful and voluntary sexual intercourse between two persons of opposite sexes, one at least of whom is married. It is not an

[1] People *v.* Ruggles, *ubi supra.*

[2] People *v.* Porter, 2 Parker (N. Y.) C. R. 14; State *v.* Powell, 70 N. C. 67.

[3] 1 Bish. Cr. Law, § 80, and cases there cited.

[4] The question of the unconstitutionality of such laws, as restrictive of the liberty of speech and of the press, is elaborately discussed, and decided in the negative, by Shaw, C. J., in Com. *v.* Kneeland, which,

offence at common law,[1] and although in most of the States it is now made criminal, it is in some of them only cognizable in the ecclesiastical tribunals. The foregoing definition is based upon the general terms of the statutes of the several States under which it is not material which of the parties is married, the offence being adultery on the part of the married person, and fornication on the part of the unmarried.[2] But it embraces a wider field, no doubt, than comes within the original idea of adultery, which was the introduction of spurious offspring into the family, whereby a man may be charged with the maintenance of children not his own, and the legitimate offspring be robbed of their lawful inheritance, making it necessary that one of the parties should be a married woman. In some of the States, this idea still prevails as to criminal prosecutions for adultery, while in suits for divorce the intercourse of a married man with an unmarried woman is held to be adultery.[3] The statutes of the several States so differ, however, that while in some States intercourse of an unmarried man with a married woman is adultery on the part of the man,[4] in others intercourse by a married man with an unmarried woman is not adultery on the part of the latter,[5] and in others, an unmarried man cannot commit adultery.[6]

with the cases in New York and Pennsylvania before cited, are leading cases upon the subject.

[1] 4 Bl. Com. 65.

[2] State *v.* Hutchinson, 36 Me. 261; Miner *v.* People, 58 Ill. 59.

[3] State *v.* Armstrong, 4 Minn. 335.

[4] State *v.* Wallace, 9 N. H. 515; State *v.* Pearce, 2 Blackf. (Ind.) 318; State *v.* Weatherby, 43 Me. 258.

[5] Cook *v.* State, 11 Ga. 53; State *v.* Armstrong, 4 Minn. 335.

[6] Respub. *v.* Roberts, 2 Dall. (Pa.) 124.

That the parties cohabited in the honest belief that they had a right to, and did not intend to commit the crime, is no defence, as has already been shown.[1]

"Open and notorious adultery" cannot be shown by the mere act of adultery. The fact of openness and notoriety must be proved, and that the party charged publicly and habitually violated the law.[2] So "living in adultery" means more than a single act of illicit intercourse.[3]

Where two are charged with adultery, committed together, they may be tried together; and one may be tried and convicted, though the other has not been arrested.[4] So where one of the parties was so intoxicated as to be ignorant that the act was committed, the other may be convicted alone.[5] And it has been held that, where the parties are tried separately, and one is acquitted, the other may be convicted.[6] But where they are tried together, it would of course be impossible to acquit one and convict the other.[7]

BIGAMY.

§ 196. **Bigamy**, otherwise called *polygamy*, or the offence of having a plurality of wives or husbands at the same time, was, like adultery, an offence of eccle-

[1] *Ante*, § 53; State *v.* Goodenow, 65 Me. 30.

[2] State *v.* Crowner, 56 Mo. 147; People *v.* Gates, 46 Cal. 52; Wright *v.* State, 5 Blackf. (Ind.) 358; State *v.* Marvin, 12 Iowa, 499; Miner *v.* People, 58 Ill. 59; Carrotti *v.* State, 42 Miss. 334.

[3] Smith *v.* State, 39 Ala. 554; Richardson *v.* State, 37 Tex. 346; Jackson *v.* State, 116 Ind. 464; Bodiford *v.* State, 86 Ala. 67.

[4] State *v.* Carroll, 30 S. C. 85.

[5] Com. *v.* Bakeman, 131 Mass. 577.

[6] Alonzo *v.* State, 15 Tex. App. 378.

[7] State *v.* Rinehart, 106 N. C. 787.

siastical cognizance, but ultimately became a statutory offence,[1] the marrying another by a person already married and having a husband or wife living being made a felony. This statute was adopted by Maryland as one which "by experience had been found applicable to their local and other circumstances," and is there held to this day, except as to the punishment, to be a part of the common law. And by the law of Maryland the crime is a felony, as doubtless it is in other States where punishment in the state prison is or may be the penalty.[2] It is substantially the law in most, if not all, of the States of the Union. It is only the second marriage which is criminal; and therefore, if the first marriage be in one jurisdiction and the second in another jurisdiction, the crime is only committed in, and of course only cognizable by the tribunals of, the latter;[3] and equally of course, if the first marriage is invalid, the second is no offence anywhere, — in fact, there is no second marriage.[4] There is but one lawful marriage, and if the first be valid the second is void; nor is it material that the second would be void on other grounds. The offence consists in the entering into a void marriage while a prior valid marriage relation exists,[5] and is complete without cohabitation.[6]

[1] 1 James I. c. 11; 4 Bl. Com. 164. [2] *Ante*, § 10.

[3] 1 Hawk. P. C., bk. 1, c. 43; Putnam *v.* Putnam, 8 Pick. (Mass.) 433; People *v.* Mosher, 2 Parker (N. Y.) C. R. 195; Com. *v.* Lane, 113 Mass. 458; Johnson *v.* Com., 86 Ky. 122.

[4] State *v.* Barefoot, 2 Rich. (S. C.) 209; Shafher *v.* State, 20 Ohio, 1; People *v.* Slack, 15 Mich. 193; McReynolds *v.* State, 5 Cold. (Tenn.) 18.

[5] People *v.* Brown, 34 Mich. 339; Regina *v.* Brawn, 1 C. & K. 144; Regina *v.* Allen, L. R. 1 C. C. 367; Hayes *v.* People, 25 N.Y. 390; Robinson *v.* Com., 6 Bush (Ky.) 309; Carmichael *v.* State, 12 Ohio St. 553.

[6] Nelms *v.* State, 84 Ga. 466; Gise *v.* Com., 81 Pa. 428; State *v.* Smiley, 98 Mo. 605.

A divorce may, and unless restricted in its terms usually does, annul the former marriage, so as to make the second one valid. In some States, however, the guilty party in a divorce for adultery on his part may be guilty of polygamy by marrying without leave of court while his divorced wife is living.[1] But after a divorce in one State, a marriage in another valid by the laws of that State, followed by a return to the State where the divorce was granted, and a cohabitation there with the second wife, will not be held polygamous, unless the second wife be an inhabitant of the State granting the divorce, and the parties went to another State to be married in order to evade the law.[2] So if the party goes to another State merely for the purpose of obtaining a divorce, and obtains it by fraud, it will be of no avail to him on his return to the State he left and marrying again there.[3] And it has been held that the crime may be committed although the defendant in good faith believed his former partner was dead or divorced.[4] Whether the formerly unmarried party to a polygamous marriage, if he marries with knowledge of the other party's disability, is also guilty of any offence, and what, is an open question, and may be solved differently in different States, according to the degree of the principal

[1] Com. *v.* Putnam, 1 Pick. (Mass.) 136; Baker *v.* People, 2 Hill (N. Y.) 325.

[2] Com. *v.* Lane, 113 Mass. 458.

[3] Thompson *v.* State, 28 Ala. 12.

[4] Com. *v.* Mash, 7 Met. (Mass.) 472; State *v.* Goodenow, 65 Me. 30; *ante*, § 53. But see, *contra*, Squire *v.* State, 46 Ind. 459; Regina *v.* Tolson, 23 Q. B. D. 168.

offence, whether felony or misdemeanor, or by special provisions of the statute.[1]

SEDUCTION.

§ 197. It is at least doubtful whether seduction was an indictable offence by the old common law.[2] It seems, however, to have been the subject of statutory prohibition as long ago as the time of Philip and Mary,[3] whereby, after reciting that "maidens and women" are, "by flattery, trifling gifts, and fair promises," induced by "unthrifty and light personages," and by those who "for rewards buy and sell said maidens and children," it is made unlawful for any person or persons to "take or convey away, or cause to be taken or conveyed away, any maid or woman child, being under the age of sixteen years," out of the possession of their lawful custodian. There seems to be no reason to doubt that this statute became a part of the common law of the Colonies,[4] and it seems to have been adopted by statute, and acted upon in South Carolina with certain modifications, — the limitation to heiresses, for instance, being regarded as not applicable to the condition of society in that jurisdiction. Indeed, it was held that such a limitation was not in the act itself fairly interpreted.[5] The distinction between abduction and

[1] See Bish. Cr. Proc., § 594; Boggus *v.* State, 34 Ga. 275.

[2] Rex *v.* Moor, 2 Mod. 128; Rex *v.* Marriot, 4 Mod. 144; 1 East P. C. 448.

[3] 4 & 5 Ph. & M. c. 8, §§ 1, 2.

[4] Com. *v.* Knowlton, 2 Mass. 530.

[5] State *v.* Findlay, 2 Bay (S. C.) 418; State *v.* O'Bannon, 1 Bail. 144. See also State *v.* Tidwell, 5 Strobh. (S. C.) 1, which, however, is a case for abduction under the third and fourth sections of the statute.

seduction seems to be that the former is presumed to be by force, or its equivalent, for the purposes of marriage or gain; while the latter is presumed to be without force, and by enticement, for the purpose of illicit intercourse.[1] The distinction is by no means clearly made, and the decisions in indictments for abduction and seduction will be found interchangeably useful to be consulted. In Connecticut, the statute punishes "whoever seduces a female"; and seduction is held *ex vi termini* to imply sexual intercourse, and is defined to be "an enticement" of the female "to surrender her chastity by means of some art, influence, promise, or deception calculated to effect that object"; and the seduction is proved, though it appear that it followed a promise of marriage made in good faith.[2] Here, too, as in the cases to be cited illustrative of the statutes against abduction, by "previous chaste character" is meant actual personal virtue,[3] which is presumed to exist, unless it be shown that the woman has had illicit intercourse with the defendant or another prior to the seduction,[4] and may still exist if it be shown that, though at some former time she may have yielded to the defendant, she had reformed, and was a chaste woman at the time of the seduction.[5] And it seems that, if

[1] State *v.* Crawford, 34 Iowa, 40.

[2] State *v.* Bierce, 27 Conn. 319; Dinkey *v.* Com., 17 Pa. 126; Croghan *v.* State, 22 Wis. 444. See the statutes of several States collected, 8 Amer. St. Rep. 870, n.

[3] Kenyon *v.* People, 26 N. Y. 203; Crozier *v.* People, 1 Parker C. C. 453.

[4] Wood *v.* State, 48 Ga. 192; State *v.* Higdon, 32 Iowa, 262; People *v.* Brewer, 27 Mich. 134; People *v.* Clark, 33 Mich. 112.

[5] State *v.* Timmens, 4 Minn. 325; State *v.* Carron, 18 Iowa, 372. But see Cook *v.* People, 2 T. & C. (N. Y.) 404.

the alleged seducer be a married man, and known to be such by the female said to have been seduced, and the means of seduction are alleged to be a promise of marriage, this is not such a false and fraudulent act as could lead to the betrayal of the confidence of any virtuous woman, and has not therefore the element of fraud which is necessary to constitute the crime of seduction.[1]

The actual consent of the woman is not necessary in order to constitute the crime of seduction;[2] but if such force is used as amounts to a rape, the crime of seduction is not committed.[3]

ABDUCTION.

§ 198. **Abduction** was made a crime by an old statute,[4] — sufficiently old to have been brought with our ancestors to this country as part of the common law.[5] The specific offence seems to have been limited to the taking away for lucre — no doubt by force, fraud, or fear — of adult females, "maid, widow, or wife," having property, or being heirs apparent, for the purpose of marriage. A taking for lucre and a

[1] Wood *v.* State, *ubi supra;* People *v.* Alger, 1 Parker C. C. (N.Y.) 333. See also Boyce *v.* People, 55 N.Y. 644, and *post*, § 198. The case of Wood *v.* State, 48 Ga. 192, is sometimes cited as holding the doctrine that it is not necessary, in order to show that a woman is not a virtuous woman, to prove that she has been guilty of previous illicit intercourse, but it is sufficient to show that her mind has become deluded by unchaste and lustful desires. But though this was the view of the judge who gave the opinion, it was distinctly disavowed by Warren, C. J., and Trippe, J., — a majority of the court, — who held to the contrary.

[2] State *v.* Horton, 100 N. C. 443.

[3] State *v.* Lewis, 48 Iowa, 578; People *v.* De Fore, 64 Mich. 693.

[4] 3 Hen. VII. c. 6

[5] Com. *v.* Knowlton, 2 Mass. 530.

marriage or defilement are essential to the completion of the offence.[1] And perhaps the distinction between this offence and kidnapping consists in this limitation,— kidnapping relating to the taking away any person, and more especially children, for any unlawful purpose. It may be, also, that abduction might be complete without taking the person abducted out of the realm, but only from home to some other place within the realm; while it was essential to the act of kidnapping that the person seized should be taken out of the country, or, at all events, seized with that intent.[2] It is now an offence for the most part, if not entirely, regulated by statute.

These statutes variously describe and define the offence. While the substance is substantially the same in all, yet there are specific differences which distinguish, and leave it uncertain, till a comparison of the statutes solves the question, whether the decisions in one State are applicable to the statutes in another. Under these several statutes it has been held that abduction "for the purpose of prostitution," means for general and promiscuous illicit intercourse. A mere seduction and illicit intercourse with the seducer does not amount to prostitution.[3] But if the purpose is that the woman shall enter into such a course of life as shall constitute prostitution or concubinage, the crime is at once committed; no long continuance of the life is necessary.[4] Where a

[1] Baker *v.* Hall, 12 Coke, 100.

[2] See *post*, § 199.

[3] Com *v.* Cook, 12 Met. (Mass.) 93; State *v.* Stovell, 54 Me 24; State *v.* Ruhl, 8 Iowa, 447; People *v.* Parshall, 6 Park. (N.Y.) C. R. 129

[4] Henderson *v.* People, 124 Ill. 607.

statute provides that the person so abducted must have been of previous chaste character, the abduction of a person who had been previously a prostitute is not within the statute, unless she had reformed.[1] If she had previously had intercourse with the defendant only, it seems that this cannot be held to be conclusive of previous unchaste character. The unchastity must be with other men.[2] In a case in Indiana,[3] a distinction is made between the phrase "of previous chaste character," as used in the statute against abduction, and the phrase "of good repute for chastity," used in another section of the same statute against seduction. In the former case, a single proven act of illicit intercourse is admissible in defence, as the issue is actual personal virtue; while in the latter case it might not be, as reputation is the issue. But the distinction is between "character" used in one statute, and "repute" used in the other; and it may be doubted if the distinction is not too fine. Very high authorities treat character and reputation as substantially identical.[4]

It is also held under these statutes that within the meaning of the term "forcible abduction" are included cases where the mind of the person is operated upon by falsely exciting fears, by threats, fraud, or other unlawful or undue influence amounting substantially to a coercion of the will, and an effective substitute for actual force.[5] And a child of four

[1] Carpenter *v.* People, 8 Barb. (N. Y.) 603; State *v.* Carron, 18 Iowa, 372.

[2] State *v.* Willspaugh, 11 Mich. 278. [3] Lyons *v.* State, 52 Ind. 426.

[4] See 1 Greenl. Ev., § 461 and notes.

[5] Moody *v.* People, 20 Ill. 315; People *v.* Parshall, 6 Park. (N. Y.) C. R. 129.

years old is incapable of consenting to be taken away by the father from the mother.[1] Where a statute limits the offence to the abduction of persons within a specified age, it is held that the fact that the abductor did not know, or even the fact that he had reason to believe, and did believe, that the person taken away was not within the designated age, is immaterial. The act is at the peril of the perpetrator.[2]

KIDNAPPING.

§ 199. **Kidnapping** is defined by Blackstone as the forcible abduction or stealing away of a man, woman, or child from his own country and sending him away to another.[3] And this definition has been adopted with the modification that the carrying away need not be into another country.[4] It is false imprisonment, with the element of abduction added.[5] And here, as in false imprisonment, fraud or fear may supply the place of force.[6]

ABORTION.

§ 200. Although there is[7] the precedent of an indictment for an attempt to procure an abortion as a crime at common law, and it has been said by a distinguished text-writer[8] that the procuring an abor-

[1] State *v.* Farrar, 41 N. H. 53. See also *ante*, § 197.

[2] State *v.* Ruhl, 8 Iowa, 447; Regina *v.* Prince, 13 Cox C. C. 138; *ante*, § 56.

[3] 4 Bl. Com. 219; Click *v.* State, 3 Texas, 282.

[4] State *v.* Rollins, 8 N. H. 550.

[5] Click *v.* State, 3 Texas, 282.

[6] Moody *v.* People, 20 Ill. 315; Hadden *v.* People, 25 N. Y. 373; Payson *v.* Macomber, 3 Allen (Mass.) 69. See also Abduction; False Imprisonment.

[7] 3 Chitty Cr. Law, 557.

[8] 2 Whart. Cr. Law, § 1220.

tion is an indictable offence at common law, it is found upon examination that the precedent referred to is for an assault, and the case [1] relied upon as an authority is also for an assault. The better opinion is, that the procuring an abortion is not, as such, an indictable offence at common law, although the acts done in pursuance of such a purpose do undoubtedly amount to other offences which the common law recognizes and punishes. But the procuring of an abortion with the consent of the mother before she is quick with child is not, at common law, even an assault, the consent of the mother effectually doing away with an element necessary to the constitution of an assault.[2] The procuring it after that time is a misdemeanor, and may be a murder.[3]

Under a statute punishing the procurement of an abortion "by means of any instrument, medicine, drug, or other means whatever," the indictment charging that the defendant beat a certain pregnant woman with intent to cause her to miscarry, it was held that the case was not made out by proof that the defendant beat her, and caused her thereby to miscarry, unless the beating was with that intent.[4]

This view of the common law doubtless led to such statutes as prevail in Massachusetts, Vermont, and New York, and probably most of the other States,

[1] Com. *v.* Demain, 6 Pa. L. J. 29. A later case in Pennsylvania, however, holds that an indictment will lie. Mills *v.* Com., 13 Pa. 631.

[2] Mitchell *v.* Com., 78 Ky. 204; Com. *v.* Parker, 9 Met. (Mass.) 263.

[3] Regina *v.* West, 2 C. & K. 784; Smith *v.* State, 33 Me. 48; State *v.* Cooper, 2 Zab. (N. J.) 52; Com. *v.* Parker, 9 Met. (Mass.) 263; Evans *v.* People, 49 N. Y. 86.

[4] Slattery *v.* People, 76 Ill. 217. See also *ante*, § 32.

punishing the procurement of a miscarriage, or the attempt to procure it, under which it is held that the consent of the woman is no excuse, and that the crime may be committed though the child be not quick.[1] And under the New York statute the woman who takes drugs to effect a miscarriage is equally guilty with the person who administers them to her.[2] Yet she is not strictly an accomplice, the law regarding her rather as a victim than a perpetrator.[3]

Upon general principles, as we have already seen, an attempt to commit a statutory misdemeanor or felony is itself a misdemeanor, indictable and punishable as such at common law.[4]

LASCIVIOUSNESS.

§ 201. **Lasciviousness** is punishable at common law, and embraces indecency and obscenity, both of word and act; as the indecent exposure of one's person in a public place,[5] or the use of obscene language in public.[6] It is immaterial how many or how few may see or hear, if the act be done in public where many may see or hear.[7] And the permission of those for whose decent appearance one is responsible to go about publicly in a state of nudity has

[1] Com. *v.* Wood, 11 Gray (Mass.) 85; State *v.* Howard, 32 Vt. 380; People *v.* Davis, 56 N. Y. 95; Mills *v.* Com., 13 Pa. 631; Cobel *v.* People, 5 Park. (N.Y.) C. R. 348. See also State *v.* Murphy, 3 Dutch. (N. J.) 112; Willey *v.* State, 46 Ind. 363; State *v.* Van Houten, 37 Mo. 357; State *v.* Fitzgerald, 49 Iowa, 260.

[2] Frazer *v.* People, 54 Barb. (N. Y.) 306.

[3] Dunn *v.* People, 29 N. Y. 523; *ante*, § 76.

[4] *Ante*, § 18.

[5] State *v.* Rose, 32 Mo. 560.

[6] State *v.* Appling, 25 Mo. 315

[7] State *v.* Millard 18 Vt. 574; Van Houten *v.* State, 46 N J L. 16.

been held to be lewdness on the part of the person so permitting.[1] Under statutes against lascivious behavior and lascivious carriage, — substantially the same, — it seems to be the law that the offence may be committed by exposure of the person and solicitation to sexual intercourse, without the consent of the party so solicited, although it be not done in a public place.[2] This, however, would not amount to open and gross lewdness.[3] Lascivious *cohabitation* implies something more than a single act of sexual intercourse;[4] it must be shown that the parties lived together as man and wife, not being legally married.[5]

FORNICATION.

§ 202. **Fornication** is the unlawful sexual intercourse of an unmarried person with a person of the opposite sex, whether married or unmarried. In some States such intercourse with a married person is made adultery. Like adultery, it was originally of ecclesiastical cognizance only; and without circumstances of aggravation, which will make it part and parcel of another offence, it is not believed to have been recognized as an offence at common law in this country.[6] The statutes of the several States, however, generally, if not universally, make it punishable under certain circumstances of openness and

[1] Britain *v.* State, 3 Humph. (Tenn.) 203.

[2] State *v.* Millard, 18 Vt. 574; Fowler *v.* State, 5 Day (Conn.) 81. See also Dillard *v.* State, 41 Ga. 278; Com. *v.* Wardell, 128 Mass. 52.

[3] Com. *v.* Catlin, 1 Mass. 8; but see Com. *v.* Wardell, 128 Mass. 52, 53.

[4] State *v.* Marvin, 12 Iowa, 499, Com. *v.* Calef, 10 Mass. 153.

[5] Pruner *v.* Com., 82 Va. 115.

[6] State *v.* Rahl, 33 Tex. 76; State *v.* Cooper, 16 Vt. 551.

publicity, which perhaps would make it indictable if there were no statute.[1] And where it is indictable, it has been frequently held that, on failure to prove the marriage of the party indicted for adultery, he may be found guilty of fornication, if the circumstances alleged and proved would warrant a conviction on an indictment for fornication.[2]

SODOMY.

§ 203. **Sodomy,** otherwise called buggery, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast.[3] This crime was said to have been introduced into England by the Lombards, and hence its name, from the Italian *bugarone.*[4] It may be committed by a man with a man, by a man with a beast,[5] or by a woman with a beast, or by a man with a woman, — his wife, in which case, if she consent, she is an accomplice.[6] But the act, if between human beings, must be *per anum,* and the penetration of a child's mouth does not constitute the offence.[7] If both parties consent, both are

[1] Anderson *v.* Com., 5 Rand. (Va.) 627; State *v.* Cooper, 16 Vt. 551; Territory *v.* Whitcomb, 1 Mont. 359; State *v.* Moore, 1 Swan (Tenn.) 136; 4 Bl. Com. 65, and note by Chitty. See also Cook *v.* State, 11 Ga. 53.

[2] Respublica *v.* Roberts, 2 Dall. (Pa.) 124; State *v.* Cowell, 4 Ired. (N. C.) 231. See also Com. *v.* Squires, 97 Mass. 59; State *v.* Cox, 2 Taylor (N. C.) 165.

[3] 1 Hawk. P. C. (8th ed.) 357.

[4] Coke, 3d Inst. 58.

[5] A fowl is now held in England to be a beast: Regina *v.* Brown, 24 Q. B. D. 357.

[6] Regina *v.* Jellyman, 8 C. & P. 604.

[7] Rex *v.* Jacobs, R. & R. C. C. 331.

guilty, unless one be under the age of discretion.[1] Under the old common law, both penetration and emission were necessary to constitute the offence;[2] but since the statute of 9 Geo. IV. c. 31, § 18, penetration only is necessary.[3] Before this statute, copulation with a fowl was not an offence, as a fowl is not a "beast"; but this statute covers copulation with any "animal." It was always regarded as a very heinous offence, and was early denounced as "the detestable and abominable crime amongst Christians not to be named," and was a felony punishable with death.[4] But though it is still a felony in most of the States, it is, we believe, nowhere capitally punished. In some of the States, where there is no crime not defined in the code, it seems to have been purposely dropped from the category of crimes.[5] The origin of the term "sodomy" may be found in the nineteenth chapter of Genesis. The practice was first denounced by the Levitical law as a heathen practice, and amongst non-Christian nations, at the present day, it is not generally regarded as criminal.

[1] Regina *v.* Allen, 1 Den. C. C. 364; Coke, 3d Inst. 58.

[2] Rex *v.* Duffin, 1 R. & R. C. C. 365.

[3] Rex *v.* Reekspear, 1 Moo. C. C. 342.

[4] 1 Hawk. P. C. (8th ed.) 357.

[5] But few cases occur in the reports. Com. *v.* Thomas, 1 Va. Cas. 307; Lambertson *v.* People, 5 Parker (N.Y.) C. R. 200; Com. *v.* Snow, 111 Mass. 411; Fennell *v.* State, 32 Texas, 378, where it is held by a divided opinion not to be an offence, on the ground that it is not defined by statute, no undefined offence being punishable there. See also Davis *v.* State, 3 H. & J. (Md.) 154; Estes *v.* Carter, 10 Iowa, 400.

CHAPTER VI.

OFFENCES AGAINST THE PERSON.

§ 205. Assault.
217. Mayhem.
218. Homicide.
§ 240. False Imprisonment.
241. Rape.
245. Robbery.

§ 204. THE principal offences against the person may be divided into three classes: first, an injury to the person, ranging in enormity from a simple assault to homicide; secondly, a false imprisonment of the person; and thirdly, composite crimes, in which a wrongful act is committed by the use of violence to the person, such as robbery and larceny from the person, and rape.

ASSAULT.

§ 205. Strange as it may seem, there is no definition of an assault which meets unanimous acceptance. The more generally received definition is that of Hawkins,[1] to wit: "An attempt or offer with force and violence to do a corporal hurt to another." We have already seen,[2] that to constitute an attempt there must be some overt act in part execution of a design to commit a crime; and upon the theory that an assault is but an attempt, it is held that a mere purpose to commit violence, unaccompanied by any effort to carry it into immediate execution, is not an assault. The violence which threatens the "corpo-

[1] 1 P. C. (8th ed.) 110.

[2] *Ante*, § 183.

ral hurt," or, as it is frequently expressed, "personal injury," or "bodily harm," must be set in motion.[1] It is the beginning of an act, or of a series of acts, which, if consummated, will amount to a battery, which is the unlawful application of violence to the person of another. One, therefore, who, within such proximity to another that he may inflict violence, lifts his hand, either with or without a weapon, with intent to strike, or lifts a stone with intent to hurl it, or seizes a loaded gun with intent to fire it, is, upon all the authorities,[2] guilty of an assault.

The better view would seem to be that an assault includes any putting of another in reasonable fear of immediate personal violence.[3]

§ 206. **Battery.** — A battery is the unlawful touching of another, or of the dress worn by another, with any the least violence.[4] An act which begins as an assault ordinarily ends as a battery, and merges in it; and since on an indictment for battery the defendant may be found guilty of a simple assault, it is an invariable rule to indict for assault and battery. For this reason, the two crimes are not carefully distinguished; the general name *assault* being applied indifferently to both. No useful end would be served

[1] People *v.* Yslas, 27 Cal. 630; Smith *v.* State, 39 Miss. 521.

[2] United States *v.* Hand, 2 Wash. (U. S. C. Ct.) 435; State *v.* Morgan, 3 Ired. (N. C.) 186; Higginbotham *v.* State, 23 Tex. 574. The Penal Code of Texas defines an assault as "Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an ability, to commit a battery." Art. 476.

[3] Steph. Dig. Cr. Law, art. 241; Regina *v.* St. George, 9 C. & P. 483; State *v.* Davis, 1 Ired. (N. C.) 125.

[4] Steph. Dig. Cr. Law, art. 241; Regina *v.* Day, 1 Cox C. C. 207.

by insisting on a distinction not made by the courts. In the following discussion, therefore, the term *assault* will be used indifferently to designate true assault and the completed battery.

§ 207. **Authority.** — The force to constitute an assault must be unlawful. A parent, or other person standing *in loco parentis*, may use a reasonable amount of force in the correction of his child.[1] So a schoolmaster may correct his pupil; or a master his apprentice;[2] but the master's authority is personal, and cannot be delegated to another, as can that of a parent.[3] An officer may also use such force in making an arrest;[4] and so, generally, may all persons having the care, custody, and control of public institutions, and charged with the duty of preserving order and preventing their wards from self-injury, such as the superintendents of asylums and almshouses.[5] So the conductor of a railway train may forcibly put from his train any person guilty of such misconduct as disturbs the peace or safety of the other passengers, or violates the reasonable orders of the company.[6] And so may the sexton of a church[7] in a like way protect a lawful assembly therein. This right, however, must be exercised with discretion, and must not, in degree or in kind of force, surpass the limits of necessity and appro-

[1] State *v.* Alford, 68 N. C. 322.

[2] Gardner *v.* State, 4 Ind. 632.

[3] People *v.* Philips, 1 Wheeler C. C. 155.

[4] Golden *v.* State, 1 S. C. 292.

[5] State *v.* Hull, 34 Conn. 132.

[6] People *v.* Caryl, 3 Park. C. C. (N. Y.) 326; State *v.* Goold, 53 Me. 279.

[7] Com. *v.* Dougherty, 107 Mass. 243.

priateness.[1] The modern tendency is to construe strictly against the person using the force. It was formerly held that a husband might correct his wife by corporal chastisement; but this is now denied to be law in some of the States, and it is doubtful if the practice would be upheld by the courts of any State.[2] The mere relationship of master and servant, the former not being charged with any duty of education or restraint, will not now, whatever may have been the law heretofore, authorize the use of force.[3]

§ 208. **Consent.** — When a person *sui juris*, without fraud or coercion, consents to the application of force, certainly, if the force be such as may be lawfully consented to, there can be no assault. It has been accordingly held that, if a woman consents to her own dishonor,[4] or to the use of instruments whereby to procure an abortion,[5] or one requests another to lash him with a whip,[6] these several acts do not constitute assaults, because they are assented to by the parties upon whom the force is inflicted; and the same has been held where two men privately spar together.[7]

[1] Com. *v.* Randall, 4 Gray (Mass.) 36.

[2] Com. *v.* McAfee, 108 Mass. 458; State *v.* Oliver, 70 N. C. 60: Gorman *v.* State, 42 Tex. 221; Fulgham *v.* State, 46 Ala. 143. See also Mr. Green's note to Com. *v.* Barry, 2 Green's Cr. Law Rep. 285.

[3] Matthews *v.* Terry, 10 Conn. 455.

[4] People *v.* Bransby, 32 N. Y. 525; Regina *v.* Meredith, 8 C. & P 589; Smith *v.* State, 12 Ohio St 466.

[5] Com. *v.* Parker, 9 Met. (Mass.) 263; State *v.* Cooper, 2 Zab. (N. J.) 52.

[6] State *v.* Beck, 1 Hill (S. C.) 363.

[7] Regina *v.* Young, 10 Cox C. C. 371.

But, as has been seen,[1] no one has a right to consent to an act which is liable to cause severe bodily harm to himself or another, or to lead to a breach of the peace. Though consent in such a case may be shown to negative a putting in fear, yet if there has been an actual battery the consent will be no excuse. So, if two men publicly engage in a fight with fists, each may be indicted for an assault and battery.[2] For consent obtained by fraud or false pretences, or threats of such a character as to overpower the will, is no consent.[3] And the consent must be positive. A mere submission, as of an idiot,[4] or of a child,[5] or of a person asleep,[6] or otherwise unconscious, or unable to understand what is going on, is not equivalent to consent.

§ 209. **Consent secured by Fraud.** — In some cases there may be an assault when the injured party apparently consents to the unlawful act, as where a female patient is deceived by a physician into consenting that improper liberties should be taken with her.[7] So, where a female pupil of tender years, by the dominating power of her teacher, is induced, without resistance, to permit the same thing.[8]

[1] *Ante*, § 23.

[2] Regina *v.* Lewis, 1 C. & K. 419; Com. *v.* Colberg, 119 Mass. 350; State *v.* Underwood, 57 Mo. 40; State *v.* Lonon, 19 Ark. 577. See, however, *contra*, Champer *v.* State, 14 Ohio St. 437; Duncan *v.* Com., 6 Dana (Ky.) 295.

[3] Regina *v.* Case, 4 Cox C. C. 220; Regina *v.* Saunders, 8 C. & P. 265; Regina *v.* Williams, 8 C. & P. 286; Regina *v.* Hallett, 9 C. & P. 748; Regina *v.* Woodhurst, 12 Cox C. C. 443.

[4] Regina *v.* Fletcher, 8 Cox C. C. 131.

[5] Regina *v.* Lock, 12 Cox C. C. 244; Hays *v.* People, 1 Hill(N.Y.)351.

[6] Regina *v.* Mayers, 12 Cox C. C. 311.

[7] Regina *v.* Case, 4 Cox C. C. 220; s. c. 1 Den. C. C. 580.

[8] Regina *v.* Nichol, R. & R. 130; Regina *v.* Lock, 12 Cox C C. 244

Consent, therefore, is to be distinguished from submission. An idiot,[1] or a person asleep[2] or otherwise insensible,[3] or demented,[4] or deceived,[5] may submit, but he does not consent. Consent is the affirmative act of an unconstrained will, and is not sufficiently proved by the mere absence of dissent.[6]

§ 210. **Degree of Force. Mode of Application.** — The degree of force used is immaterial, provided it be unlawful. The least intentional touching of the person, or of that which so appertains to the person as to partake of its immunity, if done in anger, is sufficient. Thus, to throw water upon the clothes,[7] to spit upon, push, forcibly detain, falsely imprison, and even to expose to the inclemency of the weather, are all acts which have respectively been held to constitute an assault.[8] So any forcible taking of property from the possession of another, by overcoming the slightest resistance, is an assault.[9] Nor need the application of force be direct. If the force unlawfully set in motion is communicated to the person, whether directly, by something attached to the person, as a cane or a cord, or indirectly, as where a squib is thrown into a crowd, and is tossed

[1] Regina *v.* Fletcher, 8 Cox C. C. 131.

[2] Regina *v.* Mayers, 12 Cox C. C. 311.

[3] Com. *v.* Burke, 105 Mass. 376; People *v.* Quin, 50 Barb. (N. Y.) 128.

[4] Regina *v.* Woodhnrst, 12 Cox C. C. 443; Regina *v.* McGavaran, 6 Cox C. C. 64.

[5] Com. *v.* Stratton, 114 Mass. 303.

[6] Regina *v.* Lock, 12 Cox C. C. 244.

[7] People *v.* McMurray, 1 Wheeler C. C. (N. Y.) 62.

[8] 1 Russ. on Crimes, (5th ed.) 957; State *v.* Baker, 65 N. C. 332; Long *v.* Rogers, 17 Ala. 540.

[9] State *v.* Gorham, 55 N. H. 152.

from one to another, it is sufficient. But the mere lifting a pocket-book from the pocket of another, or snatching a bank-bill from his hand, without overcoming any resisting force, is not an assault.[1] But setting a dog or a crowd upon another, or driving against the carriage in which he is seated, or striking the horse he is riding or driving, in either case to his injury, will constitute an assault.[2]

§ 211. **Mode of Application.** — It was formerly held that to put a deleterious drug into the food of another, if it be eaten and take effect, was an assault.[3] Upon subsequent consideration, it was held in England that the direct administration of a deleterious drug, without force, though ignorantly taken, is not an assault,[4] — overruling the previous case. A contrary result, however, has been reached in this country by a court of high authority, and with the reasoning of the two just cited cases before it, — the doctrine of the earlier case being approved; and it is said that it cannot be material whether the force set in motion be mechanical or chemical, or whether it acts internally or externally.[5]

The detention or imprisonment of a person by merely confining him in a place where he happens to be, as by locking the door of the room where he lies asleep, without the use of any force or fraud to place him there, though illegal, does not come within any

[1] Com. *v.* Ordway, 12 Cush. (Mass.) 270.

[2] 1 Russ. on Crimes, (5th ed.) 958; 2 Greenl. Ev., § 84; Kirland *v.* State, 43 Ind. 146; s. c. 2 Green's Cr. Law Rep. 706; Johnson *v.* Tompkins, 1 Bald. C. Ct. 571; People *v.* Moore, 50 Hun (N. Y.) 356.

[3] Regina *v.* Button, 8 C. & P. 660.

[4] Regina *v.* Hanson, 2 C. & K. 912 and notes.

[5] Com. *v.* Stratton, 114 Mass. 303.

definition of assault, although the language of some of the old text-writers is broad enough to cover it. Mr. Justice Buller[1] says, "Every imprisonment includes a battery, and every battery an assault," citing Coke upon Littleton, 253, — where it is merely said that imprisonment is a "corporall dammage, a restraint upon personal liberty, a kind of captivity," — obviously no authority for the proposition that every imprisonment includes an assault, though it is authority for the proposition that an imprisonment may be a cause of action. It is probable that such imprisonment only as follows unlawful arrest was in the mind of that great judge and common lawyer.[2] And in one case at least in this country[3] the court has gone very near to that extent. But it would not be safe to say that such is the law. There may be an imprisonment by words without an assault.[4]

§ 212. **Putting in Fear.** — Although the threatened force be not within striking distance, yet if it be part of an act or series of acts which, if consummated, will, in the apprehension of the person threatened, result in the immediate application of force to his person, this will amount to an assault, without battery; as where one armed with a weapon rushes upon another, but before he reaches him is intercepted and prevented from executing his pur-

[1] N. P. 22.

[2] See note to Bridgeman's edition of Buller, p. 22. In Emmett *v.* Lyne, 1 B. & P. N. R. 255, the proposition is said to be absurd, and the fact that it is unsupported by the authority of Coke or Littleton pointed out.

[3] Smith *v.* State, 7 Humph. (Tenn.) 43.

[4] Bird *v.* Jones, 7 Q. B. 742; Johnson *v.* Tompkins, 1 Bald. C. Ct. 571; Pike *v.* Hanson, 9 N. H. 491.

pose of striking;[1] or rides after him, upon horseback, and compels him to seek shelter to escape a battery;[2] or a man chases a woman through a piece of woods, crying, "Stop!" until she arrives at a house, when he turns back, and gives up the chase.[3] The force of fear, taking effect, supplies the actual violence.[4]

Mere words, however menacing, it seems long to have been universally agreed, do not amount to an assault. Though the speaking of the words is an act, it is not of such importance as to constitute an attempt to commit violence. It is not "violence begun to be executed."[5] But words accompanied by acts which indicate an intent to commit violence, and threaten application of force to the assaulted party unless the assailant be interrupted, constitute an assault.[6]

§ 213. **Menace, but no Intent to commit a Battery.** — It has been recently held that, if there is menace of immediate personal injury such as to excite apprehension in the mind of a reasonable man, although the person threatening intended not to injure, as where one person, within shooting distance, points an unloaded gun at another knowing that it is not loaded, it is an assault,[7] adopting the following defi-

[1] State *v.* Davis, 1 Ired. (N. C.) 125; Stephens *v.* Myers, 4 C. & P. 349.

[2] Mortin *v.* Shoppee, 3 C. & P. 373; State *v.* Sims, 3 Strobh (S. C.) 137.

[3] State *v.* Neely, 74 N. C. 425.

[4] Com. *v.* White, 110 Mass. 407; Balkum *v.* State, 40 Ala. 671.

[5] 1 Hawk. P. C. (8th ed.) 110.

[6] People *v.* Yslas, 27 Cal. 630.

[7] Com. *v.* White, 110 Mass. 407.

nition of Mr. Bishop:[1] "An assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury." And this seems to be the doctrine of the Scotch law.[2] But no well considered English case has gone to this extent, though there is a dictum by Mr. Baron Parke[3] which supports the doctrine, while other and later cases are to the contrary.[4] Nor has any other American case been found which goes so far. On the contrary, there are several which seem to imply that, if the gun be not loaded, it may be shown by the accused in defence.[5] A man who menaces another with corporal injury, with intent to excite his fears, may no doubt be guilty of an indictable offence;[6] but whether the offence constitutes an assault must be considered an open question. An intent to commit one crime cannot make a party guilty of committing another which he did not intend, unless the unintended one be actually committed. Nor does it follow, because a person may be justified in availing himself of force to avoid or ward off apprehended bodily harm, that bodily harm is intended. Not every supposed assault is an actual one, nor does it seem logical or just that the

[1] 2 Cr. Law, § 23.

[2] Morrison's Case, 1 Brown (Justic. Rep.) 394.

[3] Regina *v.* St. George, 9 C. & P. 483.

[4] Blake *v.* Barnard, 9 C. & P. 626; Regina *v.* James, 1 C. & K. 530.

[5] See, in addition to the cases very fully collected by Mr. Bishop, 2 Cr. Law, § 32, n. 1, p. 20: Burton *v.* State, 3 Tex. App. 408; Tarver *v.* State, 43 Ala. 354; Richels *v.* State, 1 Sneed (Tenn.) 606. See also Mr. Green's note to Com. *v.* White, 2 Green's C. L. R. 269, in which the doctrine of the principal case is denied, and the cases upon which it is supposed to rest carefully examined.

[6] State *v.* Benedict, 11 Vt. 236.

misapprehension of one can fix criminal responsibility upon another, though the latter cannot be allowed to complain that he has suffered the consequences of a misapprehension to which he has given rise.[1]

§ 214. **Self-defence.**[2] — As every person has the right to protect himself from injury, he may, when assaulted, use against his assailant such reasonable force in degree and kind as may be necessary and appropriate for his protection. But if he go beyond that limit, he becomes in his turn guilty of assault.[3]

There seems to be no necessity for retreating or endeavoring to escape from the assailant before resorting to any means of self-defence short of those which threaten the assailant's life. Nor where one has been repeatedly assaulted, and has reason to believe that he will be again, is he bound to seek the protection of the authorities. He may resist the attack, and, if it comes, repel force with force.[4]

But before the assaulted party will have the right to kill his assailant, he must endeavor to avoid the necessity, if it can be done with safety. If, however, there be reasonable apprehension of danger so imminent, or of such a character, that retreat or delay may increase it, then the assaulted party is justified in

[1] McKay *v.* State, 44 Tex. 43, a case in which the point is elaborately considered and the definition of Mr. Bishop disapproved; s. c. 1 Am. Cr. Rep. 46.

[2] *Ante*, § 63 et seq.

[3] Regina *v.* Driscoll, C. & M. 214; Gallagher *v.* State, 3 Minn. 270; State *v.* Gibson, 10 Ired. (N. C.) 214; Com. *v.* Ford, 5 Gray (Mass.) 475.

[4] Evers *v.* People, 6 T. & C. (N. Y.) 156; Gallagher *v.* State, 3 Minn. 270.

entering upon his defence at once, and anticipating the danger.[1]

Such force may also be used in defence of those whom it is one's right or duty, from relationship or otherwise, to protect, and indeed in defence of any one unlawfully assailed.[2]

§ 215. **Defence of Property.** — So force may be used in defence of one's house or his property. A man's house is his castle, for defence and security of himself and his family. And if it is attacked, even though the object of the attack be to assault the owner, he may, without retreating, meet the assailant at the threshold, and prevent his access to the house, if need be, even by taking his life.[3] But here, as in other cases of self-defence, if the intruder be driven off, following and beating him while on his retreat becomes in its turn an assault.[4] And in defence of property the resistance cannot extend to taking the life of the intruder where there is a mere forcible trespass, but only, if at all, where it is necessary to prevent the felonious taking or destruction of the property.[5]

But though a man will be justified in such extreme measures in defence of his property, this can only be to prevent it from being taken away from him. He cannot resort to any force which would amount to an assault or breach of the peace to recapture his

[1] State *v.* Bohan, 19 Kan. 28. See also *post*, Homicide.

[2] 1 Bish. Cr. Law, § 877.

[3] State *v.* Patterson, 45 Vt. 308; Bohannon *v.* Com., 8 Bush (Ky.) 481; Pond *v.* People, 8 Mich. 150; State *v.* Martin, 30 Wis. 216.

[4] State *v.* Conally, 3 Oreg. 69.

[5] Carroll *v.* State, 23 Ala. 28; 1 East P. C. 402; 1 Bish. Cr. Law, § 875; State *v.* Patterson, 45 Vt. 308.

stolen property,[1] as the preservation of the public peace is of greater importance than the status of any man's private property.

§ 216. **Accidental Injury.** — If a person doing a lawful act in a proper manner, without intent to harm another, sets in motion a force which by accident becomes hurtful, this is no assault. Thus, where one throws an object in a proper direction, and by striking some other object it is made to glance, or is driven by the wind out of its course, so that it strikes another, or if, without being turned from its course, it hits a person not known to be in the vicinity when the object is thrown, the act is in no sense criminal.[2] So one is not guilty of a criminal assault when the horse he is driving runs away and injures a man.[3]

MAYHEM.

§ 217. **Mayhem** is defined by Blackstone[4] as "the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary." Amongst these members were included a finger, an eye, a foretooth, and those parts which are supposed to give courage. But cutting off the ear or the nose is not mayhem at common law, since the loss of these tends only to disfigure, but not to weaken.[5] The injury must be permanent in order to constitute the offence.[6] Under the statute, however,

[1] Hendrix *v.* State, 50 Ala. 148; 3 Bl. Com. 4; *ante*, § 168.

[2] Rex *v.* Gill, 1 Str. 190; 1 Russ. on Crimes, (5th ed.) 962.

[3] Dickenson *v.* State, 24 Tex. App. 121.

[4] 4 Com. 205.

[5] 4 Bl. Com. 205. See also 2 Bish. Cr. Law, § 1001, and notes.

[6] State *v.* Briley, 8 Porter (Ala.) 472.

in Texas, the fact that the injured member, having been put back, grew again in its proper place, was no defence.[1] The offence is now almost universally, in this country, defined by statute, and generally treated as an aggravated assault. In many States the statutes cover cases not embraced by the common law, as the biting off an ear or the slitting of the nose, if the injury amounts to a disfigurement.[2]

Mayhem, at common law, was punishable in some cases as a felony, — an eye for an eye, and a tooth for a tooth, — and in others as a misdemeanor.[3] But if the offence is made a felony in this country, the punishment is defined by statute. It is doubtless, generally, a misdemeanor, unless done with intent to commit a felony.[4]

Under the statute in New York, the injury must have been done by "premeditated design" and "of purpose." Hence, if done as the result of an unexpected encounter, or of excitement produced by the fear of bodily harm, the offence is not committed.[5] So under the statute 5 Henry IV. c. 5, malice *prepense* was said by Lord Coke to mean "voluntarily and of set purpose."[6] But in North Carolina, where the statute prescribes the act done "on purpose and unlawfully, but without malice aforethought," it has been held that the intent to disfigure is *prima facie* to be inferred from an act which does in fact disfig-

[1] Slattery *v.* State, 41 Texas, 619.

[2] State *v* Girkin, 1 Ired. (N. C.) 121; State *v.* Ailey, 3 Heisk. (Tenn.) 8.

[3] 4 Bl. Com. 205; Com. *v.* Newell, 7 Mass. 245.

[4] Ibid.; Stephen's Dig. Cr. Law, c. 25 and 26.

[5] Godfrey *v.* People, 63 N. Y. 207.

[6] Coke, 3 Inst. 62. See also Godfrey *v.* People, *ubi supra.*

ure, and it is not necessary to prove a preconceived intention to disfigure.[1]

HOMICIDE.

§ 218. **Homicide** is the killing of a human being. It may be *lawful*, as when one shoots an enemy in war, or the sheriff executes another in pursuance of the mandate of the court, or kills a prisoner charged with felony in the effort to prevent his escape, and hence called *justifiable* homicide, in contradistinction to *excusable* homicide, or a homicide committed in protecting one's person or the security of his house.

Justifiable Homicide. — In addition to the illustrations already given, it may be said, generally, that wherever, in the performance of a legal duty, it becomes necessary to the faithful and efficient discharge of that duty to kill an assailant or fugitive from justice, or a riotous or mutinous person, or where one interposes to prevent the commission of some great and atrocious crime, amounting generally, though not necessarily, to felony, and it becomes necessary to kill to prevent the consummation of the threatened crime,[2] — in all these cases the homicide is justified on the ground that it is necessary, and in the interest of the safety and good order of society. But homicide can never be justifiable, except when it is strictly lawful and necessary. The soldier who shoots his adversary must strictly conform to the laws of war;[3] and the sheriff who

[1] State *v.* Girkin, 1 Ired. (N. C.) 121. See also State *v.* Simmons, 3 Ala. 497.

[2] United States *v.* Wiltberger, 3 Wash. C. C. 515.

[3] State *v.* Gut, 13 Minn. 341; 4 Bl. Com. 198.

executes a prisoner must follow the mode prescribed by his warrant.[1]

The distinction between justifiable and excusable homicide rested, in the early common law, upon the fact that the latter was punishable by the forfeiture of goods, while the former was not punishable at all.[2] It long since, however, became very shadowy, and has now an interest rather historical than practical, — the verdict of not guilty being returned whenever the circumstances under which the homicide takes place constitute either a justification or an excuse.[3]

§ 219. **Human Being. Time. Suicide.** — In order to constitute homicide, the killing must be of a person in being; that is, born and alive. If the killing be of a child still unborn, though the mother may be in an advanced state of pregnancy,[4] or if the child be born, and it is not made affirmatively to appear that it was born alive, it is no homicide.[5] Death, however, consequent on exposure, after premature birth alive, unlawfully procured, is criminal homicide.[6]

It is also a rule of the common law, valid, no doubt, at the present day, that the death must happen within a year and a day after the alleged crime; otherwise it cannot be said — such was the reasoning — to be consequent upon it.[7] In the computation of the time, the whole day on which the hurt was received is reckoned the first.[8]

[1] 1 Hale P. C. 433.

[2] 1 Hawk. P. C. (8th ed.) 79 et seq. [3] 4 Bl. Com. 186.

[4] 1 Russell on Crimes, (5th ed.) 645; Evans *v.* People, 49 N. Y. 86.

[5] United States *v.* Hewson, 7 Law Reporter (Boston), 361.

[6] Regina *v.* West, 2 C. & K. 784.

[7] Coke's Third Inst. p. 33; State *v.* Shepherd, 8 Ired. (N. C.) 195; People *v.* Kelly, 6 Cal. 210.

[8] 1 Russ. on Crimes, (5th ed.) 673.

Deliberate suicide is self-murder, and, though not punishable, one who advises, and, being present, aids and abets another to commit suicide, is guilty of murder.[1] So, also, one who kills another at his request is as guilty of murder as if the act had been done merely of his own volition.[2]

§ 220. **Murder.** — Of unlawful homicides, *murder* is the most criminal in degree, and consists in the unlawful killing of a human being with malice aforethought; as when the deed is effected by poison knowingly administered, or by lying in wait for the victim, or in pursuance of threats previously made, and, generally, where the circumstances indicate design, preparation, intent, and hence previous consideration.[3]

§ 221. **Malice, Express and Implied.** — This malice may be *express*, as where antecedent threats of vengeance or other circumstances show directly that the criminal purpose was really entertained; or *implied*, as where, though no expressed criminal purpose is proved by direct evidence, it is indirectly but necessarily inferred from facts and circumstances which are proved.

Where the killing can only be accounted for on the supposition of design or intent, the law conclusively implies malice; or, in other words, the courts instruct the jury that, certain facts being proved, malice is to be implied. And malice is implied by the law when, though no personal enmity may be

[1] Rex *v.* Dyson, Russ. & Ry. 523; Com. *v.* Bowen, 13 Mass. 356.

[2] 1 Hawk. P. C. (8th ed.) 78; Blackburn *v.* State, 23 Ohio St. 146.

[3] 4 Bl. Com. 195; Com. *v.* Webster, 5 Cush. (Mass.) 295, 316.

proved, the perpetrator of the deed acts without provocation or apparent cause, or in a deliberately careless manner, or with a reckless and wicked hostility to everybody's rights in general, or under such circumstances as indicate a wicked, depraved, and malignant spirit;[1] and so where a deadly weapon is used.[2]

And the better opinion is, that under the modern statutes defining murder in the first degree, as well as at common law, this implied malice is effectual to constitute murder in the first degree, all doubts as to guilt of the higher degree being resolved in favor of the prisoner, and of the lower degree.[3]

§ 222. **Malice Aforethought.** — It is not necessary that the design, preparation, or intent which constitutes malice aforethought should have been entertained for any considerable period of time prior to the killing. It is enough to constitute this sort of malice that a conscious purpose, design, or intent to do the act should have been completely entertained, for however limited a period prior to its execution.[4] Yet in Pennsylvania, where deliberate premeditation is made a necessary characteristic of murder in the first degree, it seems to be held that those words imply something more than malice aforethought.[5]

[1] State *v.* Smith, 2 Strob. (S. C.) 77; 4 Bl. Com. 198; 2 Bish. Cr. Law, 680 et seq.

[2] State *v.* Musick, 101 Mo. 260.

[3] Wharton, Homicide (2d ed.), §§ 660–664, and cases there cited.

[4] People *v.* Williams, 43 Cal. 344; Com. *v.* Webster, 5 Cush. (Mass.) 295; People *v.* Clark, 3 Seld. (N. Y.) 385; Shoemaker *v.* State, 12 Ohio, 43.

[5] Jones *v.* Com., 75 Pa. 403. See also Atkinson *v.* State, 20 Texas, 522.

§ 223. **Imputed Malice.** — The malice required for murder need not be actual malice against the victim. One who, intending to kill A., kills B., is guilty of murder;[1] as, for instance, where he places poison in the way of an enemy, and a friend takes it and dies.[2] So one who has a murderous intention, not however directed against individuals, as one who fires into a crowd intending to kill, is guilty of murder.[3] So one who is engaged in any felony or other crime of violence,[4] or resisting a lawful arrest,[5] where he commits homicide even accidentally, is guilty of murder. But it would seem that this rule cannot be pressed too far. In order to impute malice to one engaged in felony, it seems that the act done not only must be done in the course of a felony or other aggravated crime of violence, but must be in itself one that might be reasonably supposed dangerous to life.[6]

§ 224. **Presumptive Malice.** — It was formerly held that every homicide is to be presumed to be of malice aforethought, unless it appears from the circumstances of the case, or from facts shown by the defendant in explanation, that such malice does not exist.[7] But the better doctrine now is, doubtless, in accordance with the dissenting opinion of Mr. Justice Wilde, in the case just cited, that when the facts and circumstances attendant upon the killing

[1] McGehee *v.* State, 62 Miss. 772.

[2] Saunders's Case, 2 Plowd. 473; Gore's Case, 9 Co. 81 a.

[3] State *v.* Gilman, 69 Me. 163.

[4] Fost. Cr. Law, 258; Errington's Case, 2 Lewin C. C. 217.

[5] 1 Russ. Cr. 732 et seq.; Yong's Case, 4 Co. 40 a.

[6] Regina *v.* Serné, 16 Cox C. C. 311.

[7] Com. *v.* York, 9 Met. (Mass.) 93, Mr. Justice Wilde dissenting; Com. *v.* Webster, 5 Cush. (Mass.) 295, 316.

are equivocal, and may or may not be malicious, it is for the government to show that they are malicious; otherwise, the defendant is entitled to the most favorable construction of which the facts will admit. If, for instance, two persons are in a room together, and one is seen to emerge therefrom holding a knife in his hand, leaving behind him the other dead, and wounded in such a manner that it is certain that the death must have been caused by the knife in the hand of the person who is seen to emerge, yet, as the homicide may have been murder, manslaughter, or in self-defence, it is for the government to produce evidence that it was the former, before it will be entitled to a verdict of guilty of murder; and it cannot rely for such verdict upon the mere presumption that, the killing being shown without explanation, it was malicious.[1] The law does not presume the worst of several possible solutions against the prisoner; it rather presumes that that state of facts is the true one which would be most favorable to him.[2]

§ 225. **Degrees of Murder.** — Formerly murder, the least as well as the most atrocious, was punished by death. Now, however, in many of the States, murder has by statute been made a crime punishable with greater or less severity, according to the circumstances of atrocity under which it is committed, — death being inflicted only in the most atrocious

[1] See Bennett & Heard's Leading Cr. Cas., Vol. I. p. 322; Whart. Hom. (2d ed.), §§ 664, 669; Stokes *v.* People, 53 N. Y. 164; State *v.* Porter, 34 Iowa, 131; People *v.* Woody, 45 Cal. 289.

[2] United States *v.* Mingo, 2 Curtis C. C. 1; Read *v.* Com., 22 Gratt. (Va.) 924.

cases. Hence the different degrees of murder of which the books speak. Manslaughter has also, by the statutes of some of the States, its several degrees, founded upon the same principle of greater or less depravity, indicated by the attendant circumstances. These several statutes are held not to have changed the form of pleading at common law; but the jury are to find the crime as of the degree which the facts warrant, the court instructing them that such and such facts, if proved, would show the crime to be of a particular degree. Nor have those statutes changed the rules of evidence. Yet, in considering cases decided in these States, it is worth while to consider that in matters of definition the common law of murder may have been modified, so that, in determining what is murder and what manslaughter at common law, these cases are not always safe guides.[1]

§ 226. **Manslaughter** is any unlawful killing without malice aforethought; as when one strikes his wife, and death results from the blow, though not intended,[2] or kills another in a fight arising upon a sudden quarrel,[3] or upon mutual agreement,[4] or in the heat of passion, or upon great provocation.[5]

Every unlawful homicide is either murder or manslaughter, and whether it is one or the other depends

[1] Davis *v.* State, 39 Md. 355; Green *v.* Com., 12 Allen (Mass.) 155. In Ohio there are no crimes at common law. Smith *v.* State, 12 Ohio St. 466.

[2] Com. *v.* McAfee, 108 Mass. 458.

[3] State *v.* Massage, 65 N. C. 480. [4] Gann *v.* State, 30 Ga. 67.

[5] Maria *v.* State, 28 Texas, 698; Holly *v.* State, 10 Humph. (Tenn.) 141; Preston *v.* State, 25 Miss. 383; Com. *v.* Webster, 5 Cush. (Mass.) 295; State *v.* Murphy, 61 Me. 56.

upon the presence or absence of the ingredient of malice.[1]

Manslaughter may be *voluntary* or *involuntary.* Voluntary manslaughter is when the act is committed with a real design to kill, but under such circumstances of provocation that the law, in its tenderness for human frailty, regards them as palliating the criminality of the act to some extent.

Involuntary manslaughter is when one causes the death of another by some unlawful act, but without the intention to take life.[2]

§ 227. **Mitigating Circumstances.** — What are the circumstances of provocation which reduce this crime from murder to manslaughter it is not easy to define. It seems to be agreed that no words, however opprobrious, and no trespass to lands or goods, however aggravating, will be sufficient. To mitigate a murder to manslaughter, the excited and angry condition of the person committing the act must proceed from some cause which would naturally and instantly produce in the minds of men, as ordinarily constituted, a high degree of exasperation. Otherwise, a high-tempered man, who habitually indulges his passion, would be entitled to the same consideration as one who habitually controls his passion. The law seeks to arrive at such a result as will lead men to cultivate habits of restraint rather than indulgence of their passions. Hence the question ordinarily is not so much whether the party killing is actually under the influence of a great passion, as

[1] Read *v.* Com., 22 Gratt. (Va.) 924; Com. *v.* Webster, 5 Cush. (Mass.) 295.

[2] Com. *v.* Webster, 5 Cush. (Mass.) 295.

whether such a degree of passion might naturally be expected had he exercised such self-control as a due regard to the rights, and a due consideration of the infirmities, of others, in the interest of public safety, require. There must also be a reasonable proportion between the mode of resentment and the provocation.[1]

§ 228. **Provocation.** — The homicide, moreover, is not entitled to this reduction in the degree of its criminality, unless it be done under the influence of the provocation. If it be done under its cloak, it will not avail to excuse to any extent. If it can be reasonably collected from the weapon made use of, or from any other circumstances, that there was a deliberate intent to kill, or to do some great bodily harm, such homicide will be murder, however great may have been the provocation.[2] Nor does provocation furnish any extenuation, unless it produces passion.[3] And seeking a provocation through a quarrel or otherwise, or going into a fight dangerously armed and taking one's adversary at unfair advantage, is such evidence of malice as to deprive the guilty party of all advantage of the plea of provocation.[4] Where two parties, as in the case of a duel, enter into a conflict deliberately, and death ensues to either, it

[1] Com. *v.* Webster, 5 Cush. (Mass.) 295; State *v.* Starr, 38 Mo. 270; Fralich *v.* People, 65 Barb. (N. Y.) 48; Flanagan *v.* State, 46 Ala. 703; Preston *v.* State, 25 Miss. 383; People *v.* Butler, 8 Cal. 435; Nelson *v.* State, 10 Humph. (Tenn.) 518.

[2] 1 Russell on Crimes, 423, 440; State *v.* Cheatwood, 2 Hill (S. C.) 459; Felix *v.* State, 18 Ala. 720; People *v.* Austin, 1 Parker C. C. (N. Y.) 154.

[3] State *v.* Johnson, 1 Ired. (N. C.) 354.

[4] Price *v.* State, 36 Miss. 531; State *v.* Hildreth, 9 Ired. (N. C.) 429.

is murder by the other; while the same result, if the conflict be sudden and in hot blood, is but manslaughter.[1]

Upon this point, also, the fact that the injured party is greatly the inferior of his assailant — as if he be a child, or woman, or a man physically or mentally enfeebled — is an important element in determining how much is to be deducted from the criminality of the offence on the score of provocation.[2]

And however great may have been the provocation, if sufficient time and opportunity have transpired to allow the aroused passions to subside, or the heated passions to cool, death afterwards inflicted is murder, whether the passions have subsided or the heated blood cooled or not; and it is a question of law for the court to say whether that time has elapsed.[3]

§ 229. **Provocation. Unlawful Arrest.** — But there are cases where the provocation does not produce that heated passion of which we have just been speaking, and where, although the homicide be deliberately committed, and is not shown to be necessary, the act is held by the law to be manslaughter, and not murder. Thus it has been held, in some cases, that, where an unlawful arrest is attempted or made, the party pursued or arrested may kill his assailant, either in resistance to the arrest or in the attempt to escape, although the act be done under

[1] United States *v.* Mingo, 2 Curtis C. C. 1; State *v.* Underwood, 57 Mo. 40.

[2] Com. *v.* Mosler, 4 Barr (Pa.) 264.

[3] State *v.* McCants, 1 Speer (S. C.) 384; Rex *v.* Hayward, 6 C. & P. 157; State *v.* Moore, 69 N. C. 267.

such circumstances as would equal or surpass, in point of atrocity and moral turpitude, many cases recognized as murder.[1]

This doctrine, however, does not meet with universal approval, and it is held in other cases that the mere fact that an attempted arrest is unlawful does not necessarily reduce the killing of the officer to manslaughter. In this case, the assailed party may use such reasonable force, and only such, in proportion to the injury threatened, as is necessary to effect his escape. This, however, does not warrant him in the use of a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest.[2] And probably the killing in such case, with express malice, would be held to be murder.[3] So, in defence of one's own house, or his castle, the law will not justify a killing of the assailant, unless the assault be of such a nature as to threaten death or great bodily harm to the inmate. A mere threatened injury to the house, which does not also threaten the personal safety of the inmates, does not make necessary, and therefore does not justify, the killing of the assailant to prevent the possible injury. A mere trespass upon the property, without a felonious purpose, cannot be repelled by taking the life of the assailant.[4]

§ 230. **The Death must be the Direct Result of the Unlawful Act.** — It was formerly held that if a wit-

[1] Com. *v.* Carey, 12 Cush. (Mass.) 246; Rafferty *v.* People, 69 Ill. 111; Rex *v.* Thompson, 1 Moo. C. C. 80.

[2] Galvin *v.* State, 6 Cold. (Tenn.) 283.

[3] Roberts *v.* State, 14 Mo. 138.

[4] State *v.* Patterson, 45 Vt. 308. See also Carroll *v.* State, 23 Ala 28; 1 Russell on Crimes, 447, 502; *post*, § 235.

ness by false testimony, with the express purpose of taking life, procure the conviction and execution of a prisoner, this would be murder by the false witness.[1] But, aside from the fact that the direct connection between the testimony and the execution could in few if any cases be shown with that certainty of proof required in criminal cases, the perils of such a rule would tend to deter honest witnesses from testifying to what they believe to be true. The injury to society, to say nothing of the injustice of such a rule, is so out of proportion to any possible advantage, that modern jurisprudence seems to have discarded it.

So, though one who owes a personal public duty may incur criminal responsibility by neglecting it, yet where road commissioners, whose duty it was to keep a road in repair, with power to contract, neglected to contract, and suffered the road to become out of repair, it was held that, when injury resulted from the want of repair, neglect to contract was not the cause of the injury, in such a sense as to be imputable to their neglect.[2]

Where death follows a wound adequate to produce it, the wound will be presumed to be the cause, unless it be shown that the death was solely the result of some other cause, and not of the wound.[3] The wound being an adequate, primary, or contributory cause of the death, the intervention of another cause, preventing possible recovery or aggravating the

[1] Rex *v.* McDaniel, Leach C. C. 44.

[2] Regina *v.* Pocock, 17 Q. B. 34.

[3] Parsons *v.* State, 21 Ala. 300; Com. *v.* Hackett, 2 Allen (Mass.) 136; Crum *v.* State, 1 So. Rep. 1; s. c. 64 Miss. 1.

wound, will not relieve the defendant. If death be caused by a dangerous wound, or from a disease produced by the wound, gross ignorance or carelessness of the deceased and his attendants in its treatment does not relieve the party who inflicted the wound from responsibility.[1] Death from a cause independent of the wound will.[2] But it will be no excuse to show that, if proper treatment had been had, the death would not have ensued.[3] Mortal illness, either from a prior wound or other cause, is no excuse for one who produces death by another independent wound or other source,[4] though it has been said that, if death is the result of prior fatal disease, hastened by a wound, the person inflicting the wound is not responsible for the death.[5] It is also said that it is not murder to work on the imagination so that death ensues, or to excite the feelings so as to produce a fatal malady.[6] But it is apprehended that if the death be traceable to the acts done as the direct and primary cause, and if it can be shown that the acts done were done for the purpose of accomplishing the result, it would be murder. The question must always be whether the means were designedly, or, in the sense of the law, maliciously and successfully used to produce the result. If they were, then the guilt of murder is incurred; otherwise, life might be

[1] Bowles *v.* State, 58 Ala. 335; Kee *v.* State, 28 Ark. 155.

[2] Com. *v.* Costley, 118 Mass. 1; State *v.* Scates, 5 Jones (N. C.) 420; Com. *v.* Hackett, 2 Allen (Mass.) 136.

[3] 1 Hale P. C. 428.

[4] People *v.* Ah Fat, 48 Cal. 61; State *v.* O'Brien, 46 N. W. Rep 752; s. c. 81 Iowa, 88.

[5] Livingston *v.* Com., 14 Gratt. (Va.) 592.

[6] 1 Hale P. C. 429.

deliberately taken by some means, with impunity. To frighten one to death deliberately is as much murder as to choke or starve him.[1] The difficulty of proof that death results from a particular cause constitutes sufficient reason for caution; but if the truth be clear, the law should not fail to attach the penalty.[2]

So where one by threats or show of force compels another, acting reasonably, to leap into a river or out of a window in the attempt to escape, the assailant is criminally chargeable with the consequences;[3] and where a husband by threats or force causes his wife, in reasonable fear of violence, to leave the house, and, being unable to secure shelter, she is frozen to death, as might have been foreseen, the husband is guilty of homicide.[4] An indictment charging that the prisoner caused the death by some means unknown to the grand jury, and therefore undescribed, is sufficient upon which to find a verdict of guilty of murder, if the case will not admit of greater certainty in stating the means of causing the death.[5]

Though it was formerly doubted by some distinguished judges, it seems now to be settled that the mere omission to do a positive duty, whereby one is suffered to starve or freeze, or to suffocate or otherwise perish, is manslaughter, if merely heedlessly

[1] See 2 Bish. Cr. Law, §§ 642, 643, and note 2 to § 643; Regina *v.* Towers, 12 Cox C. C. 530.

[2] But see Whart. Hom., §§ 368–372, and notes.

[3] Regina *v.* Pitts, Car. & M. 284; Regina *v.* Halliday, 61 L. T. Rep. 701.

[4] Hendrickson *v.* Com., 85 Ky. 281.

[5] Com. *v.* Webster, 5 Cush. (Mass.) 295.

done; while it is murder, if the omission is with intent to bring about the fatal result.[1]

§ 231. **Unlawfulness.** — The unlawfulness which is a necessary ingredient in the crime of murder or manslaughter may arise out of the mode of doing a lawful act. Thus, if one is engaged in the repair of a building situated in a field away from any street, and where there is no reason to suppose people may be passing, and being upon the roof, and in ignorance of the fact that any person is below, throws down a brick or piece of timber, whereby one not known or supposed to be there is killed, the act being in itself lawful and unattended with any degree of carelessness, he is guilty of no offence. The death is the result of accident or misadventure. If we suppose the circumstances to be somewhat changed, and the building to be situated upon the highway in a country town, where passengers are infrequent, and the same act is done with the same result, the precaution, however, being taken of first looking to see if any one is passing, and calling out to give warning of danger, the killing would still be by misadventure, and free from guilt, because the act done is lawful and with due care. Yet were the same act to be done in a populous town, where people are known to be continually passing, even though loud warning were to be given, and death should result, it would be manslaughter; and if no warning at all were given, it would be murder, as evincing a degree of recklessness amounting to general malice towards all.[2] So when a parent is moder-

[1] Regina v. Conde, 10 Cox C. C. 547.

[2] 4 Bl Com. 192.

ately correcting his child, and happens to occasion his death, it is only misadventure; for the act of correction is lawful. But if he exceeds the bounds of moderation either in the manner, the instrument used, the quantity of punishment, or in any other way, and death ensues, it is manslaughter at least, and, under circumstances of special atrocity, might be murder.[1] The same act, therefore, which under certain circumstances would be lawful and proper, and involve no guilt even if death should ensue, might under other circumstances involve the guilt of manslaughter, or even murder.[2]

The condition of the person ill treated, as where, being in a debilitated condition, he is compelled to render services for which he is for the time being incompetent, is often a controlling circumstance in determining the guilt of the offender.[3]

So, though one is not in general criminally liable for the death of a servant by reason of the insufficiency of food provided, yet if the servant be of such tender age, or of such bodily or mental weakness, as to be unable to take care of himself, or is unable to withdraw from his master's dominion, the master may be criminally responsible.[4]

§ 232. **Negligence. Carelessness.** — The point at which, in the performance of a lawful act, one passes over into the region of unlawfulness is so uncertain, the line of demarcation is so shadowy, that

[1] 4 Bl. Com. 182.

[2] State *v.* Vance, 17 Iowa, 138; Ann *v.* State, 11 Humph. (Tenn.) 159; Com. *v.* York, 9 Met. (Mass.) 93; State *v.* Harris, 63 N. C. 1.

[3] United States *v.* Freeman, 4 Mason C. C. 505; Com. *v.* Fox, 7 Gray (Mass.) 585.

[4] Regina *v.* Smith, 10 Cox C. C. 82.

it has been, and from the very nature of the case must continue to be, a most prolific source of legal controversy. It is often said that the negligence or carelessness must be so gross as to imply a criminal intent; but the question still is when it reaches that point, and no rule by which to test it has been or can be given. Each particular case must be determined upon its particular circumstances; and precedents, though multitudinous, are so generally distinguishable by some special circumstance, that in a given case they seldom afford any decisive criterion, though in many instances they may afford substantial aid.[1] Self-defence is lawful, but, if carried beyond the point of protection, it becomes in its turn an assault, unlawful and criminal. If a man has a dangerous bull and does not tie him up, but leaves him at liberty, according to some opinions, says Hawkins, he is guilty of murder,[2] but certainly of a very gross misdemeanor, if a man is gored to death by the bull.[3] On the other hand, says Mr. Justice Willes, if the bull be put by the owner into a field where there is no footpath, and some one else let the bull out, and death should ensue, the owner would not be responsible. Yet, doubtless, guilt or innocence, and the degree of guilt, would depend upon what, under all the circumstances, the owner had reason to believe might be the result of his act, whether or not it would be inappreciably, appreciably, or in a higher degree hazardous to the lives of others. And this again would depend upon a variety

[1] See Regina *v.* Shepherd, L. & C. 147.
[2] 1 P. C. (8th ed.), 92.
[3] Regina *v.* Spencer, 10 Cox C. C. 525.

of circumstances; — as the degree of viciousness of the bull; the time, whether day or night, when he might be put in the field; the probability that he might be let out, or that some one would pass through the field; the size of the field; its nearness to or remoteness from a populous neighborhood; and many others which might be suggested, but which cannot be foreseen or properly estimated except in their relation to other concomitant circumstances.[1]

Carelessness in a physician, whether licensed or unlicensed, may be criminal, if it be so gross and reckless as amounts to a culpable wrong, and shows an evil mind;[2] but if he made a mistake merely, it is not criminal.[3]

And it seems that gross ignorance may be criminal;[4] and that, though the intent be good, one who is not a regularly educated physician has no right to hazard medicine of a dangerous character unless it be necessary.[5] But this, doubtless, would depend upon the intent, degree of intelligence, and other circumstances. Reckless disregard of consequences would be criminal in a regularly educated physician, while the best efforts of a pretender, made in good faith and in an emergency, would be entirely free from fault.[6] And if a man voluntarily undertakes to per-

[1] See for cases illustrative upon this point the valuable and elaborate note of Judge Bennett to Rex *v.* Hull, 1 Leading Cr. Cas. 50.

[2] Regina *v.* Spencer, 10 Cox C. C. 525; Rex *v.* Van Butchell, 3 C. & P. 629; Rice *v.* State, 8 Mo. 561.

[3] Regina *v.* Chamberlain, 10 Cox C. C. 486; State *v.* Hardister, 38 Ark. 605.

[4] Rex *v.* Spiller, 5 C. & P. 333.

[5] Simpson's Case, 1 Lewin, 172.

[6] Com. *v.* Thompson, 6 Mass. 134; 1 Hawk. P. C. (8th ed.), 104.

form the duties of a position to which he is unsuited by his ignorance, he cannot avail himself of the plea of ignorance as an excuse. It was so held in the case of an engineer of a steamboat.[1]

§ 233. **Neglect of Duty.** — The refusal or omission to act, when legal duty requires, may be as criminal as an act positively committed. Thus, where it was the duty of a miner to cause a mine to be ventilated, and he neglected to do it, and as a consequence the fire-damp exploded, causing the death of several persons, this was held criminal,[2] and it would be murder if the result was intended.[3] So an engineer, by whose omission of duty an explosion takes place[4] or a railway train runs off the track,[5] or any person bound to protect, succor, or support who neglects his duty, whereby death ensues, is criminally liable.[6]

§ 234. **Self-defence. Necessity.** — The limitations to the exercise of the right of self-defence have already been stated under the title of Assault. To what has there been said it should be here added that it was the ancient, and by the weight of authority it is the modern doctrine, that before the assaulted party will be justified in availing himself of such means of self-defence as menace the life of his assailant, he must retreat, except perhaps in defence of one's dwelling-

[1] United States *v.* Taylor, 5 McLean C. C. 242.

[2] Regina *v.* Haines, 2 C. & K. 368.

[3] Regina *v.* Conde, 10 Cox. C. C. 547.

[4] United States *v.* Taylor, 5 McLean C. C. 242.

[5] Regina *v.* Benge, 4 F. & F. 504.

[6] State *v.* Hoit, 23 N. H. 355, Regina *v.* Mabbett, 5 Cox C. C. 339; State *v.* Shelledy, 8 Iowa, 477; State *v.* O'Brien, 32 N. J. 169. See also Judge Bennett's note to Regina *v.* Lowe, in 1 Leading Cr. Cas. 60, where the cases illustrative of this point are very fully collected and stated.

house,[1] if it can be done with safety. He must not avail himself of the right to kill his assailant, if he can escape the extreme necessity with safety to himself. The point of honor, that retreating shows cowardice, is of less public concern than would be the extension of the right to take the life of another beyond the limit of clear necessity.[2] Perhaps the tendency of modern decisions is toward less strictness in requiring the assailed party to retreat, and to hold that a man who entirely without fault is feloniously assaulted may kill his assailant, without first attempting to avoid the necessity by retreating, it being possible to retreat with safety.[3]

But the necessity which excuses homicide in self-defence is not a justification of the party who seeks and brings on the quarrel out of which the necessity arises.[4] He cannot excuse himself by a necessity which he has himself created. Nor can he be justified or excused for a homicide done upon the plea of necessity, if the necessity arises from his own fault.[5]

§ 235. **Self-defence. Proper Mode.** — And the defence must be not only necessary, but also by appropriate means, — that is to say, in order to excuse a homi-

[1] See *post*, § 235.

[2] 1 Hale P. C. 481; Stoffer *v.* State, 15 Ohio St. 47; People *v.* Cole, 4 Parker C. C. (N. Y.) 35; Coffman *v.* Com., 10 Bush (Ky.) 495; State *v.* Ferguson, 9 Nev. 106; State *v.* Hoover, 4 D. & B. (N. C.) 365; Vaiden *v.* Com., 12 Gratt. (Va.) 717; United States *v.* Mingo, 2 Curtis C. Ct. (U. S.) 1; Whart. Hom., § 485 et seq.

[3] Runyan *v.* State, 57 Ind. 80; Erwin *v.* State, 29 Ohio St. 186.

[4] State *v.* Underwood, 57 Mo. 40; State *v.* Smith, 10 Nev. 106; Vaiden *v.* Com., 12 Gratt. (Va.) 717; State *v.* Neeley, 20 Iowa, 108; State *v.* Hill, 4 D. & B. (N. C.) 491.

[5] People *v.* Lamb, 17 Cal. 323; Cox *v.* State, 64 Ga. 374; 1 Hawk. P. C. (8th ed.), 79.

cide as done in self-defence, it must be made to appear that the taking of the life of the assailant in the mode adopted appeared, upon reasonable grounds, to the person taking, and without negligence on his part, necessary to save himself from immediate slaughter or from great bodily harm, — the actual existence of the danger being immaterial, if such were the appearances to him.[1]

In defence of property merely as property, homicide is not excusable. But where a man's house, in so far as it is his asylum or his property, is assailed, and in such a manner that his personal security is threatened, or that of those whom he has the right to protect, and the assault may be said to be in some sense an assault upon him, and to threaten his life, or to do him, or those he has the right to protect, some great bodily harm, it will be held excusable. But the excuse rests upon the fact that personal injury is threatened. The law does not allow human life to be taken except upon necessity. You may kill to save life or limb; to prevent a great and atrocious crime, — a felony open and forcible; and in the discharge of a legal public duty. But one man cannot be excused for intentionally

[1] United States *v.* Mingo, 2 Curtis C. C. 1; People *v.* Lombard, 17 Cal. 316; Stewart *v.* State, 1 Ohio St. 66; State *v.* Sloane, 47 Mo. 604; State *v.* Harris, 59 Mo. 550; Coffman *v.* Com., 10 Bush (Ky.) 495; Yates *v.* People, 32 N. Y. 509; Com. *v.* Drum, 58 Pa. 9; State *v.* Chopin, 10 La. Ann. 458; Munden *v.* State, 37 Texas, 353; Hnrd *v.* People, 25 Mich. 405; Pistorius *v.* Com., 84 Pa. 158; Darling *v.* Williams, 35 Ohio St. 58. This we think to be the law, by the weight of authority. But there are cases to the contrary. The cases are collected and thoroughly discussed in Wharton, Homicide, § 493 et seq.

killing another for a mere trespass upon his property.[1]

It is said in some cases, that, if a man be assaulted in his dwelling-house, he is not bound to retreat in order to avoid the necessity of killing his assailant, and that an assault upon one in his dwelling-house is thus distinguished from an assault upon him elsewhere.[2] This assault in one's dwelling-house may be in some sense an assault upon the person actually in charge.[3]

§ 236. **Struggle for Life.** — Blackstone[4] approves the case, put by Lord Bacon, of two persons being at sea upon a plank which cannot save both, and one thrusting the other off, as a case of excusable homicide. But it is difficult to see where one gets the right to thrust the other off. The right of self-defence arises out of an unlawful attack made on one's personal security, not out of accidental circumstances, which, whether threatening or not to the life of one or more persons, are in no way attributable to the fault, or even the agency, of either. Two men may, doubtless, under such circumstances struggle for the possession of the plank until one is exhausted; but neither can have the right to shoot the other to make him let go, because no right of him who shoots is invaded.

§ 237. **Accident.** — Homicide is also excusable where it happens unexpectedly, without intention,

[1] State *v.* Patterson, 45 Vt. 308; State *v.* Vance, 17 Iowa, 138; State *v.* Underwood, 57 Mo. 40; 1 Bish. Cr. Law, § 857, and cases there cited; *ante*, § 229; *post*, § 239; Whart. Hom., § 414 et seq.

[2] Pond *v.* People, 8 Mich. 150; State *v.* Martin, 30 Wis. 216; Bohannon *v.* Com., 8 Bush (Ky.) 481.

[3] State *v* Patterson, *ubi supra*.

[4] 4 Bl. Com. 186.

and by accident, or, as the old law has it, by misadventure in the performance of a lawful act in a proper manner; as where one is at work with a hatchet and its head flies off and kills a bystander;[1] so if a physician, in good faith, prescribes a certain remedy, which, contrary to expectation and intent, kills, instead of curing.[2] But if the lawful act be performed in so improper a manner as to amount to culpable carelessness, then the homicide becomes manslaughter.[3]

§ 238. **Accident in the Course of a Game.** — Where death ensues from accident in the course of a lawful sport or recreation, it is excusable homicide.[4] But this excuse will not avail one who is playing a hazardous game, in which the danger of injury is great.[5] And if a player deliberately goes outside the rules of the game to do an injury, or if while within the rules he does an act that he has reason to suppose will do injury, the fact that he is playing a lawful game will not excuse him.[6]

§ 239. **Prevention of Felony.** — Homicide in the prevention of felony is not strictly homicide in self-defence, or in the defence of property, but rests upon the duty and consequent right which devolves upon every good citizen in the preservation of order, and is upon these grounds excusable.[7] Yet not every felony may be thus prevented, but only those open

[1] 4 Bl. Com. 182. [2] Ibid. 197.

[3] Ibid. 192; *ante*, § 231.

[4] Foster, Crown Law, 3d ed. 259.

[5] Foster, Crown Law, 3d ed. 260; Regina *v.* Bradshaw, 14 Cox C. C. 83.

[6] Regina *v.* Bradshaw, 14 Cox C. C. 83.

[7] Pond *v.* People, 8 Mich. 150.

felonies, accompanied by violence, which threaten great public injury not otherwise preventable. Secret felonies, unaccompanied by force, such, for instance, as forgery or secret theft, and offences generally sounding in fraud, cannot be thus prevented.[1] Even if the crime about to be committed do not amount to a felony, if it be of such forceful character as to be productive of the most dangerous and immediate public consequences, — a riot, for instance, — it is held that death may be inflicted even by a private citizen, if necessary to prevent or suppress it.[2] Indeed, a riot is a sort of general assault upon everybody, and so resistance may be made upon the ground of self-defence.

FALSE IMPRISONMENT.

§ 240. **False Imprisonment,** which consists in the unlawful restraint of the liberty of a person, is an indictable offence at common law.[3] No actual force is necessary. The force of fraud or fear is sufficient. Thus, to stop a person on the highway and prevent him by threats from proceeding, constitutes the offence;[4] though it has been held in England, by a divided court, that the mere prevention from going in one direction, while there remained liberty of going in any other, is no imprisonment.[5] The

[1] Pond *v.* People, 8 Mich. 150; Priester *v.* Augley, 5 Rich. (S. C.) Law, 44; State *v.* Vance, 17 Iowa, 138; State *v.* Moore, 31 Conn. 479.

[2] Patten *v.* People, 18 Mich. 314.

[3] Com. *v.* Nickerson, 5 Allen (Mass.) 518; 3 Chitty Cr. Law, 835; Redfield *v.* State, 24 Tex. 133; Barber *v.* State, 13 Fla. 675.

[4] Bloomer *v.* State, 3 Sneed (Tenn.) 66; Searls *v.* Viets, 2 T. & C. (N. Y. S. C.) 224; Moses *v.* Dubois, Dud. (S. C.) 209.

[5] Bird *v.* Jones, 7 Q. B. 742.

unlawful confinement of a child by its parents is criminal;[1] and, no doubt, of a prisoner by a jailer.

Most of the States have now statutes upon the subject under which prosecutions are had.[2]

RAPE.

§ 241. **Rape** is the unlawful carnal knowledge of a woman by force, without her consent.[3]

§ 242. **Carnal Knowledge.** — Carnal knowledge, it is now generally held, both in this country and in England, is acomplished by penetration without emission,[4] though it was formerly doubted if both were not necessary, — a doctrine still held in Ohio.[5] And penetration is sufficient, however slight.[6]

The conclusive presumption of the common law, that a boy under the age of fourteen is incapable of committing rape, may have been based upon the theory that emission as well as penetration was necessary to the commission of the crime.[7]

§ 243. **Force and Violence.** — The force must be such as overcomes resistance, which, when the woman has the power to exert herself,[8] should be with such vigor and persistence as to show that there

[1] Fletcher *v.* People, 52 Ill. 395.

[2] See Abduction, Kidnapping.

[3] See *post*, § 244.

[4] Penn. *v.* Sullivan, Add. (Pa.) 143; Waller *v.* State, 40 Ala. 325; Com. *v.* Thomas, 1 Va. Cas. 307; State *v.* Hargrave, 65 N. C. 466; St. 9 Geo. IV. c. 31.

[5] Blackburn *v.* State, 22 Ohio St. 102.

[6] State *v.* Hargrave, 65 N. C. 466; Regina *v.* Hughes, 2 Moo. C. C. 190.

[7] Com. *v.* Green, 2 Pick. (Mass.) 380; Williams *v.* State, 14 Ohio, 222, where the presumption is held to be rebuttable by proof of puberty. See also People *v.* Randolph, 2 Park. C. R. (N. Y.) 174.

[8] See § 244.

is no consent. Any less resistance than with all the might gives rise to the inference of consent.[1] Where, however, there is no resistance, from incapacity, the only force necessary is the force of penetration. And fraud does not here, as in some other cases, supply the place of force. If the consent be procured, although by fraud, there is no rape.[2] Yet it has been held that where the ravishment was under the pretence of medical treatment, consented to in the belief of its necessity, this was an assault, and, it seems, a rape.[3] But where the will is overcome by the force of fear, though there be no resistance, the offence may be committed.[4]

§ 244. **Without Consent.** — According to the old definition, the act must be against the will of the woman; but these words are now held to mean without her consent.[5] If the woman be in a state of insensibility, so that she is incapable of exercising her will, whether that incapacity is brought about by the act of the accused, intentionally or unintentionally, or by the voluntary act of the woman herself, and the ravishment is effected with a knowledge of such

[1] People *v.* Dohring, 59 N.Y. 374; Taylor *v.* State, 50 Ga. 79; State *v.* Burgdorf, 53 Mo. 65; People *v.* Brown, 47 Cal. 447; Com. *v.* McDonald, 110 Mass. 405.

[2] McNair *v.* State, 53 Ala. 453; State *v.* Burgdorf, 53 Mo. 65; Don Moran *v.* People, 25 Mich. 356; Regina *v.* Saunders, 8 C. & P. 265; Clark *v.* State, 30 Texas, 448. See however, *contra*, Regina *v.* Dee, 15 Cox C. C. 579 (Ire.).

[3] Regina *v.* Case, 4 Cox C. C. 220.

[4] Regina *v.* Woodhurst, 12 Cox C. C. 443; Wright *v.* State, 4 Humph. (Tenn.) 194; Croghan *v.* State, 22 Wis. 444; People *v.* Dohring, *ubi supra*; Pleasant *v.* State, 13 Ark. 360.

[5] Regina *v.* Fletcher, 10 Cox C. C. 248; Regina *v.* Barrow, 11 Cox C. C. 191; Com. *v.* Burke, 105 Mass. 376; *post*, § 247.

incapacity, the offence is committed.[1] And the same would be true if the woman were idiotic, insane, or asleep.[2] Against the will, or without consent, means an active will. There is a difference between consent and submission. The submission of a child overcome by fear, perhaps, or one of tender years, ignorant of the nature of the act, is no consent.[3] By the law of England, a child under ten years of age is conclusively presumed to be incapable of consenting.[4] In this country, the authorities differ, the weight of authority being in favor of the English doctrine.[5]

ROBBERY.

§ 245. **Robbery** is larceny from the person or personal presence by force and violence and putting in fear.[6]

What constitutes larceny, what may be stolen, and what constitutes ownership, that the taking must be felonious, against the will or without the consent of the owner, and with intent to deprive him of his property, will be shown under the title of

[1] Regina *v.* Champlin, 1 Den. C. C. 89; Com. *v.* Burke, 105 Mass. 376; Regina *v.* Barrett, 12 Cox C. C. 498.

[2] Ibid.; Regina *v.* Fletcher, 8 Cox C. C. 131; Regina *v.* Mayers, 12 Cox C. C. 311; s. c. 1 Green's Cr. Law Rep., and valuable note by Mr. Green.

[3] Regina *v.* Day, 9 C. & P. 722; Regina *v.* Lock, 12 Cox C. C. 244; Regina *v.* Banks, 8 C. & P. 574.

[4] 1 Bl. Com. 212.

[5] Hays *v.* People, 1 Hill (N. Y.) 351, denied in Smith *v.* State, 12 Ohio St. 466. See also Fizell *v.* State, 25 Wis. 364; Gosha *v.* State, 56 Ga. 36; People *v.* McDonald, 9 Mich. 150.

[6] Com. *v.* Humphries, 7 Mass. 242; State *v.* Gorham, 55 N. H. 152; Com. *v.* Holland, 1 Dnvall (Ky.) 182.

Larceny.[1] We are now to consider the additional circumstances which elevate larceny into robbery.

§ 246. **Force and Violence.** — There must be force and violence or putting in fear, and this force and violence or putting in fear must be the means by which the larceny is effected, and must be prior to or simultaneous with it. If the larceny is effected first, and the fear or force is applied afterwards for the purpose of enabling the thief to retain possession of his booty, or for any other purpose, there is no robbery.[2]

While mere snatching from the hand or picking from the pocket of a person will be but larceny from the person,[3] it seems to be the law that, if the article be attached to the person, and the force be such as to break the attachment or to injure the person from whom the property is taken, as where a steel or silk chain attached to the stolen watch and around the neck was broken,[4] or a lady's ear from which a ring was snatched was torn, the offence is robbery, and not merely larceny from the person.[5] So, if there is a struggle for the possession of the property between the thief and the owner.[6] So, also, if force be applied for the purpose of drawing off the attention of the person being robbed.[7]

[1] *Post*, § 270.

[2] Harman's Case, 1 Hale P. C. 534; Rex *v.* Francis, 2 Str. 1015; Rex *v.* Gnosil, 1 C. & P. 304; Thomas *v.* State, 9 So. Rep. 81; s. c. 91 Ala. 34.

[3] *Post*, § 293.

[4] Rex *v.* Mason, R. & R. 419; State *v.* McCune, 5 R. I. 60.

[5] Rex *v.* Lapier, 2 East P. C. 557.

[6] Davies's Case, 1 Leach Cr. L. (4th ed.) 290 n.; State *v.* Broderick, 59 Mo. 318. But see State *v.* John, 5 Jones (N. C.) 163.

[7] Mahoney *v.* People, 5 T. & C. (N. Y.) 329; Anonymous, 1 Lewin, 300; Com. *v.* Snelling, 4 Binn. (Pa.) 379.

The force must be used with the intent of accomplishing the larceny. Where a wound was unintentionally inflicted on the hand of the owner of a basket, the intent being simply to cut the basket from behind the owner's wagon, the crime is simple larceny, not robbery.[1]

§ 247. **Putting in Fear.** — Neither actual violence nor the fear of actual violence is necessary to constitute the offence. The putting in fear is using a certain kind of force, or constructive violence.[2] Fear of personal injury is enough, as where there is a threat to shoot, or strike with a dangerous weapon, or in some other way inflict personal injury, even though it be in the future.[3] Time, place, and circumstance, as by the gathering about of a crowd apparently sympathizing with the thief, and showing that resistance would be vain,[4] are to be taken into account in determining whether this fear exists.[5] But the fear induced by a threat to injure one's character, or to deprive him of a situation whereby he earns his living, is also enough.[6] It is said, however, that the fear of injury to character, and consequent loss of means of livelihood, has never been held sufficient, except in cases where the threat was to charge with the crime of sodomy.[7] So, also,

[1] Regina *v.* Edwards, 1 Cox C. C. 32.

[2] Donnally's Case, 1 Leach Cr. L. (4th ed.) 193; Long *v.* State, 12 Ga. 293.

[3] State *v.* Howerton, 58 Mo. 581.

[4] Hughes's Case, 1 Lewin, 301.

[5] Long *v.* State, 12 Ga. 293.

[6] Rex *v.* Egerton, R. & R. 375; People *v.* McDaniels, 1 Parker C. R. (N. Y.) 198; Rex *v.* Gardner, 1 C. & P. 479.

[7] Britt *v.* State, 7 Humph. (Tenn.) 45; Long *v.* State, 12 Ga. 293; Rex *v.* Wood, 2 East P. C. 732.

it has been said that fear, induced by the threatened destruction of a child, is sufficient.[1] And there seems to be no doubt that fear induced by threats to destroy one's property, as by threats of a mob to pull down one's house, is sufficient.[2]

It is sometimes said that the element of fear must exist in every case in order to constitute the crime of robbery.[3] But there may be cases where there seems to be no opportunity for the action of fear; as where one is, without warning, knocked senseless by a single blow,[4] or is not aware of the purpose and has actually no fear, that being only a diversion of the force which is used,[5] or is already, when assaulted, in such a state of insensibility as to be incapable of fear;[6] and the weight of authority, both ancient and modern, is that it need not be alleged in the indictment under the common law.[7] And those courts which hold that fear is necessary make the force which would ordinarily excite fear conclusive evidence of it.[8]

The cases just cited also show that "against the will" means without consent.[9] Where three parties

[1] Hatham, B., in Donnally's Case, 1 Leach Cr. L. (4th ed.) 193; Eyre, C. J., Reane's Case, 2 Leach Cr. L. (4th ed.) 616.

[2] Rex *v.* Astley, 2 East P. C. 729; Rex *v.* Winkworth, 4 C. & P. 444.

[3] 1 Hawk. P. C. (8th ed.) 214.

[4] Foster C. L. 128; McDaniel *v.* State, 8 S. & M. (Miss.) 401.

[5] Com. *v.* Snelling, 4 Binn. (Pa.) 379; Mahoney *v.* People, 5 T. & C. (N. Y.) 329.

[6] Bloomer *v.* People, 1 Abb. Ap. Dec. (N. Y.) 146.

[7] Donnally's Case, 1 Leach Cr. L. (4th ed.) 193; Rex *v.* McDaniel, Foster C. L. 121; Com. *v.* Humphries, 7 Mass. 242; State *v.* Broderick, 59 Mo. 318; State *v.* Gorham, 55 N. H. 152.

[8] Long *v.* State, 12 Ga. 293; Reane's Case, 2 Leach Cr. L. (4th ed.) 616.

[9] See also Larceny, *post*, § 270.

get up a pretended robbery for the sake of obtaining a reward, the taking is not against the will, or without consent.[1] Nor is it where the property is parted with for the purpose of making a case for prosecution.[2]

§ 248. **The Taking** must be from the person, or from the personal presence. Thus, if a man assaults another, and, having put him in fear, drives away his cattle from the pasture[3] in his presence, or picks up a purse from the ground, which had fallen or been thrown into a bush during the scuffle, the taking is complete.[4] The question is, whether the chattel at the time it was taken was under the protection of the person.[5] But the possession of the robber, if complete, need be only momentary; and if it be immediately taken away from him, it is still robbery.[6] Though the thief obtain possession by delivery from the owner, as where he points a pistol, and either directly demands money,[7] or demands it under pretence of asking alms,[8] even after having ceased to resort to force,[9] — the delivery in each case being induced by fear, — it is a taking within the meaning of the law, and he is in each case guilty of robbery. And so may a forced sale be robbery, where the de-

[1] Rex *v.* McDaniel, Foster C. L. 121.

[2] Rex *v.* Fuller, R. & R. 408.

[3] 1 Hawk. P. C. (8th ed.) 214.

[4] 2 East P. C. 707; United States *v.* Jones, 3 Wash. C. Ct. 209; Crews *v.* State, 3 Cold. (Tenn.) 350; 1 Hale P. C. 533; Long *v.* State, 12 Ga. 293.

[5] Regina *v.* Selway, 8 Cox C. C. 235.

[6] Peat's Case, 1 Leach Cr. L. (4th ed.) 228.

[7] Norden's Case, Foster C. L. 129.

[8] 1 Hale P. C. 533.

[9] 1 Hawk. P. C. (8th ed.) 214, § 7.

livery is obtained by fear,[1] if the full value be not given in return for the property taken.[2] And where a man who is attempting rape, to whom the woman gives money to induce him to desist, continues his assault, he is guilty of robbery.[3]

[1] Rex *v.* Simons, 2 East P. C. 712.
[2] Fisherman's Case, 2 East P. C. 661 ; 4 Bl. Com. 244.
[3] Rex *v.* Blackham, 2 East P. C. 711.

CHAPTER VII.

OFFENCES AGAINST A DWELLING-HOUSE.

§ 250. Arson. | § 256. Burglary.

§ 249. **Protection of a Dwelling-house.** — The law gives a special protection to a dwelling-house, as a man's castle, within which it is for the public interest that he should be protected. We have already seen[1] that, when attacked in his dwelling-house, a man may take life to keep out the intruders. In addition to this measure of protection, the common law punishes certain violations of the protection of a dwelling. Two important crimes are of this sort: arson and burglary.

ARSON.

§ 250. **Arson** is the malicious burning of another's dwelling-house.

It is an offence against the security afforded by a man's dwelling-house; and the law looks upon it in this light, rather than as an injury to his property. It regards the violation of the sanctity of one's abode as a much graver offence than the mere injury to his property, just as it regards the larceny of a watch from the person or from a building as a graver offence than the simple larceny of the watch without

[1] *Ante*, § 67.

these attendant circumstances.[1] The property protected is the house, not its materials; it is not arson to pull down a house and then set fire to the pile of lumber.[2]

§ 251. **What "Dwelling-house" embraces.** — At common law the term "dwelling-house" embraced all outhouses within the same curtilage, and used as part and parcel of the residence, though not under the same roof.[3] Curtilage means an enclosure of a piece of land around a dwelling-house, usually including the buildings occupied in connection with the use of the dwelling-house, whether the enclosure be made by a fence or by the buildings themselves;[4] and a barn, the front of which forms part of the division fence, is within the curtilage.[5]

§ 252. **Dwelling-house. Ownership.** — Simply burning one's own house is not arson, nor any offence, at common law, unless it be accompanied by a design to injure.[6] But by statute in some of the States the wilful and malicious burning of any building is made punishable; and in such case the owner may be guilty of the offence by burning his own barn.[7] He may be said to own the house who has the right of present possession, as the lessee or mortgagor before foreclosure.[8] A husband is not guilty of the

[1] People *v.* Gates, 15 Wend. (N. Y.) 159.

[2] Mulligan *v.* State, 25 Tex. App. 199. [3] 4 Bl. Com. 221.

[4] Com. *v.* Barney, 10 Cush. (Mass.) 478; *post*, Burglary; Bishop, Stat. Crimes, § 277 et seq.; People *v.* Taylor, 2 Mich. 250.

[5] Washington *v.* State, 82 Ala. 31.

[6] Bloss *v.* Tobey, 2 Pick. (Mass.) 320.

[7] State *v.* Hurd, 51 N. H. 176. See also Shepherd *v.* People, 19 N. Y. 537.

[8] People *v.* Van Blarcum, 2 Johns. (N.Y.) 105; Rex *v.* Pedley, 1 Leach Cr. L. (4th ed.) 242; Rex *v.* Spalding, 1 Leach Cr. L. (4th ed.) 218.

crime who burns the house which he jointly occupies as tenant by the curtesy with his wife, who owns the fee; nor the wife who sets fire to her husband's house;[1] though a widow whose dower has not been assigned, and who has no present right of possession, the house being occupied by a tenant, may be guilty of it. So of a reversioner, who burns the house before the tenant's right of occupation has expired.[2] A servant, though living in the house, yet having no right of possession, may commit the crime;[3] but a tenancy for a year, or any special ownership which carries with it the right of possession at the time of the burning, is sufficient to exempt from guilt.[4]

§ 253. **Dwelling-house. Occupation.** — The building will be considered a dwelling-house within the meaning of the law, if actually occupied as such, though it may not have been erected for that purpose, and may also be occupied for other purposes, as for a jail, or a building occupied in part as a lodging-house.[5] It must be in some substantial sense an occupied house, and that, by the person alleged to be the owner. It is not necessary that he should be actually present in the house at the time of the burn-

[1] Snyder *v.* People, 26 Mich. 106; Rex *v.* March, 1 Moo. 182. But in Indiana it is held that under the statute the wife is guilty of arson who burns her husband's house. Emig *v.* Daum, 27 N. E. Rep. 322 (Ind.).

[2] Regina *v.* Harris, Fost. Cr. Law, 113.

[3] Rex *v.* Gowen, 2 East P. C. 1027.

[4] McNeal *v.* Woods, 3 Blackf. (Ind.) 485; 2 East P. C. 1022; People *v.* Gates, 15 Wend. (N. Y.) 159; State *v.* Lyon, 12 Conn. 487. See also *post*, Burglary.

[5] People *v.* Orcutt, 1 Park. C. R. 252; People *v.* Cotteral, 18 Johns. (N. Y.) 115; Smith *v.* State, 23 Tex. App. 357. See however, *contra*, Jenkins *v.* State, 53 Ga. 33.

ing. If the house contain the occupant's effects, and he has the design to return, after a temporary absence, this is a sufficient occupation to constitute it a dwelling-house.[1] Mere ownership, without occupancy by the owner, is not sufficient.[2] Nor is the fact that it is habitable, and intended for occupancy, unless it is also in some sense used as a place of residence.[3] It must be a completed house, ready for occupancy, and not an abandoned one, unfit for habitation.[4]

§ 254. **Malice.** — The malice requisite to constitute the crime is that general malice which accompanies a criminal purpose. Carelessness or negligence, without a specific intent unlawfully to burn or to do some other wrong, does not constitute the malice which is an essential ingredient in the crime of arson.[5] But when, intending to burn the house of one, the accused burns the house of another, the crime is committed. Arson being intended and committed, it is not permissible that the guilty party should escape the consequences by alleging his mistake as to one of the varying incidents of the crime. So far as the public offence is concerned, it is immaterial whether the house burned be that of one person or another.[6] And one may be guilty of arson by setting fire to his own house, whereby the house of another is burned, if the proximity was such that

[1] Johnson *v.* State, 48 Ga. 116; State *v.* Toole, 29 Conn. 342.

[2] Com. *v.* Barney, 10 Cush. (Mass.) 478.

[3] State *v.* Warren, 33 Me. 30; Hooker *v.* Com., 13 Grat. (Va.) 763.

[4] State *v.* McGowen, 20 Conn. 245; Elsmore *v.* St. Briavels, 8 B. & C. 461. See also McGary *v.* People, 45 N. Y. 153.

[5] 4 Bl. Com. 222.

[6] 1 Hale P. C. 569; 1 Hawk. P. C. (8th ed.) 139, § 15.

the burning of the latter was the natural and probable consequence of burning the former.[1] If the burning accomplished was not with a felonious intent, but for a purpose which if accomplished would constitute a crime of a grade below a felony, — as where a prisoner sets fire to the jail in which he is confined with the purpose of thereby effecting his escape, — this, it has been held, is not arson, if the attempt to escape is only a misdemeanor.[2] But the contrary has been held in Alabama;[3] and in England a person who set the fire for the purpose of getting the reward offered for the earliest information of it was held guilty of arson.[4]

The cases upon this point, however, seem to be wholly irreconcilable. Where there is the intent to burn coincident with the act of burning, the crime seems to be complete, upon general and well settled principles and according to every definition; and the fact that the burning was the secondary rather than the primary purpose — a felonious means to an unlawful but not felonious end — does not seem to relieve it in any respect or degree of its criminality. It sounds strangely, and seems not in accordance with sound reason or public policy, that one who intentionally commits a felony and a misdemeanor, the former as a step towards the latter, shall be deemed less guilty than he would have been if the commission of the felony had been his sole purpose,

[1] Rex *v.* Isaac, 2 East P. C. 1031.

[2] People *v.* Cotteral, 18 Johns. (N. Y.) 115; Delany *v.* State, 41 Tex. 601; State *v.* Mitchell, 5 Ired. (N. C.) 350.

[3] Luke *v.* State, 49 Ala. 30.

[4] Regina *v.* Regan, 4 Cox C. C. 335.

and he had committed no misdemeanor.[1] The failure to observe the distinction between intent and motive, the former of which qualifies the act, while the latter moves to it,[2] has doubtless led to the confusion. The man who deliberately sets fire to and burns a jail intends to burn it, whether his motive be self-sacrifice, revenge, escape, or reward.[3] The case might be different if, while a party is stealing in a building, he accidentally, by dropping a match, sets fire to the building. It has been recently held in Ireland that this, if done on board a vessel, would not come within a statute punishing the *malicious* burning of a vessel.[4] But it might be doubtful, in case of arson, if there is any malice or evil intent in the crime intended, — if it be not a mere *malum prohibitum*.[5]

§ 255. **Burning** means an actual combustion of some portion of the house, so that the wood is actually on fire. It is sufficient if it is charred. It is not necessary that it be consumed or destroyed;[6] but mere scorching is not enough.[7]

[1] See 1 Bish. Cr. Law, §§ 323–345; 2 Bish. Cr. Law, §§ 14, 15.

[2] *Ante*, § 26.

[3] Regina *v.* Regan, 4 Cox C. C. 335.

[4] Regina *v.* Faulkner, 13 Cox C. C. 550.

[5] 2 Russ on Crimes, 486.

[6] People *v.* Haggerty, 46 Cal. 354; Com. *v.* Tucker, 110 Mass. 403; People *v.* Butler, 16 Johns. (N. Y.) 203; Mary *v.* State, 24 Ark. 44. The statutes of most if not all of the States have modified the common law of arson to a greater or less extent; and while decisions will be found apparently inconsistent with the principles stated in the text, it will doubtless be found that such decisions depend upon the peculiarities of the respective statutes.

[7] Woolsey *v.* State, 17 S. W. Rep. 546 (Tex. Ct. App.).

BURGLARY.

§ 256. **Burglary** is the breaking and entering of another's dwelling-house in the night-time, with intent to commit a felony therein.[1] The breaking may be actual or constructive.

§ 257. **Actual Breaking** takes place when any apartment of the house is broken into by force; as by lifting a latch, or sliding a bolt,[2] or turning a lock or the fastening of a window, or breaking or removing a pane of glass, or lifting up or pulling down an unfastened window-sash or trap-door, or pulling open a sash which swings on hinges, or cutting out a netting of twine which is fastened over an open window, or opening the outside shutters. The offence consists in violating the common security of the dwelling-house. It is immaterial whether the doors and windows are fastened or unfastened, provided the house is secured in the ordinary way, and is not left so carelessly open as to invite an entry.[3] But leaving the door or window ajar, or unclosed even to a slight degree, and not so far as to admit the body, would constitute such an invitation, so that opening them further would not amount to a burglarious breaking;[4] and entry through an open transom is not a breaking,[5] though lifting an unfastened transom which swings upward is a break-

[1] 1 Hawk. P. C. (8th ed.) 129.

[2] State *v.* O'Brien, 46 N. W. Rep. 867; s. c. 81 Iowa, 93.

[3] Com. *v.* Stephenson, 8 Pick. 354; Rex *v.* Haines, R. & R. C. C. 451; Rex *v.* Russell, 1 Moo. C. C. 377; s. c. 2 Lead. Cr. Cas. 48, and note.

[4] Rex *v.* Smith, 1 Moo. C. C. 178; Rex *v.* Hyams, 7 C. & P. 441; Com. *v.* Strupney, 105 Mass. 588.

[5] McGrath *v.* State, 25 Neb. 780.

ing.[1] It is also held that entering a house by way of the chimney, or even getting into the chimney, is a breaking, though no actual force is used, since it is not usual to secure such an opening, and the house is as much closed as is reasonable or requisite.[2]

§ 258. **Constructive Breaking.**—A constructive breaking is where fraud or threats are substituted for force, whereby an entry is effected; as where entrance is procured by conspiring with persons within the house;[3] or by pretence of hiring lodgings, obtaining refreshment, or other business;[4] or under color of legal process fraudulently obtained;[5] or by enticing the owner out of his house, if the entry be made immediately, and before the owner's family have time to shut the door.[6] So where defendant secreted himself in a box, which he procured to be put in an express car by the agent of the express company, this was held a breaking of the car.[7]

§ 259. **Breaking. Connivance, or Consent.** — But if the owner, being apprised by his servant of a plan to rob the house, gives his servant the keys, with instructions to carry out the plan, and the servant and the prisoner go together into the house, the

[1] Timmons *v.* State, 34 Ohio St. 426.

[2] Rex *v.* Brice, R. & R. C. C. 450; State *v.* Willis, 7 Jones (N. C.) Law, 190; Walker *v.* State, 52 Ala. 376.

[3] 2 East P. C. 486; State *v.* Rowe, 4 S. E. Rep. 506; s. c. 38 N. C. 629.

[4] 2 East P. C. 486; State *v.* Mordecai, 68 N. C. 207; Johnston *v.* Com., 85 Pa. 54.

[5] Rex *v.* Farr, J. Kelyng, 43, 2 East P. C 486; State *v.* Johnson, Ph. (N. C.) 186.

[6] State *v.* Henry, 9 Ired. (N. C.) 463. But see opinion of Ruffin, C. J., who dissented upon the point as to the necessity of immediate entry. See also Breese *v.* State, 12 Ohio St. 146.

[7] Nicholls *v.* State, 68 Wis. 416.

servant unlocking the door, this is said to be no burglary, as the act is by the owner's consent;[1] though if the owner, being so apprised, merely lies in wait for the purpose of detecting the perpetrators, this is no consent, and they will be guilty of the offence.[2]

§ 260. **Dwelling-house.** — The breaking must be of some part of that actual enclosure which constitutes the dwelling-house. The mere passage across that imaginary line with which the law surrounds every man's realty, and which constitutes a sufficient breaking upon which to found the action of trespass *quare clausum fregit*, is not sufficient. But where part of a structure is occupied as a dwelling, it is burglary to break into another part within the same walls and under the same roof, as, for instance, a lower floor occupied by the same person as a shop, though there is no internal connection between the two parts.[3]

§ 261. **Breaking within the House.** — The breaking of the outer enclosure is not essential, if, after the entry through this, the house or some parts of it be broken. Thus, the forcing of the fastened outer shutters of a window would be a breaking; if these happened to be open, then the forcing of the window would be a breaking; and if both were open, and an entry be effected through them, then a breaking open

[1] Allen *v.* State, 40 Ala. 334. See also Regina *v.* Hancock, C. C. R., 6 Reptr. 351.

[2] Thompson *v.* State, 18 Ind. 386; Rex *v.* Bigley, 1 C. & D. (Irish) C. C. 202. Compare also Alexander *v.* State, 12 Tex. 540, with Regina *v.* Hancock, *ubi supra*.

[3] Quinn *v.* People, 71 N. Y. 561; People *v.* Griffin, 43 N. W. Rep. 1061; s. c. 77 Mich. 585.

of an inner door, a part of the house, would constitute the offence;[1] though not the breaking open a chest, cupboard, clothes-press, or other movable, not part of the house.[2] So if one guest at an inn break and enter the room of another guest, it is burglary.[3] It was formerly doubted whether an innkeeper would be guilty of burglary by breaking and entering the room of his guest, the doubt resting upon the question whether the room was the guest's for the time being.[4] Under statutes making a special or constructive ownership sufficient, the doubt can hardly exist.[5]

§ 262. **Breaking out.** — It was early enacted,[6] to solve the doubts which had theretofore prevailed, that the entry by day or by night into a dwelling-house without breaking, with intent to commit a felony, and the breaking out of the house, should constitute the crime of burglary. And such, we believe, is the law in England to the present day.[7] The indictment should charge the breaking out; and if so charged, it seems that in this country the prisoner may be convicted, where the statute of Anne has been adopted as part of the common law, or has been substantially followed by the statute of the State,[8] but not otherwise.[9] No case has been found,

[1] State *v.* Scripture, 42 N. H. 485; Rolland *v.* Com., 85 Pa. 66; State *v.* Wilson, Coxe (N. J.) 439.

[2] Ibid.

[3] State *v.* Clark, 42 Vt. 629.

[4] 2 Bish. Cr. Law, § 106.

[5] *Post*, § 265.

[6] 12 Anne, c. 1, § 7.

[7] Steph. Dig. Cr. Law, art. 319; Rex *v.* McKearney, Jebb C. C. 99; s. c. 2 Lead. Cr. Cas. 62 and note.

[8] State *v.* McPherson, 70 N. C. 239.

[9] White *v.* State, 51 Ga. 285.

of a conviction under such an indictment; and it is at least doubtful if it would now anywhere be held, unless under the clearest evidence that the statute of Anne is obligatory, that a breaking out to escape is a sufficient breaking to constitute burglary.[1]

§ 263. **Entry.** — In order to constitute an entry, it is not necessary that the whole person should be within the house. Thrusting in the hand or a stick, for the purpose of getting possession of goods within, through an aperture broken for the purpose, is an entry. But the mere passage of the instrument through in breaking, as an auger by which the break is effected, has been held not to be an entry;[2] yet where the auger also effects the entry, as where one bores through the floor of a corn-crib and the corn runs down through the hole, that is a sufficient entry.[3] And the thrusting the hand underneath the window, to lift it, so that the fingers extend to the inside of the window, has been held to be a sufficient entry.[4] So the sending in of a boy after breaking, the boy being an innocent agent, to bring out the goods, is an entry by the burglar, who all the while remains outside.[5] The cases seem to establish the rather nice distinction, that, where the implement held in the hands passes within the enclosure for the purpose of breaking only, there is no entry; but if either the hand or implement passes in for the

[1] Rolland *v.* Com., 85 Pa. 66.

[2] 4 Bl. Com. 227; Rex *v.* Hughes, 1 Leach Cr. L. (4th ed.) 406; Rex *v.* Rust, 1 Moo. C. C. 183.

[3] Walker *v.* State, 63 Ala. 49.

[4] Franco *v.* State, 42 Tex. 276. See also Rex *v.* Davis, R. & R. C. C. 499.

[5] 1 Hale P. C. 555.

purpose of committing the intended felony, there is an entry. And, upon principle, there seems to be no doubt that one who shoots a ball or thrusts a sword through a window with intent to kill, though he fail of his purpose to kill, is nevertheless guilty of breaking and entering.[1]

§ 264. **Dwelling-house. Occupancy.** — As in arson, the dwelling-house comprehends all the buildings within the same curtilage or common fence, and used by the owner as part and parcel thereof, though not contiguous;[2] as, for instance, a smoke-house, the front part and doors of which were in the yard of the dwelling-house, though the rear, into which the break and entry were made, was not.[3] It must be a place of actual residence or habitation, though it is not essential that any one should be within at the very time of the offence. If the occupants are away temporarily, but with the design of returning, and it is the house where they may be said to live, — their actual residence, — this constitutes it their dwelling-house. But occupation otherwise than as a place of residence, as for storage, or even casually for lodgings, or if persons not of the family nor in the general service of the owner sleep, but do not otherwise live there, and for the purpose of protection only, it is not a dwelling-house in the sense of the law. Nor is a temporary booth or tent erected at a fair or market such a dwelling-house.[4] If, how-

[1] *Ante*, § 26.

[2] *Ante*, § 251.

[3] Fisher *v.* State, 43 Ala. 17.

[4] Armour *v.* State, 3 Humph. (Tenn.) 379; Com. *v.* Brown, 3 Rawle (Pa.) 207; State *v.* Jenkins, 5 Jones (N. C.) 430; 3 Greenl. Ev., §§ 79, 80.

ever, the house be habitually occupied in part as a storehouse and in part as the lodging place of the servants and clerks of the owner, it is his dwelling-house.[1] And if it be habitually slept in by one of the family, or one in the service of the owner, even if slept in for the purpose of protection, it has been held to be a dwelling-house within the sense of the law;[2] and by the same court, that if the person so sleeping in the store for its protection be not a member of the family, or in the service of the same, he is but a watchman, and the store cannot be said to be the dwelling-house of the owner.[3]

§ 265. **Dwelling-house. Ownership.** — There may be many dwelling-houses under the same roof; as where separate apartments are rented to divers occupants, who have exclusive control of their several apartments.[4] If, however, the general owner also occupies, by himself or his servant, the building in part, exercising a supervision over it, and letting it to lodgers or to guests, the house must be treated as his, unless, as in some States is the case, a special or constructive ownership is made by statute sufficient evidence of ownership.[5] But this is rather a question of procedure, not pertaining to the definition of the crime.[6]

A church being, as Coke says, the mansion-house of the Almighty, is by the common law a dwelling-

[1] *Ex parte* Vincent, 26 Ala. 145.

[2] State *v.* Outlaw, 72 N. C. 598; State *v.* Williams, 90 N. C. 724.

[3] State *v.* Potts, 75 N. C. 129.

[4] Mason *v.* People, 26 N. Y. 200.

[5] 3 Greenl. Ev., §§ 57, 81; State *v.* Outlaw, 72 N. C. 598.

[6] See also Arson, *ante*, § 253.

house, within the meaning of the definition of burglary.[1] So was a walled town.[2]

§ 266. **Time.** — The time of both breaking and entering must be in the night, and this, at common law, was usually held to be the period during which the face of a person cannot be discerned by the light of the sun; though some authorities fixed the limits more exactly as the period between sunset and sunrise.[3] Now, by statute,[4] in England, night begins at nine and ends at six. In Massachusetts, the meaning of "night-time" in criminal prosecutions is defined to be from one hour after sunset to one hour before sunrise;[5] and doubtless other States have fixed the limit by statute. It may happen that the acts culminating in the commission of the intended felony extend through several days and nights, as where one is engaged day and night in working his way through a substantial partition wall. If the actual perforation be made during one night, and the entry on the same or a subsequent night, the offence is complete, both being in pursuance of the same design.[6] In some States, by statute, the question of time becomes immaterial.

§ 267. **Intent.** — As the breaking and entry must be with intent to commit a felony, the intent to commit a misdemeanor only would not be sufficient to constitute the crime. Thus, a break and entry with intent to commit adultery would or would not con-

[1] 3d Inst. 64; Regina *v.* Baker, 3 Cox C. C. 581.

[2] 4 Bl. Com. 224.

[3] 1 Hawk. P. C. (8th ed.) 130, § 2.

[4] 7 Wm. IV. & 1 Vict. c. 86, § 4.

[5] Com. *v.* Williams, 2 Cush. (Mass.) 582.

[6] Rex *v.* Smith, R. & R. 417; Com. *v.* Glover, 111 Mass. 395.

stitute the offence, according as adultery might be a felony, misdemeanor, or, as in some States it is, no crime at all;[1] and if the intent be to cut off the owner's ears, this is not a burglary, since the cutting off an ear does not amount to felony — mayhem — at common law.[2] So if the person who breaks is so intoxicated as to be incapable of entertaining any intent.[3]

§ 268. **Statutory Breakings.** — The crime of burglary has been much extended by statute. Thus breaking and entering in the day-time has been made criminal; and so has larceny from a dwelling-house, though there has been no breaking. Other buildings have been given protection, and in most jurisdictions it is made a crime to break and enter any building for the purpose of committing felony therein. An unfinished building, which is however used for storing tools, is a building within such a statute,[4] and it is a sufficient breaking to cut through canvas screens placed in the windows.[5] But a tomb is not a building within the meaning of such a statute.[6] A building may be within the statutory definition, though of a sort unknown when the statute was passed. Thus a railroad station is a warehouse, within the meaning of a statute passed before the time of railroads.[7]

[1] State *v.* Cooper, 16 Vt. 551.
[2] Com. *v.* Newell, 7 Mass. 245.
[3] State *v.* Bell, 29 Iowa, 316.
[4] Clark *v.* State, 69 Wis. 203.
[5] Grimes *v.* State, 77 Ga. 762.
[6] People *v.* Richards, 108 N. Y. 137.
[7] State *v.* Bishop, 51 Vt. 287.

CHAPTER VIII.

OFFENCES AGAINST PROPERTY.

§ 270. Larceny.
298. Embezzlement.
305. False Pretences.
318. Cheating.
321. Malicious Mischief.
324. Receiving Stolen Goods.
329. Forgery.
336. Counterfeiting.

§ 269. THE common law, as has been seen,[1] did not regard every interference with the property of another as criminal. In business transactions, each person was left to protect himself. It was, to be sure, a crime to *cheat* by the use of false tokens, such as would deceive the most careful; but ordinary cheating by lies was not criminal. The only crime against property of any importance was larceny; and this concerned not the title, but the possession, of personal property.

In the progress of society and trade, other similar offences became of public concern; and statutes were accordingly passed extending the crime of larceny in all directions.

Thus it was made criminal to obtain the *title* of property by false pretences; or to embezzle property already in the offender's possession. Malicious injury to property, without disturbing the possession, was made punishable; and, finally, certain injuries to real property were punished as similar injuries to

[1] *Ante*, § 17.

personal property had been. Further, protection was afforded by punishing one who received stolen goods knowingly.

Besides larceny, there was an important common law crime which affected property. This was forgery, which, together with its special form of counterfeiting, was a common and important crime in the Middle Ages.

LARCENY.

§ 270. **Larceny** is commonly defined to be the felonious taking and carrying away of the personal goods of another.[1] Notwithstanding the frequency of the offence, neither law writers nor judges are entirely agreed on its exact definition, and, as in case of "assault," it is still a matter of debate.[2] It seems to be agreed, however, that the definition given above is accurate, so far as it goes.

Formerly, larceny was either *petit*, that is, larceny of property the value of which did not exceed the sum of *twelve pence;* or *grand*, that is, larceny of property the value of which exceeded that sum; a distinction which was of consequence only as determining the degree of punishment, grand larceny being punishable with death, while petit larceny was only punishable by fine and imprisonment. Now, however, as no larceny is punishable with death, the distinction is practically done away with. Still, the value of the property at the present day determines, to some extent, the degree of punishment to be inflicted for the commission of the offence, and

[1] 4 Bl. Com. 229. [2] 2 Bish. Cr. Law, § 758 and note.

also the jurisdiction of the tribunal which is to take cognizance, and hence continues to be a matter material to be stated in the indictment.

Larceny is also *simple*, or plain theft, without any circumstances of aggravation; or *compound*, usually termed aggravated larceny, or larceny accompanied by circumstances which tend to increase the heinousness of the offence, as larceny from the person or larceny from the house, taking property from under the protection of the person or house being justly considered as indicating a greater degree of depravity in the thief than the taking of the same articles when not under such protection.

§ 271. **Personal Goods.** — Such property only is the subject of larceny at common law as is properly described as "goods and chattels." As soon as property is reduced into the form of a chattel, and so long as it retains that form, it may be stolen. Thus the milking a cow and the plucking of wool from a sheep are larcenies of the milk and wool.[1] So turpentine which has been collected from a tree,[2] illuminating gas drawn from a pipe through which it is transmitted,[3] or water in the same condition,[4] ice collected in an ice-house,[5] a key in the lock of a door,[6] a coffin,[7] and the grave-clothes in which a person is buried,[8] are all subjects of larceny; but not a dead

[1] Rex *v.* Pitman, 2 C. & P. 423.
[2] State *v.* Moore, 11 Ired. (N. C.) 70.
[3] Com. *v.* Shaw, 4 All. (Mass.) 308; Hutchison *v.* Com., 82 Pa. 472.
[4] Ferens *v.* O'Brien, 11 Q. B. D. 21.
[5] Ward *v.* People, 3 Hill (N. Y.) 395.
[6] Hoskins *v.* Tarrence, 5 Blackf. (Ind.) 417.
[7] State *v.* Doepke, 68 Mo. 208.
[8] Wonson *v.* Sayward, 13 Pick. (Mass.) 402.

body,[1] for it is not property. The dead body of a domestic animal may, however, be stolen.[2] In short, all goods and chattels reduced to possession and not abandoned — such as can be said to be the present property of some owner at the time of the taking — may be subject matters of larceny. There can be no larceny of abandoned property.[3]

Upon the ground of non-reduction to possession, sea-weed found floating on the shore between high and low water mark cannot be claimed as belonging to the owner of the fee between high and low water mark, and it is no larceny to take it.[4]

§ 272. **Instruments in Writing.** — When a paper contains writing which is of itself valuable, as, for instance, a promissory note, bond, mortgage, policy of insurance, or other chose in action or muniment of title, the character of chattel which the paper formerly had is merged in its far more important character of written obligation, and it is held to be no longer a chattel. Written obligations are therefore not subjects of larceny at the common law.[5]

A written instrument which does not contain an operative obligation still remains mere written paper, and is therefore a chattel and the subject of larceny.[6]

[1] 2 East P. C. 652.

[2] Regina *v.* Edwards, 13 Cox C. C. 384.

[3] Ibid.

[4] Regina *v.* Clinton, Ir. Rep. 4 C. L. 6. See also Com. *v.* Sampson, 97 Mass. 407.

[5] Regina *v.* Powell, 5 Cox C. C. 396; Calye's Case, 8 Co. 33 *a*; Regina *v.* Green, 6 Cox C. C. 296; Payne *v.* People, 6 Johns. (N. Y.) 103; United States *v.* Davis, 5 Mason (C. Ct.) 356; State *v.* Wilson, 3 Brev. (S. C.) 196.

[6] Rex *v.* Walker, 1 Moo. C. C. 155.

Such is a written obligation which has been performed, like a cancelled check,[1] or a deed not yet delivered.[2]

In the absence of statutes, the courts of this country have been inclined to follow the common law. But statutes here, as also indeed in England, have generally interposed, and made not only goods and chattels, as by the common law, but also choses in action and muniments of title, whether they savored of realty or not, and in fact almost everything which constitutes personalty in contradistinction to the realty, subject matters of larceny. Indeed, in many if not most of the States the felonious taking of parts of the realty may be indicted as larceny.

§ 273. **No Larceny of Real Estate.** — At common law there could be no larceny of the realty, or any part of it not detached. Only chattels could be the subject of larceny, and these, with few limitations, might be. Deeds of real estate were regarded as so "savoring of the realty" as not to be subjects of larceny.[3]

§ 274. **Wild Animals,** in a state of nature, are not subjects of larceny; but when such of them as are fit for food, or for producing property, have been reclaimed, or brought into control and custody, so that they can be fairly said to be in possession, they then become property, and may be stolen. Bees,[4] peafowl,[5] doves,[6] oysters,[6] when reduced to possession,

[1] Regina *v.* Watts, 4 Cox C. C. 336.
[2] People *v.* Stevens, 38 Hun (N. Y.) 62.
[3] 1 Hawk. P. C. 142; Rex *v.* Westbeer, 1 Leach C. C. (4th ed.) 12.
[4] State *v.* Murphy, 8 Blackf. (Ind.) 498.
[5] Com. *v.* Beaman, 8 Gray (Mass.) 497.
[6] Com. *v.* Chace, 9 Pick. (Mass.) 15; Rex *v.* Brooks, 4 C. & P. 131.
[7] State *v.* Taylor, 3 Dutch. (N. J.) 117.

belong to this category. And so, doubtless, would fish be, if caught and kept in an artificial pond, as they certainly are if captured for food or for oil.[1] So if wild animals fit for food are shot, and thus reduced to possession, they become subjects of larceny;[2] but chasing, without capture, gives no right of property.[3] And where young partridges are reared from eggs under a hen, they are subjects of larceny so long as they continue reclaimed.[4]

But dogs, cats, foxes, bears, and the like, *feræ naturæ*, were not by the common law, and are not in this country, subjects of larceny, unless by some statute they are made so,[5] or unless by the bestowal of care, labor, and expense upon them, or some part of them, they have by that treatment acquired value as property, as by being stuffed or skinned.[6] And it has been generally held that, though they may by statute become property and subjects of a civil action, and liable to taxation, they are not subjects of larceny.[7] Otherwise in New York,[8] where it is held that, under a statute punishing the stealing of the "personal property" of another, the larceny of a dog is punishable.

[1] Taber *v.* Jenny, 1 Sprague, 315.

[2] Regina *v.* Townley, 12 Cox C. C. 59.

[3] Buster *v.* Newkirk, 20 Johns. (N. Y.) 75.

[4] Regina *v.* Shickle, L. R. 1 C. C. 158.

[5] 2 Bl. Com. 193; Norton *v.* Ladd, 5 N. H. 203; Ward *v.* State, 48 Ala. 161; Rex *v.* Searing, R. & R. 350.

[6] State *v.* House, 65 N. C. 315; Regina *v.* Gallears, 1 Den. C. C. 501.

[7] Norton *v.* Ladd, *ubi supra;* Warren *v.* State, 1 Greenl. (Iowa) 106; State *v.* Lymus, 26 Ohio St. 400; State *v.* Holder, 81 N. C. 527.

[8] People *v.* Maloney, 1 Parker C. C. 503; People *v.* Campbell, 4 Parker C. C. 386; Mullaly *v.* People, 86 N.Y. 365. See also Haywood *v.* State, 41 Ark. 479.

§ 275. **Conversion into Chattels by Severance from Realty or by Killing.** — If portions of the realty become detached, not by natural causes, as blinds from a house,[1] or a nugget of gold from the vein,[2] they may become the subject of larceny, unless the detachment or severance be part and parcel of the act of taking,[3] in which case the taking is but a trespass, — "a subtlety in the legal notions of our ancestors."[4]

It was formerly held that a day must elapse between the severance and the taking in order to constitute larceny; but it is now more reasonably laid down that the lapse of time between the act of severance and the act of taking need be only so long as is necessary to make the two acts appreciably distinct, and the latter successive to the former.[5]

A difficult question, however, remains; namely, what is necessary in order to make the acts of severance and taking distinct. The mere fact that there are physically two acts is not enough. There must be something which will give an intervening possession to the owner of the soil; otherwise, there is no taking out of the owner's possession, for he has had no possession of the chattel as an article of personal property prior to its severance from the realty. If the owner, or a servant for him, takes possession of the goods after severance, any subsequent taking is

[1] Regina *v.* Wortley, 1 Den. C. C. 162.

[2] State *v.* Burt, 64 N. C. 619; State *v.* Berryman, 8 Nev. 262; s. c. and note, 1 Green's Cr. Law Rep. 335.

[3] Regina *v.* Townley, L. R. 1 C. C. 315; s. c. 12 Cox C. C. 59; State *v.* Hall, 5 Harr. (Del.) 492.

[4] 4 Bl. Com. 232. See People *v.* Williams, 35 Cal. 671.

[5] People *v.* Williams, 35 Cal. 671; State *v.* Berryman, 8 Nev. 262; Jackson *v.* State, 11 Ohio St. 104.

no doubt larceny. If there is mere lapse of time, it must, in order to justify conviction, be long enough for the jury to find that possession has vested in the owner. No doubt, such lapse of time as would indicate an abandonment by the wrongdoer of his intention to take the chattels would be enough; and if the chattels were so left on the owner's land that the wrongdoer lost the power of control of them, the possession would rest in the owner, and a subsequent taking would be larceny. But where the possession of the wrongdoer is continuous from the time of severance to the time of taking there is no larceny.[1]

The same principles apply where wild animals are reduced into possession by a trespasser. The property in such animals vests in the owner of the soil,[2] but the trespasser who takes them is not guilty of larceny unless the possession vested in the owner before the taking. If the trespasser conceals the animals on the land for a short time before removing them, he is not guilty of larceny when he takes them away.[3]

§ 276. **Value.** — The goods must be of some value, else they cannot have the quality of property. The common law held bills, notes, bonds, and choses in action generally, as of no intrinsic value, and therefore not subjects of larceny.[4] Now, by statute, most of the old limitations and restrictions are done away with. Many articles savoring of the realty, and

[1] Regina *v.* Foley, 26 L. R. Ire. 299; s. c. 17 Cox C. C. 142. See especially the dissenting opinion of Palles, C. B.

[2] Blades *v.* Higgs, 11 H. L. C. 621.

[3] Regina *v.* Townley, 12 Cox C. C. 59; Regina *v.* Petch, 14 Cox C. C. 116.

[4] 4 Bl. Com. 234; *ante*, § 272.

most if not all choses in action, are made subjects of larceny. The value may be very trifling,[1] yet no doubt must be appreciable,[2] though perhaps not necessarily equal to the value of the smallest current coin.[3] It has been held, however, in Tennessee, that the value of a drink of whiskey is too small to lay the foundation for a complaint for obtaining goods by false pretences, upon the ground that the severity of the penalty shows that the legislature could not have intended that the statute should apply to so trivial an act.[4]

§ 277. **Taking and carrying away.** — The taking and carrying away which constitute larceny must be the actual caption of the property by the thief into his possession and control, and its removal from the place where it was at the time of the caption. The possession, however, need be but for an instant, and the removal need extend no further than a mere change of place. Thus, if a horse be taken in one part of a field and led to another, the taking and carrying away are complete; or if goods be removed from one part of a house, store, or wagon to another,[5] or if money in a drawer or in the pocket of a person be actually lifted in the hand of the thief from its place in the drawer or pocket, though not withdrawn from the drawer or pocket, and though dropped or returned on discovery to the place from which it was lifted or taken, after a merely temporary pos-

[1] People *v.* Wiley, 3 Hill (N. Y.) 194.

[2] Payne *v.* People, 6 Johns. (N. Y.) 103.

[3] Regina *v.* Bingley, 5 C. & P. 602.

[4] Chapman *v.* State, 2 Head (Tenn.) 36.

[5] Johnson *v.* People, 4 Denio (N. Y.) 364; State *v.* Craige, 89 N. C. 475; State *v.* Gazell, 30 Mo. 92.

session, however brief,[1] — the larceny is complete. The lifting of a bag from its place would be a larceny,[2] while the raising it up and setting it on end, preparatory to taking it away, would not.[3]

Taking ordinarily implies a certain degree of force, such as may be necessary to remove or take into possession the articles stolen; but the enticement or toling away of a horse, or other animal, by the offer of food, is doubtless as much a larcenous taking as the actual leading it away by a rope attached.[4] So taking goods from an automatic slot machine by dropping into it a brass disk is larceny.[5] So taking by stratagem, or through the agency of an innocent party, or by a resort to and use of legal proceedings, whereby, under forms of law, possession is got by a person, with the intent of stealing, is a sufficient taking to make the act larcenous.[6] In such cases the fraud is said to supply the place of force. So it is larceny to take gas by tapping a gas-pipe and allowing the gas to flow to one's burner, without passing through the meter.[7]

§ 278. **Obtaining of Title.**—The law holds, somewhat inconsistently, that if possession only be obtained by fraud the offence is larceny, but if possession and

[1] Eckels *v.* State, 20 Ohio St. 508; Com. *v.* Luckis, 99 Mass. 431; Harrison *v.* People, 50 N. Y. 518; State *v.* Chambers, 22 W. Va. 779.

[2] Rex *v.* Walsh, 1 Moo. C. C. 14.

[3] Cherry's Case, 2 East P. C. 556; State *v.* Jones, 65 N. C. 395.

[4] State *v.* Whyte, 2 N. & McC. (S. C.) 174; State *v.* Wisdom, 8 Porter (Ala.) 511.

[5] Regina *v.* Hands, 16 Cox C. C. 188.

[6] Rex *v.* Summers, 3 Salk. 194; Com. *v.* Barry, 125 Mass. 390; Regina *v.* Buckmaster, 16 Cox C. C. 339; Regina *v.* Solomons, 17 Cox C. C. 93.

[7] Com. *v.* Shaw, 4 Allen (Mass.) 308; Regina *v.* Firth, L. R. 1 C. C. 172; Regina *v.* White, 6 Cox C. C. 213.

a title to the property be obtained by fraud, it is not, as the fraud nullifies the consent to the taking, but not the consent that the title should pass.[1] And this inconsistency arises out of the doctrine generally received that trespass is a necessary ingredient in larceny, and while a man may be a trespasser who holds goods by a possession fraudulently obtained, he cannot be a trespasser by holding goods by a title fraudulently obtained.[2] The consent of the owner, procured by fraud, that he shall have title, takes the case out of the category of larceny. But if by the same fraud the possession and title to goods are obtained from a servant, agent, or bailee of the owner, who has no right to give either possession or title, as where a watch repairer delivers the watch to a person who personates the owner, it is larceny.[3] It is difficult to see, except upon the technical ground above stated, why a title procured by fraud is any more by consent of the owner than a possession so procured. The distinction is a source of confusion, not to say a ground of reproach.[4]

It follows, therefore, that in case of larceny by trick, the question is whether or not the owner intended to pass title;[5] and in case of larceny of goods in custody of a servant, whether the servant had the power of passing title,[6] and intended to do

[1] Regina *v.* Prince, L. R. 1 C. C. 150.

[2] See 2 Bish. Cr. Law, §§ 808–812.

[3] Ibid.; Com. *v.* Collins, 12 Allen (Mass.) 181.

[4] For the distinction between larceny and obtaining money by false pretences, see *post*, § 317, and Loomis *v.* People, 67 N. Y. 322.

[5] Regina *v.* Bunce, 1 F. & F. 523; Regina *v.* Buckmaster, 16 Cox C. C. 339; Regina *v.* Middleton, L. R. 2 C. C. 38.

[6] Regina *v.* Prince, L. R. 1 C. C. 150; Regina *v.* Webb, 5 Cox C. C. 154.

so.[1] For of course, if the servant is tricked into giving up the goods without intending to pass title or possession, there is larceny.

In Iowa, and perhaps other States, the rule that there is no larceny where there is no trespass, and no trespass where there is consent obtained by fraud, has been abrogated by statute;[2] and in Tennessee it is said that the fraud constitutes a trespass, such as it is.[3]

§ 279. **Taking of Custody merely.** — Where one takes the custody of goods merely, as distinguished from possession, the crime of larceny cannot be committed. So where one moves the goods from one portion to another of the owner's shop, in order that they may be more easily stolen, it is not larceny, for no possession is taken. This question will be more fully considered later.[4]

§ 280. **Taking. Finding Lost Property.** — Lost property found and appropriated may, under certain circumstances, be said to be taken. Thus, if a person find a piece of personal property, about which there are marks or circumstances which afford a clue to the ownership, and from which he has reason to believe that inquiry might result in ascertaining the ownership, and immediately upon finding, without inquiry, appropriate it to his own use, this is a taking sufficient to constitute the act larceny. On the other hand, if there be no mark or circumstance giving any reason to suppose that the ownership can be

[1] Regina *v.* Robins, 6 Cox C. C. 420; Regina *v.* Little, 10 Cox C. C. 559.

[2] State *v.* Brown, 25 Iowa, 561.

[3] Defrese *v.* State, 3 Heisk. 53. See also State *v.* Williams, 35 Mo. 229

[4] *Post*, § 289.

ascertained, an immediate appropriation is not a taking which is larcenous.[1] If there is not a purpose at the time of finding to appropriate, a subsequent appropriation will not amount to larceny.[2]

§ 281. **Property left by Mistake.** — It is important to observe the distinction between lost and mislaid property. In the latter case, as where a customer unintentionally leaves his purse upon the counter of a store,[3] and the trader takes it and appropriates it to his own use without knowing whose it is, or a passenger unintentionally leaves his baggage at a railway station,[4] and a servant of the company, whose duty it is to report the fact to his superior, neglects to do so, and appropriates the baggage to his own use, the act in each case is larceny, because there was a likelihood that the owner would call for the property, and therefore in neither case at the time of appropriation was the property strictly lost property. There was a probability known to the taker in each case that the owner might be found, i. e. would appear and claim property which he had by mistake left. So if a person convert to his own use property left with him by mistake, and, as he knows, intended for another person, this is larceny.[5]

§ 282. **Property delivered by Mistake.** — Where one receives from another — the delivery being by mis-

[1] Com. *v.* Titus, 116 Mass. 42; s. c. 1 Am. Cr. Repts. (Hawley), 416 and note; Reed *v.* State, 8 Tex. App. 40; Regina *v.* Thurborn, 1 Den. C. C. 387.

[2] Ibid.; Baker *v.* State, 29 Ohio St. 184.

[3] Regina *v.* West, 6 Cox C. C. 415; Lawrence *v.* State, 1 Humph. (Tenn.) 228.

[4] Regina *v.* Pierce, 6 Cox C. C. 117.

[5] Wolfstein *v.* People, 6 Hun (N. Y.) 121.

take and therefore unintentional — a sum of money or other property, and the receiver at the time knows of the mistake, yet intends to keep it and to appropriate it to his own use, this is a taking sufficient to constitute larceny; as where a depositor in a savings bank, presenting a warrant for ten dollars, receives through a mistake of the clerk a hundred dollars.[1] But if the receiver did not know of the mistake at the time of taking, his intention to appropriate, formed later, will not make the act larceny.[2] This latter principle would seem to apply where one receives a coin of large value by mistake for one of smaller value, and afterwards, on discovering the mistake, appropriates it. This should not be held larceny.[3]

§ 283. **Taking. Servant.** — Where property is taken by a servant, in whose custody it is placed by the master, as of goods in a store for sale, or of horses in a stable for hiring, or of securities of a banker, or of money in a table, all the property being still in the possession of the owner by and through the servant, the act of taking by the servant is larceny. The servant has custody merely for the owner, who has the possession and property.[4]

If, however, the servant receives goods for his master from a third person, he is held to get the pos-

[1] Regina *v.* Middleton, L. R. 2 C. C. 38; s. c. 12 Cox C. C. 260, 417; 1 Green's Cr. Law Rep. 4.

[2] Regina *v.* Flowers, 16 Cox C. C. 33.

[3] Bailey *v.* State, 58 Ala. 414. See, however, Regina *v.* Ashwell, 16 Cox C. C. 1, where the English judges were equally divided on the question.

[4] Com. *v.* Berry, 99 Mass. 428; Marcus *v.* State, 26 Ind. 101; State *v.* Jarvis, 63 N. C. 556; People *v.* Belden, 37 Cal. 51.

session, and not merely the custody, and an appropriation of the goods is therefore not larceny.[1] But if one servant receives goods from another servant having custody, only custody passes; the goods are still in the master's possession, and the servant may steal them.[2]

Still further, if the servant who has taken possession of the goods puts them in the place appropriated for their reception by the master, the latter comes at once into possession, and the servant taking the goods thereafter is guilty of larceny. Such is the case where money is put by a clerk into the till, or documents into the file provided for them;[3] and so where a servant, sent with a cart to get goods of the master, has put them in the cart.[4] But where the goods are put into the master's receptacle, not in the course of employment, but merely as a place of temporary concealment until they can finally be taken away, the possession is still in the servant, and a taking is not larceny.[5]

§ 284. **Taking. Bailee.** — The appropriation by a carrier, however, or other bailee, of property of which he has possession, and in which he has therefore a quasi property, is embezzlement, and not larceny.[6] The possession of a servant is different from that of a bailee. That of the former is mere custody, while that of the latter is a real possession. Thus, as has

[1] Regina *v.* Masters, 1 Den. C. C. 332.

[2] Rex *v.* Murray, 1 Moo. C. C. 276.

[3] Regina *v.* Watts, 2 Den. C. C. 14.

[4] Regina *v.* Reed, 23 L. J. N. S. M. C. 25; S. C. Dears. C. C. 257.

[5] Com. *v.* Ryan, 30 N. E. Rep. 364 (Mass.).

[6] People *v.* Dalton, 15 Wend. (N.Y.) 581; Regina *v.* Thristle, 3 Cox C. C. 573.

been seen, money in the till is in the possession of the master, but in the custody of the clerk. But where property is delivered to another, who is not his servant, to be kept, the possession is in the employee as a trustee, and if he fraudulently converts it, it is embezzlement, and not larceny.[1]

But it has been held that, if the bailee do any act which violates the trust, as where a carrier breaks open a package delivered to him for transportation, and abstracts a part of its contents, he thereby terminates the bailment, and the act is larceny.[2]

§ 285. **Taking. Temporary Delivery upon Conditions.** — If, however, the property be delivered merely for a temporary purpose, without intention to part with it or the possession except upon certain implied conditions, as where a trader hands a hat over his counter to a customer for the purpose of examination, and the customer walks off with it, or a customer hands to a trader a bill out of which to take his pay for goods bought, and to return the change, and the trader refuses the change, it is in each case larceny.[3] The possession is in each case fraudulently obtained, which is equivalent to a taking without the consent of the owner, in the view of the law. If the possession be fraudulently obtained with intent on

[1] State *v.* Fann, 65 N. C. 317; Ennis *v.* State, 3 Greene (Iowa) 67; Regina *v.* Pratt, 6 Cox C. C. 373.

[2] State *v.* Fairclough, 29 Conn. 47; Nichols *v.* People, 17 N. Y. 114; Com. *v.* Brown, 4 Mass. 580; Rex *v.* Brazier, Russ. & Ry. 337. See also Com. *v.* James, 1 Pick. (Mass.) 375, and a valuable note of Mr. Heard to the same case, 2 Bennett & Heard Lead. Cr. Cas. 181.

[3] Com. *v.* O'Malley, 97 Mass. 584; People *v.* Call, 1 Denio (N. Y.) 120; Regina *v.* Thompson, 9 Cox C. C. 244. See State *v.* Hall, 76 Iowa, 85.

the part of the person obtaining it, at the time he receives it, to convert it to his own use, and the person parting with it intends to part with his possession merely, and not with his title to the property, the offence is larceny.[1]

Perhaps it might justly be said that in such cases the possession is not parted with, the property being in such proximity to the owner that he still has dominion and control over it.[2]

In a recent case defendant acted as attorney for A. in buying certain land. He bought it for $125, but informed A. that the price was $325, of which $10 was to go to defendant. The parties having met, A. laid the money on a table; defendant took it into the next room, paid the seller $125, and retained the balance. This was held larceny; and it was said that A. never gave up the possession to defendant, even though the latter had a right to select $10 and keep it.[3]

§ 286. **Taking by Owner.** — A general owner may be guilty of larceny of his own goods, if at the time of taking he has no right to their possession, as where one whose property has been attached takes it away with intent to deprive the attaching creditor of his security,[4] or a part owner of property in the possession of another takes it feloniously.[5]

[1] Loomis *v.* People, 67 N. Y. 322; Hildebrand *v.* People, 56 N. Y. 394; Rex *v.* Robson, Russ. & Ry. 413; Com. *v.* Barry, 124 Mass. 325; Lewer *v.* Com., 15 S. & R. (Pa.) 93; Farrell *v.* People, 16 Ill. 506; State *v.* Fenn, 41 Conn. 590.

[2] Hildebrand *v.* People, *ubi supra;* 2 East P. C. 683.

[3] Com. *v.* Lannan, 26 N. E. Rep. 858; s. c. 153 Mass. 287.

[4] Com. *v.* Greene, 111 Mass. 392. See also Palmer *v.* People, 10 Wend. (N. Y.) 165; People *v.* Thompson, 34 Cal. 671.

[5] Rex *v.* Wilkinson, Russ. & Ry. 470; Regina *v.* Webster, 9 Cox C. C. 13.

§ 287. **Taking by Wife.** — The wife of an owner of property cannot commit larceny by taking it from her husband's possession, even if she is about to elope with an adulterer,[1] though the latter might be guilty; for a wife cannot have possession of property apart from her husband.[2]

§ 288. **Intent to steal. Claim of Right.** — The taking must also be felonious; that is, with intent to deprive the owner of his property, and without color of right or excuse for the taking.[3] Therefore a taking under a claim of right, if the claim be made in good faith, however unfounded it may be, is not larcenous.[4] But a custom to take fruit, as from boxes of oranges on board a vessel *in transitu*, is neither good in itself, nor as a foundation for a claim of right.[5]

§ 289. **Permanent Taking.** — The intent to steal does not exist unless the object of the wrongdoer is permanently to deprive the possessor of property of his present interest in it. If the purpose is only a temporary use, the owner's rights in the chattel not being permanently infringed, the purpose is not larcenous.

The distinction is clearly brought out in a series of English cases. In the first, a workman in a tannery was paid according to the number of skins he

[1] Regina *v.* Kenny, 2 Q. B. D. 307.

[2] Rex *v.* Willis, 1 Moo. C. C. 375.

[3] Johnson *v.* State, 36 Tex. 375; State *v.* Ledford, 67 N. C. 60; Regina *v.* Holloway, 2 C. & K. 942; State *v.* South, 4 Dutch. (N. J.) 28.

[4] Severance *v.* Carr, 43 N. H. 65; State *v.* Homes, 17 Mo. 379; Regina *v.* Halford, 11 Cox C. C. 88; People *v.* Carabin, 14 Cal. 438; Hall *v.* State, 34 Ga. 208; State *v.* Fisher, 70 N. C. 78.

[5] Com. *v.* Doane, 1 Cush. (Mass.) 5.

dressed. He took a number of dressed skins from the master's storehouse and handed them to the foreman, in order to secure the compensation for dressing them. This was held not to be larceny of the skins; for the workman never even pretended that the skins were not the master's, or that the master had not an immediate right to the possession.[1] In the second case, a workman at a tallow chandler's took some fat from the storehouse and put it in the scales, pretending that it had been brought in for sale. Here the intention was to deprive the master of all his right in the fat, and that he should procure a new right only by purchase; and it was therefore larceny.[2]

According to this distinction, taking a chattel to be used as a means of escape and then left,[3] or for the purpose of inducing the owner to follow it[4] or to refrain from leaving the house,[5] or to facilitate the commission of another theft, does not constitute larceny.[6] Taking property, however, with a design to apply it on a note due to the taker from the owner, is depriving the owner of the specific property.[7] So is the taking of a railway ticket, with intent to use it, though coupled with the intent to return it after use.[8] To conceal it from the owner until the latter

[1] Regina *v.* Holloway, 3 Cox C. C. 241; s. c. 2 C. & K. 942. See, *contra*, Fort *v.* State, 82 Ala. 50.

[2] Regina *v.* Hall, 3 Cox C. C. 245. *Acc.* Regina *v.* Manning, 6 Cox C. C. 86.

[3] State *v.* York, 5 Harr. (Del.) 493; Rex *v.* Phillips, 2 East P. C. 662

[4] Rex *v.* Dickinson, Russ. & Ry. 420.

[5] Cain *v.* State, 21 Tex. App. 662.

[6] Rex *v.* Crump, 1 C. & P. 658.

[7] Com. *v.* Stebbins, 8 Gray (Mass.) 492.

[8] Regina *v.* Beecham, 5 Cox C. C. 181.

shall offer a reward for its recovery, or to sell it at a reduced price, is depriving him of a part.[1] But simply to withhold for a time property one has found, in the hope of a reward, is not larceny.[2]

Taking goods of another in order to pawn them is larceny, even if the intention is ultimately to redeem and restore them.[3] A man who takes an execution from an officer who is about to levy upon his goods, and keeps it, under the mistake that he can thereby prevent the levy, hopes to reap an advantage; but such an act is no more larceny than the taking a stick out of a man's hand with which to beat him.[4]

§ 290. **Taking. Concealment.** — Although the taking be open, and without secrecy or concealment, it may still be theft; and that the act is furtively done is only evidence of the criminal intent.[5] Yet there is undoubtedly in the popular, if not in the legal idea of theft, — *furtum*, — an element of secrecy in the taking.[6] But if the act be fraudulent, and known to the taker to be without right or against right, it is immaterial whether the taking be open or secret. Nor does it seem to be essential that the taker should be animated by any motive of mere pecuniary gain.[7] And the fraudulent purpose — the element without which there can be no theft, the act, in the absence of fraud, being only a trespass — must exist at the time of the taking. The taking must be

[1] Com. *v.* Mason, 105 Mass. 163; Berry *v.* State, 31 Ohio St. 219.

[2] Regina *v.* Gardner, 9 Cox C. C. 253; Micheaux *v.* State, 18 S. W. Rep. 550; s. c. 30 Tex. App. 660.

[3] Regina *v.* Trebilcock, 7 Cox C. C. 408.

[4] Regina *v.* Bailey, L. R. 1 C. C. 347.

[5] State *v.* Fenn, 41 Conn. 590. [6] State *v.* Ledford, 67 N. C. 60

[7] Regina *v.* Jones, 1 Den. C. C. 188; *post*, § 291.

with a fraudulent intent. The taking without a fraudulent intent, and a conversion afterwards with a fraudulent intent, do not, in general, constitute larceny.[1]

It is held in some cases, however, that while, if the original taking be rightful, a subsequent fraudulent conversion will not make it larceny, yet if the original taking be wrongful, as by a trespass, it will. Thus, if a man hires a horse in good faith to go to a certain place, and afterwards fraudulently converts him to his own use, this is no larceny. If he takes the horse without leave, and afterwards fraudulently converts him, this is larceny.[2] So if, under color of hiring, he gets possession with intent to steal.[3] And it has even been held by very high authority, that if possession, without intent to steal, be obtained by a false pretence of hiring for one place, when in fact the party intended to go to another and more distant place, and the property be subsequently converted with a felonious intent, this is larceny.[4] So if, after a hiring and completion of the journey without felonious intent, instead of delivering the horse to the owner, the hirer converts him to his own use.[5] This case proceeds upon the ground that the bailment is terminated. Upon the same ground, a common car-

[1] Wilson *v.* People, 39 N. Y. 459; State *v.* Shermer, 55 Mo. 83; Rex *v.* Banks, Russ & Ry. 441.

[2] Com. *v.* White, 11 Cush. (Mass.) 483; Regina *v.* Riley, Dearsley C. C. 149.

[3] State *v.* Gorman, 2 Nott & McCord (S. C.) 90; State *v.* Williams, 35 Mo. 229; People *v.* Smith, 23 Cal. 280. See also State *v.* Fenn, 41 Conn. 590.

[4] State *v.* Coombs, 55 Me. 477.

[5] Regina *v.* Haigh, 7 Cox C. C. 403.

rier who breaks open a package committed to him for transportation, and takes to his own use a portion of the contents, thereby puts an end to his bailee-ship, and becomes guilty of larceny.[1] And it may be said, generally, that a bailee who receives or gets possession with intent to steal, or fraudulently converts to his own use after his right to the possession as bailee has terminated, is guilty of larceny. In neither case does he hold possession by consent of the owner.[2]

§ 291. **Taking Lucri Causa.** — The taking need not be for pecuniary gain or advantage of the thief, if it is with design wholly to deprive the owner of his property.[3] Logically, the taking to one's self the absolute and permanent control and disposition of the property of another, with no intention of returning it to him, is an addition to the property of the taker, and in that sense necessarily a gain or advantage, without reference to the mode of control or subsequent disposition. The larceny is complete, and is not the less a larceny because it is committed as a step in the accomplishment of some other act, criminal or otherwise. It was formerly laid down, that unless it appears that it would be of some sort of advantage,[4] as to enable the offender to make a gift, or to destroy evidence which might be used against him,[5] the offence would more properly be

1 State *v.* Fairclough, 29 Conn. 47.

2 See 2 Bish. Cr. Law, §§ 834, 835. See also *ante*, § 284.

3 People *v.* Juarez, 28 Cal. 380; Regina *v.* Jones, 1 Den. C. C. 188; Hamilton *v.* State, 35 Miss. 214.

4 Regina *v.* White, 9 C. & P. 344.

5 Regina *v.* Jones, 1 Den. C. C. 188; Regina *v.* Wynn, 1 Den. C. C 365; Rex *v.* Cabbage, Russ. & Ry. 292.

malicious mischief.[1] But even those courts which laid down the rule held that this advantage might be of a very trifling character. Thus, it was held in England,[2] that where it was the duty of a servant to take such beans as were doled out to him by another servant, and split them and feed them to the horses, and the former clandestinely took a bushel of the beans and fed them to the horses whole, whereby he possibly injured his employer's horse, and saved labor to himself, this was a sufficient taking to constitute larceny. This was an extreme case of doubtful law, and it was immediately changed by statute.[3]

But by the better view there is no need of the motive of gain in order to convict of larceny. The permanent injury to the owner is enough.[4]

§ 292. **Ownership.** — A general or special ownership by another is suffcient to sustain the allegation that the property is his.[5] Even a thief has sufficient

[1] Regina *v.* Godfrey, 8 C. & P. 563; People *v.* Murphy, 47 Cal. 103; State *v.* Hawkins, 8 Porter (Ala.) 461.

[2] Rex *v.* Morfit, Russ. & Ry. 307; Regina *v.* Privett, 2 C. & K. 114.

[3] 26 & 27 Vict. c. 103, § 1.

[4] Regina *v.* Guernsey, 1 F. & F. 394; Williams *v.* State, 52 Ala. 411; People *v.* Juarez, 28 Cal. 380; Hamilton *v.* State, 35 Miss. 214; Warden *v.* State, 60 Miss. 638; State *v.* Ryan, 12 Nev. 401; State *v* Slingerland, 19 Nev. 135; State *v.* Davis, 38 N. J. L. 176; State *v.* Brown, 3 Strobh. (S. C.) 508. See, *contra*, Pence *v.* State, 110 Ind. 95; People *v.* Woodward, 31 Hun (N. Y.) 57. An excellent discussion of the question may be found in the dissenting opinion of Learned, P. J., in the last case.

[5] Com. *v.* O'Hara, 10 Gray (Mass.) 469; Regina *v.* Bird, 9 C. & P. 44; State *v.* Gorham, 55 N. H. 152; State *v.* Furlong, 19 Me. 225; State *v.* Mullen, 30 Iowa, 203; People *v.* Bennett, 37 N. Y. 117; State *v.* Williams, 2 Strobh. (S. C.) 474; United States *v.* Foye, 1 Curtis C. C. 364; Owen *v.* State, 6 Humph. (Tenn.) 330.

ownership to support the allegation as against another thief.[1]

§ 293. **Larcenies** from the person, from a vessel, and, under special circumstances, from a building, are but aggravated forms of larceny, of statutory growth, and by statutes generally similar, but in particulars different, are specially defined, and made specially punishable, and are, so far as the larceny is concerned, to be tried by the tests heretofore stated. They are sometimes called compound larcenies, as being made up of two or more distinct crimes, — as in case of larceny from the person, which, technically at least, includes an assault upon the person, — and are said to be *aggravated*, because it indicates a higher degree of depravity to take property from under the protection of the person or of the building, than to take the same property when it is found not under such protection. There is, however, the violation of the security of the person and of the building, which enhances, in the estimation of the law, the gravity of the offence. But these subdivisions of the law of larceny have become so general, that a few observations will be of use.

§ 294. **Larceny from the Person**, though it can be perpetrated only by force, is nevertheless an offence requiring no other than the mere force of taking the thing stolen, and is distinguishable from robbery, in that the latter is an offence compounded of two distinct offences, — assault and larceny, — the assault being, as it were, preparatory to and in aid of the

[1] Ward *v.* People, 3 Hill (N. Y.) 395; Com. *v.* Finn, 108 Mass. 466.

larceny.[1] If, for instance, a thief, — for instance, a pickpocket, — in passing another person snatches a pocket-book from his hand or from his pocket, this is larceny from the person; while if the thief knocks the person down or seizes him, and then takes the pocket-book from his possession, this is robbery.[2] Technically, no doubt, larceny from the person involves an assault, but it is the mere force of taking the thing. In robbery, the force or fear is prior to the larceny, and preliminary to and distinct from the taking.[3] And a thing is said to be on the person if it is attached, as a watch by a chain, or is otherwise so related to the person as to partake of its protection.[4] We have already seen that the actual taking of a thing on the person in the hand, and removing it from contact or connection with the person, is a sufficient taking.[5]

§ 295. **Larceny from Building.** — Taking property in or from a building is not necessarily larceny in a building. To constitute larceny in a building, the property taken must be in some sense under the protection of the building, and not under the eye or personal care of some one in the building.[6] Thus, if a pretended purchaser, having got manual possession of a watch in a store for the purpose of looking at it, leaves the store with the watch, he is not guilty of larceny in a building. The watch, having been de-

[1] 4 Bl. Com. 243.

[2] Regina *v.* Walls, 2 C. & K. 214; Com. *v.* Dimond, 3 Cush. (Mass.) 235.

[3] Rex *v.* Harmon, 1 Hawk. P. C. (8th ed.) 214, § 7; 2 Russ. on Crimes, 89.

[4] Regina *v.* Selway, 8 Cox. C. C. 235. See also *post*, § 295.

[5] *Ante*, § 277. See also Flynn *v.* State, 42 Texas, 301.

[6] Rex *v.* Campbell, 2 Leach C. C. 642.

livered into his custody for a special purpose, cannot be said to be under the protection of the building. And even though it had not been so delivered, but had been merely placed on the counter for inspection, it then might be more properly said to be under the personal protection of the owner, than that of the building.[1] So the snatching of property hung out upon the front of a store for the purpose of attracting customers is not larceny from a building. The goods are not under the protection of the building.[2] The distinctions are very fine. Thus, if a person on retiring to bed places his watch upon a table by his bedside, even within his reach, the taking it while he is alseep is larceny from the building.[3] The taking it while he is awake would probably amount to simple larceny only,[4] the property not being so related to the person as to be under his protection; while if taken from under the pillow of the owner while he is asleep, especially if the taking involved a disturbance of the person, it might be larceny from the person. The question in all cases is whether the property is so situated that it may be taken without a violation of the protection supposed by the law to be afforded by being kept in a building, or being within the personal custody of the owner. If so, then simple larceny only is committed. If, on the other hand, the protection afforded by the building or by personal custody be violated, then the larceny is from the building or

[1] Com. *v.* Lester, 129 Mass. 101.
[2] Martinez *v.* State, 41 Texas, 126.
[3] Rex *v.* Hamilton, 8 C & P. 49.
[4] Com. *v.* Smith, 111 Mass. 429.

from the person, as the case may be.[1] The personal custody need not be actual, but may be constructive, as the cases just cited show. And perhaps a case might be supposed where the protection of the building would be constructive also.[2] The old notion that in order to constitute larceny from the person the larceny must be by stealth, privily or clandestinely, and without the knowledge of the owner, which was embodied in some early statutes, is probably not now recognized by the law of any State.[3]

Since the building is not meant to be a protection against the owner of it, a larceny by the owner of the house is not larceny from the building.[4] And for the same reason a larceny by the owner's wife is not a larceny from the building.[5]

§ 296. **Place.** — That larceny in one jurisdiction of goods thence transported to another jurisdiction may be larceny in the latter, has already been shown.[6]

§ 297. The larceny at the same time of property of different owners, though sometimes held to be separate larcenies of the property of the different owners, is but a single act; and, both upon the reason of the thing and the tendency of the modern authorities, constitutes but a single offence. The act as an offence is against the public, and not against

[1] Regina *v.* Selway, 8 Cox C. C. 235.

[2] See also United States *v.* Jones, 3 Wash. C. Ct. 209; and *ante*, Robbery.

[3] Com. *v.* Dimond, 3 Cush. (Mass.) 235; 2 Bish. Cr. Law, § 895 et seq.

[4] Rex *v.* Gould, Leach C. C. (4th ed.) 217; Com. *v.* Hartnett, 3 Gray (Mass.) 450. But see Regina *v.* Bowden, 2 Moo. C. C. 285.

[5] Rex *v.* Gould, Leach C. C. (4th ed.) 217.

[6] *Ante*, § 80.

the several owners, with reference to whom it is but a trespass. The allegation of ownership is for the purpose of identification of the property, and is but matter of pleading.[1]

EMBEZZLEMENT.

§ 298. **Embezzlement,** though not an offence at common law, is now so universally made such by statute as to be of general interest, subject to special statutory differences or limitations. It may be defined generally as the fraudulent appropriation of another's property by one who has the lawful possession; and is distinguished from larceny by the fact that in the latter there is no possession, but this is taken. The statutes creating the crime of embezzlement, it has been well said, "have all been devised for the purpose of punishing the fraudulent and felonious appropriation of property which had been intrusted to the person by whom it was converted to his own use in such a manner that he could not be convicted of larceny for appropriating it." If the property at the time it is taken is in the possession, actual or constructive, of the owner, it is larceny; if it is not, it is embezzlement.[2]

§ 299. **Possession and Custody distinguished.** — Nice questions have arisen as to what constitutes the possession which is violated in larceny, but which in embezzlement is in the alleged delinquent. Where

[1] Nichols *v.* Com., 78 Ky. 180; State *v.* Hennessey, 23 Ohio St. 339; State *v.* Merrill, 44 N. H. 624; Bell *v.* State, 42 Ind. 335; State *v.* Morphin, 37 Mo. 373; Wilson *v.* State, 45 Texas, 76; Lowe *v.* State, 57 Ga. 171.

[2] Com. *v.* Berry, 99 Mass. 428; Com. *v.* Hays, 14 Gray (Mass.) 62; Rex *v.* Bazeley, 2 Leach C. C. (4th ed.) 835.

there is no general relationship, as that of principal and agent, or employer and employee, other than that of a special and particular trust, little difficulty arises. The party trusted has the possession by delivery for a purpose, and, having the right to the possession, violates the trust by fraudulently converting the property to his own use, whereby the crime of embezzlement becomes complete. Where, however, this general relationship of employer and employee exists, it often becomes a question of some difficulty to determine which party has the possession, — a difficulty which can be best illustrated by reference to a few decided cases. Thus, if a teller in a bank, to whom the funds of the bank are intrusted during business hours for the purpose of transacting the business of the bank, abstracts the funds from the vault after business hours, and after they have been withdrawn from his possession and put under the control of the cashier,[1] this is larceny, because the funds were in the possession of the bank. So, if a clerk ordinarily intrusted with the sale of goods, after the store is closed, enters the store and takes away the goods.[2] Money taken from the till of the master by a servant is stolen, because it is taken from the possession of the master, the servant having only the custody. Money taken from a customer by the servant, and put in his own pocket before it reaches the till, is embezzled, the servant having possession for delivery to the master, — the latter, however, never having possessed it.[3] The

[1] Com. *v.* Barry, 116 Mass. 1. [2] Com. *v.* Davis, 104 Mass. 548.
[3] Rex *v.* Murray, 5 C. & P. 145; Regina *v.* Watt, 4 Cox C. C. 336; Regina *v.* Hawkins, 1 Den. C. C. 584, Com. *v.* Berry, 99 Mass. 428;

distinction is very fine, though clear, and seems to be supported by the authorities. In some States, however, the peculiarities of the statute seem to authorize an indictment for embezzlement where the possession has reached the master, and the servant holds for him,[1] by what is elsewhere generally regarded as a mere custody or bare charge.[2] The theory of constructive possession was early carried to a great length, in order to make the law of larceny apply to acts which as yet no statute of embezzlement had covered. Thus, a watch placed in the hands of a watchmaker to be cleaned was held to be in the possession of the owner, so that the conversion of it was larceny in the watchmaker.[3]

§ 300. **Clerk. Servant. Agent. Officer.** — What constitutes the several relationships of master and servant, employer and clerk, principal and agent, and the exact meaning of the several terms, has also been the subject of much discussion. There seems to be little or no distinction, so far as the law of embezzlement is concerned, between the words "clerk" and "servant," though in popular parlance they would hardly be confounded; but between them and the word "agent" there is a distinction made. Just where the line is drawn, however, as between the one and the other, is not very well defined. Though, in general, the idea of continuity of service underlies the relation of clerkship or service, yet this

People *v.* Hennessey, 15 Wend. (N. Y.) 147; Com. *v.* King, 9 Cush. (Mass.) 284; United States *v.* Clew, 4 Wash. C. Ct. 700.

[1] Lowenthal *v.* State, 32 Ala. 589; People *v.* Hennessey, 15 Wend. (N. Y.) 147.

[2] 1 Hawk. P. C. (8th ed.) 144, § 6.

[3] Ibid., § 10.

is by no means necessary; and an agency may be general and continuous as well; so that such continuity is not decisive as a criterion, though doubtless of some importance. In fact, continuity is not essential to the quality of servant or clerk.[1] Perhaps the idea of control is more distinctively characteristic of the relationship of master and servant than of that of principal and agent.[2] Yet even here the agency may be such as to give the principal as full control of his agent as if he were a servant. An agent is always acting for his principal, with authority to bind him to the extent of his agency; while a servant, though in a certain sense acting for his master, has not the representative character of an agent, and has no authority, as servant, to bind his master. His negligence, however, may be imputed to the master. Personal presence and supervision also belong more especially to the idea of mastership.[3] Still it is only the circumstances of each particular case which will determine under which category a particular person comes; and no better aid in this particular can be given than by a reference to cases which involve special circumstances. Thus, although an apprentice is not technically a servant, he may, under special circumstances, be one within the meaning of the statute of embezzlement.[4] But a general agent of an insurance company resident abroad is not a servant;[5] and though

[1] Regina *v.* Negus, L. R. 2 C. C. 34.
[2] Regina *v.* Bowers, L. R. 1 C. C. 41.
[3] Rex *v.* Squire, Russ. & Ry. 349.
[4] Rex *v.* Mellish, Russ. & Ry. 80.
[5] Regina *v.* May, L. & C. 13.

a person employed to sell goods on commission and collect the purchase money is not a clerk,[1] a commercial traveller, who does not live with his employers, or transact business at their store, may be;[2] while one who receives material to be wrought upon in his own shop, and to be returned to the owner in the shape of manufactured goods, is neither a clerk, servant, nor agent.[3] Neither is a constable who receives a warrant to collect, with instructions to have it served if not paid. He is rather a public officer.[4] So the keeper of a county poor-house stands rather in the relation of a public officer than of servant to the superintendent who appoints him.[5]

§ 301. **Agency.** — But not all agencies come within the purview of this statute.

One whose business is that of a general agent for divers persons, and from its very nature carries with it the implied permission to treat the moneys received as a general fund out of which all obligations are to be paid, such fund to be used and denominated as his own, is not held to be an agent within the meaning of the statute of embezzlement. Thus, an auctioneer, who is the agent of the buyer and the seller for effecting the sale, would find it wholly impracticable to carry on his business if he were obliged to keep separate the funds of each particular seller.[6] So a general collector of accounts is not such an

[1] Regina *v.* Bowers, L. R. 1 C. C. 14.
[2] Rex *v.* Carr, Russ. & Ry. 198.
[3] Com. *v.* Young, 9 Gray (Mass.) 5.
[4] People *v.* Allen, 5 Den. (N. Y.) 76.
[5] Coats *v.* People, 22 N. Y. 245.
[6] Com. *v.* Stearns, 2 Met. (Mass.) 343.

agent of those for whom he collects,[1] nor is a general insurance agent receiving premiums for divers companies.[2] Nor would a general commission merchant be; nor any person who, from the nature of his business or otherwise, has authority to confound and deposit in one account, as his own, funds received from divers sources.[3]

The word "officer," as used in statutes of embezzlement, has been held to apply to the sheriff of a county,[4] the directors of a bank,[5] and the treasurers of railroads and other bodies politic.[6] Perhaps "servant" would aptly describe such persons, if the word "officer" was not in the statute.[7]

§ 302. **Employment.** — Embezzlement, as we have seen, is substantially a breach of trust; and is the peculiar crime of those who are employed or trusted by others. Many of the statutes limit the crime to cases where the fraudulent commission is by one who gets possession of the money or property "by virtue of his employment." Under this limitation it has been held, by a very strict construction, that if a servant employed to sell goods at a fixed price sells them at a less price, and embezzles the money, — that money not being the master's, but the purchaser

[1] Com. *v.* Libbey, 11 Met. (Mass.) 64.

[2] People *v.* Howe, 2 T. & C. (N. Y.) 383.

[3] Com. *v.* Foster, 107 Mass. 221; Mulford *v.* People, 28 N. E. Rep. 1096 (Ill).; People *v.* Wadsworth, 63 Mich. 500. Otherwise by statute in Illinois, as to commission merchants, warehousemen, etc. Wright *v.* People, 61 Ill. 382.

[4] State *v.* Brooks, 42 Tex. 62.

[5] Com. *v.* Wyman, 8 Met. (Mass.) 247.

[6] Com. *v.* Tuckerman, 10 Gray (Mass.) 173.

[7] Rex *v.* Squire, Russ. & Ry. 349; Regina *v.* Welch, 2 C. & K. 296.

still remaining bound for the full fixed price, — the servant does not come in possession of his master's money by virtue of his employment.[1] So, when a servant receives money for the use of his master's property, but in a manner contrary to his right or authority, and in violation of his duty, it is said not to be his master's money, but rather his own.[2] But this strictness of interpretation has not been followed in this country, where it has been held that, if an agent obtains money in a manner not authorized, and in violation of his duty, yet under the guise of his agency, he gets it by virtue of his employment;[3] and other English cases seem now in accord with this view.[4]

§ 303. **Subject Matter of Embezzlement.**— It is generally provided that all matters which may be subjects of larceny may also be subjects of embezzlement. Some statutes, however, are not so comprehensive. Save these differences, which cannot here be particularized, it may be said that whatever may be stolen may be embezzled; and what may be stolen has been considered under the title Larceny.

§ 304. **Intent to defraud** is an essential element of the case. And if the money is taken under a claim of right, as where a cashier of a mercantile establishment intercepts funds of his employers, and without their knowledge and against their wish appropriates them to the payment of his salary, by

[1] Regina *v.* Aston, 2 C. & K. 413; Rex *v.* Snowley, 4 C. &. P. 390.

[2] Regina *v.* Harris, 6 Cox C. C. 363; Regina *v.* Cullum, L. R. 2 C. C. 28.

[3] *Ex parte* Hedley, 31 Cal. 108.

[4] Regina *v.* Beechey, Russ. & Ry. 319; Rex *v.* Salisbury, 5 C. & P 155; Regina *v.* Wilson, 9 C. & P. 27.

charging them to his account, this is no embezzlement.[1] So if the use of money was made in good faith, with no intention of depriving the owner of it, the mere inability to return the money does not make the act embezzlement.[2]

FALSE PRETENCES.

§ 305. Mere verbal lying, whereby one is defrauded of his property without the aid of some visible token, device, or practice, — as when one falsely pretends that he has been sent for money,[3] or falsely states that goods sold exceed the amount actually delivered,[4] or falsely asserts his ability to pay for goods he is about to buy,[5] — was not formerly an indictable offence. But as many frauds were practised in this way which were mere private frauds, and which the court, with every disposition to punish, could not stretch the law of larceny to cover, it was at length enacted[6] that designedly obtaining money, goods, wares, or merchandises by false pretences, with intent to defraud any person, should be indictable. The provisions of this statute have been so generally adopted in this country, that, if it cannot be said to be strictly part of the common law, it may be considered as the general law of the land. And though the terms in which the enactment is made may

[1] Ross *v.* Innis, 35 Ill. 487; Kirby *v.* Foster, 22 Atl. Rep. 1111 (R. I.).

[2] People *v.* Hurst, 62 Mich 276; Myers *v.* State, 4 Ohio Circ. Ct. 570; People *v.* Wadsworth, 63 Mich. 500.

[3] Regina *v.* Jones, 1 Salk. 379.

[4] Rex *v.* Osborn, 3 Burr. 1697.

[5] Com *v.* Warren, 6 Mass. 72.

[6] 30 Geo. II. c. 24.

slightly differ in the different States, yet they are so generally similar that in most cases the decisions in one State will serve to illustrate and explain the statutes in others. And as the words of the statute cover cheats as well by words as by acts and devices, indictments under the statute are now usually resorted to, unless special circumstances or special provisions compel a resort to the old form of pleading. Under the statutes, in order to constitute the offence, it must appear (1) that the pretence is false; (2) that there was an intent to defraud; (3) that an actual fraud was committed; (4) that the false pretences were made for the purpose of perpetrating the fraud; (5) and that the fraud was accomplished by means of the false pretences.[1]

§ 306. (1.) **Pretence must be False.** — A false pretence is a false statement about some past or existing fact, in contradistinction from a promise, an opinion, or a statement about an event that is to take place. Thus, a pretence that one has a warrant to arrest, if false, is within the statute,[2] while a pretence that his goods "are about to be attached" is not.[3] Nor is a statement that something could, would, or should be done.[4]

The shades of distinction are sometimes very nice. Thus, "I can give you employment" is no pretence;[5] but "I have a situation for you in view" is.[6] And

[1] Com. *v.* Drew, 19 Pick. (Mass.) 179.

[2] Com. *v.* Henry, 22 Pa. 253.

[3] Burrow *v.* State, 12 Ark. 65.

[4] State *v.* Evers, 49 Mo. 542; Johnson *v.* State, 41 Tex. 65 Ryan *v.* State, 45 Ga. 128; State *v.* Magee, 11 Ind. 154.

[5] Ranney *v.* People, 22 N. Y. 413.

[6] Com. *v.* Parker, Thatcher Cr. Cas. (Mass.) 24.

it seems that the false statement of an existing desire or intention to accomplish some present purpose, may be a false pretence.[1] Thus, a promise is a statement of an intention to carry out the promise; and if there was no such intention, it is a false pretence.[2] The belief by the party making the statement that it is false is of no moment, if it is in fact true.[3] On the contrary, if it be false, yet he believes it to be true, this is not within the statute, as in such case there is no intent to defraud. But opinions as to quality, value, quantity, amount, and the like, are held not to be false pretences.[4] The fact, however that one does or does not hold an opinion is as much an existing fact as any other; and if it is falsely stated with intent to defraud, and does defraud, it is in every particular within both the letter and spirit of the law.[5] It may be difficult to prove that an opinion is known by the person who asserts it to be false, and that it was falsely asserted with intent to defraud. But this is a question of procedure.

The pretence must be false at the time when the property is obtained. If it be false when made, but becomes true at the time when the property is obtained, — as where one states that he has bought

[1] State *v.* Rowley, 12 Conn. 101; State *v.* Sarony, 95 Mo. 349.

[2] Regina *v.* Jones, 6 Cox C. C. 467.

[3] Rex *v.* Spencer, 3 C. & P. 420; State *v.* Asher, 50 Ark. 427.

[4] Regina *v.* Williamson, 11 Cox C. C. 328; Regina *v.* Oates, 6 Cox C. C. 540; Regina *v.* Bryan, 7 Cox C. C. 312; Regina *v.* Goss, 8 Cox C. C. 262; Scott *v.* People, 62 Barb. (N. Y.) 62; Reese *v.* Wyman, 9 Ga. 430; State *v.* Estes, 46 Me. 150.

[5] State *v.* Tomlin, 5 Dutch. (N. J.) 13; Regina *v.* Ardley, L. R. 1 C. C. 301.

cattle, when in fact he had not at the time of the statement, but had when he obtained the money, — there is no offence.[1] *Vice versa*, however, if the statement be true when made, but becomes false at the time of the obtaining the property, — as if, in the case supposed, the cattle had been bought, but had been sold at the time when the property was obtained, — then the offence would no doubt be committed.

§ 307. **Subject Matter.** — Any lie about any subject matter, by word or deed, — as by showing a badge, or wearing a uniform, or presenting a check or sample or trade-mark, or by a look or a gesture, — subject to the foregoing limitations, is a false pretence. Thus, if one falsely assert as an existing fact that he possesses supernatural power,[2] or that he has made a bet,[3] or that he is pecuniarily responsible[4] or irresponsible,[5] or is a certain person,[6] or that he is agent for or represents a certain person,[7] or belongs to a certain community[8] or military organization,[9] or is married,[10] or unmarried,[11] or engaged in a certain business,[12] or that a horse which he offers to

[1] *In re* Snyder, 17 Kan. 542.
[2] Regina *v.* Giles, 10 Cox C. C. 44; Regina *v.* Bunce, 1 F. & F. 523.
[3] Young *v.* Rex, 3 T. R. 98.
[4] State *v.* Pryor, 30 Ind. 350.
[5] State *v.* Tomlin, 5 Dutch. (N. J.) 13.
[6] Com. *v.* Wilgus, 4 Pick. (Mass.) 177.
[7] People *v.* Johnson, 12 Johns. (N. Y.) 292.
[8] Rex *v.* Barnard, 7 C. & P. 784.
[9] Hamilton *v.* Regina, 9 Q. B. 271; Thomas *v.* People, 34 N. Y. 351.
[10] Regina *v.* Davis, 11 Cox C. C. 181.
[11] Regina *v.* Copeland, C. & M. 516; Regina *v.* Jennison, 9 Cox C. C. 158.
[12] People *v.* Dalton, 2 Wheeler Cr. Cas. (N. Y.) 161.

sell is sound,[1] or that a flock of sheep is free from disease,[2] or any other lie about any matter where money is fraudulently obtained, — the offence is complete. "Why should we not hold that a mere lie about any existing fact, told for a fraudulent purpose, should be a false pretence?"[3]

§ 308. **"Puffing."** — The ordinary "puffing" of the quality of an article, such as is to be expected in the course of trade, though perhaps immoral, is not criminal; because it is a mere expression of opinion such as the purchaser should expect and be on the lookout against. Thus, a statement that certain plated spoons were equal to "Elkinton's A" (a particular sort of plated goods), and had as much silver as those goods, was held not to be a criminal false pretence;[4] an extreme case, however, and one with which dissatisfaction has been expressed.[5]

This principle, however, will not excuse a positive statement as to a fact, made falsely; as, for instance, a statement that certain goods are silver, when in fact they are of base metal.[6] Nor will it excuse a false representation of soundness upon the sale of a horse.[7] "A statement may be a mere commendation or expression of opinion, by which the seller seeks to enhance the price of the property, and justifiable; but when it is made and intended as an assertion of a fact material to the negotiation, as a basis on which the

[1] State *v.* Stanley, 64 Me. 157.
[2] People *v.* Crissie, 4 Den. (N. Y.) 525.
[3] Alderson, B., Regina *v.* Woolley, 1 Den. C. C. 559.
[4] Regina *v.* Bryan, 7 Cox C. C. 312.
[5] Erle, C. J., in Regina *v.* Goss, 8 Cox C. C. 262.
[6] Regina *v.* Roebuck, 7 Cox C. C. 126.
[7] State *v.* Stanley, 64 Me. 157; Jackson *v.* People, 126 Ill. 139.

sale is to be made, if it be false, and is known to the seller to be so, the seller is guilty of the offence, if he thereby induces the buyer to part with his property."[1]

§ 309. **Implied Representations.** — There may be an obtaining by false pretences, though all defendant's statements were true, if a falsehood was implied. Thus where one sold certain goods to another, having previously given a bill of sale of them to a third party, this was an obtaining by false pretences.[2]

The pretence need not be in words; the falsity may consist entirely in acts. Thus where the defendant, not being a member of the University, went to purchase goods in Oxford wearing a sort of cap worn only by the students of a certain College, it was held to be an obtaining by false pretences.[3] So where a coal miner, who was paid according to the number of tubs of coal he mined, put two tickets instead of one into a tub, and thus secured double pay, it was held an obtaining by false pretences.[4]

The giving of a check by a person who has no bank account is a false pretence.[5] But if he has an account, and a reasonable belief that the check will be good when presented, it is not a false pretence, though at the time the check is drawn there is no money in the bank to meet it.[6]

[1] Jackson *v.* People, 126 Ill. 139, 149.

[2] Regina *v.* Sampson, 52 L. T. 772; see also Regina *v.* Randell, 16 Cox C. C. 335.

[3] Rex *v.* Barnard, 7 C. & P. 784; see also Regina *v.* Bull, 13 Cox C. C. 608.

[4] Regina *v.* Hunter, 10 Cox C. C. 642.

[5] Rex *v.* Parker, 7 C. & P. 825; People *v.* Wasservogle, 77 Cal. 173; Barton *v.* People, 25 N. E. Rep. 776; s. c. 135 Ill. 405.

[6] Regina *v.* Walne, 11 Cox C. C. 647; Com. *v.* Drew, 19 Pick. (Mass.) 179.

§ 310. (2.) **Intent to defraud.** — If the money be obtained by the false pretence, the intent being to obtain it thereby, as where one obtains a loan upon a forged certificate of stock in a railroad company, the offence is complete, though the party obtaining the money fully intended and believed he should be able to pay the note at maturity and redeem the stock.[1] If the object in getting possession of the property be not to defraud, but to compel payment of a debt, — as when a servant gets possession of the goods of his master's debtor, to enable his master to collect his debt, — the offence is not committed.[2] So if the object be merely to get one's own property from the possession of another.[3]

§ 311. (3 and 4.) **Actual Perpetration of the Fraud.** — If the fraud be not actually accomplished by obtaining the goods, money, etc., as the charge may be, it is but an attempt, and only indictable as such. And if a person is merely induced by the false pretence to pay a debt which he previously owed, or to indorse a note which he had agreed to indorse, it is no offence under the statute.[4] So it has been held in New York,[5] that parting with money for charitable purposes is not within the statute. But this case rests upon the supposed restraining force of the preamble of the statute; and elsewhere the law has been

[1] Com. *v.* Coe, 115 Mass. 481; State *v.* Thatcher, 35 N. J. 445; Regina *v.* Naylor, 10 Cox C. C. 149; Com. *v.* Schwartz, 18 S. W. Rep. 358 (Ky.).

[2] Rex *v.* Williams, 7 C. & P. 354; *post*, § 311.

[3] *In re* Cameron, 24 Pac. 90 (Kan.).

[4] People *v.* Thomas, 3 Hill (N. Y.) 169; *ante*, § 310; People *v.* Getchell, 6 Mich. 496.

[5] People *v.* Clough, 17 Wend. 351.

held to be the reverse.[1] So obtaining a promissory note from a minor has been held to be no actual fraud, as the minor is not bound to pay;[2] though it may well be doubted if the paper upon which the note is written is not "goods," within the meaning of the statute.[3] So where defendant sells by false pretences a promissory note which in fact is perfectly good, the crime is not committed.[4]

From the rule that the false pretence must be the inducement for parting with the property, it follows that after possession and property — though under a voidable title — is obtained, false representations, whereby the owner is induced to permit the property to be retained, does not amount to the offence; as where a vendor, suspecting the solvency of the vendee, proposes to retake his goods, but is induced by false pretences to abandon his purpose; though it might be otherwise if the right to the property had not passed.[5]

§ 312. **Fraud in both Parties.** — When in a transaction each party makes false pretences, and each defrauds the other, — as when two parties exchange watches, each falsely pretending that his watch is gold of a certain fineness, — each is indictable, and neither can defend on the ground of the other's deceit.[6] It is held in New York, however, that if

[1] Regina *v.* Jones, 1 Den. C. C. 551; Regina *v.* Hensler, 11 Cox C. C. 570; Com. *v.* Whitcomb, 107 Mass. 486. So in New York now by Statute 1851, c. 144, § 1.

[2] Com. *v.* Lancaster, Thatch. Cr. Cas. (Mass.) 428.

[3] Regina *v.* Danger, 7 Cox C. C. 303.

[4] People *v.* Wakely, 62 Mich. 297.

[5] People *v.* Haynes, 14 Wend. (N. Y.) 546.

[6] Com. *v.* Morrill, 8 Cush. (Mass.) 571.

the money parted with is for the purpose of inducing the false pretender to violate the law, as, for instance, a pretended officer not to serve a warrant, the indictment will not lie.[1] But this case proceeds upon the ground that the object of the statute is to protect the honest, while the better view is that the law is for the protection of all, by the punishment of rogues. The application of the principle that one man may escape punishment of crime because the person upon whom he committed it was guilty of the same or a different crime, would paralyze the law. The true rule is to punish each for the crime he commits.

§ 313. **Delivery with Knowledge. Ordinary Prudence.** — If the party who delivers the goods is not deceived by the false pretence, but is aware of its falsity, the offence is not committed, though there would be an attempt;[2] and so, perhaps, if he has the means of knowledge, — as when one falsely represents that on a former occasion he did not receive the right change, and thereby obtained additional change.[3] Yet if the change thus obtained is through actual deceit, operating on the mind of the party who delivers, it is within both the letter and the spirit of the law.[4]

The false pretence, it was once generally and is

[1] McCord *v.* People, 46 N. Y. 470, Peckham, J., dissenting, with whom is the weight both of reason and authority; Com. *v.* Henry, 22 Pa. 253; 2 Bish. Cr. Law, § 469. See *ante*, § 25.

[2] Regina *v.* Mills, D. & B. C. C. 205; State *v.* Young, 76 N. C. 258; Regina *v.* Hensler, 11 Cox C. C. 570.

[3] Com. *v.* Norton, 11 Allen (Mass.) 266; Com. *v.* Drew, 19 Pick (Mass.) 179.

[4] Regina *v.* Jessop, D. & B. C. C. 442; 2 Bish. Cr. Law, § 432 *a*.

now sometimes said, must be of such a character as is calculated to deceive a man of ordinary intelligence and caution.[1] One man, it has been intimated by high authority, is not to be indicted because another man has been a fool.[2] But in the practical application of the rule the courts seem to have been guided, in determining whether the false pretence was an indictable one, more by the fact that the deceit and fraud were intended and actually accomplished, than that they were calculated generally to deceive. And the doctrine which formerly obtained, that if the party from whom the goods were obtained is negligent, or fails in ordinary prudence, the offence is not committed, seems now to be generally discarded, as a doctrine which puts the weak-minded and the incautious at the mercy of rogues. The tendency of the more recent authorities is to establish the rule that, whatever the pretence, if it be intended to defraud, and actually does defraud, the offence is committed. The shallowness of the pretence, and its obvious falsity, may be evidence that the party must have had knowledge, and so was not deceived or defrauded by the pretence; but it is only evidence upon the question whether in fact the person parting with his property was deceived. If, in fact, the party is induced by the pretence to part with his money, — if the pretence takes effect, — then the money is obtained by it. Thus, it was held that a pretence that a one-pound note, reading so upon its face, was a five-pound note, to a party who could

[1] Jones *v.* State, 50 Ind. 473.

[2] Per Lord Holt, Regina *v.* Jones, 2 Ld. Raym. 1013.

read, was a false pretence.[1] It was also held an indictable false pretence to represent to a person who could not read, as a Bank of England note, the following instrument: —

"£5.] BANK OF ELEGANCE. [No. 230.

"I promise to pay on demand the sum of five Rounds, if I do not sell articles cheaper than anybody in the whole universe.

"Five. For MYSELF & Co.

"Jan. 1, 1850. M. CARROLL."[2]

So where the defendant obtained money on the pretence that he could communicate with spirits, it was held an obtaining by false pretences.[3]

§ 314. (5.) **The Fraudulent Pretence as the Means.** — The false pretence must have been the means whereby the defrauded party was induced to part with his property. It is not meant by this that the false pretence should have been the sole inducement which moved the promoter. It is enough if, co-operating with other inducements, the fraud would not have been accomplished but for the false pretence.[4] So when property is sold with a written covenant of title and against encumbrances, and at the same time it

[1] Regina *v.* Jessop, D. & B. C. C. 442.

[2] Regina *v.* Conlson, 1 Den. C. C. 592. See also Regina *v.* Woolley, 1 Den. C. C. 559; *In re* Greenough, 31 Vt. 279; State *v.* Mills, 17 Me. 211; Cowen *v.* People, 14 Ill. 348; Colbert *v.* State, 1 Tex. App. 314; 2 Bish. Cr. Law, § 464; Steph. Dig. Cr. Law, art. 330; Roscoe's Cr. Ev. (9th ed.) 498.

[3] Regina *v.* Lawrence, 36 L. T. Rep. 404.

[4] State *v.* Thatcher, 35 N. J. 445; People *v.* Haynes, 11 Wend. (N. Y.) 557; Regina *v.* Lince, 12 Cox C. C. 451; Fay *v.* Com., 28 Gratt. (Va.) 912; *In re* Snyder, 17 Kan. 542.

is also fraudulently represented verbally that the property is unencumbered, the offence is committed if the verbal representation was the inducement.[1] It is doubtful, however, whether a written covenant of title, or against encumbrances merely, can be fairly regarded as a representation that the property sold is unencumbered, so as to be the foundation of an indictment. It would seem to be only an agreement which binds the party civilly in case of breach.[2]

§ 315. **Remoteness of the Pretence.** — The pretence must be reasonably near to the obtaining; if too remote, the crime is not committed. Thus, where defendant obtained admission to a swimming-race by a false representation, and won the prize, it was held that the prize was not obtained by false pretences;[3] and where, to induce one to buy certain shares in the stock of a corporation, the defendant falsely stated that their purchase was necessary in order to participate in the drawing of certain lots, the falsehood was held too remote.[4] So when the defendant by false representations induced a city to agree that judgment should be entered against it, and the judgment was paid, it was held by the majority of the court not to be an obtaining by false pretences.[5]

§ 316. **Property obtained.**— In general, the property obtained must be such as is the subject of larceny.[6]

[1] State *v.* Dorr, 33 Me. 498; Com. *v.* Lincoln, 11 Allen (Mass) 233; Regina *v.* Abbott, 1 Den. C. C. 273.

[2] Rex *v.* Codrington, 1 C. & P. 661; State *v.* Chunn, 19 Mo. 233.

[3] Regina *v.* Larner, 14 Cox C. C. 497.

[4] Com. *v.* Springer, 8 Pa. Co. Ct. 115.

[5] Com. *v.* Harkins, 128 Mass. 79.

[6] Regina *v.* Robinson, Bell C. C. 34.

The obtaining a credit on account,[1] for instance, is not within the statute, unless its scope is sufficient to embrace such a transaction; nor is the procurement of an indorsement of payment of a sum of money on the back of a promissory note,[2] nor obtaining land,[3] or board and lodging.[4] The statutes of the several States must control in this particular.

§ 317. **False Pretences. Larceny.**— The distinction between the crimes of obtaining money by false pretences and larceny is fine but clear. If a person by fraud induces another to part with the possession only of goods, this is larceny; while to constitute the former offence the property as well as the possession must be parted with.[5] In larceny the owner has no intention to part with his property, and the thief cannot give a good title. If the owner delivers his property under the inducement of a false pretence, with intent to part with his property, the person who obtains it by fraud may give a good title.[6] If the owner is tricked out of the possession, and does not mean to part with the property, it is larceny; but if he is tricked out of both, yet means to part with his property, it is obtaining property by false pretences.[7]

But even though the property does not pass to the

[1] Regina *v.* Eagleton, Dears. 515.

[2] State *v.* Moore, 15 Iowa, 412.

[3] State *v.* Burrows, 11 Ired. (N. C.) 477.

[4] State *v.* Black, 75 Wis. 490.

[5] Regina *v.* Kilham, L. R. 1 C. C. 261; State *v.* Vickery, 19 Tex. 326; People *v.* Johnson, 91 Cal. 265.

[6] Zink *v.* People, 77 N. Y. 114.

[7] Regina *v.* Prince, 11 Cox C. C. 193. See also the very elaborately considered case of Regina *v.* Middleton, 12 Cox C. C. 260, 417; s. c. L. R. 2 C. C. 38; 1 Green's Cr. Law Rep. 4.

offender, it is an obtaining by false pretences if the intent was to pass title to another; and the crime seems to be complete, although no title in fact passed.[1] Thus, in cases where the defendant obtained goods by pretending to be sent by the purchaser, the crime has been held to be committed.[2]

CHEATING.

§ 318. **Cheating** is the fraudulent pecuniary injury of another by some token, device, or practice of such a character as is calculated to deceive the public.[3] Thus, selling bread for the army, and marking the weight falsely upon the barrels;[4] or selling by false weights[5] or measures;[6] or playing with false dice;[7] or arranging the contents of a barrel so that the top shall indicate that it contains one thing, while in fact it contains another and worthless thing, coupled with the assertion that the contents are "just as good at the bottom as at the top";[8] or selling a picture or cloth falsely marked with the name or trade-mark of a well known artist[9] or man-

[1] Cleasby, B., in Regina *v.* Middleton, L. R. 2 C. C. 38, 68. See Com. *v.* Jeffries, 7 Allen (Mass.) 548.

[2] Rex *v.* Adams, Russ. & Ry. 225; People *v.* Johnson, 12 Johns. (N. Y.) 292. See Regina *v.* Butcher, 8 Cox C. C. 77.

[3] 1 Hawk. P. C. (8th ed.) 318, § 1. See also Rex *v.* Wheatly, 2 Burr. 1125; s. c. 1 Benn. & Heard's Lead. Cr. Cas. 1, and notes, as to distinction between mere private cheats and those which affect the public so as to become criminal.

[4] Respublica *v.* Powell, 1 Dall. (Pa.) 47.

[5] Young *v.* Rex, 3 T. R. 98.

[6] Rex *v.* Osborn, 3 Burr. 1697; People *v.* Fish, 4 Parker (N. Y.) C. R. 206.

[7] Leeser's Case, Cro. Jac. 497; Rex *v.* Maddocke, 2 Rolle, 107.

[8] State *v.* Jones, 70 N. C. 75.

[9] Regina *v.* Closs, D. & B. C. C. 460.

ufacturer;[1] or the use of false papers,[2] — have been held to be cheats at common law. So has obtaining release from imprisonment by a debtor by means of a forged order from the creditor upon the sheriff.[3] So it has been held that obtaining from an illiterate person a signature to a note different in amount from that agreed on, by false reading, is a cheat.[4] So, doubtless, would be obtaining money by begging, under the device of putting the arm in a sling, for the purpose of making it appear that it had been injured when it had not. It is an indictable offence to maim one's self whereby the more successfully to beg,[5] or to disqualify one's self for service as a soldier.[6]

Mere lying by words, although successful in fraudulently obtaining the goods of another, without the aid of some visible sign, token, device, or practice, has never been held at common law to be a cheating.[7]

§ 319. **Token. Device.** — A token is a thing which denotes the existence of a fact, and if false, and calculated to deceive generally, it will render the person who knowingly uses it for the purpose of inducing the belief that the fact denoted does exist, to the

[1] Rex *v.* Edwards, 1 Trem. P. C. 103.

[2] Serlested's Case, Latch, 202; Com. *v.* Boynton, 2 Mass. 77; Com. *v.* Speer, 2 Va. Cas. 65; Lewis *v.* Com., 2 S. & R. (Pa.) 551; State *v.* Stroll, 1 Rich. (S. C.) 244.

[3] Rex *v.* Fawcett, 2 East P. C. 862.

[4] Hill *v.* State, 1 Yerg. (Tenn.) 76; 1 Hawk. P. C. (8th ed.) 218, § 1.

[5] 1 Inst. 127.

[6] 3 Burn's J. P. (13th ed.) 741, s. v. Maim.

[7] Rex *v.* Grantham, 11 Mod. 222; Rex *v.* Osborn, 3 Burr. 1697; Com. *v.* Warren, 6 Mass. 72; State *v.* Delyon, 1 Bay (S. C.) 353; People *v.* Babcock, 7 Johns. (N. Y.) 201.

pecuniary injury of another, guilty of the crime of cheating. A business card, in common form, purporting to be the card of an existing firm, which is not genuine, and asserts as fact what is not true, is a false token.[1]

A forged order for the delivery of goods is held to be a token, and obtaining goods in this way a cheat, while the obtaining them by the mere verbal false representation that the person purporting to be the signer of the order had sent for them would not be so.[2] And so is the forged check of another than the person who presents it;[3] but not, it is said, his own worthless check upon a bank where he has never had a deposit,[4] this being merely a false representation in writing. But it is difficult to see why the writing is a token in one case and not in the other. Such subtle distinctions have now very generally been obviated by statutes making the obtaining of money by false pretences criminal.[5]

False personations were formerly held to be cheats,[6] and even falsehoods as to personal identity, age, or condition; and perhaps would now be,[7] where statutes do not provide for such frauds. There seems to be no reason, upon principle, why one who falsely asserts that he is what he naturally or by device falsely appears to be, should not be held guilty of cheating, as availing himself of a visible sign.[8]

[1] Jones *v.* State, 50 Ind. 473.
[2] Rex *v.* Thorn, C. & M. 206; Rex *v.* Grantham, 11 Mod. 222.
[3] Com. *v.* Boynton, 2 Mass. 77.
[4] Rex *v.* Jackson, 3 Camp. 370.
[5] See False Pretences.
[6] Rex *v.* Dupee, 2 Sess. Cas. 11.
[7] Rex *v.* Hanson, Say. 229.
[8] 1 Gab. Cr. Law, 204.

§ 320. **Swindling.** — In South Carolina, the subject of cheating was early made a matter of statutory regulation, providing for the punishment of "any person who shall overreach, cheat, or defraud by any cunning, swindling acts and devices, so that the ignorant or unwary may be deluded thereby out of their money or property," under which obtaining horses from an unsophisticated person by means of threats to prosecute for horse-stealing, and that the pretended owner would have his life if he did not give them up, was held indictable.[1] And in Georgia, obtaining money by false pretences is a form of swindling.[2]

MALICIOUS MISCHIEF.

§ 321. **Malicious Mischief,** at common law, was confined to injuries to personal property. Injuries to the realty were held to be matters only of trespass. And such, perhaps, were all injuries to personal property, short of their destruction.[3] But such injuries, both to personal and real property, came to be of such frequency and seriousness that they were made matters of special statute regulation, for the purpose of providing a more adequate remedy and a severer punishment than was permitted by the common law. And from the time of Henry VIII. down to the present time, both in England and in this country, a great number of statutes have been passed touching the subject, covering such forms of mis-

[1] State *v.* Vaughan, 1 Bay (S. C.) 282.

[2] Code, § 4587.

[3] State *v.* Manuel, 72 N. C. 201. But see People *v.* Smith, 5 Cow. (N. Y.) 258; Loomis *v.* Edgerton, 19 Wend. (N. Y.) 419.

chief as then existed and from time to time grew out of the changing circumstances of society, till now almost every form of such mischief is made the subject of statute regulation, and but few cases arise which are cognizable only by the common law. Nevertheless, the common law is looked to, so far as it is applicable, in aid of the interpretation of the statutes. In many cases the dividing line between malicious mischief and larceny is very shadowy, as where there is a total destruction of the property without any apparent advantage to the destroyer.[1] Indeed, it has been held that the same facts might support an indictment for either offence.[2]

§ 322. **Malice,** in all that class of crimes included under the general category of "malicious mischief," is not adequately interpreted by the ordinary legal definition of malice; to wit, the voluntary doing of an unlawful act without lawful excuse.[3] But it is a more specific and less general purpose of evil. It is defined by Blackstone as a "spirit of wanton cruelty, or black and diabolical revenge."[4] And, in a case where the prosecution was for wilfully and maliciously shooting a certain animal, the court held that to constitute the offence the act must be not only voluntarily unlawful and without legal excuse, but it must be done in a spirit of wanton cruelty or wicked revenge.[5]

[1] *Ante*, § 290.

[2] State *v.* Leavitt, 32 Me. 183; State *v.* Helmes, 5 Ired. (N. C.) 364; Snap *v.* People, 19 Ill. 80; People *v.* Moody, 5 Parker C. R. (N. Y.) 568; Parris *v.* People, 76 Ill. 274.

[3] *Ante*, § 33.

[4] 4 Bl. Com. 244.

[5] Com. *v.* Walden, 3 Cush. (Mass.) 558. See also Goforth *v.* State, 8 Humph. (Tenn.) 37; Branch *v.* State, 41 Texas, 622; Duncan *v.* State, 49 Miss. 331.

And such has been held to be the true interpretation of a statute which punishes mischief done "wilfully *or* maliciously," [1] and even where it punishes mischief "wilfully" done,— the history of the legislation of which the statute formed a part showing that such was the intent of the legislature.[2] Doing or omitting to do a thing, knowingly and wilfully, implies not only a knowledge of the thing, but a determination, with a bad intent or purpose, to do it, or omit doing it.[3]

There is, undoubtedly, in most cases, an element of personal hostility and spite, of actual ill will and resentment towards some individual or particular community, and in some cases this is held to be essential;[4] but, unless restricted to these by statute, there seems to be no reason to doubt that wanton cruelty or injury to or destruction of property, committed under such circumstances as to indicate a malignant spirit of mischief, indiscriminate in its purpose, as where one goes up and down the street throwing a destructive acid upon the clothes of such as may be passing to and fro, for no other purpose than to do the mischief, would be held to constitute the offence.[5] Yet it has been held that proof of malice towards a son is not admissible on an indict-

[1] Com. *v.* Williams, 110 Mass. 401.

[2] State *v.* Clark, 5 Dutch. (N. J.) 96.

[3] Felton *v.* United States, 96 U. S. 699; Com. *v.* Kneeland, 20 Pick. (Mass.) 206.

[4] State *v.* Robinson, 3 Dev. & Batt. (N. C.) 130; Hobson *v.* State, 44 Ala. 380; State *v.* Newby, 64 N. C. 23; State *v.* Pierce, 7 Ala. 728.

[5] State *v.* Landreth, 2 Car. L. R. 446; Mosely *v.* State, 28 Ga. 190; Duncan *v.* State, 49 Miss. 331.

ment for malicious injury to the property of the father;[1] while, on the other hand, it has been held that proof of malice towards a bailee is admissible on an indictment for injury of property described in the indictment as belonging to the bailor.[2] Mere malice towards the property injured, however, as where one injures a horse out of passion or dislike of the horse, is not sufficient to constitute the offence;[3] but wanton and cruel mischief to an animal from a bad mind, without personal ill feeling, is malicious mischief.[4]

In order to bring the act within the purview of the law against malicious mischief, it must appear that the mischief is done intentionally, and perhaps it is not too much to say for the purpose of doing it, and not as incidental to the perpetration of some other act, or the accomplishment of some other purpose, however unlawful. Thus, where one breaks a door or window to gratify his passion for theft, or his lust, or while he is engaged in an assault, or if the injury be done in the pursuit of pleasure, as in hunting or fishing, or for the protection of his crops, or in any other enterprise, lawful or unlawful, where the injury is not the end sought, but is merely incidental thereto, the act does not constitute the offence of malicious mischief.[5] And where the injury is

[1] Northcot *v.* State, 43 Ala. 330.

[2] Stone *v.* State, 3 Heisk. (Tenn.) 457.

[3] 2 East P. C. 1072; State *v.* Wilcox, 3 Yerger (Tenn.) 278; Shepherd's Case, 2 Leach Cr. C. (4th ed.) 539.

[4] State *v.* Avery, 44 N. H. 392; Mosely *v.* State, 28 Ga. 190.

[5] Regina *v.* Pembliton, 12 Cox C. C. 607; s. c. 2 Green's C. L. R. 19; State *v.* Clark, 5 Dutch. (N. J.) 96; Wright *v.* State, 30 Ga. 325; State *v.* Bush, 29 Ind. 110; Duncan *v.* State, 49 Miss. 331.

done under a supposed right, claimed in good faith, there is no malice in the sense of the law.[1]

§ 323. **Malice inferable from Circumstances.**—Direct proof of express malice by actual threats is not necessary, but it may be inferred from the attendant facts and circumstances.[2]

RECEIVING STOLEN GOODS.

§ 324. **Receiving Stolen Goods,** knowing them to be stolen, was originally an accessorial offence, of which the receiver could only be convicted after the conviction of the thief; but it long since became, both in England and in this country, a substantive offence, triable separately, and without reference to the crime of the principal.[3]

Receiving stolen goods, knowing them to be stolen, for the purpose of aiding the thief in concealing them or in escaping with them, is as much an offence as if the receiving be done with the hope of obtaining a reward from the owner, or other pecuniary gain or advantage.[4] But there must be a

[1] State *v.* Flynn, 28 Iowa, 26; Sattler *v.* People, 59 Ill. 68; State *v.* Newkirk, 49 Mo. 84; State *v.* Hause, 71 N. C. 518; Goforth *v.* State, 8 Humph. (Tenn.) 37; Palmer *v.* State, 45 Ind. 388; Regina *v.* Langford, C. & M. 602.

[2] State *v.* Pierce, 7 Ala. 728; State *v.* McDermott, 36 Iowa, 107.

[3] Regina *v.* Caspar, 2 Moo. C. C. 101; s. c. 2 Leading Cr. Cas. 451 and note; Regina *v.* Hughes, 8 Cox C. C. 278; Com. *v.* King, 9 Cush. (Mass.) 284; Loyd *v.* State, 42 Ga. 221; State *v.* Coppenburg, 2 Strobh. (S. C.) 273; State *v.* Weston, 9 Conn. 527.

[4] People *v.* Wiley, 3 Hill (N. Y.) 194; State *v.* Rushing, 69 N. C. 29; Com. *v.* Bean, 117 Mass. 141; Rex *v.* Davis, 6 C. & P. 177; People *v.* Caswell, 21 Wend. (N. Y.) 86; State *v.* Hazard, 2 R. I. 474; Rex *v.* Richardson, 6 C. & P. 335.

fraudulent intent to deprive the true owner of his interest in them.[1]

§ 325. **Receiving.** — To constitute one a receiver, the stolen goods need not have come into his actual manual possession. It is enough if they have come under his observation and control, as where a person allows a trunk of stolen goods to be placed on board a vessel as part of his luggage.[2] But there must be such control as is at least equivalent to constructive possession.[3] If one finds property which he has reason to believe was stolen, and seeks to turn it to his pecuniary advantage, he may be convicted of receiving stolen goods.[4] The owner may be a receiver as well as a thief, if the goods be received from one who stole them from the owner's bailee.[5] But as the wife cannot under any circumstances steal from the husband, one who receives from her cannot be convicted of receiving stolen goods.[6]

§ 326. **When Goods cease to be Stolen Goods.** — The crime can be committed so long only as the goods continue to have the character of stolen goods. Where they have come back into the control of the owner, but he, in order to detect the thief or the receiver, takes measures to have them offered to the receiver, they have ceased to be stolen goods, and

[1] Rice *v.* State, 3 Heisk. (Tenn.) 215; People *v.* Johnson, 1 Parker C. R. (N. Y.) 564; Pelts *v.* State, 3 Blackf. (Ind.) 28.

[2] State *v.* Scovel, 1 Mill (S. C.) 274; State *v.* St. Clair, 17 Iowa, 149; Regina *v.* Smith, 6 Cox C. C. 554; Regina *v.* Rogers, 37 L. J N. s. M. C. 83.

[3] Regina *v.* Wiley, 4 Cox C. C. 412.

[4] Com. *v.* Moreland, 27 Pitts. L. J. (Pa.), No. 45.

[5] People *v.* Wiley, 3 Hill (N. Y.) 194; *ante*, § 155.

[6] Regina *v.* Kenny, 2 Q. B. D. 307.

the receiver cannot be convicted.[1] Nor are the goods to be treated as stolen except in a jurisdiction where the larceny can be inquired into; consequently, where goods are stolen in one jurisdiction and brought into another, the receiver cannot be convicted in the latter jurisdiction.[2] In those jurisdictions, however, where a thief who himself brings into the State goods stolen outside it may be convicted of larceny, one who receives from the thief goods stolen outside may be convicted of receiving, since the goods continue to be stolen goods.[3]

§ 327. **Knowledge.** — The receiver need not have been absolutely certain that the goods were stolen; it is enough if he had reasonable grounds for believing them to be stolen.[4] And if he had knowledge of the circumstances, he need not have known that in law they were sufficient to constitute larceny.[5] But if, knowing the circumstances, he believed them not to constitute a crime at all, the element of guilty knowledge is lacking, and the receiver cannot be convicted.[6]

§ 328. **Evidence.** — Recent possession, without any evidence that the property stolen had been in the possession of some person other than the owner before it came to the alleged receiver, or other circumstances to rebut the presumption of larceny, is

[1] Regina *v.* Dolan, 6 Cox C. C. 449; Regina *v.* Schmidt, L. R. 1 C. C. 15; United States *v.* De Bare, 6 Biss. (U. S. Dist. Ct.) 358.

[2] Rex *v.* Prowes, 1 Moo. C. C. 349; Regina *v.* Madge, 9 C. & P. 29.

[3] Com. *v.* Andrews, 2 Mass. 14; People *v.* Wiley, 3 Hill (N. Y.) 194.

[4] Regina *v.* White, 1 F. & F. 665.

[5] Com. *v.* Leonard, 140 Mass. 473.

[6] Regina *v.* Adams, 1 F. & F. 86; Com. *v.* Leonard, 140 Mass. 473.

rather evidence of larceny than of receiving stolen goods.[1] And evidence of the possession of other stolen goods cannot be given to show that the receiver knew the particular goods in question to be stolen.[2]

FORGERY.

§ 329. **Forgery** is "the fraudulent making or alteration of a writing to the prejudice of another man's right,"[3] — the word "writing" including printed and engraved matter as well,[4] but not a painting with the name of the artist falsely signed,[5] nor a wrapper about a box of baking-powder.[6] The instrument forged, it is generally held, must purport upon its face in some way to prejudice the legal rights or pecuniary interest of the supposed signer, or of the person defrauded. Thus, a recommendation of one person to another as a person of pecuniary responsibility, may be the subject of forgery.[7] And it has been held in England that the false making of a letter of recommendation, whereby to procure an appointment as school-teacher,[8] or as constable,[9] — or a certificate of good character, whereby to enable the person in whose favor it is made to obtain a certificate of qualification for a particular service, — is

[1] Rex *v.* Cordy, cited in note to Pomeroy's edition of Archbold Cr. Pr. & Pl. vol. ii. p. 479; Regina *v.* Langmead, 9 Cox C. C. 464.

[2] Regina *v.* Oddy, 5 Cox C. C. 210.

[3] 4 Bl. Com. 247.

[4] Com. *v.* Ray, 3 Gray (Mass.) 441.

[5] Regina *v.* Closs, 7 Cox C. C. 494.

[6] Regina *v.* Smith, 8 Cox C. C. 32.

[7] State *v.* Ames, 2 Greenl. (Me.) 365.

[8] Regina *v.* Sharman, Dears. C. C. 285.

[9] Regina *v.* Moah, D. & B. C. C. 550.

an indictable forgery at common law;[1] — extreme cases, no doubt, and founded perhaps on an old statute (33 Hen. VIII. c. 1, — not, however, so far as appears by the reports, referred to in either case), whereby cheating by false "privy tokens and counterfeit letters in other men's names" is made an indictable offence. But the false making of a mere recommendation of one person to the hospitalities of another, with a promise to reciprocate, has been held in this country to be no forgery.[2] Whether, in a case precisely analogous to the English cases just referred to, our courts would follow them, remains to be seen. Undoubtedly they would, wherever a substantially similar statute may be found.[3] *The "prejudice to another man's right"* may apply as well to the party imposed upon as to the person whose name is forged. As to the latter, no doubt the writing must import his legal liability in some way. But as to the former, if he is defrauded or imposed upon, or the forgery is made with fraudulent intent, the act seems to come clearly within the definition. It is certainly to be questioned whether the law will allow a man to live upon the hospitalities of his fellows, which he has obtained by forged letters of recommendation. The forgery is not the less a forgery because it is made use of as a false pretence.[4]

§ 330. **Forgery must be Material.** — The false making, however, must be of some instrument having pecuniary importance, or its alteration in some material respect.

[1] Regina *v.* Toshack, 1 Den. C. C. 492.

[2] Waterman *v.* People, 67 Ill. 91.

[3] Com. *v.* Hartnett, 3 Gray (Mass.) 450.

[4] Com. *v.* Coe, 115 Mass. 481; s. c. 2 Green's C. L. R. 292.

A very slight alteration, however, may be material. It has been held in England that the alteration of the name of the person to whom a note is payable, the alteration being from the name of an insolvent to a solvent firm,[1] and in this country, that the alteration of the name of the place where payable, is material. And alteration by erasure constitutes the offence.[2] So does any other erasure, or detachment from or leaving out, as from a will, of a material part of the instrument, whereby its effect is changed.[3] If the instrument do not purport to be of any legal force, whether its invalidity be matter of form or substance, — as if it be a contract without consideration,[4] or a will not witnessed by the requisite number of witnesses,[5] or a bond or other instrument created and defined by statute, but not executed conformably to the statute,[6] — then the false making or alteration is not a forgery. The addition, moreover, of such words as the law would supply,[7] or of a word or words otherwise immaterial, and such as would not change the legal effect of the instrument, — as where the name of a witness is added to a promissory note, in those States where the witness is immaterial, — would not constitute the offence;[8] though, doubtless, in those States where such addition would be mate-

[1] Rex *v.* Treble, 2 Taunt. 328; State *v.* Robinson, 1 Harr. (N. J.) 507.

[2] White *v.* Hass, 32 Ala. 430.

[3] State *v.* Stratton, 27 Iowa, 420; Combes's Case, Noy, 101.

[4] People *v.* Shall, 9 Cow. (N. Y.) 778.

[5] Rex *v.* Wall, 2 East P. C. 953; State *v.* Smith, 8 Yerg (Tenn.) 150.

[6] Cunningham *v.* People, 4 Hun (N. Y.) 455.

[7] Hunt *v.* Adams, 6 Mass. 519.

[8] State *v.* Gherkin, 7 Ired. (N. C.) 206.

rial, by making, as in Massachusetts, the security good for twenty instead of six years, such an alteration would be held a forgery. Nor, it seems, would the alteration of the marginal embellishments or marks of a bank-note, not material to the validity of the note, constitute forgery.[1]

If the instrument forged does not appear upon its face to have any legal or pecuniary efficacy, it must be shown by proper averments in the indictment how it may have.[2]

§ 331. **Legal Capacity. Fictitious Name.** — It is not essential that the person in whose name the instrument purporting to be made should have the legal capacity to act, nor that the person to whom it is directed should be bound to act upon it, if genuine, or should have a remedy over.[3] Indeed, the forged name may be that of a fictitious person,[4] or of one deceased,[5] or of an expired corporation.[6] But signing to a note the name of a firm which in fact does not exist, one of the names in the alleged firm being that of the signer of the note, is not forgery.[7] Even the signing one's own name, it being the same as that of another person, the intent being to deceive

[1] State *v.* Waters, 3 Brev. (S. C.) 507.

[2] State *v.* Wheeler, 19 Minn. 98; State *v.* Pierce, 8 Iowa, 231; Com. *v.* Ray, 3 Gray (Mass.) 441; People *v.* Tomlinson, 35 Cal. 503; *post*, § 334.

[3] People *v.* Krummer, 4 Park. C. R. (N. Y.) 217; State *v.* Kimball, 50 Me. 409.

[4] Rex *v.* Bolland, 1 Leach C. C. (4th ed.) 83; Rex *v.* Marshall, Russ. & Ry. 75; Sasser *v.* State, 13 Ohio, 453; People *v.* Davis, 21 Wend. (N. Y.) 309.

[5] Henderson *v.* State, 14 Tex. 503.

[6] Buckland *v.* Com., 8 Leigh (Va.) 732.

[7] Com. *v.* Baldwin, 11 Gray (Mass.) 197.

and defraud, by using the instrument as that of the other person,[1] may constitute the offence. But the alteration of one's own signature to give it the appearance of forgery, though with a fraudulent intent, is not forgery.[2] And where two persons have the same name but different addresses, and a bill is directed to one with his proper address, but is received by the other, who accepts it, adding his proper address, the acceptance is not a forgery.[3]

§ 332. **The Alteration** may be by indorsing another name on the back of a promissory note,[4] or by falsely filling up an instrument signed in blank, as by inserting or changing the words of a complete instrument,[5] or by writing over a signature on a piece of blank paper,[6] or by tearing off a condition from a non-negotiable instrument, whereby it becomes so altered as to purport to be negotiable,[7] or by pasting one word over another,[8] or by making the mark instead of a signature,[9] or by photographing.[10] So the alteration of an entry, or making a false entry, by a clerk in the books of his employer, with intent to defraud, is a forgery.[11] And so is the obtaining by

[1] People *v.* Peacock, 6 Cow. (N. Y.) 72; Mead *v.* Young, 4 T. R 28; Com. *v.* Foster, 114 Mass. 311.

[2] Brittain *v.* Bank of London, 3 F. & F. 465.

[3] Rex *v.* Webb, 3 B. & B. 228.

[4] Powell *v.* Com., 11 Gratt. (Va.) 822.

[5] State *v.* Kroeger, 47 Mo. 552.

[6] Caulkins *v.* Whisler, 29 Iowa, 495.

[7] State *v.* Stratton, 27 Iowa, 420; Benedict *v.* Cowden, 49 N. Y. 396.

[8] State *v.* Robinson, 1 Harr. (N. J.) 507.

[9] Rex *v.* Dunn, 2 East P. C. 962.

[10] Regina *v.* Rinaldi, 9 Cox C. C. 391.

[11] Regina *v.* Smith, L. & C. C. C. 168; Biles *v.* Com., 32 Pa. 529.

the grantee from the grantor his signature to a deed different from that which had been drawn up and read to the grantor,[1] or by the promisee from the promisor his signature to a note for a greater amount than had been agreed upon.[2] And in England it has been quite recently held, upon much consideration, that where a man who had deeded away his property afterwards, by another deed falsely antedated, conveyed to his son a part of the same property, he was guilty of forgery;[3] — a doctrine which, however, has not only not been adopted, but has been doubted, in this country,[4] where the received doctrine is, that a writing in order to be the subject of forgery must in general be, or purport to be, the act of another; or it must at the time be the property of another; or it must be some writing under which others have acquired rights, or have become liable, and in which these rights and liabilities are sought to be changed by the alteration, to their prejudice, and without their consent.[5] Under this rule it seems that the maker of an instrument may be guilty of forgery by altering it after it has been delivered and becomes the property of another;[6] but the alteration of a draft by the drawer, after it has been accepted and paid and returned to him, is no forgery, but rather the drawing of a new draft.[7]

[1] State *v.* Shurtliff, 18 Me. 368.

[2] Com. *v.* Sankey, 22 Pa. 390.

[3] Regina *v.* Ritson, L. R. 1 C. C. 200.

[4] 2 Bish. Cr. Law, §§ 584, 585.

[5] State *v.* Young, 46 N. H. 266; Com. *v* Baldwin, 11 Gray (Mass. 197.

[6] State *v.* Young, 46 N. H. 266; Com. *v.* Mycall, 2 Mass. 136.

[7] People *v.* Fitch, 1 Wend (N. Y.) 198.

§ 333. **Filling Blanks.** — One may be guilty of forgery by merely filling up blanks without authority. Thus, if an employer leaves with a clerk checks signed in blank, with authority to fill them only for a certain purpose, and he fills them for another purpose, he is guilty of forgery; but if there is general authority to fill the blanks, it is no forgery, even if they are filled for an illegal purpose.[1]

§ 334. **Intent to defraud** is a necessary element in the crime of forgery. But it is not necessary that the fraud should become operative and effectual, so that some one is in fact defrauded, nor need the intent be to defraud any particular person, or other than a general intent to defraud some person or other.[2] An alteration, therefore, by one party to an instrument, to make it conform to what was mutually agreed upon, being without fraudulent intent, lacks the essential quality of fraud.[3]

The lack of similitude between a genuine and a forged signature is immaterial, except as bearing upon the question of intent. The fact of no resemblance at all gives rise to the inference that there was no fraudulent intent. But if the signature be proved, the presumption of fraud arises, whether there is any resemblance or not between the genuine and forged signatures.[4]

[1] People *v.* Reinitz, 6 N. Y. Suppl. 672; People *v.* Dickie, 17 N. Y. Suppl. 51.

[2] Com. *v.* Ladd, 15 Mass. 526, Rex *v.* Ward, 2 Ld. Raym. 1461; Henderson *v.* State, 14 Tex. 503.

[3] Pauli *v.* Com., 89 Pa. 432.

[4] Mazagora's Case, R. & R. 291, Com. *v.* Stephenson, 11 Cush. (Mass.) 481; Regina *v.* Jessop, D. & B. C. C. 442; Regina *v.* Coulson, 1 Den. C. C. 592; State *v.* Anderson, 30 La. Ann. 557.

And even if the resemblance be close and calculated to deceive, the act may be shown to have been done without any fraudulent intent.[1] As the essence of forgery is the intent to defraud, the mere imitation of another's writing, or the alteration of an instrument whereby no person can be pecuniarily injured, does not come within the definition of the offence. And if this probability of injury does not appear on the face of the instrument, it must be shown in the indictment, by proper averments, how the injury may happen. Thus, the alteration of the date of a check in a check-book does not of itself import injury to any one, and in order to make it the foundation of an indictment, it must be set forth in the indictment how this may happen.[2] Nor does an alteration of an instrument to the prejudice alone of him who alters constitute forgery; as when the holder and payee of a promissory note alters the amount payable to a smaller sum.[3]

§ 335. **Uttering.** — A forgery is uttered when there is an attempt to make use of it by bringing it to the knowledge of an innocent person.[4] This use may be of any sort; pledging is uttering,[5] and so is merely showing a receipted bill to gain credit.[6] But showing to an accomplice is not uttering.[7]

[1] Regina *v.* Parish, 8 C. & P. 94; **Rex** *v.* Harris, 7 C. & P. 428; Com. *v.* Goodenough, Thatch. Cr. Cas. (Mass.) 132.

[2] Com. *v.* Mulholland (Pa.), 5 Weekly Notes of Cases, 208.

[3] 1 Hawk. P. C. (8th ed.) 264, § 4. See also Counterfeiting.

[4] Regina *v.* Radford, 1 Den. C. C. 59.

[5] Thurmond *v.* State, 8 S. W. 473; s. c. 25 Tex. App. 366.

[6] Regina *v.* Ion, 2 Den. C. C. 475.

[7] Regina *v.* Heywood, 2 C. & K. 352.

Where a forgery is sent into another jurisdiction by mail or other innocent agent, and is shown there, there would seem to be an utterance in both jurisdictions.[1]

COUNTERFEITING.

§ 336. **Counterfeiting** is the making of a false coin in the similitude of the genuine, with intent to defraud. It is a species of forgery, and its distinguishing characteristic is that there must be some appearance of similitude to the thing counterfeited;[2] whereas in forgery no such similitude is requisite,[3] and no genuine instrument may have ever existed. Whether there is such similitude seems to be a question of fact for the jury.

Before the adoption of the Constitution of the United States the offence of counterfeiting was punishable in the several Colonies under the common law; but by the adoption of that Constitution the power to coin money was prohibited to the States, and reserved to the United States. Strictly speaking, therefore, there is no such offence as counterfeiting at common law in this country; but it is wholly an offence created by the statutes of the United States. But the offence is punishable as a cheat, or an attempt to cheat, by the States as well; and, in point of fact, most of the States, if not all,

[1] Regina *v.* Taylor, 4 F. & F. 511; Regina *v.* Finkelstein, 16 Cox C. C. 107.

[2] Rex *v.* Welsh, 1 East P. C. 164; United States *v.* Marigold, 9 How. (U. S.) 560, per Daniel, J.; United States *v.* Morrow, 4 Wash. C. Ct. 733; Rex *v.* Varley, 2 W. Bl. 682.

[3] See *ante*, Forgery.

have statutes against the making and uttering of counterfeit coin.[1]

Punished at common law as a cheat, it is a misdemeanor, unless clearly made a felony by statute.[2]

[1] Fox *v.* Ohio, 5 How. (U. S.) 410; United States *v.* Marigold, 9 How. (U. S.) 560; Moore *v.* Illinois, 14 How. (U. S.) 13; State *v.* McPherson, 9 Iowa, 53.

[2] Wilson *v.* State, 1 Wis. 184.

CHAPTER IX.

MARITIME OFFENCES.

§ 338. Piracy. | § 339. Barratry.

§ 337. THE common law punishes certain acts committed upon the high seas, when, if committed upon land, the acts would not be criminal, or would be crimes of a different nature. The most important crimes of this nature are piracy and barratry.

PIRACY.

§ 338. "**Piracy** at the common law consists in committing those acts of robbery and depredation upon the high seas which, if committed on the land, would have amounted to felony there."[1] It was originally punishable at common law as petit treason, but not as a felony; and later, by statute,[2] it is made triable according to the course of the common law, subject to the punishment — capital — provided by the civil law.[3] Under the law of nations, (which is part of the common law,) it may be committed by an uncommissioned armed vessel attacking another vessel,[4] or by feloniously taking from the possession

[1] 1 Russ. on Crimes, bk. 2, c. 8, § 1.

[2] 28 Hen. VIII. c. 15.

[3] 1 Russ. on Crimes, bk. 2, c. 8, § 1. This statute has been repealed by Stat. 1 Vict. c. 88, § 1.

[4] Savannah Pirates, Warburton's Trial, 370.

of the master the ship or its furniture, or the goods on board, whether the taking be done by strangers, or by the crew or passengers of the vessel.[1]

Robbery on board a vessel sailing under a foreign flag is not piracy,[2] but the category of piratical acts has been much extended by statute.[3]

As the offence, if committed at all, is committed on the high seas, that is, out of the jurisdiction of the States, the adjudications and judicial decisions in this country have been mostly confined to cases arising under the statutory jurisdiction of the courts of the national government.[4]

A pirate is an outlaw, and may be captured and brought to justice by the ship of any nation.[5]

A commission purporting to be issued by an unknown government, or by a province of an unacknowledged nation, affords no protection.[6]

BARRATRY.

§ 339. **Barratry** is a maritime offence, and consists in the wilful misconduct of the master or mariners,

[1] Attorney General *v.* Kwok-a-Sing, L. R. 5 P. C. 179; Rex *v.* Dawson, 13 How. St. Tr. 451. See also United States *v.* Tully, 1 Gall. C. Ct. 247; United States *v.* Jones, 3 Wash. C. Ct. 209; United States *v.* Gibert, 2 Sumner C. Ct. 19; United States *v.* Pirates, 5 Wheat. (U. S.) 184; The Antelope, 10 Wheat. (U. S.) 66.

[2] United States *v.* Palmer, 3 Wheat. (U. S.) 610.

[3] United States *v.* Brig Malek Adhel, 2 How. (U. S.) 210. On the question of jurisdiction of a crime committed on board a foreign vessel, see the very learned and elaborate case of Com. *v.* Macloon, 101 Mass. 1.

[4] For the statutory law upon this subject see U. S. Revised Statutes, § 5368.

[5] The Marianna Flora, 11 Wheat. (U. S.) 1.

[6] United States *v.* Klintock, 5 Wheat. (U. S.) 144.

for some unlawful purpose, in violation of their duty to the owners of the vessel.

Thus, stealing from the cargo,[1] wilful deviation in fraud of the owner,[2] or delay for private gain,[3] or for any unlawful purpose,[4] have severally been held to constitute barratry. So has the unlawful resistance to the search of a belligerent.[5] And negligence may be so gross as to amount to fraud, just as at common law it may be so gross as to amount to criminality.[6] It is not necessary that there should be fraud, in the sense of an intention on the part of the accused to promote his own benefit at the expense of the owners, but any wilful act of known illegality, every gross malversation or criminal negligence in the discharge of duty, whereby the owner of the vessel is damnified, comes within the legal definition of barratry.[7] But the negligence must be so gross as to be evidence of a fraudulent intent.[8]

[1] Stone *v.* National Ins. Co., 19 Pick. (Mass.) 34.
[2] Vallejo *v.* Wheeler, Cowp. 143.
[3] Ross *v.* Hunter, 4 T. R. 33.
[4] Roscow *v.* Corson, 8 Taunt. 684.
[5] Brown *v.* Union Ins. Co., 5 Day (Conn.) 1.
[6] Patapsco Ins. Co. *v.* Coulter, 3 Pet. (U. S.) 222.
[7] Lawton *v.* Sun Mut. Ins. Co., 2 Cush. (Mass.) 500.
[8] Fayerweather *v.* Phenix Ins. Co., 54 N. Y. Super. Ct. 545.

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