PRINCIPLES

OF

THE CRIMINAL LAW

A CONCISE EXPOSITION OF THE NATURE OF CRIME,
THE VARIOUS OFFENCES PUNISHABLE BY THE ENGLISH LAW,
THE LAW OF CRIMINAL PROCEDURE,
AND THE LAW OF SUMMARY CONVICTIONS.

WITH

TABLE OF OFFENCES, THEIR PUNISHMENTS,
AND STATUTES.

BY

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AUTHOR OF "A CONCISE DIGEST OF THE INSTITUTES OF GAIUS AND JUSTINIAN."

THIRTEENTH EDITION.

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PREFACE TO THE THIRTEENTH EDITION.

The alterations in this edition are very numerous and have necessitated the re-writing of a considerable part of the book.

The last edition was published in 1912, and since its publication there have been many additions to the complicated mass of statutes which goes to make up the Criminal Law. If statute law continues to increase at the present rate without any serious attempt at codification it will soon be impossible to produce a work of this size which will not, for any practical purposes, be valueless owing to the extent of the omissions.

Although the present edition covers more ground than the last the size of the book has been slightly reduced. This has been effected by the use of a different method of printing and by the deletion of some obsolete matter and unnecessary repetitions.

A. M. WILSHERE.

1 Elm Court, Temple.

June, 1919.

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Erratum.—P. 160, note (*z*), *for* 2 & 3 Geo. V. c. 20, s. 3, *read* 2 & 3 Geo. V. c. 20, s. 2.

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PRINCIPLES

OF

THE CRIMINAL LAW

BOOK I.

INTRODUCTORY CHAPTER.

CRIME.

THE term "*crime*" admits of description rather than definition. There are no certain and universal intrinsic qualities which at once stamp an act with the character of a crime. We term a flagitious act a crime rather on account of its *legal consequences* than from any regard to such intrinsic characteristics. One of the most satisfactory explanations of the term under consideration is "an act or omission forbidden by law under pain of punishment" (*a*).

The question at once presents itself, What are the distinguishing marks of "punishments"? This will, perhaps, be seen most clearly by a contrast. Sanctions (that is, evils incurred by a person in consequence of disobedience to a command, and thus enforcing that command) fall under two heads:

(1) Those which consist in the wrongdoer being obliged to indemnify the injured party, as by paying him damages.

(2) Some suffering experienced by the wrongdoer.

(*a*) *Mann* v. *Owen*, [1829] 9 B. & C. 599, 602.

In the first case the enforcement of the sanction is in the discretion of the injured party (or his representative), and its object is his *compensation*.

In the second case the sanction is a *punishment* imposed for the public benefit, and enforced or remitted at the discretion of the sovereign as the representative of the public (*b*).

Here we arrive at the true distinction between Civil Injuries or Torts, and Crimes. The difference is not a difference between the natures of the two classes of wrongs, but a difference between the modes in which they are respectively pursued—that is, whether as in the first or second of the cases mentioned above (*c*).

That there is nothing in the nature of a crime which, *per se*, determines that a particular wrongful act should be necessarily relegated to the category of crime, two considerations will suffice to show. First, in different countries, and at different eras in the history of the same country, the line between *civil* and *criminal* is, and has been, utterly different. For example, at Rome simple theft was regarded as a civil injury, for which pecuniary redress had to be made. The second consideration is that the same wrongful act may be regarded as a crime or a civil injury according as proceedings are taken with reference to the one or the other sanction. In the English law the best examples of this are libels and assaults. The same writing, or the same assault, may be made the subject of civil or of criminal proceedings. If A. write of B. that he is a swindler, B. may either indict A. for the crime, or bring an action against him for the civil injury (*d*).

It may be well to interpose an explanation of the courses open to the injured person when the same wrong is both a crime and a civil injury. He has not always the power of choosing in which way he will proceed. The rule is based on

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(*b*) Austin's Jurisprudence, 518.

(*c*) Austin, 417. A good description of crimes, having in view the true ground of difference, is given in Bishop, 1 Cr. L. § 43: "Those wrongs which the government *notices* as injurious to the public, and punishes in what is called a criminal proceeding in its own name."

(*d*) Austin, 417, 518.

the distinction of crimes into felonies and misdemeanours (*e*). An action for damages based upon a *felonious* act on the part of the defendant, committed against the plaintiff, is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted, and the proper course for the Court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted (*f*). In misdemeanours there is no such rule; either proceedings may be taken first, or both may be pursued concurrently.

Before leaving the subject of the difference between crimes and civil injuries, two other groundless distinctions may be adverted to. First, the distinction does *not*, at the present day, consist in this, that the mischief of crimes (as a class) is more extensive than that of civil injuries (as a class). If we consider the origin of law, and particularly if we examine the customs and law of some of the primitive societies still existing in various parts of the world, we find that the notion of reprisal or vengeance precedes that of compensation. Its enforcement is usually left to the aggrieved party, but any serious breach of custom may be regarded as a public offence, so that the offender may incur *punishment* by the community. And, before sin and crime have been distinguished, the motive for thus punishing serious offences is the fear that the criminal may bring down upon the society the anger of the gods, and his punishment often takes the form of expulsion or outlawry, as in the Roman law *sacratio*. While, therefore, it may be true, as a historical explanation, to say that the possible mischief of an offence led to its being considered as what we now call a crime, yet this at the present day is no test of what is a crime.

Secondly, the moral nature of an act is an element of no value in determining whether it is criminal or not. On the one hand, an act may be grossly immoral, and yet it may not

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(*e*) v. p. 6.

(*f*) *Smith* v. *Selwyn*, [1914] 3 K. B. 98; v. also *Appleby* v. *Franklin*, [1886] 17 Q. B. D. 93; *Midland Insurance Co.* v. *Smith*, [1881] 6 Q. B. D. 561.

bring the doer within the pale of the criminal law—as in the case of adultery. "Human laws are made, not to punish sin, but to prevent crime and mischief" (*g*). On the other hand, an act perfectly innocent, from a moral point of view, may render the doer amenable to punishment as a criminal. To take an extreme example: W. was convicted on an indictment for a common nuisance, for erecting an embankment which, although it was in some degree a hindrance to navigation, was advantageous in a greater degree to the users of the port (*h*). Here the motive, if not praiseworthy, was at least innocent. The fact that the motive of the defendant is positively pious and laudable does not prevent a conviction if his act is in itself unlawful (*i*).

Some acts have been recognised as crimes in the English law from time immemorial, though their punishments and incidents may have been affected by legislation. Thus murder and rape are crimes at *common law*. In other cases, acts have been pronounced crimes by particular *statutes*, which have also provided for their punishment—*e.g.*, offences against the Bankruptcy Laws.

It is often of the utmost importance to determine whether a particular proceeding is a criminal or a civil proceeding. Thus, the right of appeal which generally exists in civil causes is, where there is a right of appeal, of a different nature and form in criminal proceedings. The true test is whether or not the infliction of punishment follows on the result being unfavourable to the defendant. If the end of the proceeding is that the defendant is required to pay a sum of money, the question will resolve itself into whether the fine is a debt or a punishment (*k*).

In treating of the Criminal Law, or the Pleas of the Crown (*l*), the subject naturally divides itself into two por-

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(*g*) *Attorney-General* v. *Sillem*, [1863] 2 H. & C. 526.
(*h*) *R.* v. *Ward*, [1836] 5 L. J. K. B. 221.
(*i*) *R.* v. *Sharpe*, [1857] 26 L. J. M. C. 47. But v. p. 10.
(*k*) *Cattell* v. *Ireson*, [1858] 27 L. J. M. C. 167.
(*l*) So called because the king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is, therefore, in all cases the proper prosecutor for every public offence, 4 Bl. 2.

tions. The first, dealing with crimes generally and the various individual crimes, their constituents, their differences, appropriate punishments, and other incidents, may be termed —*The Law of Crimes.* The second, dealing with the machinery by means of which these crimes are prevented, or, if committed, by means of which they meet with their punishment, may be termed—*The Law of Criminal Procedure.*

DIVISIONS OF CRIME.

Crime. Offence.—These terms are sometimes used synonymously of the whole class of illegal acts which entail punishment. Each of them, however, has sometimes a narrower signification; and in this sense they are opposed to each other, and divide between them the whole field of acts which each in its wider sense covers. The latter use is that which confines the term "offence" to acts which are not indictable, but which are punished on summary conviction, or by the forfeiture of a penalty (*m*); while "crime" is restricted to those which are the subjects of indictment.

The main classification of indictable crimes is threefold —Treason, Felony, Misdemeanour—though "treason" is strictly included in the term "felony."

Indictable Crimes.—All treasons, felonies, and misdemeanours, misprisions of treason and felony, whether existing at common law or so created by statute, are the subjects of indictment. So also are all attempts to commit any of these acts (*n*). Further, if a statute prohibits a matter of public grievance, or commands a matter of public convenience (such as the repairing of highways or the like), all acts or omissions contrary to the prohibition or command of the statute are misdemeanours at common law, and are punishable by indictment, if the statute does not manifestly exclude this mode of proceeding (*o*). But it is otherwise if the rights which are regulated are merely private.

(*m*) v. *Lee* v. *Dangar, Grant & Co.*, [1892] 2 Q. B. at pp. 347, 348.
(*n*) v. p. 12.
(*o*) *R.* v. *Hall*, [1891] 1 Q. B. 747; v. p. 307.

Misprision.—In general this term signifies some neglect or contempt, especially when a person, without assenting thereto, knows of any treason or felony and conceals it (*p*). But it has also been applied to every great misdemeanour which has no certain name given to it in the law; for example, the maladministration of public officers.

Felony. Misdemeanour.—In distinguishing felony from misdemeanour as in distinguishing a crime from a civil injury, we shall also find that the difference is only one founded on the consequences of each. It is a popular idea that the present distinction between felonies and misdemeanours is one founded on the degree of enormity of the crime. That this is not necessarily the case will be seen when we consider what offences belong to the one class and what to the other. No one will maintain that perjury, which is a misdemeanour, is of less gravity than simple larceny, which is a felony. As a rule, however, the more serious crimes are felonies.

The origin of the word "felony" is very doubtful (*q*), but in feudal times it was understood to mean a crime which resulted in the forfeiture of the land of the criminal to the lord of the fee, although it must be admitted that to this rule there were one or two exceptions. By a slight deflection the term was extended to offences which involved forfeiture of goods. Blackstone thus defines a felony to be "an offence which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment *may* be superadded according to the degree of guilt" (*r*). Capital punishment, indeed, usually followed upon a conviction for felony, the exceptions being petty larceny and mayhem.

It may be noticed that where a statute declares that an offender against its provisions shall be deemed to have *feloniously* committed the act, the offence is thereby made a felony (*s*).

(*p*) v. pp. 39, 79.
(*q*) For various derivations, see Murray's "New English Dictionary," *sub tit.* "Felon."
(*r*) 4 Bl. 95.
(*s*) *R.* v. *Johnson*, [1815] 3 M. & S. 556.

"*Misdemeanour*" is to be regarded as a negative expression, being applied to indictable crimes not falling within the class of felonies.

In the year 1870 the Legislature struck at the root of the distinction we have been treating of; but the terms "felony" and "misdemeanour," having become firmly attached to the various indictable offences, still remain. It was provided that no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se*, should thereafter cause any attainder or corruption of blood, or any *forfeiture* or escheat (*t*).

In addition to the distinction as to forfeiture, which we have just seen to be a thing of the past, there are other points, some nominal, others real, which distinguish felonies from misdemeanours. The following are the most important:

(i) As to *arrest*.—It will suffice here to state generally that an arrest without warrant is justifiable in certain cases of supposed felony, where it would not be in cases of supposed misdemeanour (*u*).

(ii) As to the *parties implicated*.—The distinction between principals and accessories is recognised only in felonies (*w*).

(iii) As to the *trial*.—Misdemeanours may be tried upon an indictment, inquisition, or information; felonies upon the first two only.

The right of peremptory *challenge* to jurors is confined to cases where the prisoner is indicted for felony.

On minor points there is also a difference, *e.g.*, the form of oath taken by the jury (*x*); again, in misdemeanour the defendant is not given in charge to the jury (*y*); and in felonies the prisoner must be present throughout the trial, while a case of misdemeanour may be tried although the accused be not present, if he have previously pleaded (*z*). In many cases of misdemeanour the person accused is entitled to

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(*t*) 33 & 34 Vict. c. 23, s. 1.
(*u*) v. pp. 293—296.
(*w*) v. p. 25.
(*x*) v. p. 357.
(*y*) v. p. 358.
(*z*) Archbold, 169.

be released on bail while awaiting his trial, whereas this is not the case if the charge is one of felony (*a*).

(iv) As to the *civil remedy*.—As we have seen (*b*), the felony should be prosecuted before a civil action is commenced against the guilty person with reference to the same act; in misdemeanour there is no such necessity.

(*a*) v. p. 301 *et seq*. (*b*) v. p. 3.

CHAPTER II.

ESSENTIALS OF A CRIME.

In order to ascertain who are and who are not capable of committing crime, it will be necessary to examine certain terms which are liable to confusion.

In the first place we must deal with those mental elements which occur in every case of crime, and the absence of which (except in a limited number of cases to which we will refer) excludes the act from the category of crimes, viz., *Will* and *Criminal Intention* or *Mens rea*. In dealing with these we must necessarily consider the external or physical facts which create criminal liability, *i.e.*, *Acts* and their *Consequences*, and in relation to will and intention we must further consider *Motive*. All these five terms have received many definitions, and moreover are frequently used, even by lawyers, with somewhat different shades of meaning. It is perhaps safer, therefore, to attempt a broad explanation rather than definition.

The term *Act* denotes, strictly speaking, only such physical facts as follow immediately upon a determination of the will to effect them: Acts therefore are said to be *willed*. Consequences, on the other hand, are the results which follow as the effect of the act and to the attainment of which the act is directed; consequences, therefore, are said to be *intended* —*i.e.*, aimed at. Thus if I strike a match, the act is the muscular movement of striking to which my will is determined; the intended consequence is the ignition of the match. (The distinction between act and consequences is, however, frequently disregarded, and an act with its immediate consequences, *e.g.*, the whole process of lighting the match, is spoken of as an act.) Since acts are willed, a man does an

act *wilfully* when he is a free agent and what is done arises from the spontaneous action of his will (*c*), when his act is done, not by accident or inadvertence, but so that his mind goes with it (*d*). If the act be not willed, it is said to be *involuntary* and does not render its doer amenable to the criminal law. An *omission* to act may, similarly, be either wilful or involuntary.

Intention and Motive.—The term "intention" has reference to the effect which is aimed at by an act, either, as above illustrated, to the consequences, or to the purpose which will ultimately be effected, as, *e.g.*, in the expression "Assault with intent to rob." (It may also have another looser meaning, as when a man says that he "intends" to do something to-morrow.) Intention must always be carefully distinguished from motive, which is the incentive to acts. Motive, speaking broadly, is a term applicable to any mental condition or consideration which induces us to particular conduct, as, for example, a mere feeling of hostility which induces one man to libel another, or the desire of winning a scholarship which induces a student to work. It is not correct to say that motive is immaterial in determining whether conduct is criminal. It is true that, if conduct is *per se* criminal, the fact that the motive was innocent is no defence; but in some cases, on the other hand, the presence or absence of a particular motive may determine the criminality of conduct (*e*); and, further, the presence or absence of motive may be a clue as to the existence of intention—thus if A. kills B., the presence or absence of motive may be a clue as to whether the killing was intended or unintended. Intent, however, is much more material than motive in determining the character of conduct, and the same conduct may or may not amount to a crime according to the intention. For example, A. takes a horse from the owner's stable without his consent. If he intend fraudulently to deprive the owner of the property and appropriate the horse to himself he is guilty of the crime

(*c*) *Young & Harston, In re*, [1886] 31 C. D., at p. 175.
(*d*) *R.* v. *Senior*, [1899] 1 Q. B., at p. 290; 68 L. J. Q. B. 175
(*e*) v. pp. 15, 149.

of larceny. If he intend to use it for a time and then return it, it is a mere trespass which is only a civil injury (*f*). It should be noted that, if there be present a criminal intention, the prisoner is not exculpated because the results of the steps which he takes to carry out that intention are other than those which he anticipated. For example, if A., intending to murder B., shoots at him, but kills C., the intention (*i.e.*, to shoot B.) being criminal and felonious, A. is guilty of murder.

Malice.—The law presumes that every person intends the natural consequences of his acts. If a man voluntarily does an act from which harm naturally arises he is deemed to intend harm (*g*). Malice, therefore, is deemed to exist whenever a wrongful act is done voluntarily without justification or excuse (*h*). This is sometimes termed malice *in law* or *implied* malice, to distinguish it from malice *in fact* or *express* malice, *i.e.*, actual hostility or ill will, which may be a motive for *conduct*, and may have other effects which will be noted later (*i*).

To make a person a criminal he must as a general rule have a *mens rea*, *i.e.*, some guilty or culpable condition of mind. Thus if I offer a forged note, not knowing it to be such and therefore not intending to defraud, I have committed no crime. But if I have such intention, this criminal intention stamps my conduct with the character of crime. The criminal condition of mind necessary for any particular offence varies according to the rules of the common law or the statute relating to that offence, and which may require that an act in order to be criminal must have been done "maliciously," "feloniously," "fraudulently," or with some particular "intent." Generally it may be classed as

(i) *Active*—When the mind is actively or positively in fault, as where there is an intent to defraud, or

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(*f*) *R.* v. *Holloway*, 2 C. & K. 942; 18 L. J. M. C. 60.
(*g*) *R.* v. *Harvey*, 2 B. & C., at p. 864.
(*h*) *Bromage* v. *Prosser*, 4 B. & C., at p. 255.
(i) v. p. 93

(ii) *Passive*—Where the conduct is the result of inadvertence.

There are, however, some exceptions to the rule that *mens rea* is necessary to constitute a crime. It is impossible to systematise or define these exceptions, which, however, except in the case of public nuisances, relate for the most part only to minor offences created by statute, and particularly to offences such as the adulteration of food, or the sale of food under false trade descriptions, or the sale of intoxicants (*k*). In many of such cases the Court has come to the conclusion that the object of the statute would be defeated if guilty knowledge or intention were held to be necessary to constitute the offence, and therefore that criminal responsibility may be fixed upon a man for acts done by his servant in the course of his employment, even though the master may have expressly forbidden them. The same principle applies to "some and perhaps all public nuisances" (*l*). No general rule can be laid down as to when *mens rea* is necessary to constitute a statutory offence, and it is necessary to look at the object and terms of each act to see whether, and how far, knowledge or any criminal intention is of the essence of the offence created (*m*).

Though a mere intention is not punishable if no steps are taken to carry it into effect, an *attempt* to commit either a felony or a misdemeanour is itself a crime, and therefore the subject of punishment. An attempt may be said to be the doing of any of the acts which must be done in succession before the intended object can be accomplished, with the limitation that it must be an act which directly approximates to the offence, and which, if the offence were committed, would be one of its actual causes as distinct from a mere act of preparation (*n*). Thus A., with the intention of endeavouring

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(*k*) See *Sherras* v. *De Rutzen*, [1895] 1 Q. B., at p. 921; 64 L. J. M. C. 218; *Coppen* v. *Moore*, [1898] 2 Q. B., at p. 312; 67 L. J. Q. B. 689.

(*l*) [1895] 1 Q. B., at p. 921.

(*m*) *Cundy* v. *Le Cocq*, [1884] 13 Q. B. D., at p. 209. Compare *Chisholm* v. *Doulton*, 22 Q. B. D. 736; 58 L. J. M. C. 133.

(*n*) *R.* v. *White*, [1910] 2 K. B. 124; 79 L. J. K. B. 854; *R.* v. *Linneker*, 75 L. J. K. B. 385.

fraudulently to obtain insurance moneys, represented that a burglary had taken place at his shop and that jewellery had been stolen. He had, in fact, hidden the jewellery in his shop, and was found by the police tied up as if by burglars. He had made no application for the insurance. It was held that he had not yet made any attempt, but only preparation for an attempt which he contemplated (*o*). But one of a series of acts done to attain a desired result may be an attempt although it could not effect the result unless followed by other acts. For instance, the giving of a small dose of poison, which would not be fatal unless followed by other doses, may be an attempt to murder (*p*).

An attempt to commit a crime which in fact, owing to the circumstances of the case, cannot be committed, is nevertheless punishable as an attempt. Thus a person may be convicted of attempting to steal from a pocket, although that pocket may have contained nothing that could be stolen (*q*).

Every attempt to commit an indictable offence is itself an indictable misdemeanour at common law. In one case, *i.e.*, attempt to murder, it is a felony by statute (*r*).

If on the trial of a person charged with felony or misdemeanour the jury do not think that the offence was completed, but, nevertheless, are of opinion that an attempt was made, they may find a verdict to that effect. The prisoner is then dealt with as if he had been convicted on an indictment for the attempt (*s*).

(*o*) *R.* v. *Robinson*, [1915] 2 K. B. 342; 84 L. J. K. B. 149.
(*p*) *R.* v. *White*, *supra*.
(*q*) *R.* v. *Ring*, 61 L. J. M. C. 116. He might also properly be charged with assault with intent to commit a felony; v. p. 175.
(*r*) 24 & 25 Vict. c. 100, ss. 11—15.
(*s*) 14 & 15 Vict. c. 100, s. 9.

CHAPTER III.

PERSONS CAPABLE OF COMMITTING CRIMES.

THERE are certain exemptions from criminal responsibility; and, under certain circumstances, acts which would otherwise be criminal are on some special ground not deemed so. The personal exemptions are based upon exceptional considerations and will be dealt with at the end of this chapter. Apart from these special cases the exemption, as a rule, arises from the absence of one of the essential elements dealt with in the preceding chapter. The burden of proving the circumstances which confer the exemption lies upon the accused. The law, in the first instance, presumes that he is innocent. But as soon as it is proved that he has committed what, ordinarily, is a criminal offence, the law, as we have seen, presumes that his acts were voluntary and that he intended their natural consequences, and therefore had a criminal intention. Accordingly it is for the accused to rebut these presumptions. So also it is for him to prove any matters which, under the special circumstances of the case, may amount to a justification or excuse.

The several instances of irresponsibility may be reduced to the following classes:—

(1) Absence of criminal intention:—Insanity: Infancy: Ignorance (mistake): Accident.

(2) Absence of will, *i.e.*, the act is purely involuntary:—Physical compulsion, as if A. kills B. with C.'s hand.

(3) Instant and well-grounded fear, which either is, or in theory is assumed to be, stronger than the fear naturally inspired by the law:—

Fear of excessive unlawful harm: Coercion of married women by their husbands.

(4) When an act, under ordinary circumstances criminal, is denuded of that character, inasmuch as it is directly authorised by the law:—

In pursuance of legal duty; *e.g.*, the sheriff hanging a criminal.

In pursuance of legal right; *e.g.*, slaying in self-defence.

Here the *motive* of the accused justifies or excuses his act. Thus if A. kills B. in a fight, his intention, viz., to do harm to B., is the same whether he is acting purely in self-defence or from revenge or a desire to fight (*ss*), but in the former case his motive is one which is lawful and therefore exempts him from criminal responsibility.

Some of these grounds of exemption must now be dealt with more fully.

Insanity.—Two classes of mental alienation are usually recognised:—

(1) *Dementia naturalis*, or *a nativitate*—in other words, *idiocy*, or absence of understanding from birth, without lucid intervals. A person deaf and dumb from birth is by presumption of law an idiot, but it may be shown that he has the use of his understanding.

(2) *Dementia accidentalis*, or *adventitia*—usually termed *insanity*. The mind is not naturally wanting or weak, but is deranged from some cause or other. It is either *partial* (insanity upon one or more subjects, the party being sane upon all others) or *total*. It is also either *permanent* or *temporary*, the person in the latter case being afflicted with his disorder at certain periods only, with lucid intervals (*t*).

Three stages in the history of the law as to insanity may be discerned. The first may be illustrated by the following dictum of an English Judge in the year 1724: A man who is to be exempted from punishment "must be a man that is totally deprived of his understanding and memory, and

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(*ss*) v. p. 149.

(*t*) As to *dementia affectata*, or drunkenness, v. p. 18.

doth not know what he is doing, no more than an infant, than a brute, or a wild beast" (*u*). In the second stage the power of distinguishing right from wrong in the abstract was regarded as the test of responsibility (*w*). The third and existing doctrine dates from the trial of M'Naughten in the year 1843 (*x*).

In M'Naughten's case certain questions were propounded by the House of Lords to the Judges. The substance of their answers was to the following effect: "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing ~~what~~ was wrong." Thus the question of knowledge of right or wrong, instead of being put generally and indefinitely, is put in reference to the *particular act* at the *particular time* of committing it.

As to *partial* insanity, that is, when a person is sane on all matters except one or more, the judges declared that "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." And again: "Notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time of committing such crime that he was acting contrary to the law of the land."

(*u*) *R.* v. *Arnold*, [1724] 16 How. St. Tr. 764.
(*w*) *R.* v. *Bellingham*, [1812] Collinson on Lunatics, 671.
(*x*) 10 Cl. & Fin. 200; 1 C. & K. 130.

An irresistible impulse affords no defence if it is due to mere moral insanity, *i.e.*, when, although the moral faculties of the accused are diseased, his intellectual faculties are sound so that he knows what he is doing. But a man may be insane if, through actual disease of the mind, he is deprived of the capacity to control his actions (*y*).

As to *medical* evidence on the question of insanity—a witness of medical skill may be asked whether, assuming certain facts, proved by other witnesses, to be true, they, in his opinion, indicate insanity. But he cannot be asked, although present in Court during the whole trial, whether from the evidence he has heard he is of opinion that the prisoner, at the time he committed the alleged act, was of unsound mind; for such a question, unlike the previous one, involves the determination of the truth of the evidence, which it is for the jury to determine (*z*).

The law presumes sanity: and, therefore, the burden of the proof of insanity lies on the defence (*a*). Even in the case of an acknowledged lunatic, the offence is presumed to have been committed in a lucid interval, unless the contrary be shown. It is for the petty jury to decide whether a case of insanity, recognised as such by the law, has been made out. The grand jury have no right to ignore a bill on the ground of insanity (*b*).

When evidence is given of the insanity of the prisoner at the time of commission of the offence, and it appears to the jury that he did the act charged, but was insane at the time when he committed it, they must find a special verdict to the effect that the accused is guilty, but was insane at the time of the commission of the offence. If such a verdict is found the Court will order the accused to be kept in custody as a criminal lunatic in such place and in such manner as it shall think proper, till the King's pleasure be known; and the King may order the confinement of such person during

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(*y*) *R.* v. *Hay*, 22 Cox, 268; *R.* v. *Fryer*, 24 Cox, 403; v. also Archbold, p. 17.
(*z*) *R.* v. *Frances*, [1849] 4 Cox, 57. See also *M'Naughten's Case.*
(*a*) *R.* v. *Jefferson*, [1908] 72 J. P. 467, 469.
(*b*) *R.* v. *Hodges*, [1838] 8 C. & P. 195.

his pleasure (*c*). So if a person indicted is insane, and upon arraignment is found to be so by a jury impanelled to discover his state of mind, so that he cannot be tried, or if on his trial, or when brought up to be discharged for want of prosecution, he appears to the jury to be insane, the Court may record such finding, and order him to be kept in custody till the King's pleasure be known (*d*).

In accordance with the dictates of humanity no criminal proceedings can be taken against a man when he becomes *non compos mentis*. Thus, if a man commit murder and become insane before arraignment, he cannot be called upon to plead: if after trial before judgment, judgment cannot be pronounced; if after judgment before execution, execution will be stayed.

Drunkenness.—Drunkenness is sometimes termed *dementia affectata*—acquired madness. A state of voluntary intoxication is not, properly speaking, any excuse for crime (*e*).

It would, however, be incorrect to say that the consideration of drunkenness is never entertained in the criminal law. Though it is no excuse for crime, yet it is sometimes an index of the quality of an act. Thus, in a case where the intention with which the act was done is the essence of the offence, the drunkenness of the accused may be taken into account by the jury when considering the motive or intent with which he acted; for example, on the question whether a person who struck a blow was excited by passion or acted from ill-will; whether expressions used by the prisoner were uttered with a deliberate purpose, or were merely the idle expressions of a drunken man (*f*). So a person cannot be said to have *intended* suicide if he were so drunk that he did not know what he was doing (*g*). And to rebut the presumption that a man is taken to intend the natural consequences of his acts it may

(*c*) 46 & 47 Vict. c. 38. s. 2.
(*d*) 39 & 40 Geo. III. c. 94, s. 2.
(*e*) v. *Pearson's Case*, [1835] 2 Lew. C. C. 144.
(*f*) *R.* v. *Thomas*, [1837] 7 C. & P. 817; v. also *R.* v. *Cruse*, [1838] 8 C. & P. 541; *R.* v. *Doherty*, [1887] 16 Cox. 306.
(*g*) *R.* v. *Moore*, [1852] 3 C. & K. 319.

be shown that his mind was so affected by drink that he was incapable of knowing that what he was doing was likely to inflict serious injury (*h*).

If the drunkenness be involuntary—as, for example, if it be by the contrivance of the prisoner's enemies—he will not be accountable for his action while under that influence (*i*). Also, if drunkenness has been so far persisted in as to produce the disease of insanity, or such a degree of madness (as delirium tremens), even for a time, as to render a person incapable of distinguishing right from wrong, this, equally with other kinds of mental disease, may be pleaded in defence (*k*).

Infancy.—Infancy can be used in defence only as evidence of the absence of criminal intention, though there are certain presumptions of law on the subject, some of which may, and some may not, be rebutted.

The age of discretion, and therefore of responsibility, varies according to the nature of the crime. What the civil law technically terms "infancy" does not terminate till the age of twenty-one is reached; but this is not the criterion in criminal law. Two other ages have been fixed as points with reference to which the criminality of an act is to be considered.

Under the age of *seven*, an infant cannot be convicted of a felony, or even, it is stated, of any indictable offence (*l*); for until he reaches that age he is presumed to be *doli incapax;* and the law does not permit this presumption to be rebutted by even the clearest evidence of a mischievous discretion (*m*).

Between *seven* and *fourteen*, he is still, *prima facie*, deemed by law to be *doli incapax;* but this presumption may be rebutted by clear evidence of a mischievous discretion, or, in other words, that the person accused had a guilty knowledge that he was doing wrong (*n*), the principle of the

(*h*) *R.* v. *Meade*, [1909] 1 K. B. 895, 899; 78 L. J. K. B. 476.
(*i*) Archbold, 20.
(*k*) *R.* v. *Davis*, [1881] 14 Cox, 563.
(*l*) Archbold, 10.
(*m*) A *præsumptio juris et de jure.*
(*n*) A *præsumptio juris.* See *R.* v. *Owen*, [1830] 4 C. & P. 236.

law being *malitia supplet ætatem*. Thus, it was held that a boy of nine years might be hanged for murder, having manifested a consciousness of guilt, and a discretion to discern between good and evil, by hiding the body (*o*). There is one exception to this rule, grounded on presumed physical reasons. A boy under the age of fourteen cannot be convicted of rape or similar offences, even though he has arrived at the full state of puberty (*p*). He may, however, be convicted as principal in the second degree, *i.e.*, of aiding and assisting others, if he be proved to be of a mischievous discretion (*q*).

Between *fourteen* and *twenty-one*, an infant is presumed to be *doli capax*, and accordingly, as a rule, may be convicted of any crime. But this rule is said to be subject to exceptions, notably in the case of offences consisting of mere non-feasance—as, for example, not repairing highways. It is given as a reason for the exemption in cases of the latter character that, not having the command of his fortune till he is twenty-one, the person wants the capacity to do those things which the law requires (*r*). The extent and even the existence of those exceptions is, however, doubtful (*s*).

Though, as we have seen, infants who have arrived at years of discretion are not allowed to commit crimes with impunity, we shall find that in certain cases the law deals with juvenile offenders in an exceptional way, in order, if possible, to prevent their becoming confirmed criminals (*t*).

Ignorance (including mistake).—Two kinds of ignorance must be distinguished—Ignorance of Law, Ignorance of Fact. It is a leading principle of English law that ignorance of law in itself will never excuse. Though it is implied in some of the excuses of which we have treated, *e.g.*, infancy, the ignorance of the law is not the ground of exemption. It is no defence for a foreigner charged with a crime committed

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(*o*) Archbold, 11. v. *York's Case*, [1748] Fost. 70.
(*p*) *R.* v. *Jordan*, [1839] 9 C. & P. 8.
(*q*) *R.* v. *Eldershaw*, [1828] 3 C. & P. 396.
(*r*) 4 Bl. 22.
(*s*) Archbold, 14.
(*t*) Summary convictions of infants will be dealt with in a special chapter.

in England that he did not know he was doing wrong, even though the act is not an offence in his own country (*u*).

Ignorance or mistake of fact will or will not excuse, according as the original intention was or was not lawful. For example, if a man, intending to kill a burglar breaking into his house, kill his own servant, he will not be guilty of an offence. But if, intending, without any legal justification, to do grievous bodily harm to A., he, in the dark, kill B., he will be guilty of murder.

Accident, &c.—To be valid as an excuse, the accident must have happened in the performance of a lawful act with due caution. For example, A., properly pursuing his work as a slater, lets fall a slate on B.'s head; B. dies in consequence of the injury. Here A. will not be liable; but it would have been otherwise had he at the time been engaged in some criminal act, or if he had not exercised proper skill or care. We shall find cases of this description most frequently in drawing the line between culpable and excusable homicide.

The third division comprises cases where the act is done under a fear stronger than that which the law inspires.

Fear of Great and Unlawful Harm.—It is believed that in only one class of cases, viz., where compulsion by threats has been applied by rebels or rioters, has the excuse been allowed that an offence was committed under threats of personal violence or injury (*w*), the reason given for the exception being that in times of public insurrection and rebellion the person offending may be under so great pressure as to be unable to resist, there being no legal tribunal or officer of justice to whom he can appeal. But in a time of peace, though a man be violently assaulted, and have no other possible means of escaping death but by killing an innocent person, if he commit the act he will be guilty of murder; for he ought rather to die himself than escape by the murder of

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(*u*) *R.* v. *Esop*, [1836] 7 C. & P. 456.

(*w*) *R.* v. *M'Growther*, 18 How. St. Tr. 391; 2 St. Hist. Cr. Law, 106. v. also *R.* v. *Crutchley*, [1831] 5 C. & P. 133; and *R.* v. *Tyler and Price*, [1838] 8 C. & P. 616.

an innocent man. But in such a case he may kill his *assailant* (*x*).

State of Married Women.—In many cases of *felony*, if a married woman commits the crime *in the presence* of her husband, the law presumes that she acts under his coercion, and therefore excuses her from punishment. But this exemption is not allowed in treason, nor even in all felonies, though it is not well settled where the line is drawn. It appears, however, that in murder, at all events, this protection is not allowed to the wife (*y*). In no case is she excused if her husband be not present, not even if the act be done by his order (*z*). The presumption of law may be rebutted by evidence. Thus, if it can be shown that she acted voluntarily, and was the principal actor and inciter of the crime, she may be convicted, although her husband were present (*a*).

In cases of *misdemeanour* the prevailing opinion seems to be that the wife is responsible for her acts, although her husband was present at the commission (*b*). However, in earlier cases this was doubted, and the rule prevailing in felony applied (*c*). At any rate, the exemption does not extend to those offences relating to domestic matters and the government of the house, in which the wife may be supposed to have a principal share, as in keeping a disorderly or gaming house.

It requires the co-operation of two persons at least to constitute a conspiracy. Of this crime, therefore, a husband and wife cannot by themselves be convicted, inasmuch as in the eye of the law they are regarded as one person. So a wife cannot be convicted of stealing her husband's goods, except under the Married Women's Property Act, 1882 (*d*); nor of harbouring him when he has committed a crime.

(*x*) v. p. 140.
(*y*) *R.* v. *Manning*, [1849] 2 C. & K. 903.
(*z*) *Brown* v. *Att.-Gen. of New Zealand*, [1898] A. C. 234; 67 L. J. P. C. 7.
(*a*) Archbold, 21; *R.* v. *Baines*, [1900] 69 L. J. Q. B. 681.
(*b*) *R.* v. *Cruse*, [1838] 8 C. & P. 541; v. Archbold, 21.
(*c*) *R.* v. *Price*, [1837], 8 C. & P. 19.
(*d*) 45 & 46 Vict. c. 75, s. 16; now reproduced by 6 & 7 Geo. 5, c. 50, s. 36; v. p. 203.

This relation of wife to the husband is the only one which the law recognises as a shield from criminal punishment. The other private relations, parent and child, master and servant, will not excuse the commission of any crime; either child or servant being liable, notwithstanding the command or coercion of the parent or master.

Certain exceptional cases, where the ordinary rules as to the capability of committing crime do not entirely prevail, require a brief notice.

The Sovereign.—The Sovereign can do no wrong; therefore he is not amenable to the ordinary criminal Courts of his kingdom. But although it is presumed that he can do no wrong, yet if he commands an unlawful act to be done, *e.g.*, an unlawful arrest, the person doing it is not indemnified, but is punishable.

Corporations.—Even corporations aggregate, such as railway and other companies, may be indicted by their corporate names for breaches of duty; whether such breaches consist of wrongful acts, *e.g.*, obstructing highways, or wrongful omissions, *e.g.*, neglecting to repair bridges (*e*).

Aliens.—Foreigners who commit crimes in England are punishable exactly as if they were natural-born subjects. It is no defence on behalf of a foreigner that he did not know he was doing wrong, the act not being an offence in his own country. Though this is no defence, it may mitigate the punishment (*f*).

Ambassadors.—Different views, materially conflicting with each other, have been held as to the criminal liability of ambassadors and their suites. Most writers maintain that for no offence, whether it be against the life, person, or property of an individual, is an ambassador amenable to the criminal

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(*e*) *R.* v. *Great North of England Railway Co.*, [1846] 9 Q. B. 315; *R.* v. *Tyler & Others*, [1891] 2 Q. B. 588; 61 L. J. M. C. 38.

(*f*) *R.* v. *Esop*, [1836] 7 C. & P. 456.

law of the country to which he is sent (*g*): for, by the fiction of exterritoriality, he is regarded as continuously resident in the State of which he is the representative (*h*). Others assert that though he is not punishable for crime made such by the laws of the particular country, he is so for any great crimes which must be such in any system. Or, as it is sometimes expressed, he is punishable for *mala in se*, but not for acts which are merely *mala quia prohibita*. Thus, upon this view, which is, however, very doubtful, an ambassador might be convicted for murder or rape, but not for smuggling. There is, however, one class of offences which, if committed by an ambassador or one of his suite, might stand on a different footing, namely, offences affecting the existence and safety of the State. For a direct attempt against the life of the Sovereign, it is said that the offender would be directly punishable by the State (*i*).

(*g*) Phillimore's International Law, vol. ii. part vi. c. 7.
(*h*) Foote's Foreign and Domestic Law, pp. 165, 554.
(*i*) 1 Hale, P. C. 96—99; Fost. 187, 188.

CHAPTER IV.

PRINCIPALS AND ACCESSORIES.

THOSE who are implicated in the commission of crimes are either *Principals or Accessories.* This distinction is recognised in *felonies* alone.

Principals are either

Principals in the first degree, or Principals in the second degree.

Accessories are either

Accessories before the fact, or Accessories after the fact.

Of these in their order:—

Principal in the first degree.—He who is the actor or actual perpetrator of the deed. It is not necessary that he should be actually present when the offence is consummated; thus, one who lays poison or a trap for another is a principal in the first degree. Nor need the deed be done by the principal's own hands; for it will suffice if it is done through an innocent agent, as, for instance, if one incites a child or a madman to murder (*k*).

Principal in the second degree.—One who is *present* aiding and abetting at the commission of the deed. This presence need not be actual; it may be constructive. That is, it will suffice if the party has the intention of giving assistance, and is sufficiently near to give the assistance; as when one is watching outside, while others are committing a felony inside the house. There must be both a participation in the act and

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(*k*) *R.* v. *Michael*, 9 C. & P. 356; *R.* v. *Bleasdale*, 2 C. & K. 765.

a community of purpose (which must be an unlawful one) at the time of the commission of the crime. So that, as to the first point, mere presence or mere neglect to endeavour to prevent a felony will not make a man a principal; as to the second, acts done by one of the party, but not in pursuance of the arrangement, will not render the others liable.

The distinction between principals of the first and of the second degree is not practically a material one, inasmuch as the punishment of offenders of either class is generally the same.

Accessories are those who are not (i) the chief actors in the offence, nor (ii) present at its performance, but are some way concerned therein, either before or after the fact committed.

Accessory before the fact.—One who, being *absent* at the time when the felony is committed, yet procures, counsels, commands, or abets another to commit a felony (*l*). The bare concealment of a felony about to be committed does not make an accessory. It is not necessary that there should be any direct communication between the accused and the principal; *e.g.*, if A. requests B. to procure the services of C. in order to murder D., A. will be an accessory.

The accessory will be answerable for all that ensues upon the execution of the unlawful act commanded, at least for all probable consequences: as, for instance, if A. commands B. to beat C., and he beats him so that he die, A. is accessory to the murder. But if the principal intentionally commits a crime essentially different from that commanded, the person commanding will not be answerable as accessory for what he did not command. Thus, if A. commands B. to break into C.'s house, and B. sets fire to the house, A. cannot be convicted of the arson. But a mere difference in the mode of effecting the deed, or in some other collateral matter, will not divest the commander of the character of accessory if the felony is the same in substance. Thus, if A. commands B to kill C. by poison, and he kills him with a sword, A.'s command suffices to make him an accessory (*m*).

(*l*) Archbold, 1375.

(*m*) Archbold, 1376.

With regard to manslaughter.—As a rule the offence is sudden and unpremeditated, and this view of the nature of the crime having been taken, it has been said that there can be no accessory before the fact in manslaughter. But in many cases there is deliberation, though it is not accompanied by an intention to take away life. It is easy to present a case in which there may be an accessory before the fact to manslaughter. A. counsels B. to mischievously give C. a dose of medicine merely to make him sick, and C. dies in consequence. A. is guilty as an accessory before the fact to the manslaughter (*n*).

As to the trial of those who command, counsel, or procure the commission of a felony.—Until a recent date it was the rule that such a person could not without his own consent be tried except at the same time with the principal or after the principal had been tried and found guilty. He was merely an accessory, and therefore he could not be tried before the fact of the crime was established. Now, however, it is provided that an accessory before the fact may be indicted, tried, convicted, and punished in all respects as if he were a principal felon (*o*). Two courses are therefore open to the prosecution: either (a) to proceed, as formerly, against the person who counsels, &c., as an accessory before the fact, together with the principal felon, or after his conviction; or (b) to indict the counsellor for a substantive felony (for to that his offence is declared by the statute to amount), and this may be done whether the principal has or has not been convicted, and although he is not amenable to justice (*p*). The punishment in either case is the same. If one of these two modes has been adopted, of course the offender cannot be afterwards prosecuted in the other. To convict of the substantive felony under this Act, it is still necessary to prove that the principal deed has actually been committed.

To solicit or incite to the commission of a felony or a

(*n*) *R.* v. *Gaylor*, [1857] 7 Cox, 253.
(*o*) 24 & 25 Vict. c. 94, s. 1; and as to larceny, etc., see Larceny Act, 1916, s. 35.
(*p*) 24 & 25 Vict. c. 94, s. 2.

misdemeanour, if the deed is not committed, is a misdemeanour at common law (*q*).

Accessory after the fact.—One who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon (*r*). What is required to make a person an accessory after the fact? (i) There must have been some felony committed and completed; (ii) the party charged must have had notice, direct or implied, at the time he assisted, &c., the felon, that he had committed a felony; (iii) he must have done some act to assist the felon personally. It will suffice if there has been any assistance given in order to hinder the felon's apprehension, trial, or punishment; for example, concealing him in the house, or supplying him with horse or money to facilitate his escape, or destroying or making away with evidence which might be used against him (*s*). But merely *suffering* the principal to escape will not make the party an accessory after the fact (*t*).

Receiving stolen goods, knowing them to have been stolen, is generally treated as a separate offence; the receiver being convicted of a felony, misdemeanour, or summary offence, according as the stealing of the property is a felony, misdemeanour, or offence punishable on summary conviction (*u*). If, however, the stealing, obtaining, &c., is a felony, the receiver may be indicted either as an accessory after the fact, or for a substantive felony (*w*). And every receiver may be indicted and convicted whether the principal be or be not convicted, or be or be not amenable to justice (*x*).

We have noticed (*y*) that, as a rule, the wife is protected from criminal liability for acts committed in the presence of her husband. Much more, then, can she claim this immunity when the offence with which she is charged is that of relieving

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(*q*) *R.* v. *Gregory*, [1866] L. R. 1 C. C. R. 77; 36 L. J. M. C. 60; *R.* v. *Higgins*, [1801] 2 East, 5.
(*r*) Archbold, 1383.
(*s*) *R.* v. *Levy*, 7 Cr. App. R. 61; [1912] 1 K. B. 158.
(*t*) Archbold, 1383; *R.* v. *Chapple*, [1840] 9 C. & P. 355.
(*u*) v. p. 218.
(*w*) Archbold, 701.
(*x*) 6 & 7 Geo. 5, c. 50, s. 33, sub-s. 3; v. p. 218.
(*y*) v. p. 22.

and assisting her husband after he has committed a felony. There is no exemption in respect of any other relation. Even the husband may be convicted for assisting his wife (*z*).

An accessory after the fact to a felony may be tried in the same manner as an accessory before the fact; that is, either as an accessory with the principal, or after his conviction, or as for a substantive felony, independently of the principal (*a*).

An accessory after the fact is, in general, punishable by imprisonment for any term not exceeding two years (with or without hard labour), and may also be required to find security for keeping the peace, or, in default, to suffer additional imprisonment for a period not exceeding one year (*b*). But an accessory after the fact to murder may receive sentence of penal servitude for life, or for any term not less than three years, or imprisonment not exceeding two years (*c*).

As to *treason*.—The same acts which in a felony would make a man an accessory before or after the fact will in treason make the offender a principal traitor. This rule is said to exist *propter odium delicti*.

As to *misdemeanours*.—Those who aid or counsel the commission of the crime are dealt with as principals (*d*); those who merely assist after the misdemeanour has been committed are not punishable (*e*), unless, indeed, the act amount to the misdemeanour of rescue, obstructing the officer, or the like. The same rules apply to offences punishable on summary conviction (*f*), and a person who knowingly either aids, or counsels, or procures another to commit an offence punishable on summary conviction may himself be convicted of that offence whether he be actually present when it is committed or not (*g*).

(*z*) Archbold, 1383.
(*a*) 24 & 25 Vict. c. 94, s. 3.
(*b*) 24 & 25 Vict. c. 94, s. 4.
(*c*) 24 & 25 Vict. c. 100, s. 67.
(*d*) 24 & 25 Vict. c. 94, s. 8. The same provision is also made by many later statutes; v. Archbold, 1383.
(*e*) 1 Hale, 613, see *R.* v. *Bubb*, [1906] 70 J. P. 143.
(*f*) 11 & 12 Vict. c. 43, s. 5.
(*g*) *Benford* v. *Sims*, [1898] 2 Q. B. 641; 67 L. J. Q. B. 655; *Du Cros* v *Lambourne*, [1907] 1 K. B. 40; 76 L. J. K. B. 50.

Recapitulation.

The following outline of the present state of the law on the subject of degrees of guilt may serve to place the matter in a clearer light:—

There are no accessories in treason or misdemeanours, only in felonies.

Principals, whether of the first or second degree, are virtually dealt with in the same way.

Accessories, whether before or after the fact, may be treated as such, or charged with a substantive felony; but if once tried in either of these capacities, the other may not be afterwards resorted to.

Accessories before the fact receive the same punishment as principals; accessories after the fact generally imprisonment not exceeding two years.

In the following imaginary case examples of each of the four kinds of participation in a crime will be found. A. incites B. and C. to murder a person. B. enters the house and cuts the man's throat, while C. waits outside to give warning in case any one should approach. B. and C. flee to D., who, knowing that the murder has been committed, lends horses to facilitate their escape. Here B. is principal in the first degree, C. in the second degree. A. is accessory before the fact, D. after the fact.

BOOK II.

PART I.

OFFENCES OF A PUBLIC NATURE.

CHAPTER I.

OFFENCES AGAINST THE LAW OF NATIONS.

CERTAIN offences are regarded as violating those unwritten laws which are admitted by nations in general. It must not be assumed that any State is at liberty to take upon itself the punishment of an offence against the law of nations, if such offence is committed by a foreign subject within the territories of a foreign jurisdiction. The most that it can do in such a case is to demand that justice be done by the foreign State. But the case is otherwise if the offence is committed in parts which are considered extra-territorial, such as the high seas. In these all nations equally have an interest, and may proceed against individuals who are there guilty of offences against the law of nations.

PIRACY.

The term includes both the common law offence and also certain offences which have been provided against by particular statutes.

Piracy at Common Law.—The offence consists in committing acts of robbery within the jurisdiction of the Court of Admiralty (*a*). Formerly the proper Courts for the trial of piracy were the Admiralty Courts (*b*), but later the trial was

(*a*) Archbold, 624. (*b*) Archbold, 624.

by commissioners nominated by the Lord Chancellor, in whose number were always found some common law Judges (*c*). Now, the Judges sitting at the Central Criminal Court and at the assizes are empowered to try cases of piracy (*d*).

The robbery must be proved as in ordinary cases of that crime committed on land. The taking must be without authority from any prince or State, for a nation cannot be deemed guilty of piracy. If the subjects of the same State commit robbery upon each other on the high seas it is piracy. If the injurer and the injured be of different States the nature of the act will depend on the relation of those States. If in amity it is piracy; if at enmity it is not; for it is a general rule that enemies can never commit piracy on each other, their depredations being mere acts of hostility (*e*).

The gist of the offence is the place where it is committed, viz., the high seas, and within the jurisdiction of the Admiralty (*f*).

Piracy by Statute.—By particular statutes certain acts are made piracy. Such are the following:—

For any natural-born subject to commit an act of hostility upon the high seas against another of His Majesty's subjects under colour of a commission from a foreign power (*g*), or, in time of war, to assist an enemy on the sea (*h*).

For any commander, master of a ship, or any seaman or marine, to run away with the ship or cargo, or to yield them up voluntarily to any pirate; or to consult or endeavour to corrupt any such person to the commission of such acts; or to bring any seducing message from any pirate, enemy, or rebel; or to confine the commander or to put force upon

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(*c*) 28 Henry VIII. c. 15. v. p. 326.
(*d*) 4 & 5 Wm. IV. c. 36, s. 22; 7 & 8 Vict. c. 2, s. 1.
(*e*) *Tivnan, In re*, [1864] 5 B. & S. 645; Archbold, 626.
It should be remembered that the Declaration of Paris (1856) contained a provision that privateering should be abolished, binding on the countries parties to that declaration—Russia, Turkey, England, France, Italy, Austria, and Prussia.
(*f*) As to the jurisdiction of the Admiralty, v. Arch. 30—35, and *post*, p. 326.
(*g*) 11 Wm. III., c. 7, s. 7, made perpetual by 6 Geo. I. c. 19.
(*h*) 18 Geo. II. c. 30, s. 1.

him so that he cannot fight in defence of his ship; or to make, or endeavour to make, a revolt in the ship (*i*).

For any person to have dealings with, or render any assistance to, a pirate (*k*).

For any person to board a merchant ship and throw overboard or destroy any of the ship's goods (*l*).

The punishment for piracy was formerly death. Now the offender is liable to penal servitude to the extent of life, or to imprisonment not exceeding two years. But piracy accompanied with an assault with intent to murder, or with wounding or endangering the life of any person on board of, or belonging to, the vessel, is still punishable with death (*m*).

OFFENCES AS TO SLAVES.

This class of offences is connected with the last, inasmuch as the first and chief crime which we shall notice is declared to be piracy, felony, and robbery—viz., for any British subject, or person within British territory, to convey away, or assist in conveying away, any persons on the high seas as slaves, or to ship them for such purpose (*n*). The punishment formerly was death, but now may be penal servitude to the extent of life (*o*).

Dealing in slaves and certain other offences are made felonies. And it is a misdemeanour for a seaman to serve on board a ship engaged in the slave trade (*p*).

A more recent statute consolidates the law on the subject of trading in slaves; but it preserves the provisions noticed above (*q*).

(*i*) 11 Wm. III. c. 7, s. 8.
(*k*) 8 Geo. I. c. 24, s. 1, perpetual by 2 Geo. II. c. 28.
(*l*) *Ibid.*
(*m*) 7 Wm. IV. and 1 Vict. c. 88, ss. 2, 3. The rules governing punishment will be found on pp. 422-455. In future only the *maximum* punishment for each offence will be noted in the text. Usually imprisonment, with or without hard labour, for (as a rule) not more than two years, may be awarded as an alternative to penal servitude. In case of misdemeanour a fine may be imposed as part or all of the sentence. Whipping of males can be ordered only when specially allowed by statute, and only once for the same offence.
(*n*) 5 Geo. IV. c. 113, s. 9.
(*o*) 7 Wm. IV. & 1 Vict. c. 91, s. 1.
(*p*) 5 Geo. IV. c. 113, ss. 10, 11.
(*q*) 36 & 37 Vict. c. 88; v. *R.* v. *Zulueta*, [1843] 1 C. & K. 215.

CHAPTER II.

OFFENCES AGAINST THE GOVERNMENT AND SOVEREIGN.

We now have to deal with offences committed by members of the community in violation of their duties as subjects, these offences for the most part also incidentally causing injury to individuals.

TREASON (*r*).

The crime comprises the three following main classes of acts:—

(1) Compassing and imagining the King's death, including every conspiracy, the natural effect of which may probably be to cause personal danger to the King.

(2) Actual levying of war against the King for the attainment by force of public objects.

(3) Political plots and conspiracies intending to bring about the deposition of the King, or levying war against him, or the invasion of his territories.

To these should be added adhering to the King's enemies, *i.e.*, foreign powers with whom we are at open war, and a few acts which are of the rarest occurrence, and at the present day hardly demand any notice.

(*r*) Treason against the Government was termed "*high*" treason to distinguish it from "*petit*" treason, which consisted in the murder of a superior by an inferior in natural, civil, or spiritual relation; "and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary, these being breaches of the lower allegiance of private and domestic faith, are denominated *petit* treason" (4 Bl. 75). But as every offence which would previously have amounted to petit treason is now regarded simply as murder (9 Geo. IV. c. 31, s. 2, and 24 & 25 Vict. c. 100, s. 8), there is no longer any reason for distinguishing the graver offence by the epithet "high."

The present law on the subject dates back to an Act passed in the reign of Edward III., known as the Statute of Treasons (*s*).

By the terms of this statute, treason is committed "when a man doth compass or imagine the death of our lord the King, or of our lady his Queen, or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving them aid or comfort in the realm or elsewhere, and thereof be probably (or provably '*probablement*') attainted of open deed by people of their condition." The statute proceeds to define as other acts of treason the counterfeiting of the King's great or privy seal or his money, and bringing false money into this realm (which offences are no longer treason); and slaying the chancellor, treasurer, or the King's judges while doing their offices.

By the "King" is to be understood the Sovereign *de facto*, though he be not the King *de jure* (*t*). On the other hand, the person rightfully entitled to the crown, if not in possession, is not within the statute. The "Queen" referred to is the Queen consort, a Queen regnant being included in the term "King."

It is the designing that constitutes the offence of compassing the death of the King, &c. But this design must be evidenced by some overt act, so that if there be wanting either the design, as in the case of killing the King by accident, or the overt act, as when the design has been formed, but laid aside before being put into execution, there can be no conviction for treason.

What will constitute an overt act? Anything wilfully done or attempted by which the Sovereign's life may be endangered; for example, conspirators meeting to consult on the means of killing the Sovereign (*u*); or of usurping the

(*s*) 25 Edw. III., st. 5, c. 2.
(*t*) 11 Hen. VII. c. 1, s. 1.
(*u*) *R.* v. *Vane*, [1553] Kel. 15.

powers of government (*w*); writings, if published, importing a compassing of the Sovereign's death, and even words advising, or persuading to what would be an overt act, will suffice as evidence of the design; but not so loose words which have no reference to any designed act (*x*).

To constitute a levying of war against the Sovereign there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature (*y*). But there need not be actual fighting; nor is the number of persons taking part in the movement material.

The levying is either *direct* or *constructive*. It is direct when the war is levied directly against the King or his forces, with intent to do some injury to his person, to imprison him, or the like (*z*); for example, a rebellion to depose him, or delivering up the Sovereign's castle to the enemy. It is constructive when committed for the purpose of effecting innovations of a public and general nature by an armed force, the pretended end of the movement being rather the purification of the Government than its overthrow. Thus it is treason to attempt by force to alter the religion of the State, or to obtain the repeal of its laws. So it is treason to throw down *all* enclosures, open *all* prisons; but not if the attempt be to break down a particular enclosure, or to deliver a particular person from prison, because in these latter cases the design is particular and not general (*a*).

The offence of adhering to the Sovereign's enemies must also be evidenced by some overt act, as, for example, by raising troops for the enemy, or sending them money, arms, or intelligence. By the "Sovereign's enemies" are meant the subjects of foreign powers with which he is at war. It appears, therefore, that a British subject, though in open rebellion, can never be deemed an enemy of the Sovereign, so as to make assistance rendered to him treason within this branch of the statute (*b*).

(*w*) *R.* v. *Hardy*, 1 East, P. C. 60.
(*x*) v. *R.* v. *Gordon*, [1781], Doug. 593.
(*y*) *R.* v. *Frost*, [1839] 9 C. & P. 129.
(*z*) Archbold, 1025.
(*a*) *R.* v. *Dammaree*, [1710] 15 How St. Tr. 522.
(*b*) Archbold, 1032.

The meaning of the words in the statute relative to this offence is this: "Giving aid and comfort to the King's enemies" are words in opposition; they are words to explain what is meant by being "adherent to." Therefore, whether a man be adherent to the King's enemies in his realm by giving to them aid and comfort in his realm, or if he be adherent to the King's enemies elsewhere, that is by giving them aid and comfort elsewhere, he is equally adherent to the King's enemies, and if he is adherent to the King's enemies, then he commits the treason which the statute defines (*c*). Where the accused, a British subject, acting as German Consol, assisted German subjects of military age to return to Germany after a state of war existed, and was in consequence convicted of adhering to the King's enemies, it was held, on appeal, that the conviction must be quashed, because the jury had not been told that they must consider whether the acts of the accused were done by him with the intention of assisting the King's enemies or whether (as he asserted), he acted without any evil intention and in the belief that it was his duty to assist German subjects to return to Germany, in which case he would not be guilty (*d*).

Subsequent to the Statute of Treasons Parliament from time to time made other offences treason—notably several in the reign of Henry VIII., in the matter of religion. All these new treasons, however, were abrogated in the reigns of Edward VI. and Mary, and the statute of Edward III. was restored to its place as the standard of treason; but subsequent additions to the number of treasonable offences were afterwards made by the Legislature. The following still remain:—

(i) Endeavouring (to be evidenced by some overt act) to prevent the person entitled under the Act of Settlement from succeeding to the Crown (*e*), or maliciously, and advisedly, by writing or printing, maintaining that any other person has any right to the Crown (*f*).

(*c*) *R.* v. *Casement*, [1917] 1 K. B. 98.
(*d*) *R. v. Ahlers*, [1915] 1 K. B. 616; 11 Cr. App. R. 63.
(*e*) 1 Anne, st. 2, c. 17, s. 3.
(*f*) 6 Anne, c. 41.

(ii) Compassing, imagining, or intending death, or any harm tending to death, maim or wounding, imprisonment, or restraint of the person of the Sovereign (*g*).

This offence can be committed not only by British subjects but also by aliens who are subjects of Sovereigns at peace with the King; but alien enemies cannot be tried for treason unless they have, during the war, been living in this country under the King's protection (*h*). A British subject may change his nationality (*i*), but this must not be done in time of war, as the taking of an oath of allegiance to a foreign power which is at war with the King is in itself an act of treason (*k*).

There are some points in connection with the procedure in prosecutions for treason which may be noticed here.

In the first place, no prosecution for treason can take place after three years from the commission of the offence, if it be committed within the realm, unless the treason consist of a designed assassination of the Sovereign (*l*).

The prisoner indicted for treason (or misprision of treason) is entitled to have delivered to him, ten days before the trial, a copy of the indictment, and a list of the witnesses to be called, and of the petty jurors, to enable him the better to make his defence (*m*). But these provisions do not apply to cases of treason in compassing and imagining the death of the Sovereign (or misprision of such treason) where the overt act is an act against the life or person of the Sovereign. In such cases the prisoner is indicted, arraigned, and tried in the same manner and upon like evidence as if he stood charged with murder, though, if he be found guilty, the consequences are those of treason (*n*).

(*g*) 36 Geo. III. c. 7, s. 1, confirmed by 57 Geo. III. c. 6, s. 1. The former statute also denominated certain other acts of treason; but all these offences, with the exception of those against the person of the Sovereign noticed above, were converted into felonies by 11 & 12 Vict. c. 12, s. 1; v. Treason-Felony, p. 40.

(*h*) See *De Jager* v. *Attorney-General of Natal*, [1907] A. C. 326.

(*i*) 33 & 34 Vict. c. 14, ss. 4, 6.

(*k*) *R.* v. *Lynch*, [1903] 1 K. B. 444; 72 L. J. K. B. 167.

(*l*) 7 & 8 Wm. III. c. 3, ss. 5. 6.

(*m*) 7 Anne, c. 21, s. 14; 6 Geo. IV. c. 50, s. 21.

(*n*) 39 & 40 Geo. III. c. 93; 5 & 6 Vict. c. 51, s. 1.

One overt act is sufficient to prove the treason, but any number may be mentioned in the indictment. To this overt act, or else to it and another overt act of the same treason, there must be two witnesses, unless the accused confesses willingly (*o*).

Formerly the punishment for treason was of a most barbarous character. Males were drawn on a hurdle to the place of execution, and hanged, but cut down while alive; afterwards they were disembowelled, the head was severed from the body, the body quartered, and the quarters placed at the disposal of the Sovereign. By a wholesome statute, this proceeding was deprived of its more outrageous features, and it was provided that beheading might be substituted by the Sovereign, or the capital sentence might be altogether remitted (*p*). By a previous Act (*q*), the punishment of females, formerly burning alive, had been changed to hanging. Now, by the Abolition of Forfeiture for Felony Act, 1870 (*r*), the only part of the sentence which is retained in any case is the hanging, for which, however, beheading may be substituted by the Sovereign.

Certain additional consequences of conviction and attainder (*s*), viz., forfeiture of lands and goods, and corruption of blood, were abolished by the statute just mentioned (*t*), but certain incapacities were at the same time attached to convictions for treason or felony (*u*).

MISPRISION OF TREASON.

Misprision of treason consists in the bare knowledge and concealment of treason without any assent, any degree of assent making the party a principal traitor. At common law this mere concealment, being construed as aiding and

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(*o*) 7 & 8 Wm. III. c. 3, ss. 2, 4; except in cases tried, as above, as for murder.
(*p*) 54 Geo. III. c. 146.
(*q*) 30 Geo. III. c. 48.
(*r*) 33 & 34 Vict. c. 23, s. 31.
(*s*) A man is convicted when found guilty; he was said to be attainted when judgment had been given.
(*t*) 33 & 34 Vict. c. 23, s. 1.
(*u*) v. p. 441.

abetting, was regarded as treason, inasmuch as, it will be remembered, there is no distinction between principals and accessories in treason (*w*). It was specially enacted that a bare concealment of treason should be held a misprision only (*x*). Misprision of treason is a high misdemeanour. The punishment was imprisonment and forfeiture of goods, and it would appear that forfeiture is still a part of the punishment, as the Act to abolish Forfeiture for Felony (*y*) only applies to convictions for treason, felony, or *felo de se*. The party knowing of any treason must, as soon as possible, reveal it to some Judge of Assize or Justice of the Peace.

ATTEMPTS TO ALARM OR INJURE THE KING.

It may be remembered that at the beginning of the reign of Queen Victoria a morbid desire for notoriety induced certain youths to annoy her by discharging firearms at her person, or in her presence. To put an end to this the Legislature provided that deeds of this kind should be regarded as high misdemeanours (*z*). The acts enumerated are: To discharge, point, aim, or present at the person of the Sovereign any gun or other arms, whether containing any explosive or destructive material or not; to discharge any explosive substance near him; to strike or throw anything at him with intent to injure or alarm him, or break the public peace; or in his presence to produce any arms or destructive matter with like intent. The punishment may be penal servitude to the extent of seven years, with a whipping.

TREASON-FELONY, *or* FELONIOUS COMPASSING TO LEVY WAR, ETC.

Certain offences which had been declared treason by statute (*a*) were, by a later statute (*b*), made felonies. To these, on account of their treasonable character, the name "treason-felony" is sometimes given. The acts enumerated

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(*w*) v. p. 29.
(*y*) 33 & 34 Vict. c. 23, s. 1.
(*a*) 36 Geo. III. c. 7, s. 1.
(*x*) 1 & 2 Phil. & Mary, c. 10.
(*z*) 5 & 6 Vict. c. 51, s. 2.
(*b*) 11 & 12 Vict. c. 12, s. 3.

are—compassing, &c. (i) to deprive or depose the Sovereign from the style, honour, or name of the Crown of the United Kingdom, or other of his dominions; (ii) to levy war against the Sovereign within the United Kingdom, in order by force or constraint to compel him to change his measures or counsels, or to put force or constraint upon, or intimidate or overawe both Houses, or either House of Parliament; (iii) to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other of the Sovereign's dominions.

This compassing, &c., must be evidenced by some overt act, or by something published in printing or writing. Though the facts alleged in the indictment, or proved on the trial of any person indicted under this Act for felony, amount to treason, the person is not by reason thereof entitled to be acquitted of such felony; but if tried for the felony he cannot afterwards be prosecuted for treason upon the same facts (*c*). The punishment may extend to penal servitude for life. Nothing contained in this Act lessens the force of the Statute of Treasons.

SEDITION.

Sedition is a comprehensive term, embracing all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. The objects generally are to excite discontent and insurrection, to stir up opposition to the Government, and to bring the administration of justice into contempt (*d*).

This description is somewhat vague; but in that respect it only resembles the offence itself. It is hard to lay down any decisive line, on one side of which acts are seditious and on the other innocent. The term "sedition" is commonly used in connection with words written or spoken. It is,

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(*c*) 11 & 12 Vict. c. 12, s. 7.
(*d*) *R.* v. *Sullivan*; *R.* v. *Pigott*, [1868] 11 Cox, 44, 45.

however, used of many other matters, some of which are treated of separately; for example, unlawful training to arms, and unlawful secret societies or meetings.

What is sufficient to constitute seditious libels or words? It may be answered generally—such political writings or words as do not amount to treason (*e*), but which are not innocent. We have already seen what constitutes treason. As to what are innocent: it is the right of a subject to criticise and censure freely the conduct of the servants of the Crown, whether ministerial or judicial, and the acts of the Government and proceedings in Courts of Justice, so long as he does it without malignity, and does not impute corrupt or malicious motives (*f*). Any words or writings between these extremes may be seditious if they have a plain tendency to produce public mischief by perverting the mind of the subject and creating a general dissatisfaction towards Government (*g*), or causing general disaffection or disorder (*h*).

Proving the truth of a seditious libel is no excuse for the publishing it; nor should it extenuate the punishment, inasmuch as the statute (*i*), which allows the defendant charged with libel to plead the truth under certain conditions, does not apply to seditious libels (*k*).

The punishment for seditious libels or words is fine and imprisonment as for a misdemeanour. Punishable in the same way are slanderous words uttered to a Judge or magistrate while acting in the duties of his office (*l*).

UNLAWFUL OATHS AND SOCIETIES.

Oaths.—At the end of the eighteenth century, in consequence of sedition and mutiny having been promoted by persons banding themselves together under the obligation of

(*e*) Though treason itself may be said to be a kind of sedition.
(*f*) *R.* v. *Sullivan*, &c., *supra*.
(*g*) *i.e.*, the Government of this country, not of foreign countries, *R.* v. *Antonelli*, [1906] 70 J. P. 4.
(*h*) *R.* v. *Burns*, 16 Cox, 355.
(*i*) 6 & 7 Vict. c. 96, s. 6.
(*k*) *R.* v. *Duffy*, [1846] 2 Cox, 45; *R.* v. *Burdett*, [1820] 4 B. & Ald. 95. As to seditious libels in newspapers, v. 51 & 52 Vict. c. 64, s. 8, *post*, p. 93.
(*l*) v. p. 81.

an oath, an Act was passed to make criminally punishable those who took oaths of a certain character: Any person administering or causing to be administered, or aiding in or being present at and consenting to such administering, any oath or engagement intended to bind any person to engage in any mutinous or seditious purpose; or to disturb the peace; or to be of any society formed for such purpose; or to obey the orders of a committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose; or not to inform or give evidence against any associate or other person; or not to discover an unlawful combination or illegal act, or illegal oath or engagement—is guilty of felony. The punishment is penal servitude for a term not exceeding seven years, or imprisonment not exceeding two years. The same consequences also attend *taking* such an oath when not compelled to (*m*). It will be observed that this statute is not confined to oaths administered for seditious and mutinous purposes, but applies to other unlawful combinations (*n*).

A later statute declares (*o*) to be felony the taking or the taking part in administering any oath intended to bind a person to commit any treason, or murder, or any felony punishable with death. The punishment for such offence may be penal servitude to the extent of life.

Persons taking these oaths by *compulsion* are not excused on that account unless they disclose the circumstances to a Justice of the Peace, one of the Secretaries of State, or the Privy Council, within, under the first statute, four days; under the second statute, fourteen days (*p*). The oath need not be in any precise form so long as the parties understand it to have the force and obligation of an oath; therefore, of course, it is not necessary that it should be taken on the Bible (*q*).

(*m*) 37 Geo. III. c. 123, s. 1; 54 & 55 Vict. c. 69, s. 1 (2).
(*n*) *R.* v. *Marks*, [1802] 3 East, 157.
(*o*) 52 Geo. III. c. 104, s. 1; 7 Wm. IV. & 1 Vict. c. 91, s. 1.
(*p*) 52 Geo. III. c. 104, s. 2.
(*q*) *R.* v. *Lovelass*, [1834] 6 C. & P. 596.

Societies.—Societies whose members are required to take any oath or engagement unlawful under the two above-mentioned statutes of George III., or not required or authorised by law, or of which the members subscribe any unauthorised test or declaration, or the names of whose members or officers are kept secret from the society at large, or which commit certain other specific offences, are, by statute (*r*), made unlawful combinations. Exceptions are, however, made in favour of societies for religious and charitable purposes and freemasons' lodges; also as to declarations approved of by two Justices, and registered according to the provisions of the Act.

All persons who are members of, or aid or support, such societies are guilty of a misdemeanour, punishable by penal servitude for not more than seven years. Proceedings can only be taken in the name of a law officer of the Crown (*s*).

OFFENCES AGAINST THE FOREIGN ENLISTMENT ACT.

The main object of this statute (*t*) is to regulate the conduct of His Majesty's subjects during the existence of hostilities between foreign States with which His Majesty is at peace, and to prevent injury to the public by involving the State in misunderstandings with foreign powers.

Two classes of criminal acts are made misdemeanours:—
Illegal enlistment. Illegal shipbuilding and expeditions.

Illegal Enlistment.—To do any of the following acts without the Sovereign's licence is prohibited: (i) For any *British subject*, within or without His Majesty's Dominions, to enlist and for *anyone*, within His Majesty's Dominions, to induce any other person to enlist in the service of a foreign State at war with a friendly State. (ii) For any *British subject* to leave His Majesty's Dominions for, or for *any one* to induce any other person to do so, with intent so to enlist. (iii) For *any one* by misrepresentation to induce any other

(*r*) 39 Geo. III. c. 79; 57 Geo. III. c. 19.
(*s*) 9 & 10 Vict. c. 33, s. 1.
(*t*) 33 & 34 Vict. c. 90.

person to leave His Majesty's Dominions, or embark on a ship within His Majesty's Dominions, with intent that such person should so enlist. (iv) For the master or owner of any ship knowingly to take on board illegally enlisted persons. In each case the offender may be punished by fine, or imprisonment not exceeding two years, or both. And in the case of illegally taking on board, the ship is detained until satisfaction is given; and illegally enlisted persons are put on shore and not allowed to return to the ship (*u*).

Illegal Shipbuilding, &c.—For any person to build, commission, equip, or despatch a ship, knowing or having reasonable cause to believe (the burden of proof lying on the builder that it is not illegal) that the ship is to be employed in the service of such a State, if done without licence, is punishable in the same way, and the ship and her equipment are forfeited to the King. If the contract for building the ship has been made before the beginning of the war, the builder or equipper is not punishable if immediately after the issue of the King's proclamation of neutrality he gives notice to the Secretary of State, and ensures that the ship will not be despatched until the termination of the war without the licence of the King (*w*).

Augmenting, without licence, the warlike force of a ship in such service, by adding to the number of guns or to the equipment, is punishable in the same way (*x*).

It is also made a similar offence for any person within His Majesty's dominions to prepare or fit out, or assist in fitting out, without licence, any military or naval expedition against a friendly State. All arms and ships used for such a purpose are forfeited (*y*). When an expedition is unlawfully prepared within the King's dominions, a *British subject* who assists is guilty of an offence, though his assistance is rendered from a place outside the King's dominions (*z*).

(*u*) 33 & 34 Vict. c. 90, ss. 4—7.
(*w*) *Ibid.* ss. 8, 9.
(*x*) *Ibid.* s. 10.
(*y*) *Ibid.* s. 11. v. *R.* v. *Sandoval*, [1887] 16 Cox, 206.
(*z*) *R. v. Jameson*, [1896] 2 Q. B. 425; 65 L. J. M. C. 218.

The offender may be tried within the jurisdiction where the offence was committed, or where the offender may be (*a*).

A Judge of a superior Court in the United Kingdom, or elsewhere of the highest British Court of Criminal Jurisdiction, may order the trial to be had at any place within His Majesty's dominions (*b*).

DESERTION, MUTINY, AND INCITING THERETO.

Any person who maliciously endeavours to seduce a person serving in His Majesty's sea or land forces from his duty or allegiance, or incites him to any mutiny or mutinous practice, is guilty of felony. It is punishable with penal servitude to the extent of life. The trial may be had at the assizes for any county in England (*c*).

Other provisions of the same kind are contained in the Army Act, 1881 (*d*), which comes into force and remains in force for the period named in an annual Act passed for the purpose. That Act makes any person who procures or persuades a soldier to desert, or knowingly aids or assists, or conceals a soldier in deserting, liable on summary conviction to six months' imprisonment with or without hard labour (*e*). The deserter himself is punishable upon trial by court-martial with death if on, or under orders for, active service; or if otherwise, with imprisonment or penal servitude (*f*). The Naval Discipline Act, 1866 (*g*), and the amending Act of 1884 (*h*), provide for the punishment by court-martial and otherwise of mutiny and other offences committed by persons subject to that Act, mutiny with violence being made punishable with death. Punishments are also provided for

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(*a*) *Ibid.* s. 16.
(*b*) *Ibid.* s. 18.
(*c*) 37 Geo. III. c. 70, perpetual by 57 Geo. II. c. 7; 7 Wm. IV. & 1 Vict. c. 91, s. 1.
(*d*) 44 & 45 Vict. c. 58.
(*e*) *Ibid.* s. 153.
(*f*) *Ibid.* s. 12.
(*g*) 29 & 30 Vict. c. 109.
(*h*) 47 & 48 Vict. c. 39.

those who endeavour to seduce those subject to the Act from their allegiance (*i*).

ILLEGAL TRAINING AND DRILLING.

Meetings for the purpose of training or drilling to the use of arms without authority from the Sovereign, or the lieutenant or two Justices of the Peace of the county, are illegal. Any person who is present for the purpose of training or assisting in training is guilty of a misdemeanour and is liable to penal servitude to the extent of seven years. If he is present for the purpose of being himself trained, he is punishable with fine and imprisonment not exceeding two years. The prosecution must be commenced within six months after the offence is committed. Any magistrate, constable, or peace officer may disperse such meetings, and arrest and detain any person present (*k*).

UNLAWFUL DEALINGS WITH PUBLIC STORES.

The law on this point is consolidated by the Public Store Act, 1875 (*l*). Certain marks are appropriated by the Government for the distinguishing of public stores. If any one, without lawful authority, which he must prove, applies any of these marks in or on any such stores, he is guilty of a misdemeanour, and may be imprisoned for a term not exceeding two years (*m*). If any one, with intent to conceal His Majesty's property in such stores, obliterates these marks, wholly or in part, he is guilty of felony, and is punishable with penal servitude to the extent of seven years (*n*). The unlawful possession of public stores is punishable on summary conviction (*o*).

(*i*) See page 48 for general remarks as to the punishment of offences by those in the Army or Navy.
(*k*) 60 Geo. III. and 1 Geo. IV. c. 1, ss. 1, 2.
(*l*) 38 & 39 Vict. c. 25
(*m*) *Ibid.* s 4.
(*n*) *Ibid.* s. 5.
(*o*) *Ibid.* ss. 7—11.

It is also an offence punishable on summary conviction knowingly to buy or receive from a soldier arms, ammunition, regimental clothing, military decorations, &c., or to be found in possession of such articles without being able to account satisfactorily for such possession (*p*).

OFFENCES BY MEMBERS OF THE ARMY AND NAVY.

It may be convenient to notice shortly offences of a strictly military nature which are punishable by a court-martial.

As to the *Army*.—It is provided by the Army Act, 1881, that every officer or private who shall incite or join any mutiny, or knowing of it shall not give notice to the commanding officer, or shall desert, or enlist in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use insolence to his superior officer, or disobey his lawful commands, shall suffer death or such other punishment as the Act prescribes for these offences. Other offences are set forth and their punishments prescribed.

The Act does not, however, exempt soldiers from being punishable by the ordinary criminal Courts. It expressly provides that nothing therein is to exempt any officer or soldier from being proceeded against by the ordinary course of law, when accused of felony or misdemeanour, or of any offence other than absenting himself from service or misconduct respecting his contract (*q*). And if a person who has been sentenced for an offence by a court-martial is afterwards tried by a civil Court for the same offence, that Court in awarding punishment shall have regard to the military punishment he may have already undergone. No person acquitted or convicted by a competent civil Court is to be tried by court-martial for the same offence.

As to the *Navy*.—The Naval Discipline Act, 1866 (*r*), and the amending Act of 1884 (*s*) make similar provisions for the

(*p*) 44 & 45 Vict. c. 58, s. 156; 5 & 6 Geo. V. c. 58, s. 6.
(*q*) *Ibid.* ss. 144, 162.
(*r*) 29 & 30 Vict. c. 109.
(*s*) 47 & 48 Vict. c. 39.

navy as to courts-martial, the trial of offences, no exemption from ordinary criminal jurisdiction, &c.

COINAGE OFFENCES.

The law on this subject has been consolidated by the Coinage Offences Act, 1861 (*t*). It will be our task to present its matter under several heads.

A. *Counterfeit Coin.*—A distinction is made as to the kind of coin. Whosoever falsely makes or counterfeits any coin resembling, or apparently intended to resemble or pass for—

(i) The King's current gold or silver coin of this realm (*u*),

(ii) Foreign gold or silver coin (*w*),

(iii) The King's current copper coin (*x*),

is guilty of felony, and is punishable, in the case of gold and silver coin of the realm, with penal servitude to the extent of life, in the other cases to the extent of seven years;

(iv) Foreign coin other than gold or silver coin (*y*)

is guilty of a misdemeanour, punishable for the first offence with imprisonment not exceeding one year; for the second offence with penal servitude to the extent of seven years.

This offence, as also the offences, to be noticed later, of buying, selling, and uttering counterfeit coin is complete although the false coin has not been finished, or is not in a fit state to be uttered (*z*); nor is any attempt to utter necessary. Any one, not necessarily an officer from the Mint, may at the trial prove the falseness (*a*). In this offence is included that committed by persons lawfully engaged in coining, but who make the coin lighter, or of baser alloy. The counterfeiting can generally only be proved by circumstantial evidence; for example, by proof of finding coining

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(*t*) 24 & 25 Vict. c. 99. In the present division the quoting of a section must be understood to refer to this Act.
(*u*) s. 2.
(*w*) s. 18.
(*x*) s. 14.
(*y*) s. 22.
(*z*) s. 30.
(*a*) s. 29.

tools in working order, and pieces of the money, some in a finished, some in an unfinished state.

B. *Colouring Coin.*—To gild, silver, or colour counterfeit coin, or any piece of metal with intent to make it pass for gold or silver coin; or to colour, file, or otherwise alter genuine coin with intent to make it pass for coin of a higher degree, is a felony punishable with penal servitude to the extent of life (*b*).

C. *Impairing Gold and Silver Coin.*—Impairing, diminishing, or lightening any of the King's gold or silver coin, with the intent that it shall pass for gold or silver coin, is felony, punishable with penal servitude to the extent of fourteen years (*c*).

Having in possession any filings, clippings, dust, &c., obtained by the above-mentioned process, is a felony, the limit of penal servitude for which is seven years (*d*).

D. *Defacing Coin.*—Defacing the King's gold, silver, or copper coin, by stamping thereon any names or words, although the coin be not thereby lightened, is a misdemeanour, punishable with imprisonment not exceeding one year (*e*). It should be added that coin so defaced is not legal tender; and by the permission of the Attorney-General or Lord Advocate, any person who tenders or puts off coin so debased may be brought before two magistrates, and on conviction be fined not exceeding forty shillings (*f*).

E. *Buying or Selling, &c., Counterfeit Coin at Lower Value.*—Any person, without lawful authority or excuse (the proof whereof lies on the accused), buying, selling, receiving, or putting off any counterfeit coin for a lower rate or value than it imports, is guilty of felony. If the counterfeit be of gold or silver the extent of penal servitude is life (*g*); if copper, the limit is seven years (*h*).

(*b*) s. 3.
(*c*) s. 4.
(*d*) s. 5.
(*e*) s. 16.
(*f*) s. 17.
(*g*) s. 6.
(*h*) s. 14.

F. *Importing and Exporting Counterfeit Coin.*—Importing or receiving into the United Kingdom from beyond the seas, without lawful authority, &c., counterfeit coin resembling the King's gold or silver coin, knowing the same to be false and counterfeit, is a felony, punishable with penal servitude to the extent of life (*i*). Importing foreign counterfeit coin is a felony, the limit of penal servitude for which is seven years (*k*).

Exporting, or putting on board any vessel for the purpose of being exported from the United Kingdom any coin counterfeit of the King's current coin, without lawful authority, &c., is a misdemeanour punishable with imprisonment not exceeding two years (*l*).

G. *Uttering Counterfeit Coin.*—Tendering, uttering, or putting off counterfeit gold or silver (*m*) coin, knowing the same to be false and counterfeit, is a misdemeanour punishable with imprisonment not exceeding one year. If at the time of uttering the offender has any other counterfeit gold or silver coin in his possession, or if he within ten days utters another coin, knowing it to be counterfeit gold or silver, the punishment may extend to two years (*n*). If the uttering is after a previous conviction for either of these offences, or for having in possession three or more pieces of counterfeit gold or silver coin, or for any felony relating to the coin, the utterer is guilty of felony, and may be sentenced to penal servitude for life (*o*).

Knowingly uttering counterfeit copper coin, or having in possession three or more pieces of counterfeit copper coin with intent to utter them, is a misdemeanour punishable by imprisonment for one year (*p*).

Knowingly uttering counterfeit coin meant to resemble a foreign gold or silver coin is punishable for the first offence with imprisonment not exceeding six months; for the second

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(*i*) s. 7.
(*k*) s. 19.
(*l*) s. 8.
(*m*) s. 9.
(*n*) s. 10.
(*o*) s. 12.
(*p*) s. 15.

not exceeding two years. The third offence is a felony punishable with penal servitude to the extent of life (*q*).

Uttering spurious coin, *e.g.*, foreign coin, medals, pieces of metal, &c., as current gold or silver coin, with intent to defraud, is a misdemeanour punishable with imprisonment to the extent of one year (*r*).

H. *Having Counterfeit Coin in Possession.*—Having three or more counterfeit gold or silver coins in possession, knowing them to be counterfeit, and intending to utter or put them off, is a misdemeanour punishable with penal servitude for five years (*s*). If after previous conviction for either of the misdemeanours mentioned in secs. 9 and 10, or any felony relating to the coin, the crime is a felony, and may be punished with penal servitude to the extent of life (*t*). If the coin is the King's copper coin the limit of the punishment is imprisonment for one year (*u*). Having in possession without lawful excuse more than five pieces of foreign counterfeit coin renders the possessor liable to a fine not exceeding forty shillings for each piece, on conviction before a justice (*w*).

I. *Making, &c., Coining Tools.*—Knowingly and without lawful authority, &c., making or mending, buying or selling, or having in custody or possession any coining instrument or apparatus adapted and intended to make any gold or silver coin or foreign coin, is a felony punishable with penal servitude for life (*x*). If the instruments, &c., are designed for coining the King's copper coin, the limit of the penal servitude is seven years (*y*).

Conveying out of the Mint, without lawful authority, &c., any coining instrument, or any coin, bullion, metal, or mixture of metals, is a felony punishable with penal servitude for life (*z*).

If in any case coin is suspected to be diminished or counterfeited, it may be cut, bent, &c., by any person to whom

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(*q*) ss. 20, 21.
(*s*) s. 11.
(*u*) s. 15.
(*x*) s. 24.
(*z*) s. 25.
(*r*) s. 13.
(*t*) s. 12.
(*w*) s. 23.
(*y*) s. 14.

it is tendered; the loss to fall on the deliverer if the coin is found to be counterfeit or unreasonably diminished; on the person to whom tendered, if found correct (*a*). Provision is also made for the seizure by any one finding them of counterfeit coin or tools; for search for the same; and for their ultimate delivery to the officers of the Mint or other persons duly authorised to receive them (*b*).

By a more recent statute (*c*) it was declared to be a misdemeanour to make or have in one's possession for sale, any medal, cast, or coin, made of metal or of any metallic combination, and resembling in size, figure, and colour any current gold or silver coin. The punishment is imprisonment for a term not exceeding one year with or without hard labour.

CONCEALMENT OF TREASURE TROVE.

"Treasure trove is where any gold or silver in coin, plate, or bullion is found concealed in a house, or in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee having the franchise of treasure trove" (*d*). The offence of concealing the discovery of it is a common law misdemeanour, punishable by fine and imprisonment (*e*).

DISCLOSURE OF OFFICIAL SECRETS.

By the Official Secrets Act, 1911 (*f*), if any person for any purpose prejudicial to the safety or interests of the State (*g*) approaches or enters any prohibited place (*h*) or makes any

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(*a*) s. 26.
(*b*) s. 27.
(*c*) 46 & 47 Vict. c. 45.
(*d*) *Att.-Gen.* v. *Moore*, [1893] 1 Ch., at p. 683.
(*e*) *R.* v. *Thomas and Willett*, [1863] 33 L. J. M. C. 22.
(*f*) 1 & 2 Geo. V. c. 28.
(*g*) This purpose will be presumed unless the contrary is proved, section 1, sub-section 2.
(*h*) This includes by section 3 any work of defence, arsenal, factory, dockyard, camp, ship, telegraph or signal station or office belonging to His Majesty, and any place used for building, making, or storing any ship, arms, or materials for use in war, or plans or documents relating thereto, any place belonging to His Majesty which is for the time being declared by a Secretary of State to be a prohibited place, and any railway, road or means of communication, or used for gas, water, or electricity or other works for purposes of a public character.

sketch, model, or note calculated or intended to be useful to an enemy, or obtains or communicates to any other person any such sketch, &c., or other document or information, he is guilty of felony and liable to penal servitude for seven years (*i*). Any person who has in his possession or control any sketch, document, or information, which relates to a prohibited place, or has been made or obtained in contravention of the Act, or which has been entrusted in confidence to him, and who communicates it to any unauthorised person or who retains it when he has no right to retain it, is guilty of a misdemeanour punishable by imprisonment for two years, or by a fine, or by both. The person who receives such sketch, document, or information, having reasonable ground at the time to believe that it is communicated to him in contravention of the Act, is also guilty of a misdemeanour punishable in the same way, unless he proves that the communication was contrary to his desire (*k*). Attempting to commit or inciting to the commission of these offences in punishable in the same way as the principal offence (*l*).

A person who knowingly harbours any one whom he has reasonable grounds for supposing to be about to commit or to have committed any of these offences, or who, having harboured any such person, wilfully refuses to disclose to a superintendent of police any information as to such person, is guilty of a misdemeanour punishable by imprisonment with or without hard labour for one year, or by a fine, or by both (*m*). A prosecution under this Act can only be commenced with the consent of the Attorney-General or Solicitor-General (*n*).

A variety of other offences affecting the Sovereign and Government, and thence called *contempts* or *high misdemeanours*, might be noticed, but it will suffice here merely to mention them, referring for a fuller notice to Blackstone's Commentaries. They consisted of contempts against the

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(*i*) *Ibid.* s. 1.
(*k*) *Ibid.* s. 2.
(*l*) *Ibid.* s. 4.
(*m*) *Ibid.* s. 7.
(*n*) *Ibid.* ss. 8, 12.

King's palaces or Courts of Justice, or against his title, person and government, or prerogative. No prosecution for such offences has occurred in modern times. It is, however, a contempt against the King, punishable by fine and imprisonment, to disobey any of his lawful commands, *e.g.*, the orders of his Courts (*o*) or the provisions of a statute prohibiting a general grievance or commanding a public convenience (*p*).

(*o*) v. p. 81.

(*p*) v. p. 5.

CHAPTER III.

OFFENCES AGAINST RELIGION.

Certain acts or courses of conduct which are forbidden by religion are also productive of disorder and mischief to the community. These acts have therefore been declared illegal, and offenders are punishable, not for a breach of the law of God, as such, but for offending against the law of the country. That the State does not consider itself bound to enforce in every respect the obligations of morality is obvious from the fact that mere lying and other acts of immorality are not within the pale of the criminal law.

APOSTASY—BLASPHEMY.

The punishment for apostasy, or the total *renunciation* of Christianity, was for a long period death. It was afterwards provided that if any one *educated in, or having made profession of*, the Christian religion, by writing, printing, teaching, or advised speaking, maintained that there were more Gods than one, or denied the Christian religion to be true, or the Holy Scripture to be of divine authority, he should for the first offence be incapacitated for civil or military employment, and for the second offence suffer imprisonment for three years (*q*).

Blasphemy is also punishable at common law by fine and imprisonment. The offence includes the *irreverent* denial or ridicule of the *Christian* religion, or contumelious reproaches

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(*q*) 9 & 10 Wm. III. c. 32; in the Revised Statutes, c. 35. It is believed that there has been no prosecution under this statute.

of Jesus Christ, or profane scoffing at the Holy Scriptures or exposing any part thereof to hatred and ridicule. But blasphemy consists not in an honest questioning of the truths of the Christian religion, but in a wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects (*r*). Publications which, in an indecent and malicious spirit, assail and asperse the truth of Christianity, or of the Scriptures, in language calculated and intended to shock the feelings and outrage the belief of mankind, are properly regarded as blasphemous libels (*s*). But the disputes of learned men upon particular points of religion are not punished as blasphemy. The law is rarely put in force, and then only when the libel is of a most extravagant or outrageous nature.

DISTURBING PUBLIC WORSHIP.

Any person wilfully and maliciously or contemptuously disturbing any lawful meeting of persons assembled for religious worship, or molesting the person officiating or any of those assembled, upon proof by two or more credible witnesses before a magistrate, must answer for such offence at the quarter sessions, and upon conviction is fined forty pounds (*t*). Riotous, violent, or indecent behaviour in a place of worship, otherwise called "brawling," is punishable on summary conviction by a fine of five pounds or imprisonment for two months (*u*).

A similar offence is that committed by a person who, in any churchyard or graveyard in which parishioners have a right of burial, under the Burial Laws Amendment Act, 1880, delivers an address not being part of or incidental to a religious service permitted by that Act, and not otherwise permitted by any lawful authority, or who in any such place wilfully endeavours to bring into contempt or obloquy the

(*r*) *R.* v. *Ramsay*, [1883] 48 L. T. N. S. 733; 15 Cox, 231; *R.* v. *Boulter*, [1908] 72 J. P. 188.
(*s*) *R.* v. *Bradlaugh*, [1883] 15 Cox, 217.
(*t*) 52 Geo. III. c. 155, s. 12.
(*u*) v. 23 & 24 Vict. c. 32, s. 2. See also *post*, p. 179.

Christian religion, or the belief or worship or the members or any minister of any Church or denomination of Christians, or is guilty of any riotous, violent, or indecent behaviour at any burial under the Act, or wilfully obstructs such a burial. These offences are misdemeanours (*w*).

MISCELLANEOUS.

Profane swearing is punishable on summary conviction by fine (*x*).

Profanation of the Sabbath is also under certain circumstances an offence. A statute of Charles II. provides that no person may do any work of his *ordinary* calling upon the Lord's Day, works of necessity and charity only excepted, under penalty of five shillings. Nor may any one expose to sale any wares, on penalty of forfeiting his goods; nor may drovers, &c., travel, under a penalty of twenty shillings (*y*). But no prosecution for such offence may now be commenced without the consent of the chief officer of police of the district, or of two justices, or of a stipendiary magistrate (*z*).

Places of entertainment, amusement, or debate, open on Sunday, admission to which is paid for, are to be deemed disorderly houses, and the keeper fined or imprisoned (*a*). The Crown is now, however, empowered to remit the penalties (*b*).

Fortune-telling, &c.—By an Act of 1735 (*c*), the old penalties of the common law for witchcraft were abolished. But by the same Act it was made punishable by twelve months' imprisonment to undertake to tell fortunes or to pretend, from skill in any occult or crafty science, where lost

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(*w*) 43 & 44 Vict. c. 41, s. 7. v. also p. 179.
(*x*) 19 Geo. II. c. 21.
(*y*) 29 Car. II. c. 7.
(*z*) 34 & 35 Vict. c. 87; the section making this Act temporary was repealed by 56 & 57 Vict. c. 54.
(*a*) 21 Geo. III. c. 49, s. 1; v. *Terry* v. *The Brighton Aquarium Company*, [1875] L. R. 10 Q. R. 306; 44 L. J. M. C. 173; 32 L. J. N. S. 458.
(*b*) 38 & 39 Vict. c. 80.
(*c*) 9 Geo. II. c. 5.

or stolen goods could be found. This Act, however, is practically superseded by the Vagrancy Act, 1824 (*d*), under which every person is summarily punishable as a rogue and vagabond who pretends to tell fortunes or uses any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose.

(*d*) 5 Geo. IV. c. 83; v. p. 127.

CHAPTER IV.

OFFENCES AGAINST PUBLIC JUSTICE.

In the first place we shall treat of that class of offences against public justice which consist in avoiding, or assisting another to avoid, lawful custody or the punishments awarded by a Court of Justice.

ESCAPE.

The offence of escape is committed (i) by a prisoner who, without the use of force, escapes from custody or prison; (ii) by a custodian who allows a prisoner to escape.

If a prisoner, whether innocent or guilty, escapes without force from lawful custody, whether the escape is made from gaol or in transit thereto, he is guilty of a common law misdemeanour and punishable by fine and imprisonment (*e*).

Officers who, after an arrest, *negligently* allow a prisoner to escape, are punishable with a fine (*f*); if they *voluntarily* permit it, they are deemed guilty of the same offence, and are liable to the same punishment as the prisoner who escapes from their custody, and this whether the latter has been committed to gaol or is only under bare arrest. But the officer cannot be thus punished for a felony until after the original offender has been convicted. Before the conviction, however, he may be fined and imprisoned as for a misdemeanour. Allowing an escape is only punishable criminally

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(*e*) Archbold, 1113.

(*f*) Or, according to some authorities, by fine and imprisonment; v. Archbold, 1117

if the original imprisonment were for some criminal matter. If the prisoner is in custody for and is guilty of felony, the officer is also punishable as an accessory after the fact.

Private individuals having persons lawfully in their custody, who *negligently* allow an escape, are punishable by fine and imprisonment; if *voluntarily*, they are punishable as an officer would be under the same circumstances. It is the duty of a private individual to deliver over to an officer any person whom he has lawfully arrested.

Aiding in the escape of a prisoner from a prison, other than a convict, military, or naval prison (*g*), or, with intent so to aid, conveying to him a mask, disguise, instrument, or any other thing, is a felony punishable with imprisonment to the extent of two years (*h*). Aiding a prisoner in custody for treason or felony to make his escape from prison, or from the constable or officer conveying him under a warrant to prison, is a felony punishable with penal servitude to the extent of seven years (*i*). Aiding a prisoner of war to escape is a felony punishable with penal servitude for life (*k*).

BREACH OF PRISON.

This offence consists in the escape from lawful custody by the use of any force. The consequences vary according to the crime for which the prisoner is in custody. If he is in custody for treason or felony, the breach is also felony (*l*), and punishable by penal servitude to the extent of seven years. If he is in custody for any other offence, the breach is a misdemeanour, and punishable by fine and imprisonment. There seems also to be this difference between the two cases—in the first it must be proved that the prisoner escaped; in the second this is not necessary.

(*g*) As to these, see the statutes quoted in Arch. 1116.
(*h*) 28 & 29 Vict. c. 126, s. 37.
(*i*) 16 Geo. II. c. 31, s. 3; 54 & 55 Vict. c. 69, s. 1, sub-s. 2.
(*k*) 52 Geo. III. c. 156; 54 & 55 Vict. c. 69, s. 1, sub-s. 2.
(*l*) 1 Edw. II. st. 2, c. 1, in Revised Statutes, 23 Edw. 1. *Stat. de frang pris.*

To constitute this offence there must be an actual breaking, though an accidental displacement of loose bricks on the top of a wall has been held to be a breaking (*m*). Merely getting over the wall or the like is an escape only. It will be a sufficient defence to prove that the prisoner has been indicted for the original offence and acquitted; but unless he has been actually acquitted, or he can prove that no such offence was ever committed, it is not material whether the accused was guilty of the original offence or not.

"Prison" here includes any place where one is lawfully imprisoned, whether upon accusation or after conviction; for example, in the gaol or constable's house.

BEING AT LARGE DURING TERM OF PENAL SERVITUDE.

Penal servitude was substituted for transportation in the year 1857 (*n*), but the incidents of the latter attach to the former.

For a convict to be at large without lawful authority, which it lies on him to prove, before the expiration of the term of transportation or penal servitude to which he was sentenced, is a felony punishable by penal servitude to the extent of life (*o*).

RESCUE.

Rescue is the forcibly and knowingly freeing a prisoner from lawful custody. If the original offender is convicted, the rescuer is guilty of the same offence as such original, whether it be treason, felony, or misdemeanour. If the rescuer is thus convicted of felony, the punishment may be penal servitude to the extent of seven years (*p*); if of misdemeanour, fine and imprisonment. If the original offender is not convicted, the rescuer may still be punished by fine

(*m*) *R.* v. *Haswell*, R. & R. 458.
(*n*) 20 & 21 Vict. c. 3.
(*o*) 5 Geo. IV. c. 84, s. 22; 4 & 5 Wm. IV. c. 67.
(*p*) 1 & 2 Geo. IV. c. 88, s. 1.

and imprisonment as for a misdemeanour (*q*). If the prisoner was in private custody, the rescuer is not liable criminally unless he knew him to be in custody on a criminal charge.

Rescuing or attempting to rescue a person convicted of murder, whilst proceeding to execution; or rescuing out of prison a person committed for or convicted of murder, is a felony punishable with penal servitude to the extent of life (*r*).

Rescuing or attempting to rescue an offender sentenced to penal servitude from a person charged with his removal, is a felony punishable in the same way as if the party rescued had been in gaol (*s*).

Another common law misdemeanour is pound breach, that is, rescuing goods or cattle from the custody of the law when impounded for rent or (in case of cattle) damage feasant (*t*). It is seldom, however, that a prosecution occurs, as by statute a civil remedy in treble damages is given for pound breach (*u*). To rescue cattle distrained when straying or damage feasant is also summarily punishable under various statutes (*w*).

OBSTRUCTING LAWFUL ARREST, ETC.

A person opposing the arrest of a criminal becomes thereby an accessory in felony, and in treason and misdemeanours a principal (*x*).

An assault upon, resistance to, or wilful obstruction of a peace officer in the execution of his duty, or any person acting in his aid, or an assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the person assaulting or of any other person for any offence, is a misdemeanour, punishable with imprisonment to the extent of two years (*y*). Wounding, doing grievous bodily harm to,

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(*q*) Archbold, 1150.
(*r*) 25 Geo. II. c. 37, s. 9; 7 Wm. IV. & 1 Vict. c. 91, s. 1.
(*s*) 5 Geo. IV. c. 84, s. 22.
(*t*) *R. v. Butterfield*, [1893] 17 Cox. 598; *R.* v. *Nicholson*, [1901] 65 J. P. 298.
(*u*) 2 Wm. & Mary, c. 5, s. 3; and 11 Geo. II. c. 19, s. 10
(*w*) v. Archbold, 1176.
(*x*) v. pp. 28.
(*y*) 24 & 25 Vict. c. 100, s. 38.

shooting at, or attempting to shoot at, any person with such intent is punishable with penal servitude to the extent of life (*c*). Assaulting and obstructing peace officers in the execution of their duty is also summarily punishable under other statutes (*d*).

In cases where a coroner has jurisdiction to hold an inquest, it is a misdemeanour to destroy the dead body, or otherwise to prevent the holding of an intended inquest upon it, and to do so amounts to an obstruction of an officer in the discharge of his duty (*e*).

Not only positively obstructing an officer, but also refusing to aid him in the execution of his duty in order to preserve the peace is a crime. This offence is a misdemeanour at common law (*f*); but the prosecution must show that a breach of the peace was at the time being committed in the presence of the constable, and that there was a reasonable necessity for him to call on the defendant to render him assistance (*g*).

PERJURY.

The law upon this subject has now been consolidated by the Perjury Act, 1911 (*h*).

If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding (which expression includes a proceeding before any Court, tribunal, or person having by law power to hear, receive, and examine evidence on oath) *wilfully* makes a statement material in that proceeding which he knows to be false, or does not believe to be true, he is guilty of perjury and is liable to penal servitude for seven years or to imprisonment with or without hard labour for two years, or to a fine, and a fine may be imposed in addition to the penal servitude or imprisonment (*i*). The false state-

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(*c*) 24 & 25 Vict. c. 100, s. 18.
(*d*) 34 & 35 Vict. c. 112, s. 12; 48 & 49 Vict. c. 75, s. 2.
(*e*) *R.* v. *Stephenson*, [1884] 13 Q. B. D. 331; 53 L. J. M. C. 176.
(*f*) v. *R.* v. *Sherlock*, [1866] L. R. 1 C. C. R. 20; 35 L. J. M. C. 92.
(*g*) *R.* v. *Brown*, [1841] C. & M. 314.
(*h*) 1 & 2 Geo. V. c. 6. The Act does not extend to Scotland or Ireland.
(*i*) *Id.*, s. 1. "Oath" includes "affirmation" and "declaration," s. 15.

ment need not be made before the tribunal itself; it will be sufficient to constitute the offence if it is made on oath before a person authorised by law to administer an oath and to record or authenticate the statement provided the oath is taken for the purpose of a judicial proceeding (*k*), *e.g.*, an affidavit intended to be used upon an application in an action. Every Court, Judge, justice, officer, commissioner, arbitrator, or other person having, by law or by consent of parties, authority to hear, receive, and examine evidence, is empowered to administer an oath to all witnesses legally called (*l*).

A false statement made by a person lawfully sworn in England for the purpose of a judicial proceeding in another part of the King's Dominions, or in a British tribunal lawfully constituted in any place outside the King's Dominions (*e.g.*, a Consular Court), or in a tribunal of any foreign State will amount to perjury within the meaning of the Act; so also will a false statement made for the purposes of a judicial proceeding in England, if made by a person lawfully sworn under the authority of an Act of Parliament in any other part of the King's Dominions or before a British tribunal or a British officer in a foreign country, or within the jurisdiction of the Admiralty of England (*m*).

The oath must be made *wilfully*, that is, not by inadvertence or mistake. It must also be made *falsely*; that is, the defendant must know the matter to be false or not know it to be true (*n*).

It is not necessary in all cases that he should know that it was untrue; for he will be guilty if he swears to the truth of his statement, not knowing anything about the matter, for he cannot then be said to believe it to be true (*o*); much more if he swears to its truth, thinking what he swears is untrue. In other words, he is guilty if the jury is satisfied that his intention was to deceive. And he may be indicted for perjury

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(*k*) *Ibid.*
(*l*) 14 & 15 Vict. c. 99, s. 16.
(*m*) 1 & 2 Geo. V. c. 6, s. 1, sub-ss. 4, 5.
(*n*) v. section 1, sub-section 1.
(*o*) *R.* v. *Mawbey*, [1796] 6 T. R. 619, 637.

if he swears that he only *believes* such and such to be the case if he knows it not to be so (*p*).

It will have been observed that to be punishable as perjury the false words must be a *material* statement, *i.e.*, they must relate to something which is *relevant* (*q*), and be made for the purpose of affecting a decision of the "Court, tribunal, or person." A statement is therefore material if it affects the credit of a witness (*r*) or the admissibility of evidence (*s*) or even if, after conviction, it is made by the prisoner in mitigation of his sentence (*t*).

The question whether a statement on which perjury is assigned in an indictment was material, is a question of law for the Judge to decide, and not a question for the jury (*u*).

It is not necessary to constitute perjury that the false oath be believed by the Court before which it is taken, or that any person be damaged by it; for the prosecution is grounded, not on the damage to the party, but on the abuse of public justice.

A false verdict is not regarded as perjury, because it is said the jurors do not swear to depose to the truth, but only to judge of the deposition of others (*w*).

Perjury and offences punishable under the Perjury Act, 1911, are offences to which provisions of the Vexatious Indictments Act apply; and, therefore, no bill of indictment can be presented to or found by the grand jury unless one of the preliminary steps indicated in that Act has been taken (*x*).

If any Judge of a Court of record or a petty sessional Court, or any justice of the peace sitting in special sessions, or any sheriff before whom a writ of enquiry or a writ of trial is executed, is of opinion that any witness in a proceeding before him has been guilty of perjury, he may order him to be prosecuted for perjury if he thinks there is sufficient cause

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(*p*) *R.* v. *Pedley*, [1772] 1 Leach C. C. 327.
(*q*) v. p. 383.
(*r*) *R.* v. *Baker*, [1895] 1 Q. B. 797; 64 L. J. M. C. 177.
(*s*) Arch. 1130.
(*t*) *R.* v. *Wheeler*, [1917] 1 K. B. 283; 86 L. J. K. B. 40; 12 Cr. App. R. 159.
(*u*) 1 & 2 Geo. V. c. 6, s. 1, sub-s. 6.
(*w*) 1 Russ. 320.
(*x*) 1 & 2 Geo. V. c. 6, s. 11; v. p. 330.

for such a prosecution, and he may commit him for trial at the assizes (*y*).

A Court of quarter sessions has no jurisdiction to try an indictment for perjury or subornation of perjury or for any offence against the Perjury Act, 1911 (*z*).

A person cannot be convicted of perjury or of any offence against the last-mentioned Act, or of subornation of perjury, solely upon the evidence of one witness as to the falsity of any statement which he is accused of having made (*a*). Two witnesses must contradict what the accused has sworn; or, at least, one must so contradict, and other evidence must materially corroborate that contradiction (*b*). But this rule does not apply when the perjury consists in the defendant having contradicted what he swore on a former occasion; in this case the testimony of a single witness in support of the defendant's own original statement will suffice (*c*).

False oaths which are *not* taken in the course of a judicial proceeding are not, properly speaking, perjury, but with regard to such oaths the Perjury Act, 1911, provides that if any person, being required or authorised by law to make any statement on oath for any purpose, and being lawfully sworn, wilfully makes a statement which is material for that purpose and which he knows to be false, or does not believe to be true, he is guilty of a *misdemeanour* and is punishable in the same way as if he had committed perjury (*d*). Certain cases are specifically provided for by the Act, namely:—

Using a false affidavit for the purposes of the Bills of Sale Acts (*e*).

False oaths or declarations or statements with reference to marriages (*f*), or as to births or deaths (*g*).

(*y*) 1 & 2 Geo. V. c. 6, s. 9.
(*z*) *Ibid.* s. 10.
(*a*) *Ibid.* s. 13.
(*b*) v. *R.* v. *Boulter*, [1852] 21 L. J. M. C. 57; 5 Cox, 543; *R.* v. *Braithwaite*, [1859] 1 F. & F. 638; *R.* v. *Threlfall*, 111 L. T. 168; 24 Cox, 230.
(*c*) *R.* v. *Hook*, [1858] D. & B. 606; 27 L. J. M. C. 222.
(*d*) 1 & 2 Geo. V. c. 6, s. 2.
(*e*) *Ibid.*
(*f*) 1 & 2 Geo. V. c. 6. s. 3.
(*g*) *Ibid.* s. 4.

A person who knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular in (i) a statutory declaration, or (ii) in an abstract, account, balance-sheet, book, certificate, declaration, report, &c., which he is authorised or required to make or verify by Act of Parliament, or (iii) in any oral declaration or answer which he is required to make by Act of Parliament, is guilty of a misdemeanour and liable to imprisonment for *two* years or a fine, or to both (*h*).

A person who attempts to procure himself to be registered under any Act of Parliament as a person qualified by law to practise any vocation or calling, or to procure a certificate of the registration of any person, by wilfully making either verbally or in writing any declaration, certificate, or representation which he knows to be false, is also guilty of a misdemeanour punishable by imprisonment for *one* year or a fine, or by both (*i*).

There are certain other statutes (*k*) which render punishable certain other false declarations with regard to the subjects with which such statutes deal.

Among such subjects are:—

Parliamentary and Municipal elections: 35 & 36 Vict. c. 33.

In Bankruptcy matters: v. p. 98.

In matters relating to the customs, &c.: 39 & 40 Vict. c. 36, s. 168.

A County Court bailiff indorsing a false memorandum of service of process: 51 & 52 Vict. c. 43, s. 78.

False statements in reports or certificates for the purpose of the audit or investigation of trust accounts by a duly appointed auditor or by the public trustee: 6 Edw. VII. c. 55, s. 13 (8) (*l*).

(*h*) *Ibid.* s. 5.
(*i*) *Ibid.* s. 6.
(*k*) Others have been repealed by the Perjury Act, 1911.
(*l*) This offence is punishable upon conviction on indictment by imprisonment for two years and a fine, or on summary conviction by imprisonment for six months and a fine.

SUBORNATION OF PERJURY.

The procuring another to take such a false oath as would constitute perjury in the principal (*m*). The punishment for subornation is the same as for perjury itself; and the same course has to be taken under the Vexatious Indictments Act. Inciting or attempting to suborn another person to commit perjury is a misdemeanour punishable by fine and imprisonment (*n*).

VOLUNTARY OATHS.

It is unlawful for a justice of the peace or other person to administer or receive, or cause or allow to be administered or received, any oath, affidavit, or solemn affirmation touching any matter wherof he has not jurisdiction or cognisance by some statute in force (*o*). The offence is a misdemeanour, punishable by fine or imprisonment, or both. The administering, &c., is punishable, although the person did not act wilfully in contravention of the statute, but only inadvertently (*p*).

BRIBERY.

The offence of bribery comprises acts differing considerably from each other. They may be divided into three classes:—

(1) Where some public official is approached by one bringing him a reward, in order to influence his conduct in his office.

(2) Where some person having it in his power to procure or aid in procuring for another a public place or appointment, is so approached (*q*).

(3) Where a reward is corruptly paid to an agent of another person to induce such officer or agent to do some act in breach of his duty.

(*m*) Archbold, 1134.
(*n*) 1 & 2 Geo. V. c. 6, s. 7.
(*o*) 5 & 6 Wm. IV. c. 62, s. 13.
(*p*) *R.* v. *Nott*, [1843] 12 L. J. M. C. 143.
(*q*) v. 1 Hawk. c. 67, ss. 1—3.

(1) The offence of *offering* to, or *receiving* by, a public officer, judicial or ministerial, an undue reward to influence his behaviour in his office, is a misdemeanour at common law punishable by fine and imprisonment. Both the giver and the taker are guilty. And though the reward be refused, the offerer is equally punishable for the attempt. The offence is not restricted to the case of influencing the higher officers, such as Judges or members of the Government, but extends to those in a subordinate position. Thus, for example, the colonel of a regiment is a public and ministerial officer, and it is a misdemeanour for him to receive, or for any one to pay him, a bribe to show favour in respect of catering contracts for his regiment (*r*). So also a constable is a public official (*s*).

The bribery of Customs officers and Excise officers is punishable by special statutes (*t*), but is not indictable. A particular species of bribery, viz., corruptly influencing jurymen, will be treated of hereafter under the title of Embracery (*u*).

By the Public Bodies Corrupt Practices Act, 1889 (*w*), every person who corruptly solicits or receives any gift or reward for himself or on account of any member, officer, or servant of a public body (including a County or Town Council, Vestry, and certain other bodies defined by the Act) to induce him to do or forbear from doing anything in respect of any transaction in which the public body is concerned, and also any person offering or paying any gift or reward for such a purpose is guilty of a misdemeanour. The punishment is imprisonment for two years, or a fine of £500, or both, and an offender who has received a bribe may be ordered to pay it over to the public body. He may also be adjudged to forfeit any public office held by him at the date of his conviction and to be incapable of holding a public office for seven years.

(*r*) *R.* v. *Whitaker*, [1914] 3 K. B. 1283; 84 L. J. K. B. 225; 10 Cr. App. R. 245.
(*s*) *R.* v. *Lehwers*, 140 Cent. Crim. Ct. Sess. Pap. 131.
(*t*) 39 & 40 Vict. c. 36, s. 217; 53 & 54 Vict. 21, s. 10.
(*u*) v. p. 75.
(*w*) 52 & 53 Vict. c. 69.

Upon a second conviction for a like offence he may be subjected to further disabilities. The consent of the Attorney-General is required before a prosecution can be commenced under the Act.

(2) For the sake of convenience we may distinguish two varieties of the offence of bribery to secure a place or appointment:

(a) When the place or appointment is in the gift of some public officer.

(b) When it is determined by public election.

(a) This offence may also be regarded as falling under the first class (1), inasmuch as the presentation to the place by the public officer is one of the duties of his office. The offence is a misdemeanour at common law. Thus the attempt to procure an appointment by offering a sum of money to a Cabinet Minister was punished as a misdemeanour (*x*).

By particular statutes it has also been provided that persons buying or selling, or receiving or paying money or rewards for offices, are guilty of a misdemeanour punishable by fine and imprisonment, forfeiture of the office and disqualification from ever holding it (*y*). So also are persons who do not thus directly buy or sell, but who pay money for soliciting or obtaining offices, or any negotiations or pretended negotiations relating thereto (*z*).

(b) Bribery at elections.

Bribery or attempted bribery at elections, whether parliamentary, municipal, parochial, or for any other public office or appointment, and the treating of voters in connection therewith, have always been offences at common law (*a*), which, it has been said, abhorred any tendency to corruption. But in most cases the offence is also punishable under particular statutes.

(*x*) *R.* v. *Vaughan*, [1769] 4 Burr. 2494.
(*y*) 5 & 6 Edw. VI. c. 16, s. 1; 49 Geo. III. c. 126, ss. 1, 3.
(*z*) *Ibid*, s. 4.
(*a*) *R.* v. *Pitt and Mead*, [1762] 3 Burr. 1335; *Hughes* v. *Marshall*, [1831] 2 Tyr. 134; *R.* v. *Lancaster*, [1890] 16 Cox C. C. 737.

As to *parliamentary* elections.—The statute law on this subject is contained chiefly in the Corrupt Practices Prevention Acts, the chief of which are mentioned below (*b*).

The offences declared to be *bribery* on the part of the *candidate* or his agents are the following:

(a) To, directly or indirectly, give, lend, or agree to give or lend; or offer, or promise, any *money*, or *valuable consideration* (*c*), to or for any voter, or other person in order to induce any voter to vote, or refrain from voting, or to corruptly do any such act on account of such voter having voted or refrained from voting at any election. An offer to pay rates, &c., has been since included in this offence (*d*).

(b) To give, &c., any *office, place, or employment*, under the same circumstances (*e*).

(c) To pay, &c., money, with the intent that it shall be expended in bribery; or knowingly to pay it in discharge of what has been so expended (*f*).

These, and also "treating" and "using undue influence," are comprised in the term "corrupt practice" (*g*).

Treating is defined to be corruptly providing any meat, drink, entertainment, or provision to any person, for the purpose of corruptly influencing him to give or refrain from giving his vote at the election.

Undue influence is defined to be the use of or threats to use any force, violence, or restraint, or to inflict or threaten any temporal or spiritual injury or loss upon any person in order to induce or compel him to vote or refrain from voting, or by duress or any fraudulent device to impede the free exercise of the franchise of any elector (*h*).

(*b*) 17 & 18 Vict. c. 102, amended by 21 & 22 Vict. c. 87; 26 & 27 Vict. c. 29; 30 & 31 Vict. c. 102, s. 49; 31 & 32 Vict. c. 125, ss. 43—47. As to these Acts, the Corrupt Practices Act, 1883, 46 & 47 Vict. c. 51, has repealed the following, viz.: sections 1, 4, 5, 6, 9, 14, 23, 36, 39, and parts of 2, 3, 7, and 38 of the first of these Acts; the whole of the second, the whole of the third except section 6, part of section 34 of the fourth, and sections 43, 45, 46, and 47 of the fifth. See also 58 & 59 Vict. c. 40.

(*c*) 17 & 18 Vict. c. 102, ss. 2 and 3.

(*d*) 30 & 31 Vict. c. 102, s. 49

(*e*) 17 & 18 Vict. c. 102, s. 2.

(*f*) *Ibid.*

(*g*) 46 & 47 Vict. c. 51, ss. 1—3.

(*h*) 46 & 47 Vict. c. 51, s. 2.

Any voter who allows himself to be bribed or treated is also guilty of bribery or treating (*i*).

The commission of any "corrupt practice" other than personation, or procuring personation, is a misdemeanour. The punishment is imprisonment for one year, or a fine not exceeding £200.

Personation of a voter, or procuring such personation, is a felony, and is punishable by imprisonment with hard labour for two years (*k*).

By the same statute a large number of acts are declared to be "illegal practices," and are made punishable *on summary conviction* by a fine of £100 (*l*). It is unnecessary to specify all these offences, but they chiefly have relation to expenses improperly incurred by a candidate at an election, to payments made to electors for printing, advertising, &c., to the use of certain premises as committee rooms, and to the publication of untrue statements with regard to a rival candidate.

A corrupt agreement to withdraw an election petition is a misdemeanour punishable by imprisonment for twelve months and a fine of £200 (*m*).

Certain disqualifications also attach to candidates and others who have been found guilty of bribery, corrupt practices, &c., as to which reference may be made to the Corrupt Practices Act, 1883.

The Ballot Act, 1872 (*n*), sec. 3, declares certain fraudulent dealings with ballot papers and ballot boxes to be misdemeanours. The punishment in the case of an election officer or clerk is imprisonment for two years, and in the case of any other person imprisonment for six months.

As to *municipal* elections.—Any person who is guilty of a "corrupt practice" at such an election is liable to the same prosecution and punishment as if the corrupt practice had been committed at a parliamentary election. The law as to

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(*i*) 17 & 18 Vict. c. 102, s. 3; 46 & 47 Vict. c. 51, s. 1.
(*k*) *Ibid.* s. 6.
(*l*) *Ibid.* ss. 7—12.
(*m*) *Ibid.* s. 41.
(*n*) 35 & 36 Vict. c 33.

"illegal practices" is also substantially the same as in the case of parliamentary elections (*o*).

(3) The bribery of agents:

By the Prevention of Corruption Act, 1906, it is provided that (i) if any agent (which term will include any servant or employee) corruptly accepts or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to the principal's affairs, or (ii) if any person *corruptly* gives or agrees to give any consideration to an agent for acting in such a way, or (iii) if any person *knowingly* gives to an agent, or if an agent knowingly uses with intent to deceive his principal any receipt, account, or other document in respect of which the principal is interested and which contains any statement which is false in any material particular and which to his knowledge is intended to mislead the principal, he is guilty of a misdemeanour and liable on conviction on indictment to imprisonment for two years or to a fine of £500, or to both, or on summary conviction to imprisonment for four months or to a fine of £50, or to both. But a prosecution for such an offence cannot be instituted without the consent of the Attorney-General or Solicitor-General (*p*).

By the Prevention of Corruption Act, 1916, it is provided that, where an offence under the Prevention of Corruption Act, 1906, or under the Public Bodies Corrupt Practices Act (*q*), has been committed in relation to a contract or proposal for a contract with His Majesty, or any Government department or any public body, or a sub-contract to execute such work, penal servitude up to seven years may be awarded instead of imprisonment (*r*). Any money, gift or consideration given or received by a person in the employment of His Majesty,

(*o*) v. 47 & 48 Vict. c. 70; 1 & 2 Geo. V. c. 7.
(*p*) 6 Edw. VII. c. 34.
(*q*) v. p. 70.
(*r*) 6 & 7 Geo. V. c. 64, s. 1.

etc., by or from a person or agent of a person, holding or seeking to obtain a contract from His Majesty, etc., shall be deemed to have been given or received corruptly unless the contrary is proved (*s*).

EMBRACERY, ETC.

Embracery is an attempt to influence a jury corruptly to give a verdict in favour of one side or party, by promises, persuasions, entreaties, money, entertainments, or the like. A juryman himself may be guilty of this offence by corruptly endeavouring to bring over his fellows to his view. The offence is a misdemeanour, both in the person making the attempt and in those of the jury who consent. The punishment—both at common law and by statute—is fine and imprisonment (*t*).

COMMON BARRATRY.

This is the offence of *habitually* inciting and stirring up suits and quarrels between His Majesty's subjects, either at law or otherwise (*u*). It is insufficient to prove a single act, inasmuch as it is of the essence of the offence that the offender should be a *common* barrator. Moreover it is no crime for a man frequently to bring actions in his own right, though he be unsuccessful.

The offence is a misdemeanour, punishable by fine and imprisonment. If the offender is connected with the legal profession, he is disabled from practising for the future. If, having been convicted of this offence, he afterwards practises, the Court may enquire into the matter in a summary way; and on the subsequent practising being proved, the offender may be sentenced to penal servitude to the extent of seven years (*w*).

(*s*) Section 2.
(*t*) 6 Geo. IV. c. 50, s. 61.
(*u*) Archbold, 1146.
(*w*) 12 Geo. I. c. 29, s. 4.

MAINTENANCE.

This is the unlawful intermeddling in a civil suit that in no way belongs to one, by *maintaining* or assisting either party, with money or otherwise, to prosecute or defend it (*x*). It is a misdemeanour punishable by fine and imprisonment.

The subject is of more importance from a civil than from a criminal point of view, as if the object of an agreement is to promote the criminal offence of maintenance or champerty the agreement is illegal and cannot be enforced.

The offence is not committed by assisting another person in a criminal prosecution or in his defence to a prosecution (*y*). And acts of this kind are justifiable when the maintainer is actuated by motives of charity (*z*) or has a common interest in the action with the party maintained, as, *e.g.*, from kindred or from the relationship of landlord and tenant or master and servant (*a*).

CHAMPERTY.

Champerty is a species of maintenance. The distinguishing feature is, that the bargain is made with the plaintiff or defendant *campum partire*, that is, in the event of success to divide the land or other subject-matter of the suit with the champertor in consideration of his carrying on the party's suit at his own expense. Thus it has been held punishable as champerty to communicate such information as will enable a party to recover a sum of money by action, and to exert influence in procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered (*b*).

(*x*) Archbold, 1146; v. also *Bradlaugh* v. *Newdegate*, [1883] 11 Q. B. D. 1; 52 L. J. Q. B. 454.
(*y*) *Grant* v. *Thompson*, [1895] 18 Cox C. C. 100.
(*z*) *Harris* v. *Brisco*, 17 Q. B. D. 504; 55 L. J. Q. B. 423.
(*a*) *Bradlaugh* v. *Newdegate*, *supra*.
(*b*) *Stanley* v. *Jones*, [1831] 7 Bing. 369.

COMPOUNDING OFFENCES.

A private individual is not obliged to set the law in motion for the prosecution of a criminal, though he is punishable for the concealment of treason or felony (*c*). Thus, merely to forbear to prosecute is no offence; there is wanting something else to constitute a crime, and this essential is the taking some reward or advantage.

Under this title we shall treat of compounding (a) felonies; (b) misdemeanours; (c) informations on penal statutes; noticing also the offence of taking rewards for helping to recover stolen goods.

(a) *Compounding felony*, or forbearing to prosecute a felon on account of some reward received, is a misdemeanour at common law, punishable by fine and imprisonment. The offence of compounding a felony is complete at the time when the agreement to abstain from prosecuting is made; it is not necessary, therefore, in an indictment for such an offence, to allege that the prisoner did abstain from prosecuting, and that by reason of such abstention the thief escaped prosecution (*d*). The offence is not confined to owners of stolen property who enter into such agreements; any person, therefore, who, having knowledge that a felony has been committed, receives a reward upon his agreeing to abstain from prosecuting, is guilty of this offence (*e*). The reward need not be of a monetary nature, but may be any advantage proceeding from or on behalf of the felon and accruing to the person who forbears. The most common form of this crime is what was anciently known as *theft-bote*, that is, the forbearing to prosecute a thief, in consideration of receiving one's stolen goods back again, or other advantage. But the mere taking back stolen goods, without agreeing to show any favour to the thief, is no crime. If after the compounding the compounder nevertheless prosecuted the felon to

(*c*) v. pp. 39, 79.
(*d*) *R.* v. *Burgess*, [1885] 16 Q. B. D. 141; 55 L. J. M. C. 97.
(*e*) *Ibid.*

conviction, the Judge would direct an acquittal of the prosecutor if he were himself prosecuted for the compounding (*f*).

To *corruptly* take any reward for helping a person to recover property stolen or obtained by any felony or misdemeanour (unless all due diligence to bring the offender to trial has been used), is felony punishable by penal servitude to the extent of seven years, and in case of a male under sixteen by whipping (*g*). An advertisement offering a reward for the return of stolen or lost property, using words purporting that no questions will be asked or seizure or enquiry made after the person producing the property, or that return will be made to any pawnbroker or other person who has bought or made advances on such property of the amount paid for or lent on the same, renders the advertiser, printer, and publisher liable to forfeit £50 each to any person who will first sue for it (*h*). But an action cannot be brought to recover the forfeiture from the printer or publisher except within six months after the forfeiture is incurred, nor at all without the consent of the Attorney- or Solicitor-General (*i*).

(b) *Compounding misdemeanours.*—An agreement to compound a misdemeanour is not a criminal offence unless it is done under circumstances constituting a conspiracy to pervert justice. But it is illegal in the sense that a contract for such a purpose neither can be enforced by action, nor can interfere with the right of the Crown to proceed with a prosecution for a misdemeanour (*k*).

(c) *Compounding informations upon penal statutes.*—In order to promote the discovery and punishment of crime, certain statutes imposing a pecuniary penalty on the offender

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(*f*) *R.* v. *Stone*, [1830] 4 C. & P. 379.
(*g*) Larceny Act, 1916, s. 34.
(*h*) Larceny Act, 1861, s. 102.
(*i*) 33 & 34 Vict. c. 65, s. 3.
(*k*) Archbold, p. 1152. It has, however, been suggested that a compromise may legally be made of an offence which might be the subject of a civil action as, *e.g.*, an assault. *Ibid.*, and v. *Keir* v. *Leeman*, [1844] 6 Q. B. 308; *Fisher* v. *Apollinaris Co.*, L. R. 10 Ch. 297.

award the penalty, either in part or in whole, to any person who prosecutes, hence termed a *common informer*. It has been enacted that if any informer makes any composition without leave of the Court, or takes any money or promise from the defendant to excuse him, he is guilty of a misdemeanour punishable by fine and imprisonment, and is for ever disabled from suing on any popular or penal statute (*l*). A person may be thus convicted of taking a reward for forbearing to prosecute, although no offence liable to a penalty has been committed by the person from whom the money is taken (*m*). The Act does not, however, apply where the penalties compounded for are only recoverable before justices (*n*).

MISPRISION OF FELONY.

Misprision of felony is the concealment of some felony (other than treason) (*o*) committed by another. There must be knowledge of the offence merely, without any assent; for if a man assent he will either be a principal or an accessory. Thus one will be guilty of misprision who sees a felony committed, and takes no steps to secure the apprehension of the offender. The offence is a misdemeanour, punishable by fine and imprisonment (*p*).

EXTORTION AND OTHER MISCONDUCT OF PUBLIC OFFICERS.

Every malfeasance, or culpable non-feasance of an officer of justice, with relation to his office, is a misdemeanour at common law punishable by fine or imprisonment, or both, and removal from office. Under the term "officers of justice" are included not only the higher officers, as Judges, sheriffs, but also those of a lower rank, as constables. The proceedings

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(*l*) 18 Eliz. c. 5; 56 Geo. III. c. 138, s. 2.
(*m*) *R.* v. *Best*, [1839] 9 C. & P. 368.
(*n*) *R.* v. *Crisp*, [1818] 1 B. & Ald. 282.
(*o*) Misprision of Treason, v. p. 39.
(*p*) Prosecutions for this offence appear to have long since fallen into desuetude. See, however, *Williams* v. *Bayley*, [1866] L. R. 1 H. L. at p. 220

will generally be by impeachment, or information in the King's Bench, according to the rank of the offender; but an indictment will also lie.

As to *malfeasance* (*q*).—A judicial officer is punishable for any illegal act committed by him from fraudulent, corrupt, or vindictive motives, or for manifest illegality and oppression or gross abuse of power, or partiality and wilful abuse of discretion. So also a ministerial officer, such as an overseer, is liable for any illegal act committed in the execution of his duties, from corrupt, vindictive, or improper motives (*r*).

Extortion, in the more strict sense of the word, consists in an officer unlawfully taking, by colour of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due (*s*). But it is not criminal to take a reward, voluntarily given, and which has been usual in such a case, for the more diligent or more expeditious performance of his duty.

As to *non-feasance*.—An officer is equally liable for neglect of his duty as for active misconduct. Thus an overseer is indictable for not providing for the poor (*t*). A refusal by any person to serve an office to which he has been duly appointed, and from which he has no ground of exemption, is an indictable offence.

There are special statutory provisions with regard to sheriffs and their officers. If such a person conceals a felon or refuses to arrest him in his bailiwick, or releases a prisoner who is not bailable, or is guilty of certain other offences against the Sheriffs Act, 1887 (*u*), he commits a misdemeanour, and is liable to imprisonment for a year, and may be fined. If he withholds a prisoner bailable after he has offered sufficient security, or takes or demands any money other

(*q*) As to Bribery, v. p. 69, *et seq.*
(*r*) Archbold, 130, 131.
(*s*) Archbold, 1150.
(*t*) Archbold, 131.
(*u*) 50 & 51 Vict. c. 55, s. 29, sub-s. 1.

than the fees he is allowed by Act of Parliament (*w*), or grants a warrant for execution of any writ before he has received the writ, or is guilty of a breach of the provisions of the Act, or of any wrongful neglect in the execution of his office, or of any contempt of a superior Court, he may be punished as for contempt of Court, and be compelled to forfeit £200, and to pay all damage suffered by the party aggrieved (*x*).

CONTEMPT OF COURT.

A contempt of Court is a disobedience to the rules, orders, or process or a disregard of the dignity of a Court of law. All such contempts are misdemeanours punishable by fine and imprisonment (*y*), but if committed against a Court of *record*, that Court has, in most cases, power to fine and imprison the offender in a summary way (*z*) It does not fall within the purview of this work to treat of the latter mode of procedure, which is now the usual way of dealing with this class of offence. The remedy by indictment or information, however, still remains (*a*).

Contempt of Court is of three kinds (*b*): (i) Where some contempt in face of the Court has been committed. (ii) Where there has been a publication of scandalous matter of the Court itself. (iii) Where any act is done or writing published calculated to obstruct or interfere with the due course of justice or

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(*w*) This does not apply to overcharges made by mistake, *Lee* v. *Dangar, Grant & Co.*, [1892] 2 Q. B. 337; 61 L. J. Q. B. 780.

(*x*) 50 & 51 Vict. c. 55, s. 29, sub-ss. 2, 3.

(*y*) Archbold, 1158.

(*z*) Courts of Record are those whose judicial acts and proceedings are enrolled for a perpetual memorial and testimony; which rolls are called the *records* of the Court, and their truth cannot be questioned. This power to fine and imprison is one of their chief distinguishing marks; and the very erection of a new jurisdiction with power of fine and imprisonment makes it instantly a Court of Record.

(*a*) v. Judgment of Cave, J., in *R.* v. *Judge of Brompton County Court*, [1893] 2 Q. B. 195; 62 L. J. Q. B. 604. The summary jurisdiction of inferior Courts of Record, such as the Mayor's Court, the Court of Quarter Sessions, and County Court, is limited to contempts committed *in facie curiæ*. *Ibid.* and *R.* v. *Lefroy*, L. R. 8 Q. B. 134; 42 L. J. (N. S.) Q. B. 121.

(*b*) *McLeod* v. *St. Aubyn*, [1899] A. C. 549; *R.* v. *Gray*, [1900] 2 Q. B. 36; 69 L. J. Q. B. 502.

the lawful process of the Courts. Examples of the latter class of contempt are :

Intimidation of parties or witnesses (*c*).

Disobedience to the orders of the Court (*d*).

The manufacture of false evidence to mislead the Court (*e*).

The publication of comments relating to pending cases which are calculated to prejudice the fair trial of those cases and so interfere with the course of justice (*f*).

An agreement to indemnify bail (*g*).

(*c*) Archbold, 1145. By 55 & 56 Vict. c. 64, it is a misdemeanour, punishable by a fine of £100, or imprisonment for three months, to threaten or injure a person on account of his evidence given before a Royal Commission, or a Parliamentary Committee, or on any enquiry held by statutory authority.

(*d*) See *R.* v. *Robinson*, 2 Burr. 799; *R.* v. *Johnson*, 4 M. & S. 515; v. also Archbold, p. 6.

(*e*) *R.* v. *Vreones*, [1891] 1 Q. B. 360; 60 L. J. M. C. 62.

(*f*) *R.* v. *Tibbits*, [1902] 1 K. B. 77; 71 L. J. K. B. 4. See also Archbold, 1159, 1160.

(*g*) *R.* v. *Porter*, [1910] 1 K. B. 369; 79 L. J. K. B. 241.

CHAPTER V.

OFFENCES AGAINST THE PUBLIC PEACE.

MANY of the crimes mentioned in other chapters involve a breach of the peace. But the offences now to be dealt with are those in which the breach of the peace is the prominent feature. In some—for example, in libel—at first sight the injury done to the individual appears to be the principal point; but a consideration of the way in which the law deals with the offence shows that it is otherwise. Thus, proof of the truth of a libel will not amount to a defence, unless it was for the public benefit that the matter should be published.

RIOTS (*h*).

There are two minor offences, which, as steps to the graver crime of riot, must first be noticed.

An *unlawful assembly* is any meeting of three or more persons for purposes forbidden by law or with intent to carry out any common purpose, lawful or unlawful, under such circumstances of alarm, either from the large numbers, or the mode or time of the assembly, as in the opinion of firm and rational men are likely to endanger the peace; although no aggressive act may be actually done (*i*). All parties joining in and countenancing the proceedings are criminally liable. It is generally considered that the intention must be to do something which, if actually executed, would amount to a riot. But a lawful assembly is not rendered unlawful by reason of the knowledge of those taking part in it that

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(*h*) For riotous destruction of buildings, machinery, &c., v. p. 264.
(*i*) *R.* v. *Vincent*, [1839] 9 C. & P. 91.

opposition will be raised to it, which opposition will in all probability give rise to a breach of the peace by those creating it (*k*).

A *rout* is said to be the disturbance of the peace caused by those who, after assembling together to do a thing which, if executed, would amount to a riot, *proceed* to execute that act, but do not actually execute it. It differs from a riot only in the circumstance that the enterprise is not actually executed.

A *riot* is a tumultuous disturbance of the peace by *three* or more persons, assembling together of *their own authority*, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a *private nature*, and afterwards *actually executing* the same, in a violent and turbulent manner, to the terror of the people, and this whether the act intended be of itself *lawful or unlawful* (*l*).

An example will more clearly show the difference between these three crimes. A hundred men armed with sticks meet together at night to consult about the destruction of a fence which their landlord has erected: this is an unlawful assembly. They march out together from the place of meeting in the direction of the fence: this amounts to a rout. They arrive at the fence, and, amid great confusion, violently pull it down: this is a riot.

In order to constitute a riot five elements are necessary: (i) the presence of not less than three persons; (ii) a common purpose; (iii) execution or inception of the common purpose; (iv) an intent to help one another, by force if necessary, against anyone who may oppose them in the execution of the common purpose; (v) force or violence displayed in such a manner as to alarm at least one person of reasonable firmness. The object must be of a local or private nature: otherwise, as if to redress a public grievance, it may amount to treason (*m*).

(*k*) *Beatty* v. *Gillbanks*, [1882] 9 Q. B. D. 308; 51 L. J. M. C. 117.
(*l*) Archbold, 1164.
(*m*) *Field* v. *Receiver of Metropolitan Police*, [1907] 2 K. B. 853; 76 L. J. K. B. 1015; v. p. 36.

The gist of the offence is the *unlawful manner of proceeding*, that is, with circumstances of force or violence, or in such a way as to create terror in the minds of the public. Therefore, assembling for the purpose of an unlawful object, and actually executing it, though it might be punishable as a conspiracy, is not a riot, if it is done peaceably (*n*).

These three offences are common law misdemeanours, punishable by fine or imprisonment, or both.

For the case of riots which assume a more formidable aspect, further provision is made by statute (*o*). If twelve or more persons are unlawfully and riotously assembled to the disturbance of the peace, and being required by proclamation (*p*), by a justice of the peace, sheriff or under-sheriff, mayor, or other head officer of a town to disperse, they then continue together for an hour after, they are guilty of felony, and liable to penal servitude to the extent of life (*q*). It is a felony attended by the same punishment to oppose the reading of the proclamation: and this opposition will not excuse those who know that the proclamation would have been read had it not been for this hindrance (*r*). Prosecutions under this Act must be commenced within twelve months after the commission of the offence (*s*).

Posse comitatus.—A course of proceeding founded on an old statute (*t*), still unrepealed, is provided for offences of this character. Any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus* (*i.e.*, a force consisting of all able-bodied men except clergymen), and suppress a riot, rout, or unlawful

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(*n*) Archbold, 1165. *Clifford* v. *Brandon*, [1810] 2 Camp, at p. 369.
(*o*) Riot Act, 1 Geo. I. st. 2, c. 5; and 7 Wm. IV. & 1 Vict. c. 91, s. 1.
(*p*) "Reading the Riot Act."
(*q*) 1 Geo. I. st. 2, c. 5, s. 1. The form of proclamation is prescribed by the statute: "Our sovereign lord the king chargeth and commandeth all persons being assembled immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies—God save the King."
(*r*) *Ibid.* s. 5.
(*s*) *Ibid.* s. 8.
(*t*) 13 Hen. IV. c. 7.

assembly; may arrest the rioters, and make a record of the circumstances on the spot, which will be sufficient evidence for the conviction of the offenders. Any battery, wounding, or killing that may happen in suppressing the riot is justifiable.

The riotous demolishing of buildings, machinery, &c., is punishable by penal servitude for life under a more recent statute (*u*).

AFFRAY.

A fighting between two or more persons in some *public* place, to the terror of His Majesty's subjects. If it takes place in private, it will be an assault. It differs from a riot, inasmuch as there must be three persons to constitute the latter. Mere quarrelsome or threatening words do not amount to an affray.

An affray may be suppressed and the parties separated by a private person who is present; and a peace officer is bound to interfere. The offence is a common law misdemeanour, punishable by fine or imprisonment, or both.

CHALLENGE TO FIGHT.

To challenge to fight, either by word or letter, or to be the bearer of such challenge, or to provoke another to send a challenge, is a misdemeanour at common law punishable by fine or imprisonment, or both. It is not necessary that actual fighting should follow. Provocation, however great, is no justification (*w*), though it may mitigate the sentence of the Court.

SENDING THREATENING LETTERS.

It is obvious that the receipt of a threatening letter is not unlikely to lead to a breach of the peace on the part of the receiver. Therefore to prevent such breach, and at the same time to punish what is an offence against the security of the

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(*u*) 24 & 25 Vict. c. 97, ss. 11, 12. *See post*, p. 264.
(*w*) *R.* v. *Rice*, [1803] 3 East, 581.

subject, it has been provided that, if any person, knowing the contents, sends or delivers any letter or writing threatening to burn or destroy any house, barn, or other building, or grain or other agricultural produce in a building, or any ship, or to kill, maim, or wound any cattle, he is guilty of felony, and may be punished by penal servitude for ten years, and if a male under sixteen a whipping (*x*). The same consequences are attached to sending letters threatening to murder (*y*).

EXTORTION, ETC.

We may notice here certain other cases of making threats and sending threatening letters. Every person who (i) utters, knowing the contents thereof, any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing or (ii) utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (living or dead) of certain specified crimes, with intent to extort or gain thereby any property or valuable thing from any person or (iii) with intent to extort or gain any property or valuable thing from any person, accuses or threatens to accuse that person or any other person (living or dead) of any such crime is guilty of felony punishable by penal servitude for life, and if a male under sixteen, by a whipping.

Every person who with intent to defraud or injure any other person (a) by unlawful violence or restraint of the person of another or (b) by accusing or threatening to accuse any person (living or dead) of any such crimes, compels or induces any person to execute or destroy any valuable security or to affix the name of any person, company, or firm or the seal of any corporate body upon any paper, etc., in order that it may be converted into or used as a valuable security is guilty of felony punishable by penal servitude for life.

(*x*) 24 & 25 Vict. c. 97, s. 50.
(*y*) 24 & 25 Vict. c. 100, s. 16.

The crimes specified are—any crime punishable with death or penal servitude for not less than seven years, or assault with intent to commit rape, or attempt to commit rape or an unnatural crime. (*z*). It is immaterial whether the person threatened be innocent or guilty of the offence imputed to him (*a*).

Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same is guilty of felony punishable by penal servitude for not more than five years (*b*).

Every person who with intent (a) to extort any valuable thing from any person or (b) to induce any person to confer or procure for any person any appointment or office of profit or trust (1) publishes or threatens to publish any libel upon any other person (living or dead) or (2) directly or indirectly threatens to print or publish, or offers to abstain from or prevent the printing or publishing, of any matter touching any other person (living or dead) is guilty of a misdemeanour punishable by imprisonment for not more than two years (*c*).

LIBEL AND INDICTABLE SLANDER.

Offences of this class are rightly considered as affecting the public peace, inasmuch as their tendency is directly to provoke breaches of the peace. This will appear from the definition of a libel.

A libel is a malicious defamation made public either by printing, writing, signs, pictures, or the like, tending either to blacken the memory of one who is dead or the reputation of one who is alive, by exposing him (or his memory) to public hatred, contempt, or ridicule (*d*).

In prosecutions for libels vilifying the character of

(*z*) 6 & 7 Geo. V. c. 50, s. 29.
(*a*) *R.* v. *Gardner*, 1 C. & P. 479.
(*b*) 6 & 7 Geo. V. c. 50, s. 30.
(*c*) *Ibid.* s. 31.
(*d*) v. Archbold, 1187. This definition refers only to defamatory libels, and not to those already noticed, of a seditious, blasphemous, or indecent nature (v. pp. 42, 57). But in all cases of libel the ground of criminal proceedings is the same, namely, "The public mischief which libels are calculated to create, in alienating the minds of the people from religion and good morals, rendering

deceased persons, it must be shown that the intention has been to bring contempt on the families of the deceased, or to stir up hatred against them, or to excite them to a breach of the peace (*e*). Writings tending to degrade and defame persons of position in foreign countries at peace with the King are libellous, as tending to interrupt the pacific relations between the two countries (*f*). Writings, though they do not reflect on the character of any particular individual, as, for example, on bodies of men, may be punishable as libels if they tend to a breach of the peace, or to stir up hatred towards a class generally (*g*).

To those who are aggrieved by a libel two courses are open, either to prosecute the offender criminally by indictment or information, or to seek redress by a civil action. This is the general rule, but there are cases where the wrongdoer is criminally punishable, although no action will lie against him. This is the case when the matter of the libel is true. It is a clearly established rule that in a civil action the truth of the matter is a good defence; whereas in a criminal proceeding it is not necessarily so. The gist of the crime is the provocation to a breach of the peace by exciting feelings of revenge, &c., and the libel is not divested of this characteristic on account of its being founded on truth. But by an Act (*h*), known as Lord Campbell's Act, it was provided that a defendant indicted for libel might plead a plea of justification, alleging the truth of the libel, but the plea must also allege that it was for the public benefit that it should be published and the particular fact by reason whereof the publication was for the public benefit. If the defendant is nevertheless convicted the Court, in pronouncing sentence, may consider whether the guilt of the defendant has been aggravated or mitigated by the plea of justification and the evidence which

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them hostile to the government and magistracy of the country, and, where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the public peace." 1 Russ. 597.

(*e*) R. v. Topham, [1791] 4 T. R. 126. Archbold, p. 1188.

(*f*) *R.* v. *Peltier*, [1803] 28 St. Tr. 530.

(*g*) *R. v. Osborn*, [1732] 2 Barn. K. B. 138, 166

(*h*) 6 & 7 Vict. c. 96, s. 6.

has been given in support of it. The question of the truth of the libel cannot, however, be investigated before a magistrate, but only on plea at the trial (*i*), except in the case of newspaper libels, as to which Parliament has enacted that a Court of summary jurisdiction, upon the hearing of a charge against the publisher, &c., of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit and as to the truth of the libel, and if the Court is of opinion, after hearing such evidence, that there is a probable presumption that a jury would acquit the person charged, it may dismiss the case (*k*). And if the Court in such a case thinks the libel to be one of a trivial character, it may, with the consent of the defendant, deal with the matter summarily by fining him a sum not exceeding £50 (*l*).

As to the *form* in which the libel is expressed, it will be none the less an offence because the libellous imputation is conveyed indirectly—for example, by a hint, question, exclamation, irony, &c. Even hanging a man in effigy amounts to libel, as tending to bring him into contempt and to provoke a breach of the peace. And a mere subterfuge, as by writing only a letter or two of the name, will not avail if there be satisfactory evidence as to what person is meant. The words used are to be taken in the sense ordinarily understood. Where the libellous signification of the words does not appear on the face of the libel, innuendoes are inserted in the indictment, and proved by evidence stating the meaning and intended application of the words.

An indictment may be maintained for words written, for which, if they were merely spoken, no *action* would lie without proof of *special damage*—for example, to write that a man is a swindler (*m*). But a *slander*, *i.e.*, defamation by words spoken, even though it may be actionable without proof of special damage, is not indictable unless it is seditious, blasphemous, or uttered to a magistrate in the execution of his duty or tending to provoke a breach of the peace (*n*).

(*i*) *R.* v. *Carden*, [1879] 5 Q. B. D. 1; 49 L. J. M. C. 1.
(*k*) 44 & 45 Vict. c. 60, s. 4.
(*l*) *Ibid.* s. 6.
(*m*) *I'Anson* v. *Stuart*, [1834] 1 T. R. 748.
(*n*) Archbold, p. 1187.

As to the *publication*, or making public of the libel. To make a writing a libel it must be published, *i.e.*, communicated to some person: for the mere writing or composing of a defamatory paper which is never read or divulged to others will not amount to a libel. But, on the other hand, a slight circumstance will be sufficient to constitute a publication. Thus communication, though only to a single person, even if he be the person defamed (*o*), is a sufficient publication to render the libeller responsible in a criminal prosecution, even though the libel be contained in a private letter. It will be remembered that the gist of the criminal offence is that the libel tends to provoke a breach of the peace, and the fact that the publication is to the person libelled would be even more likely to produce that result than if the publication were to another person. It is otherwise in civil proceedings, as to render the defendant liable to *damages* there must be a publication to some person other than the party defamed.

The facts to be established on a prosecution for libel are:

(a) The making and publishing of the writing.

(b) That the writing is libellous in its nature.

For a long period it was maintained by Judges and others that it was the province of the jury to deal with the first of these questions only, and that the second was to be determined by the Judge. But the controversy was settled by Fox's Act (*p*), which enacted that the jury may give a general verdict of Guilty or Not Guilty on the whole matter in issue, and are not, as formerly, to be required or directed by the Court to find the defendant guilty if they are satisfied that the writing was published and bore the meaning ascribed to it in the indictment. But the Judge may state his opinion to the jury, though they are not bound to act upon it, and before he allows the case to go to the jury the Judge must be satisfied that the terms of the alleged libel are such that they *can* bear a defamatory meaning (*r*).

(*o*) *R.* v. *Adams*, [1888] 22 Q. B. D. 66; 58 L. J. M. C. 1.

(*p*) 32 Geo. III. c. 60.

(*r*) *Capital and Counties Bank* v. *Henty*, [1882] 7 A. C. 741, 744; 52 L. J. Q. B. 232.

Criminal intention is inferred in law from the mere fact of the publication of libellous matter, which is in itself an unlawful act (*s*). Accordingly, even when the older and more strict forms of indictments were used, it was unnecessary to allege that the publication was "malicious" (*t*). The burden of rebutting this inference lies therefore upon the accused person, who may prove circumstances which rendered the publication lawful. But in answer to this the prosecution may, in some cases, show that the publication was not in fact for any lawful purpose, but was actuated by *express malice* or malice in fact—that is to say, by ill-will or any other improper motive (*u*).

The accused person may, as we have seen, set up the special plea of justification, which must be in writing. But he may also, under the plea of "not guilty," prove (1) that the publication was accidental; (2) that the matter complained of was fair comment on a matter of public interest; (3) that the publication was upon a privileged occasion.

1. It is a defence that the publication was *accidental* or made without the authority or knowledge of the defendant (*w*). Thus where the defendant is not the first publisher, but, as in the case of a bookseller, merely takes a subordinate part in disseminating a libel, he can escape liability by proving that he did not know of the libel *and* that his ignorance was not due to negligence (*x*). It has been provided by statute (*y*), that whenever upon the trial of any indictment or information for libel evidence has been given which establishes a presumptive case of publication against the defendant by the act of any person by his authority, the defendant may prove that the publication was without his knowledge, consent, or authority and did not arise from want of care on his part. It should be noted that no criminal prosecution can be commenced against any proprietor,

(*s*) *Bromage* v. *Prosser*, 4 B. & C. 247. See *ante*, p. 11.
(*t*) *R.* v. *Munslow*, [1895] 1 Q. B. 761; 64 L. J. M. C. 138.
(*u*) Archbold, pp. 1191, 1192.
(*w*) *R.* v. *Munslow*, *supra*.
(*x*) *Emmens* v. *Pottle*, 16 Q. B. D. 354.
(*y*) 6 & 7 Vict. c. 96, s. 7.

publisher, editor, or person responsible for the publication of a newspaper for any libel published therein without the order of a Judge in chambers, and the person accused must have notice of the application and opportunity of being heard against it (*z*).

2. It is a defence that the matter complained of was "*fair comment*"; that is to say, that (i) it related to a matter of public interest and concern, such as the administration of public affairs or institutions, or public performances, or literary works (*a*), *and* (ii) that it was pure criticism, *i.e.*, an expression of opinion upon existing facts and not allegation of facts (*b*), and (iii) that it was bona-fide criticism, *i.e.*, an opinion honestly held and expressed in the language of a fair man; the mere fact that the opinion is wrong will not destroy the defence, but, on the other hand, proof of malice in fact "may take a criticism prima-facie fair outside the right of fair comment" (*c*).

3. It is a question for the Judge whether an occasion is *privileged* so as to prevent the publication of a libel from being punishable. Privilege may be *absolute* or *qualified*. In the latter case the privilege is lost if the prosecutor can show that the defendant was not honestly availing himself of the privilege but was actuated by express malice.

Absolute privilege exists for (a) judicial proceedings, Parliamentary Debates and Acts of State (*d*); (b) reports published by order of Parliament (*e*); (c) fair and accurate *newspaper* reports of judicial proceedings, if published contemporaneously (*f*).

Qualified privilege exists for (a) fair and accurate reports of proceedings in Parliament (*g*), in Courts of Justice (*h*) and

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(*z*) 51 & 52 Vict. c. 64, s. 8.
(*a*) *Merivale* v. *Carson*, 20 Q. B. D. 275.
(*b*) *Davis* v. *Shepstone*, 11 A. C. 187; 55 L. J. P. C. 51.
(*c*) *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. at p. 640.
(*d*) See *Chatterton* v. *Secretary of State for India*, [1895] 1 Q. B. 191
(*e*) 3 & 4 Vict. c. 9. ss. 1, 2.
(*f*) 51 & 52 Vict. c. 64, s. 3.
(*g*) *Wason* v. *Walter*, L. R 4 Q. B. 73.
(*h*) Archbold, p. 1193.

public meetings of vestries, town councils, and similar bodies to which the public and newspaper reporters are admitted (*i*); (b) statements published (i), in discharge of a legal, moral, or social duty, such as characters given to servants (*k*) or (ii) in self-defence (*l*), or (iii) by reason of a common interest with the person to whom the communication is made (*m*).

Libel is a misdemeanour, punishable in the case of one who publishes a defamatory libel, knowing it to be false, by imprisonment not exceeding two years, and fine (*n*). But if the prosecution do not prove that the defendant knew it to be false, the punishment is fine or imprisonment not exceeding one year, or both (*o*).

Libel is one of the offences to which the Vexatious Indictments Act applies (*p*).

In cases of private prosecutions for libel, if the defendant is acquitted the Court may order the prosecutor to pay the whole or any part of the costs incurred in the defence (*q*).

The law as to criminal proceedings for libel by husband or wife against the other is not altered by the Married Women's Property Act, 1882 (*r*), which enables criminal proceedings to be taken by a wife against her husband, and *vice versa*, for the protection and security of the wife's separate estate or the husband's property. A prosecution for libel is not for the protection and security of such property, and therefore a wife cannot prosecute her husband or give evidence against him upon a prosecution for a personal libel upon herself (*s*).

(*i*) 51 & 52 Vict. c. 64, s. 4. The privilege is lost if the defendant has, after request, refused or neglected to insert in the same paper a reasonable statement contradicting or explaining the report.

(*k*) *Child* v. *Affleck*, 9 B. & C. 408.

(*l*) *Coward* v. *Wallington*, 7 C. & P.

(*m*) *Hunt* v. *Great Northern Railway Co.* [1891] 2 Q. B. 189; 60 L. J. Q. B. 498.

(*n*) 6 & 7 Vict. c. 96, s. 4.

(*o*) 6 & 7 Vict. c. 96, s. 5; v. *Boaler* v. *The Queen*, [1888] 21 Q. B. D. 284; 57 L. J. M. C. 85.

(*p*) v. p. 330.

(*q*) 8 Ed. VII. c. 15, s. 6, sub-s. 2.

(*r*) Re-enacted by the Larceny Act, 1916, v. p. 203.

(*s*) *R.* v. *The Lord Mayor of London*, [1886] 16 Q. B. D. 772; 55 L. J. M. C. 118.

FORCIBLE ENTRY OR DETAINER.

Forcible entry is the violent taking, forcible detainer is the violent keeping possession of lands and tenements with menaces, force, and arms and without the authority of the law. It is no defence to a charge of forcible entry that the accused has been unjustly turned out of possession (*t*), inasmuch as he has his remedy at law, and the fact of his right does not diminish the breach of the peace. If there be not employed such force or menaces as are calculated to prevent resistance, it is a mere trespass (*u*).

The offence is a misdemeanour, punishable by fine and imprisonment. The Court may by a writ of restitution summarily restore possession to the person entitled, unless the defendant has been permitted to remain quietly in possession for three years previously to the finding of the indictment (*w*).

(*t*) 5 Rich. II. c. 8; v. Archbold, p.

(*u*) *R.* v. *Smyth*, [1832] 5 C. & P. 201. See also *Lows* v. *Telford*, [1876] 1 A. C. 414; 45 L. J. Ex. 613; *Milner* v. *Maclean*, [1825] 2 C. & P. 17; *R.* v. *Child*, [1846] 2 Cox, C. C. 102; *Edwick* v. *Hawes*, [1881] 18 Ch. D. 199.

(*w*) v. 31 Eliz. c. 11; 21 Jac. I. c. 15.

CHAPTER VI.

OFFENCES AGAINST PUBLIC TRADE.

SMUGGLING.

SMUGGLING is the importing or exporting either (a) goods without paying the legal duties thereon, or (b) prohibited goods. The existing law on the subject is contained chiefly in the Customs Consolidation Act, 1876 (*a*).

The statute subjects to forfeiture the goods which have in any way been the subjects of smuggling practices. Persons taking goods out of a warehouse without paying the duties are declared to be guilty of a misdemeanour (*b*).

Shooting at vessels belonging to the navy or revenue service, or shooting at or wounding an officer engaged in the prevention of smuggling, is declared to be a felony punishable by penal servitude for not less than three years (*c*).

To procure persons to assemble for the purpose of smuggling is punishable by imprisonment for twelve months; and if any person so offending be armed or disguised, or being so armed or disguised be found with any goods liable to forfeiture within five miles of the sea coast or of any navigable river, he is punishable by imprisonment with hard labour to the extent of three years (*d*). To assemble (to the number of three or more persons) for the purpose of smuggling is punishable by a penalty of not less than £100 or more than £500 (*e*).

(*a*) 39 & 40 Vict. c. 36. (*b*) *Ibid.* s. 85.
(*c*) *Ibid.* s. 193. (*d*) *Ibid.* s. 189.
(*e*) 42 & 43 Vict. c. 21, s. 10.

Making signals at night to smuggling vessels is a misdemeanour punishable by a fine of £100, or imprisonment not exceeding one year (*f*).

All proceedings for offences against Acts relating to the Customs must be commenced within three years after the date of the offence (*g*).

OFFENCES AGAINST THE BANKRUPTCY LAWS.

The Bankruptcy Act, 1914 (*h*), enumerates several acts which, if done by a person adjudged bankrupt or in respect of whose estate a receiving order in bankruptcy has been made, are misdemeanours punishable by imprisonment for two years. It will be observed that under the last-mentioned Act the onus of proving the absence of the intent to defraud or, as the case may be, to conceal the state of his affairs, or to defeat the law, is in several instances thrown upon the accused, and that in such cases it is not necessary for the prosecution to allege in the indictment or to prove any such intent. The acts referred to are briefly as follows:

(i) Not to the best of his belief making full discovery of his estate to the administering trustee and how he has disposed of any part thereof, unless he proves that he had no intent to defraud.

(ii) Neglecting to deliver up to the trustee property under his control which he is required by law to deliver up, unless he proves that he had no intent to defraud.

(iii) Neglecting to deliver up books, papers, &c., under his control to the trustee, unless he proves that he had no intent to defraud.

(iv) After, or within *six* months before, the presentation of the bankruptcy petition, concealing property to the value of £10, or any debt due to or from him, unless he proves that he had no intent to defraud.

(*f*) 39 & 40 Vict. c. 36, s. 190.
(*g*) *Ibid.* s. 257.
(*h*) 4 & 5 Geo. V. c. 59, s. 154, re-enacting section 11 of the Debtors Act, 1869 (32 & 33 Vict. c. 62) as amended by the Bankruptcy Act, 1890, s. 26.

(v) Within the same time fraudulently removing any part of his property to the value of £10.

(vi) Making any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud.

(vii) Failing for a month to inform the trustee of any false debt which he knows or believes to have been proved.

(viii) After the presentation of a petition, preventing the production of any book, document, or paper relating to his affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law.

(ix) After the presentation of a petition or within *six* months (*i*) before concealing, mutilating, or falsifying any such document, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law.

(x) Within the same limits of time (*i*) making a false entry in any such document unless he proves that he had no intent to conceal the state of his affairs or to defeat the law.

(xi) Within the same limits of time (*i*) fraudulently parting with, altering, or making omissions in any such document.

(xii) After the presentation of a bankruptcy petition, or at any meeting of his creditors within *six* months before such presentation, attempting to account for any part of his property by fictitious losses or expenses.

(xiii) Within *six* months before the presentation of the bankruptcy petition, or before the date of a receiving order made under s. 107 of the Act (*k*), or after the presentation of a petition and before the making of a receiving order, obtaining property on credit which he has not paid for.

(xiv) Within the same (last mentioned) time obtaining under the false pretence of carrying on business and, if a trader, of dealing in the ordinary way of his trade, any

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(*i*) Or (in the case of books of account) *two years* prior to the presentation of the petition if the bankrupt has been engaged in any trade or business and the books which have been fraudulently destroyed, falsified, or dealt with are such books as were necessary to explain his transactions and financial position as mentioned on p. 99. Section 158, 4.

(*k*) *i.e.*, a receiving order made against a judgment debtor in lieu of committal.

property on credit which he has not paid for, unless he proves that he had no intent to defraud.

(xv) Within the same (last mentioned) time pledging or disposing of any property which he has obtained on credit and has not paid for, unless, in the case of a trader, such pledging or disposing is in the ordinary way of his trade, and unless in any case he proves that he had no intent to defraud.

(xvi) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of any of his creditors to an agreement with reference to his affairs or to his bankruptcy.

A person who has on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors and who is again adjudged bankrupt or against whom a receiving order is made will be guilty of a misdemeanour punishable by two years' imprisonment if, having during the whole or part of the two years next before the presentation of the bankruptcy petition been engaged in any trade or business, he has not kept proper books of account or has not preserved all books of account so kept, unless his unsecured liabilities at the date of the receiving order do not exceed £100 or if he proves that in the circumstances the omission was honest and excusable. The books of account required to be kept are such as are necessary to exhibit his transactions and financial position in his business, including a book containing detailed entries from day to day of all cash received and paid (*i.e.*, a cash book) and, where he has dealt in goods, accounts of all goods sold and purchased, and statements of annual stocktakings. There can be no prosecution for this offence without an order of the Court, nor where the receiving order is made within two years from the 1st April 1914 (*l*).

So also it will be a misdemeanour punishable in the same way (*m*), where a receiving order is made *after the 1st April*

(*l*) 4 & 5 Geo. V. c. 59, s. 158. It will be observed therefore that this offence cannot be committed in the case of any bankruptcy the receiving order in which has been made prior to the 1st April, 1916.

(*m*) *Ibid.* s. 157. The leave of the Court will be required for a prosecution for this offence.

1916 against a person who, having been engaged in any business and having at the date of the receiving order any unpaid debts contracted in the course of such business, has:—

(*a*) Within two years prior to the presentation of the petition or the date of a receiving order made under s. 107 of the Act, materially contributed to the extent of his insolvency by gambling or by rash and hazardous speculations, such gambling or speculations being unconnected with his business; or

(*b*) Has between the dates of the presentation of the petition and the receiving order lost any part of his estate by such gambling or speculations; or

(*c*) Fails to give a satisfactory account for the loss of any substantial part of his estate incurred within a year before the presentation of the petition.

It is also a misdemeanour punishable in the same way for an undischarged bankrupt (i) either alone or jointly with any other person, to obtain credit to the extent of £10 from any person without informing him that he is an undischarged bankrupt; (ii) to engage in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt (*n*).

One offence is a felony, punishable in the same way by imprisonment not exceeding two years; namely, if any person who is adjudged bankrupt or in respect of whose estate a receiving order has been made, after the presentation of the bankruptcy petition or within six months before, absconds from England and takes with him, or attempts or *prepares* to abscond and take with him, property to the value of £20, which ought by law to be divided amongst his creditors (*o*).

(*n*) *Ibid.* s. 155. In order to constitute the first of the offences under this section it is not necessary to show that the defendant had any intention to defraud (*R.* v. *Dyson*, [1894] 2 Q. B. 176; 63 L. J. M. C. 124), nor that he expressly stipulated for credit if in fact he obtained it (*R.* v. *Peters*, [1886] 16 Q. B. D. 636).

(*o*) *Ibid* s. 159, replacing section 12 of the Debtors Act, 1869.

Certain other offences are misdemeanours, punishable by imprisonment not exceeding *one* year (*p*):

For *any* person (whether he become bankrupt or not):

(i) In incurring a debt or liability, to obtain credit under false pretences, or by means of any other fraud. For instance, a man may be convicted of this offence who orders food at a restaurant knowing that he has not the money to pay for it, as he must have been aware that the custom of such establishment is that refreshments shall be paid for before the customer leaves (*r*).

(ii) With intent to defraud any creditor, to make any gift, delivery, or transfer of, or any charge on, his property.

(iii) With intent to defraud his creditors, to conceal or remove any part of his property since, or within two months before, the date of any unsatisfied judgment or order for money obtained against him.

It is also a misdemeanour, punishable by imprisonment not exceeding one year, for a creditor wilfully and fraudulently to make a false claim in a bankruptcy (*s*).

All these misdemeanours fall within the provisions of the Vexatious Indictments Act (*t*).

All the above-mentioned offences under the Bankruptcy Act, 1914, including the felony under s. 159, are also summarily punishable by imprisonment not exceeding six months. But summary proceedings cannot be instituted after one year from the first discovery of the offence either by the Official Receiver or the trustee of the bankruptcy, or, if the proceedings are instituted by a creditor, then by that creditor, nor in any case can they be commenced after three years from the commission of the offence (*u*).

If a trustee in bankruptcy or an official receiver report to the Bankruptcy Court that a bankrupt or debtor has been

(*p*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13. This section is reproduced by section 156 of the Bankruptcy Act, 1914, which, however, applies only to a person who has been adjudged bankrupt or against whom a receiving order has been made. In view of the wider language of the Debtors Act, section 156 of the Act of 1914 seems superfluous; v. Archbold, p. 1198.

(*r*) *R.* v. *Jones*, [1898] 1 Q. B. 119; 67 L. J. Q. B. 41.

(*s*) 4 & 5 Geo. V. c. 59, s. 160, replacing section 14 of the Debtors Act, 1869.

(*t*) *Ibid.* s. 164; v. p. 330.

(*u*) *Ibid.* s. 164.

guilty of an offence under the Debtors Act, or under the Bankruptcy Act, 1914, or if the Court is satisfied upon the representation of any creditor that there is ground to believe that the bankrupt or debtor has been guilty of such offence, the Court shall, if there be a reasonable probability of conviction, and if it thinks that the circumstances are such as to render a prosecution desirable, order a prosecution (*w*).

COUNTERFEITING TRADE-MARKS AND APPLYING FALSE TRADE DESCRIPTIONS.

This subject seems peculiarly to fall within a chapter dealing with offences against trade, though it would also find a place under the heading "Forgery." The law as to offences relating to trade-marks is contained in the Merchandise Marks Act, 1887 (*x*). By this Act every person who (1) forges any trade-mark; or (2) falsely applies to goods any mark so nearly resembling a trade-mark as to be calculated to deceive; or (3) makes any die, machine, or instrument for the purpose of forging a trade-mark; or (4) applies any false trade description to goods; or (5) disposes of or has in his possession any die, &c., for the purpose of forging a trade-mark; shall, unless he proves that he acted without intent to defraud (*y*), be guilty of an offence against the Act (*z*). Further, every person who sells or has in his possession for sale, or any purpose of trade or manufacture, any goods to which any forged trade-mark or false trade description is applied, shall, unless he proves (1) that having taken all reasonable precautions he had no reason to suspect the genuineness of the trade-mark or trade description; and (2)

(*w*) *Ibid.* s. 161, re-enacting section 16 of the Debtors Act, 1869, as amended by the Bankruptcy Act, 1883.

(*x*) 50 & 51 Vict. c. 28.

(*y*) The "fraud" here referred to has been held to mean the putting off on a purchaser, not necessarily a bad article, or one of less value, but one different from that which he has stipulated to buy. *Starey* v. *Chilworth Powder Co.*, [1889] 24 Q. B. D. 90; 59 L. J. M. C. 13.

(*z*) 50 & 51 Vict. c. 28, s. 2, sub-s. 1.

that, on demand made by the prosecutor, he gave all the information in his power with respect to the person from whom he obtained such goods; or (3) that he had otherwise acted innocently, be guilty of an offence against the Act (*a*). Every person guilty of an offence against the Act is liable (1) on conviction on indictment to imprisonment, with or without hard labour, for two years, or to a fine; (2) on summary conviction, to imprisonment, with or without hard labour, for four months, or to a fine of £20, and, in the case of a second conviction, to imprisonment for six months, or to a fine of £50; (3) in any case, to forfeit any article by means of which the offence has been committed (*b*). The expression "trade description," as used in this Act, means any statement as to the number, quantity, measure, gauge, or weight of any goods; or the place in which they were made or the mode of their manufacture; or the material of which they are composed; or as to the goods being the subject of an existing patent, privilege, or copyright (*c*). The Act exempts from punishment a person who makes dies, &c., for others, or applies marks to the goods of others, in the ordinary course of his business, provided he has acted in good faith and has taken proper precautions, and that when required to do so he gives the injured person all the information in his power (*d*). No proceedings are to be taken under the Act after three years from the offence, or after one year from its discovery (*e*).

Forging an entry in the trade-mark register or knowingly making or using in evidence a forged copy of an entry in the register is a misdemeanour (*f*).

The piracy of a registered design is punishable by a penalty of £50 recoverable by the registered proprietor (*g*).

(*a*) *Ibid.* s. 2, sub-s. 2.
(*b*) 50 & 51 Vict. c. 28, s. 2, sub-s. 3.
(*c*) *Ibid.* s. 3, sub-s. 1.
(*d*) *Ibid.* s. 6.
(*e*) *Ibid.* s. 15.
(*f*) 5 Edw. VII. c. 15, s. 66.
(*g*) 7 Edw. VII. c. 29, s. 60.

UNLAWFUL INTERFERENCE WITH TRADE BY COMBINATIONS, ETC.

It is perfectly legal for workmen to protect their interests by meeting or combining together, or forming unions, in order to determine and stipulate with their employers the terms on which only they will consent to work for them. But this right to combine must not be allowed to interfere with the right of those workmen who desire to keep aloof from the combination to dispose of their labour with perfect freedom as they think fit. Nor must it interfere with the right of the masters to have contracts of service duly carried out. Infraction of such rights will bring the wrongdoers within the pale of the criminal law of conspiracy.

The law on this subject is principally contained in the Conspiracy and Protection of Property Act, 1875 (*h*). It will be well to prefix a provision of the Trade Union Act, 1871 (*i*). The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

The following acts are forbidden, and are punishable on summary conviction or indictment, by imprisonment not exceeding three months, or penalty not exceeding £20.

(i) For *any* (*k*) person, with a view to compel any other person to abstain from doing, or to do, any act (*l*) which such other person has a legal right to do or abstain from doing—to wrongfully and without authority,

(a) Use violence to, to intimidate (*m*), such other person, or his wife, or children, or injure his property (*n*);

(*h*) 38 & 39 Vict. c. 86, s. 7, repealing 34 & 35 Vict. c. 32, and other Acts.

(*i*) 34 & 35 Vict. c. 31, s. 2.

(*k*) This word makes the law of general application, and not restricted to trade disputes, though practically the offence most frequently occurs in connection therewith. The act of one person is sufficient to constitute an offence, and it is not necessary that there should be any crowd or combination. *Smith* v. *Thomasson*, [1890] 16 Cox, 740.

(*l*) The particular act must be specified in the summons and conviction. *R.* v. *McKenzie*, [1892] 2 Q. B. 519; 61 L. J. M. C. 181; and see note (*n*) below.

(*m*) It has been held that the meaning of the word "intimidate" must be limited to threats of personal violence. v. *Curran* v. *Treleaven*, [1891] 2 Q. B. at p. 5.

(*n*) The particular property injured must be specified in the summons and conviction. *Smith* v. *Moody*, [1903] 1 K. B. 56; 72 L. J. K. B. 43.

(b) Persistently follow him about from place to place;

(c) Hide his tools, clothes, or other property, or hinder him in the use thereof;

(d) Watch or beset his house, or other place where he resides, or works, or carries on business (commonly known as "picketing"), unless the purpose be to peacefully obtain or communicate information or to peacefully persuade any person to abstain from working (*o*);

(e) Follow him, with two or more other persons, in a disorderly manner in or through any street or road.

(ii) For a person employed by the municipal authorities, public companies, contractors, or others who have undertaken to supply gas or water, either alone or with others wilfully and maliciously to break his contract of service, knowing or having reasonable cause to believe that the probable consequence will be to deprive the inhabitants wholly or to a great extent of gas or water (*p*).

(iii) For a person wilfully and maliciously to break his contract of service, knowing, or having reason to believe, that the probable consequence will be to endanger human life, or cause serious bodily injury, or expose valuable property to destruction or serious injury (*q*).

Upon a prosecution for any of the above offences, the offender may elect to have the case tried on indictment, and not by a Court of summary jurisdiction (*r*).

Trade disputes now form an exception to the general law of conspiracy in one respect. If, in connection with a trade dispute, two or more persons combine to do something which if done by one is not punishable as a crime, they will not, on account of their number, be indictable for the conspiracy at common law (*s*).

(*o*) 6 Edw. VII. c. 47, s. 2.
(*p*) 38 & 39 Vict. c. 86, s. 4.
(*q*) *Ibid.* s. 5.
(*r*) *Ibid.* s. 9.
(*s*) 38 & 39 Vict. c. 86, s. 3; nor is it even actionable, 6 Edw. VII. c. 47, s. 1.

CHAPTER VII.

CONSPIRACY.

CONSPIRACY consists in the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in the intention of one person only it is not indictable, but when two persons agree to carry it into effect the very plot is an act in itself which is punishable by the law (*t*).

The offence of conspiracy may be classed under three heads: first, where the end to be attained is in itself a crime; second, where the object is lawful, though the means to be resorted to are unlawful; third, where the object is to do an injury to a third party, or a class, though, if the wrong were inflicted by a single individual, it might be a civil wrong and not a crime (*u*).

The gist of the offence is the *combination*. Of this offence a single person cannot be convicted, unless, indeed, he is indicted with others who are dead or unknown to the jurors or are not in custody (*w*); and where two persons are indicted together for conspiracy both must be convicted or both acquitted (*x*). Even if one of the accused pleads guilty he must be discharged if his co-defendant be acquitted (*y*). And, on the same ground, man and wife cannot by themselves be convicted, for they are one person. An agreement by two or more persons to do certain acts may be criminal, although those acts, if done by one person, might not expose him to

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(*t*) *R.* v. *Brailsford*, [1905] 2 K. B. at p. 746; 75 L. J. K. B. 730.
(*u*) *R.* v. *Parnell*, [1881] 14 Cox, 508.
(*w*) *R.* v. *Kinnersley*, [1719] 1 Str. 193; *Beechey* v. *R.*, 85 L. J. P. C. 32.
(*x*) *R.* v. *Manning*, [1883] 12 Q. B. D. 241; 53 L. J. M. C. 85.
(*y*) *R.* v. *Plummer*, [1902] 2 K. B. 339; 71 L. J. K. B. 805.

any punishment whatever. For instance, buying goods without intending to pay for them is not in itself a crime (*z*), but an *agreement* between two or more persons to assist each other in doing so would amount to a conspiracy (*a*). We have just remarked that the gist of the offence is the agreement; a mere intention will not suffice to constitute the crime (*b*). But if the agreement (the conspiracy itself) can be proved, there is no need to prove that anything has been done in pursuance of it. Of course, the existence of the unlawful agreement is generally evidenced by some overt acts, but these are evidence merely, and not essential if the agreement can be proved otherwise (*c*).

The definition shows a conspiracy to be an agreement to do an *unlawful* act. It is the indefinite meaning of this word "unlawful" that gives to the crime of conspiracy its wide extent. The following are the most important classes of conspiracy:—

(1) When the end to be accomplished would be a *crime* in each of the conspiring parties; in other words, a conspiracy to commit a crime (*d*). The case of murder is specially provided for by statute, the persons conspiring being liable to penal servitude to the extent of ten years (*e*). And by the same statute one who solicits, encourages, persuades, or endeavours to persuade, or proposes to any person to murder any other person, is liable to the same punishment (*f*). Such an offence may be committed by the publication of an article in a newspaper, although not specifically addressed to any one person (*g*). To constitute a solicitation or persuasion there must be some communication to the person said to have been solicited, but it is not necessary to show that the mind of such person was affected. Even if the communication

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(*z*) Assuming, of course, that there is no false representation made. See, however, p. 236 as to certain cases of this kind.
(*a*) *R.* v. *Orman*, [1880] 14 Cox, 381.
(*b*) *Mulcahy* v. *R.*, [1868] L. R. 3 H. L. at p. 317.
(*c*) *R.* v. *Gill*, [1818] 2 B. & Ald. 204.
(*d*) v. Archbold, 1350.
(*e*) 24 & 25 Vict. c. 100, s. 4.
(*f*) *Ibid.*
(*g*) *R.* v. *Most*, [1881] 7 Q. B. D. 244: 50 L. J. M. C. 113.

cannot be proved to have reached that person the prisoner may be convicted of the common law misdemeanour of *attempting* to commit the statutory offence (*h*).

(2) Where, with a malicious design to do an injury, the purpose of the conspiracy is to effect a wrong (*i*), though not such a wrong as, when perpetrated by a single individual, would amount to an offence against the criminal law. We may distinguish the following cases:

(i) Conspiracies to obstruct, prevent, or defeat the course of public justice, as, *e.g.*, a conspiracy to charge a man falsely with any crime (*k*); or conspiracies to do anything which will cause a public mischief, as, for instance, to obtain passports by false pretences (*l*).

(ii) Conspiracies to cheat and defraud, as, for example, where one of two partners conspires with a third person to cheat his partner out of partnership property in a manner which would not amount to a criminal offence (*m*).

(iii) Conspiracies to injure a man in his civil rights otherwise than by fraud, as, *e.g.*, a conspiracy to make pirated music for sale and so to deprive the owner of his copyright (*n*) or a conspiracy to injure a man in his trade by unlawful means (*o*).

It should be noted that the basis of a *civil* action for conspiracy is damage caused by an unlawful act. The acts of several persons in combination may be unlawful where similar acts by one person could not be; several persons, for instance, may coerce and intimidate where one alone could not do so. Acts causing damage and done in pursuance of a conspiracy may therefore be actionable and also indictable, although, if done by one person, they would not even be actionable (*p*). But even when damage has resulted

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(*h*) *R.* v. *Krause*, [1902] 66 J. P. 121.

(*i*) *R.* v. *Warburton*, [1870] L. R. 1 C. C. R. 274; 40 L. J. M. C. 22; 11 Cox C. C. 584; *R.* v. *Aspinall*, [1876] 2 Q. B. D. at p. 59.

(*k*) Archbold, 1354.

(*l*) *R.* v. *Brailsford*, [1905] 2 K. B. 730; see also *R.* v. *Porter*, [1910] 1 K. B. 369; 3 Cr. App. R. 237.

(*m*) *R.* v. *Warburton*, L. R. 1 C. C. R. 274; 40 L. J. M. C. 22.

(*n*) *R.* v. *Willetts*, 70 J. P. 127.

(*o*) *R.* v. *Rowlands*, 17 Q. B. 671.

(*p*) *Quinn* v. *Leatham*, [1901] A. C. 495.

from the acts of a combination, no action will lie unless there has been some unlawful act. Damage resulting from the exercise of legal rights will not be ground for an action merely because their exercise was due to express malice (*q*).

We have already noticed the case of trade conspiracies and referred to an exception to the common law doctrine in such matters (*r*).

Conspiracy is a misdemeanour, punishable by fine or imprisonment, or both; in the case of conspiracy to murder by penal servitude to the extent of ten years (*s*). This crime falls within the provisions of the Vexatious Indictments Act (*t*).

It should be noticed that the acts and statements of any of the conspirators in furtherance of the common design may be given in evidence against the others, although they were not present at the time when such acts were done or words spoken. But before this can be done evidence of the existence of the conspiracy must first be given (*u*).

If the purpose of the conspiracy is a felonious one and *actually carried out*, the conspiracy is merged in the felony; so that after a conviction for the felony the defendant cannot be tried for the conspiracy. But if the defendant is indicted for the conspiracy, he is not entitled to an acquittal because the facts show a felony. Under such circumstances, however, he cannot be subsequently tried for the felony unless the Court has discharged the jury from giving a verdict on the misdemeanour (*w*).

(*q*) *Allen* v. *Flood*, [1898] A. C. 1.
(*r*) v. p. 105.
(*s*) *supra*, p. 107.
(*t*) v. p. 330.
(*u*) Archbold, 1359.
(*w*) 14 & 15 Vict. c. 100, s. 12.

CHAPTER VIII.

OFFENCES AGAINST PUBLIC MORALS, HEALTH, AND GOOD ORDER.

Under this head will be noticed a somewhat miscellaneous class of offences which are considered to affect the public rather than the individual; though some of them at first sight appear rather to concern particular persons, *e.g.*, bigamy.

They are, however, punishable not upon the mere ground of the immorality of the offender, but in order to prevent the injury to public morality which would result if their commission were unchecked.

BIGAMY.

The offence consists in marrying a second time while the defendant has a former husband or wife still living (*x*).

The second marriage is void, and constitutes a felony; and this whether the second marriage takes place in the United Kingdom or elsewhere, either within or without the King's dominions (*y*). There are certain cases which are excepted by the statute which declares the second marriage generally felonious; these excepted cases are:—

(i) A second marriage contracted elsewhere than in England or Ireland by any other than one of His Majesty's subjects (*z*).

(ii) A second marriage by one whose husband or wife has been continually *absent* from such person for the last seven years, and has not been known by such person to be living

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(*x*) 24 & 25 Vict. c. 100, s. 57.
(*y*) *R.* v. *Russell*, [1901] A. C. 446; 70 L. J. K. B. 998.
(*z*) 24 & 25 Vict. c. 100, s. 57.

within that time (*a*). Where absence for seven years is proved it is for the prosecution to show that the prisoner knew that his or her wife or husband was alive, and failing proof of such knowledge he is entitled to be acquitted (*b*).

(iii) A second marriage by one who, at the time of such second marriage, was *divorced* from the bond of the first marriage.

(iv) A second marriage by a person whose former marriage has been declared void by the sentence of any Court of competent jurisdiction, as, for instance, in a suit for nullity of marriage (*c*).

In none of these cases is the second marriage a felony; but in the second case it is a mere nullity.

It is no defence to the charge of bigamy that the subsequent marriage would in any case have been void, as for consanguinity or the like (*d*). But if the *first* marriage were void, the second will not be bigamous (*e*). There was at one time much conflict of judicial opinion as to whether a *bona-fide* belief by a prisoner at the time of the second marriage that her husband was then dead, such belief being based on reasonable grounds, was a sufficient defence although the period of seven years mentioned in the statute had not expired. In consequence of this conflict of opinion, Mr. Justice Stephen, who tried a prisoner on this charge, stated a case for the opinion of the Court for Crown Cases Reserved, after directing the jury that a belief in good faith and on reasonable grounds by the prisoner that her husband was dead was no defence. In this case the husband had not been heard of for five years preceding the second marriage, but reappeared shortly after it. The jury convicted the prisoner, stating, however, that they thought that she in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage. The Court was divided in opinion, but the majority of the judges decided, and it is

(*a*) 24 & 25 Vict. c. 100, s. 57.
(*b*) *R.* v. *Curgerwen*, [1865] L. R. 1 C. C. R. 1; 35 L. J. M. C. 58.
(*c*) 24 & 25 Vict. c. 100, s. 57.
(*d*) *R.* v. *Allen*, [1872] L. R. 1 C. C. R. 367; 41 L. J. M. C. 101.
(*e*) Archbold, 1244.

now settled law, that if in such a case the jury are satisfied of the prisoner's *bona fides*, and that she had reasonable grounds to believe that her husband was dead, she is entitled to an acquittal (*f*).

Both the first (*i.e.*, the real) and the second (so-called) wife or husband are competent witnesses. Formerly the first wife or husband was not a competent witness for the prosecution, but by the Criminal Justice Administration Act, 1914 (*g*) she (or he) may be called as a witness either for the prosecution or for the defence and without the consent of the person charged. The effect of this Act is, apparently, to make the first wife or husband a competent but not *compellable* witness (*h*).

This felony is punishable by penal servitude to the extent of seven years (*i*). The person who goes through the form of marriage with the bigamist, knowing him or her to be such, does not altogether escape liability. He or she may be (but seldom is) indicted as principal in the second degree, having been present aiding and assisting the other in committing the felony.

There are certain other offences connected with marriage. For instance, persons solemnising marriage, except in the manner required by law, are guilty of felony (*k*). Making false declarations, signing false notices or certificates of marriage, &c., are offences attended by the same penalties as perjury (*l*).

INDECENT CONDUCT.

To this head may be referred the public and indecent exposure of the person, which is a nuisance at common law. An intention to outrage decency or to annoy need not be shown. For instance, bathing in a state of nudity near

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(*f*) *R.* v. *Tolson*, [1889] 23 Q. B. D. 168; 58 L. J. M. C. 97.
(*g*) 4 & 5 Geo. V. c. 58, s. 28, sub-s. 3.
(*h*) Archbold, 449, 452, 1232; v. also *post*, p. 367.
(*i*) 24 & 25 Vict. c. 100, s. 57.
(*k*) 4 Geo. IV. c. 76, s. 21; 6 & 7 Will. IV. c. 85, s. 39.
(*l*) 1 & 2 Geo. V. c. 6, s. 3. As to forging Marriage Licences, v. Forgery. As to Abduction, v. p. 166.

inhabited houses or a frequented footpath is an indictable offence (*m*). So also is the exposing for public sale or view any obscene book, print, picture, or other indecent exhibition. Both of these offences are misdemeanours and punishable by fine or imprisonment with hard labour, or both (*n*). Power is given to magistrates, under certain circumstances, to authorise the searching of houses and other places in which obscene books, &c., are suspected to be sold or otherwise published for gain, and to authorise their seizure and destruction (*o*).

The public exhibition of indecent pictures or writings, and the delivery of handbills containing similar obscene matter, are also punishable by fine and imprisonment under the Act 52 & 53 Vict. c. 18, and advertisements relating to diseases arising from sexual intercourse are declared to be indecent within the meaning of the Act.

It is a misdemeanour punishable on conviction on indictment with twelve months' imprisonment with hard labour, or upon summary conviction by a fine of £10, to send or attempt to send a postal packet which encloses any indecent print, book, or article, or which has on its cover any words, marks, or designs of an obscene or grossly offensive character (*p*). A newspaper proprietor who inserts advertisements inviting persons to send for such prints, &c., may, if he knew them to be indecent, be convicted as aiding and abetting such an offence (*q*).

GAMING AND GAMING-HOUSES.

The law does not deem it within its province to punish such practices as ordinary gaming, unless either some fraud is resorted to, or regular institutions are established for the purpose, or play is carried on in a public place so as to amount to a public nuisance.

(*m*) *R.* v. *Reed*, [1871] 12 Cox, 1.
(*n*) 14 & 15 Vict. c. 100, s. 29; v. also *post*, p. 123.
(*o*) 20 & 21 Vict. c. 83. As to Indecent Assaults, v. p. 161; Disorderly Houses, &c., v. p. 122; Acts of Indecency with a Male Person, v. p. 163.
(*p*) 8 Edw. VII. c. 48, s. 63.
(*q*) *R.* v. *De Marny*, [1907] 1 K. B. 388.

As to *Gaming*.—If any person by fraud, or unlawful device, or ill practice, in playing with cards, dice, or other games, or in betting or wagering on any game, sport, pastime, or exercise, win any sum of money or valuable thing, he is deemed guilty of obtaining money by false pretences, and punished accordingly (*r*).

Betting or gaming in any street or *public place*, to which the public have access, with any table or instrument of gaming, at any game of chance, subjects the player to the punishments of 5 Geo. IV. c. 83 (*s*), as a rogue and vagabond; or, at the discretion of the magistrate, to a penalty not exceeding 40s. for the first offence, and £5 for any subsequent offence (*t*). A railway carriage in transit where gaming is carried on is a public or open place within the meaning of the statute (*u*). Mere betting on horseracing is not within this statute (*w*). But now any person frequenting or loitering in streets or public places (but not racecourses) for the purpose of bookmaking or betting or paying or receiving bets may, for the first two offences, be fined £10 and £20 respectively by a Court of Summary Jurisdiction; and for a third offence, and also in every case where it is shown that while committing the offence he had any betting transaction with a person under the age of sixteen, he may be convicted on indictment and sentenced to a fine of £50 or to six months' imprisonment (*x*).

The subject of Lotteries will be considered under the head "Nuisances."

A person who effects a marine insurance without having any *bona-fide* interest in the safe arrival of the ship or in the preservation of the subject-matter insured; and any person in the employment of the owner of a ship, not being a part owner, who effects a contract of marine insurance in

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(*r*) 8 & 9 Vict. c. 109, s. 17. Tossing for wagers is a pastime or exercise within the meaning of this section. *R.* v. *O'Connor*, [1881] 45 L. T. N. S. 512; 15 Cox, 3.

(*s*) v. *r.* 127.

(*t*) 36 & 37 Vict. c. 38, s. 3.

(*u*) *Langrish* v. *Archer*, [1882] 10 Q. B. D. 44; 52 L. J. M. C. 47.

(*w*) *Lester* v. *Quested*, [1901] 20 Cox, C. C. 66.

(*x*) 6 Edw. VII. c. 43.

relation to the ship, the contract being made "interest or no interest," or subject to a similar term, is liable on summary conviction to six months' imprisonment, with or without hard labour, and a fine of £100. A broker or other person through whom such a contract is effected, and any insurer with whom it is effected, is liable to the same punishment if he knew that the contract was one of the above nature (*y*).

As to *Gaming-houses*.—Houses of this description are classed among public nuisances. The keepers are guilty of a common law misdemeanour, and liable to fine or imprisonment, or both.

The chief steps taken by the Legislature to suppress the evils of gaming-houses are the following: A statute of Henry VIII. prohibited the keeping of any common house for dice, cards, or other unlawful games, under a penalty upon the keeper of forty shillings for every day, and upon a player of six shillings and eightpence for every time of playing (*z*). Subsequent statutes included other games under heavier penalties (*a*). By a later statute (*b*), the statute of Henry VIII. is repealed so far as it prohibited bowling, tennis, or other games of mere skill. Further provision was also made against those who own or occupy any house, room, or place, who shall use the same for the purpose of unlawful gaming. The owner or keeper, and every person assisting in conducting the business of the house, is liable to a penalty not exceeding £500, in addition to the penalty under 33 Hen. VIII.; or to imprisonment not exceeding twelve months (*c*).

A common gaming-house has been defined to be a house kept or used for playing therein unlawful game (*i.e.*, any game

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(*y*) 9 Edw. VII. c. 12, s. 1. Proceedings cannot be instituted under this Act without the consent of the Attorney-General. There is a right of appeal to Quarter Sessions.

(*z*) 33 Hen. VIII. c. 9.

(*a*) See 9 Anne, c. 19; 12 Geo. II. c. 28; 13 Geo. II. c. 19; 18 Geo. II. c. 34.

(*b*) 8 & 9 Vict. c. 109, amended by 17 & 18 Vict. c. 38.

(*c*) 8 & 9 Vict. c. 109, s. 4; and 17 & 18 Vict. c. 38, s. 4.

of chance *or* any mixed game of chance or skill (*d*)) and in which a bank is kept by one of the players or in which the chances are not alike favourable to all the players (*e*).

A club-house where mere games of chance are played nightly is a common gaming-house, especially if the stakes are excessive, and the proprietor of the house, and the committee of management, are liable to the penalty of £500; mere players are not, but they may be bound over not to haunt gaming-houses, and for playing dice and certain games in gaming-houses fines may be imposed on the players (*f*).

No house, office, room, or other place may be opened or used for the purpose of the owner, occupier, or keeper, or any person using the same or having the care or management of the business, betting with persons resorting there, or for the purpose of receiving any money or valuable thing as the consideration for any promise to pay or give any money or valuable thing on the event of any race, fight, game, sport, or exercise (*g*). Every such house is declared to be a common nuisance, and also a gaming-house within the Gaming Act, 1845 (*h*). The penalty is £100, or six months' imprisonment with hard labour (*i*). Exhibiting placards, or otherwise advertising betting-houses, and offering by such means to give information with a view to betting, are punished by a penalty of £30, or imprisonment for two months (*k*). Any fixed and recognised spot (such as a stool and an umbrella tent over it on a racecourse) may be a betting place within the meaning of the Act (*l*); but nevertheless, the place must be something in the nature of a betting-house or office, and this is not the case where a bookmaker merely stands on a

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(*d*) *Jenks* v. *Turpin*, [1884] 13 Q. B. D. at 530; 53 L. J. M. C. 161.

(*e*) 8 & 9 Vict. c. 109, s. 2.

(*f*) *Jenks* v. *Turpin*, *supra;* as to the liability of the players, see 33 Hen. VIII. c. 9, ss. 8, 9; 12 Geo. II. c. 28, s. 3; 13 Geo. II. c. 19, s. 9.

(*g*) 16 & 17 Vict. c. 119, s. 1.

(*h*) 8 & 9 Vict. c. 109.

(*i*) 16 & 17 Vict. c. 119, s. 3. This penalty is enforceable on summary conviction, the accused having a right to elect to be tried by a jury, v. p. 453. But he may also be indicted for the nuisance.

(*k*) 16 & 17 Vict. c. 119, as amended by 37 Vict. c. 15.

(*l*) *Bows* v. *Fenwick*, [1874] L. R. 9 C. P. 339; 43 L. J. M. C. 107; *Brown* v. *Patch*, [1899] 1 Q. B. 892; 68 L. J. Q. B. 588.

racecourse, in an enclosure to which the public have as free access as himself (*m*). The Act (*n*) is directed against the owner or occupier of a place used for betting, and not against persons resorting thereto for the purpose of betting (*o*); but it will be sufficient "occupation" if the defendant uses the place with the knowledge and assent of the real occupier of the premises (*p*). A *bona-fide* club, although it may be intended that betting should be carried on in the club-house between the members, but not with non-members, is not a house used for betting within the meaning of this Act (*r*). But it will be otherwise where the club consists partly of bookmakers and partly of members who go there to bet with such bookmakers and not with each other (*s*). And the office of a newspaper, which invited persons to enter upon a "coupon competition" and to pay a small sum for guessing the winners of horse-races upon the understanding that those successful should receive prizes, was held to be within the Act (*t*).

The fact that the entrance of a peace officer is obstructed, or that the place is found provided with means of gaming, is evidence that the house is a common gaming-house. Heavy penalties are imposed for such obstruction, and also upon any persons found in the house if they refuse their names and addresses, or give them falsely (*u*).

Further, by the Licensing Consolidation Act, 1910, if any licensed victualler suffers any gaming or unlawful game on his premises, or keeps or uses them in contravention of the Betting Act, 1853, or suffers them to be so used, he is liable to penalties not exceeding for the first offence £10 and for the second offence £20 (*w*).

(*m*) *Powell* v. *The Kempton Park Racecourse Company, Lim.* [1899] App. Cas. 143; 68 L. J. Q. B. 392. See, however, *R.* v. *Humphrey*, [1898] 1 Q. B. 875.

(*n*) 16 & 17 Vict. c. 119.

(*o*) *Snow* v. *Hill*, [1885] 14 Q. B. D. 588; 54 L. J. M. C. 95.

(*p*) *R.* v. *Deaville*, [1903] 1 K. B. 468; 72 L. J. K. B. 272.

(*r*) *Downes* v. *Johnson*, [1895] 2 Q. B. 203; 64 L. J. M. C. 238.

(*s*) *R.* v. *Corrie*, [1904] 68 J. P. 294; *Jackson* v. *Roth*, [1919] 1 K. B. 102.

(*t*) *R.* v. *Stoddart*, [1901] 1 K. B. 177; 70 L. J. Q. B. 189.

(*u*) 17 & 18 Vict. c. 38.

(*w*) 10 Edw. VII. & 1 Geo. V. c. 24, s. 79.

It has been made a misdemeanour, punishable by imprisonment with hard labour for three months, or a fine of £100, or both—(1) For the purpose of making a profit to send to a person known to be an infant any advertisement, letter, &c., inviting him to *bet* or to apply for information as to betting, racing, &c., or *to borrow money* (*x*); or (2) without the sanction of any Court, to solicit, for the purpose of making a profit, an infant to make an affidavit in connection with any loan (*y*). If the letter, &c., inviting to bet is sent to an infant at a university or school, the sender is to be deemed to have known of his infancy unless he proves that he had reasonable grounds for believing the contrary; and there is the same presumption of knowledge of infancy in the case of a letter inviting an infant to *borrow* money to whatever place it may be addressed (*z*).

COMMON OR PUBLIC NUISANCES.

A common or public nuisance is an unlawful act or an omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all the King's subjects. It will be seen therefore that such public nuisances consist of acts either of commission or of omission, that is, causing something not authorised by law to be done which annoys the community generally, or neglecting to do something which a legal duty and the common good require. Public nuisances are opposed to private nuisances, which annoy particular individuals only—that is, to which all persons are not liable to be exposed (*a*). The distinction is one based on the extent of the operation of the evil and not one relating to the class of evil; inasmuch as all kinds of nuisances which when injurious to private persons are action-

(*x*) 55 Vict. c. 4, ss. 1, 2.
(*y*) *Ibid.* s. 4.
(*z*) *Ibid.* s. 3; 63 & 64 Vict. c. 51, s. 5.
(*a*) Archbold, 1247. *R.* v. *Byers*, [1907] 71 J. P., at p. 207.

able as private nuisances, when detrimental to the public welfare are punishable on prosecution as public nuisances. For instance, the obstruction of a public highway, in however remote a district, and although it may only lead to one or two houses, is a public nuisance, because every member of the public has a right to use the road, though few may desire to do so; whereas, on the other hand, a weir or dam in a non-navigable river, by which fish are prevented from running up the river, only amounts to a private nuisance to the owners of land on the banks of the river, though they may be many hundreds in number (*b*).

Common nuisances are indictable at common law as misdemeanours, but many, perhaps most, of them are prohibited by various statutes. They do not give rise to civil action by every one who is subjected to the common annoyance. But if any one can prove that he has sustained from the public nuisance a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial, he may pursue his civil remedy and obtain compensation or an injunction (*c*). Conversely, private nuisances are actionable only, and are not indictable.

Another course of proceeding is sometimes available in the case of nuisances, namely, *abatement* or removal of the nuisance without legal proceedings. In private nuisances this is commonly allowed to be done by the party aggrieved. In the case of public nuisances a private individual cannot resort to this course unless the nuisance does him a special injury, and then only so far as is necessary to exercise his right (*d*).

A County Council or Urban District Council may remove obstructions to or encroachments upon highways vested in them (*e*).

Urban or Rural District Councils are empowered to require a person by whose act or default a nuisance arises or

(*b*) *Leconfield* v. *Lonsdale*, [1870] L. R. 5 C. P. 657; 39 L. J. C. P. 305.
(*c*) *Benjamin* v. *Storr*, [1874] L. R. 9 C. P. 400; 43 L. J. C. P. 162.
(*d*) *Dimes* v. *Petley*, [1850] 15 Q. B. 276; *Ford* v. *Harrow Urban Council*, [1903] 88 L. T. 394.
(*e*) *Reynolds* v. *Urban District Council of Presteign*, [1896] 1 Q. B. 604; 65 L. J. Q. B. 400.

continues to abate the same within a specified time, and to execute such works as may be necessary for that purpose (*f*). If this requirement is not complied with complaint may be made to the justices, and an order obtained to abate the nuisance and imposing a penalty (*g*). If the order is disobeyed, further penalties are incurred, and power is given to the sanitary authority to abate the nuisance, and recover from the offender any expense occasioned thereby (*h*).

The principal classes of public nuisances will be briefly noticed (*i*):

(i) Nuisances to *highways, bridges, and public navigable rivers.*—These annoyances may be either positive, by actual obstruction; or *negative*, by want of reparation. In the latter case, only those persons are liable whose legal duty it is to keep the roads, &c., in repair (*k*). The former class consists of a variety of offences—for example, laying rubbish on the road, or digging trenches in it; assembling or attracting a crowd (*l*); or diverting part of a public navigable river, or obstructing the navigation.

In cases of this kind the real object of the proceedings is to obtain the removal of an obstruction or to enforce the duty to repair, and not to punish the defendant. It is therefore usual to postpone sentence to enable the defendant to do his duty in this respect, and then to inflict a nominal fine. The Court may, if it thinks fit, give judgment for the prostration or removal of an obstruction and the sheriff will then remove it (*m*). Upon a prosecution for the non-repair or obstruction of a highway, public bridge, or navigable river,

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(*f*) 38 & 39 Vict. c. 55, s. 9.

(*g*) *Ibid.* s. 96.

(*h*) *Ibid.* s. 98.

(*i*) The following is a useful classification of nuisances (v. Archbold, 1247): (i) Nuisances to bridges, highways, etc.; (ii) Nuisances to public health or comfort; (iii) Nuisances to public safety (see examples of "miscellaneous nuisances," *post*, p. 122); (iv) Nuisances to public morals or decency (including indecent conduct, disorderly houses, etc.); (v) Nuisances in respect of corpses.

(*k*) 5 & 6 Will. IV. c. 50, and other statutes cited, Archbold, 1284.

(*l*) *Barber* v. *Penley*, [1893] 2 Ch. 447; 62 L. J. Ch. 623; *R.* v. *Carlile*, [1834] 6 C. & P. 636.

(*m*) *Bagshaw* v. *Buxton Local Board*, [1875] 1 C. D., at p. 224; 45 L. J. Ch. 260.

either the prosecutor or the defendant may be ordered to pay costs to the other as in civil proceedings (*n*).

(ii) *Carrying on offensive or dangerous trades or manufactures.*—Manufactures which are injurious to the health, or so offensive to the senses as to detract sensibly from the enjoyment of life and property in their neighbourhood, are nuisances; and it is no defence that the public benefit outweighs the public annoyance (*o*). And, even though a noxious trade has already been established in a place remote from habitations and public roads, and persons come and build near, or a new road is made, an indictment for a nuisance will nevertheless lie (*p*). The presence of other nuisances will not justify one of them (*r*), and no length of time will legitimate a public nuisance, but the consideration of time may sometimes concur with other circumstances to prevent the character of nuisance from attaching. Where, for example, a neighbourhood has long been devoted to offensive trades an indictment will not lie for setting up another similar trade unless the public inconvenience is greatly increased (*s*).

The manufacture, sale, carrying, and importation of gunpowder, nitro-glycerine, and other explosive substances are regulated by the Explosives Act, 1875 (38 & 39 Vict. c. 17), which contains stringent regulations as to the carrying on of those trades.

The navigation of aircraft over certain areas may be prohibited by a Secretary of State, and the infringement of such a prohibition, except in the case of necessity, is punishable on conviction on indictment or summarily by imprisonment for six months or a fine of £200, or by both (*t*).

The fact that a nuisance has been created by works carried on under statutory powers affords no defence unless the statute either expressly sanctions the nuisance or authorises or directs

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(*n*) 8 Edw. VII. c. 15, s. 9, sub-s. 3.
(*o*) *R.* v. *Ward*, [1836] 5 L. J. K. B. 221.
(*p*) *Hole v. Barlow*, [1858], 4 C. B. (N. S.), at p. 336; 27 L. J. C. P. 208.
(*r*) *R.* v. *Neil*, [1826] 2 C. & P. 485.
(*s*) *R.* v. *Watts*, M. & M., 281; *R.* v. *Neville*, Peake (3rd ed.), 125.
(*t*) 1 & 2 Geo. V. c. 4; see also 2 & 3 Geo. V. c. 22.

the doing of what necessarily involves a nuisance (*u*). Statutory powers which are merely permissive do not confer any immunity from liability for nuisance (*w*).

Nuisances which affect the public health are dealt with in the numerous statutes which treat of that subject, and have already been referred to.

(iii) *Houses, &c., which interfere with public order and decency.*—The following places are nuisances, and, upon indictment, may be suppressed, and their owners, keepers, or ostensible managers punished by fine or imprisonment, or both: Disorderly inns or alehouses; bawdy-houses (*x*); gaming and betting-houses (*y*); unlicensed or improperly conducted playhouses, booths, stages for dancers, and the like.

Prosecutions for keeping a bawdy-house or gaming-house fall within the provisions of the Vexatious Indictments Act (*z*).

(iv) *Lotteries.*—All lotteries are declared by statute (*a*) public nuisances. A lottery is a distribution of prizes by lot or chance, *e.g.*, selling packets containing half a pound of tea and a coupon for something of uncertain value constitutes a lottery (*b*). But if the competition for prizes is decided by skill or judgment, although the skill required may be small, such a competition does not amount to a lottery (*c*). State lotteries were, however, authorised by successive Acts of Parliament until 1824, when they were discontinued.

(v) A vast number of other acts have been declared public nuisances at common law; for example, exposing in a public

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(*u*) *R.* v. *Pease*, [1832] 4 B. & Ad. 30; *Hammersmith, &c., Railway Co.* v. *Brand*, [1869] L. R. 4 H. L. 171; *London and Brighton Railway Co.* v. *Truman*, 11 A. C., at p. 50.

(*w*) *Metropolitan Asylums District* v. *Hill*, 6 A. C. 193; 50 L. J. Q. B. 353; *R.* v. *Bradford Canal Co.*, G. B. & S. 731; 34 L. J. Q. B. 191.

(*x*) 25 Geo. II. c. 36, s. 8; 3 Geo. IV. c. 114; 48 & 49 Vict. c. 69, s. 13.

(*y*) v. p. 115, *et seq.*

(*z*) v. p. 330.

(*a*) 10 & 11 Will. III. c. 17. See also 42 Geo. III. c. 119, s. 2.

(*b*) *Taylor* v. *Smetten*, [1883] 11 Q. B. D. 207; 52 L. J. M. C. 100.

(*c*) *Stoddart* v. *Sagar*, [1895] 2 Q. B. 474; 64 L. J. M. C. 234; *Hall* v. *Cox* [1899] 1 Q. B. 198; 68 L. J. Q. B. 167.

thoroughfare persons afflicted with infectious diseases; exposing the person, and other indecent public exhibitions(*d*); allowing mischievous dogs to go abroad unmuzzled, the owner being aware of their nature; keeping fierce animals in places open to the public; having an unfenced excavation near a public street; keeping a corpse unburied if the defendant has the means of providing burial (*e*); or disposing of it in such a way as to cause a public nuisance (*f*); or with a view to prevent an inquest being held upon it (*g*); removing, without lawful authority and from whatever motive, a corpse from a grave (*h*); making great noises in the street at night; using firearms in the highway to the terror of the public (*i*); selling food unfit for human consumption (*k*); and in general anything which is an appreciable grievance to the public at large.

It was not until recently an offence to burn a dead body provided it was not done in such a way as to cause a nuisance. An Act has, however, now been passed enabling burial authorities to construct proper crematoria and providing that any person who shall procure or take part in the burning of human remains except in accordance with the Act and the regulations made under it shall be liable to a penalty of £50. In order to prevent the process of cremation from being used for improper purposes it is also provided that a person who, with intent to conceal the commission or impede the prosecution of any offence, procures or attempts to procure the cremation of a body or makes any declaration or certificate under the Act, shall be liable to penal servitude for five years; and if even without such intent a person wilfully makes any false representation, or signs, or utters, any false certificate with a view to procuring the burning of any human remains,

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(*d*) v. pp. 112—13.
(*e*) *R.* v. *Vann*, [1851] 2 Den. C. C. 325.
(*f*) *R.* v. *Price*, [1884] 12 Q. B. D. 247.
(*g*) *R.* v. *Stephenson*, [1884] 13 Q. B. D. 331; 53 L. J. M. C. 176; and see 2 Edw. VII. c. 8, s. 8, sub-s. 3.
(*h*) *R.* v. *Sharpe*, [1857] 26 L. J. M. C. 47; D. & B. 160.
(*i*) *R.* v. *Meade*, [1903] 19 Times L. R. 540.
(*k*) *R.* v. *Dixon*, 3 M. & S. 11.

he is liable to imprisonment with or without hard labour for two years (*l*).

There are two cases where there might be a doubt as to the person who is criminally responsible for a nuisance. As between landlord and tenant the rule is that the person who has the control of the premises is liable for the consequences of a nuisance. The tenant is therefore *prima facie* liable, but he may rebut that presumption by showing that the landlord in fact has the control; as, for example, where a public nuisance is caused by the failure of the landlord to do repairs for which he is responsible, and in respect to which he has control of the premises (*m*). A master or employer is liable for a nuisance caused by the acts of his servants if done in the course of their employment, even though those acts are done without his knowledge and contrary to his general orders (*n*).

ADULTERATION AND UNWHOLESOME PROVISIONS.

The modern law as to *adulteration* is contained chiefly in the Sale of Food and Drugs Act, 1875 (*o*). Mixing or ordering, or permitting other persons to mix, colour, or stain, any article of food with any material injurious to health, with intent that the same may be sold in that state, is punishable for the first offence by a penalty of £50; the second offence is a misdemeanour, punishable by imprisonment not exceeding six months (*p*). The same consequences attend the adulteration of drugs, so as to affect injuriously the quality or potency of such drugs (*q*). In either case the person is excused if he can prove absence of knowledge of the adulteration, and that he could not with reasonable diligence

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(*l*) 2 Edw. VII. c. 8, s. 8.
(*m*) *Cavalier* v. *Pope*, [1905] 2 K. B., at 762.
(*n*) *R.* v. *Stephens*, [1866] L. R. 1 Q. B. 702; 35 L. J. Q. B. 251; v. p. 12.
(*o*) 38 & 39 Vict. c. 63, which applies equally to the case of a purchase by a private individual under section 12 and by the public officer mentioned in section 13 of the Act. *Parsons* v. *The Birmingham Dairy Company*, [1882] 9 Q. B. D. 172; 51 L. J. M. C. 111; see also 62 & 63 Vict. c. 51.
(*p*) 38 & 39 Vict. c. 63, s. 3.
(*q*) *Ibid.* s. 4.

have obtained that knowledge (*r*). He is also to be discharged if he can prove that he bought the article in the same state as he sold it, with a warranty (*s*). The giving of a false warranty is punishable by fine (*t*).

There are other minor offences in connection with the sale of food, &c., viz., selling to the prejudice of the purchaser any article of food, or any drug, which is not of the nature, substance, or quality of the article demanded by such purchaser (*u*); abstracting from an article of food so as to affect injuriously its quality, substance, or nature, with the intent that the same may be sold in its altered state without notice thereof (*w*), the penalty in each case being £20.

In a prosecution under this enactment for selling any article of food, or any drug, which is not of the nature, substance, or quality demanded by the purchaser, it is not necessary to prove guilty knowledge on the part of the seller (*x*). But the absence of such guilty knowledge would be a defence to a charge of adulteration under the third or fourth sections of the Act, and also to a charge of giving a false warranty under the twenty-seventh section (*y*).

Medical officers and inspectors of nuisances are empowered by the Public Health Act, 1875, to inspect and examine any animal, meat, fish, vegetables, corn, bread, milk, &c., sold or exposed for sale, or in course of preparation for sale, and intended for the food of man, and, if they consider the same diseased, unsound, or unfit for food, to seize and carry it away so as to be dealt with by a justice, who may order it to be destroyed, and may also punish the person to whom it belongs or on whose premises it was found by a penalty of £20 for every animal, &c., so condemned, or by imprisonment (without fine) for a term not exceeding three months (*z*).

(*r*) *Ibid.* s. 5.
(*s*) *Ibid.* s. 25; 62 & 63 Vict. c. 51, s. 20.
(*t*) *Ibid.* s. 27; 62 & 63 Vict. c. 51, s. 20.
(*u*) *Ibid.* s. 6.
(*w*) *Ibid.* s .9.
(*x*) *Betts* v. *Armstead*, [1888] 20 Q. B. D. 771; 57 L. J. M. C. 100.
(*y*) *Derbyshire* v. *Houliston*, [1897] 18 Cox, C. C. 609.
(*z*) 38 & 39 Vict. c. 55, ss 116—19; 53 & 54 Vict. c. 59, s. 28.

The adulteration and killing of seeds are punishable by a fine of £5 for the first and £50 for a subsequent offence (*a*).

Penalties are also imposed for the adulteration, &c., of agricultural fertilisers and feeding-stuffs (*b*).

The adulteration of beer is forbidden under a penalty of £50 (*c*).

There are also special statutory provisions as to butter, and the sale of margarine (*i.e.*, any substance prepared in imitation of butter) is only allowed provided the conditions imposed by the Margarine Act (*d*) are complied with. These conditions require, amongst other things, that all cases and packages containing margarine should be conspicuously marked with that word. The penalties for infringing this Act are £20 for the first offence, £50 for the second, and £100 for subsequent offences.

FACTORIES, WORKSHOPS, AND MINES.

By the Factory and Workshop Acts (*e*), many regulations are made as to the sanitary arrangements of such buildings, the safety of machinery, &c., used therein, the periods of employment of children and women, the education of children, accidents, and many other matters as to which the reader is referred to the statutes. Pecuniary penalties (and in some cases imprisonment) are imposed for breaches of these regulations. There are also statutes containing similar provisions with regard to mines (*f*).

WANTON AND FURIOUS DRIVING.

Any one having the charge of any carriage or vehicle, who, by wanton or furious driving or racing, or by wilful misconduct, or by wilful neglect, causes any bodily harm

(*a*) 32 & 33 Vict. c. 112.
(*b*) 6 Edw. VII. c. 27.
(*c*) 48 & 49 Vict. c. 51, s. 8.
(*d*) 50 & 51 Vict. c. 29; see also 62 & 63 Vict. c. 51, and 7 Edw. VII. c. 21.
(*e*) 41 Vict. c. 16; 54 & 55 Vict. c. 75; 58 & 59 Vict. c. 37; 1 Edw. VII. c. 22.
(*f*) As to coal-mines, 1 & 2 Geo. V., c. 50. As to metalliferous mines, 35 & 36 Vict. c. 77. As to the employment of young persons under eighteen in shops or warehouses, 55 & 56 Vict. c. 62. As to laundries, 7 Edw. VII. c. 39.

to another, is guilty of a misdemeanour, and is liable to imprisonment not exceeding two years, or fine, or both (*g*).

If any person drives a motor-car recklessly or negligently or at a speed or in a manner dangerous to the public, even though no injury is caused, he is liable on summary conviction to a fine of £20, or in the case of a second conviction to a fine of £50 or imprisonment for three months (*h*). And whether or not danger is caused no person may drive a motor-car at a greater speed than 20 miles per hour, nor within any limits prescribed by the Local Government Board at a greater speed than 10 miles per hour; under a penalty of £10 for the first, £20 for the second, and £50 for the third offence (*i*).

VAGRANCY.

There are always in this country a great number of persons who, without making any attempt to earn a livelihood, make it their habit and mode of life to wander about begging and otherwise misconducting themselves. The law punishes such as *vagrants*, taking care that mere misfortune or poverty does not place an innocent person in this class (*k*). The chief statute on the subject is 5 Geo. IV. c. 83, amended by 1 & 2 Vict. c. 38; other Acts render liable to the punishments of these statutes those who evidence their culpability by certain kinds of conduct.

Persons of this character are diveded into three classes:—(1) Idle and disorderly persons; (2) Rogues and vagabonds; (3) Incorrigible rogues.

(1) *Idle and disorderly persons.*—This class consists of such characters as the following: (i) Persons able but

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(*g*) 24 & 25 Vict. c. 100. s. 35. If the driving is dangerous but no harm is occasioned, the driver is liable to a penalty of 40s., 7 Edw. VII. c. 53, s. 79.

(*h*) 3 Edw. VII. c. 36, ss. 1, 11.

(*i*) *Ibid.* s. 9.

(*k*) *Pointon* v. *Hill*, [1884] 53 L. J. M. C. 62; 15 Cox, 461, where it was held that workmen on strike who collected alms for themselves and their fellows were not "idle and disorderly persons" within the meaning of 5 Geo. IV. c. 83, s. 3.

refusing to work and becoming or allowing their families to become chargeable to the parish; (ii) those returning to and becoming chargeable on a parish from which they have been legally removed by justices; (iii) hawkers and pedlars wandering about and trading without licence; (iv) prostitutes behaving in public places in a riotous or indecent manner; (v) beggars asking alms or causing or encouraging any children to do so (*l*); (vi) insubordinate or disobedient paupers (*m*); (vii) persons fraudulently applying for parish relief or not making a complete disclosure of property in their possession (*n*).

The punishment on conviction before a magistrate for the first offence is imprisonment for a period not exceeding one month (*o*).

(2) *Rogues and vagabonds.*—Under this designation fall (i) those who commit any of the above offences a second time; (ii) persons pretending to tell fortunes; (iii) wandering about, lodging in a barn, in the open air, not having any visible means of subsistence, and not giving a good account of themselves; (iv) publicly exposing to view obscene prints, &c.; (v) publicly exposing their persons; (vi) exposing wounds or deformities in order to obtain alms; (vii) collecting alms or contributions of any kind under false pretences; (viii) running away and leaving wife or children chargeable to the parish; (ix) gaming or betting in public (*p*); (x) having in possession one or more of certain instruments with intent to commit a felonious act; (xi) being found in a dwelling-house, &c., for an unlawful purpose; (xii) suspected or reputed thieves frequenting or loitering about public places with intent to commit a felony (*q*); (xiii) making violent resistance when apprehended by a police officer as an idle and disorderly person, provided he be convicted as such;

(*l*) 5 Geo. IV. c. 83, s. 3. But begging for a special occasion is not within this Act, *Pointon* v. *Hill*, *supra*.
(*m*) 34 & 35 Vict. c. 108, s. 7.
(*n*) 11 & 12 Vict. c. 110, s. 10; 45 & 46 Vict. c. 36, s. 5.
(*o*) 5 Geo. IV. c. 83, s. 3.
(*p*) 36 & 37 Vict. c. 38; v. p. 128.
(*q*) 5 Geo. IV. c. 83, s. 4; 33 & 34 Vict. c. 112, s. 15; 54 & 55 Vict. c. 69, s. 7.

(xiv) acting contrary to directions of certificates given to persons discharged from prison under 5 Geo. IV. c. 83; s. 15 (*r*); (xv) an alien who disobeys an order for his expulsion, or an alien immigrant who is guilty of an offence against the Aliens Act, 1905 (*s*); (xvi) a male person who knowingly lives wholly or in part on the earnings of prostitution or who in a public place persistently solicits or importunes for immoral purposes (*t*). Also a man or woman who has for gain exercised control or influence over a prostitute so as to show that he or she is aiding her prostitution with any person; the punishment in these cases on summary conviction is *six* months' imprisonment, but the offender cannot upon a second conviction be proceeded against as an "incorrigible rogue." He can, however, be prosecuted either for the first or subsequent offence, by indictment, and in that case he may be sentenced to imprisonment for two years and, on a second conviction, if a male, to be whipped (*u*).

The punishment which may be awarded by the magistrate is imprisonment not exceeding three months. But from him there is an appeal to quarter sessions (*w*).

(3) *Incorrigible rogues.*—To be dealt with as such are: (i) Those who are convicted a second time of an act which makes the doer a rogue and vagabond (except as above stated); (ii) escaping out of a place of confinement before the expiration of the time for which they were committed under the Act; (iii) making violent resistance when apprehended by a peace officer as a rogue and vagabond, if subsequently convicted of the offence for which they were apprehended (*x*).

The magistrate may commit a person convicted as an incorrigible rogue to prison with hard labour until the next Quarter Sessions. By that Court he may be imprisoned with

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(*r*) 5 Geo. IV. c. 83, s. 4.
(*s*) 5 Edw. VII. c. 13, s. 3, sub-s. 2, and s. 7; as to which v. p. 440, *post*.
(*t*) 61 & 62 Vict. c. 39.
(*u*) 2 & 3 Geo. V. c. 20, s. 7, sub-ss. 1, 4, 5.
(*w*) 5 Geo. IV. c. 83, ss. 4, 14; 4 & 5 Geo. V. c. 58, s. 37.
(*x*) 5 Geo. IV. c. 83, s. 5.

hard labour for a period not exceeding one year and ordered to be whipped (*y*).

SENDING UNSEAWORTHY SHIPS TO SEA.

Every person who sends or attempts to send, or is a party to sending or attempting to send, a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, is guilty of a misdemeanour (*z*).

The master of a British ship knowingly taking her to sea in such an unseaworthy state is also guilty.

But the accused will not be deemed guilty if he proves in the former cases that he has used all reasonable means to ensure the ship being sent to sea in a seaworthy state, or that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable; in the case of the master, if he proves the latter of these points.

The consent of the Board of Trade is necessary before the institution of any prosecution for this offence (*a*).

(*y*) *Ibid.* s. 10. The incorrigible rogue is not *indicted* at Quarter Sessions, but merely brought up for sentence, he having been already convicted at Petty Sessions. Though *drunkenness* is not an indictable offence, but only punishable on summary conviction, the subject may have a passing notice here. A person found drunk and incapable in any street or public thoroughfare, building, or other place, or on any licensed premises, is liable to a penalty of 10s. for the first offence; 20s. and 40s. for the second and third within the twelve months; if he is in charge of a child under seven years of age the penalty is 40s. or imprisonment for a month (2 Edw. VII. c. 28, s. 2). If, whilst drunk, a person is guilty of riotous or disorderly behaviour, or is in charge of any carriage, horse, cattle, or steam-engine, or is in possession of any loaded firearms, the penalty is 40s. or imprisonment for a month (35 & 36 Vict. c. 94, s. 12). A penalty is inflicted upon publicans for permitting drunken conduct, 10 Edw. VII. and 1 Geo. V. c. 24, s. 75; v. also 10 & 11 Vict. c. 89. As to the detention in an inebriate reformatory of criminal habitual drunkards, v. p. 440. As to prohibition of sale of liquor to persons declared to be habitual drunkards, v. 2 Edw. VII. c. 28, s. 6.

(*z*) 57 & 58 Vict. c. 60, s. 457.

(*a*) The same Act provides heavy pecuniary penalties for overloading sea-going ships.

NEGLECT OF DUTY BY MASTERS, ETC., OF SHIPS.

Owners and masters of ships are bound to conform with the regulations as to lights and sailing rules prescribed by the Merchant Shipping Act Amendment Act, 1894, and in case of wilful default the person offending is guilty of a misdemeanour (*b*).

It is a misdemeanour for a pilot when piloting a ship, by wilful breach or neglect of duty or by reason of drunkenness, to do any act tending either to the immediate loss or serious damage of the ship, or to endanger the life or limb of any person on board. There are also severe pecuniary penalties for acts of minor misconduct (*c*).

It is also a misdemeanour for the master or person in charge of a vessel to fail, without reasonable cause, to stand by another vessel with which his own has come into collision, or to render all necessary assistance to the passengers and crew, or to give to the master of the other vessel the name of his own vessel (*d*).

TRADES REQUIRING A LICENCE OR REGISTRATION.

There are certain trades and professions as to which the law requires for various reasons that those who exercise them shall in some cases obtain a licence and in others shall register themselves, and pecuniary penalties, in most cases severe, are inflicted upon those persons who are convicted summarily of carrying on such trades or professions without licence or registration. The occupations in question are too numerous to be here specified, but the following may be given as examples of those for which a licence is required: Sellers of intoxicating liquor, keepers of private lunatic asylums, pawnbrokers, and game dealers. Amongst businesses and

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(*b*) 57 & 58 Vict. c. 60, s. 419.
(*c*) 2 & 3 Geo. V. c. 31, ss. 46, 47, 48.
(*d*) 57 & 58 Vict. c. 60, s. 422.

professions requiring registration are medical practitioners, chemists, dealers in explosives, and manufacturers of margarine. A recent addition to the latter class are money-lenders, who are required to register themselves under a penalty of £100, or, upon a second conviction, a similar penalty and three months' imprisonment with hard labour (*e*).

(*e*) 63 & 64 Vict. c. 51, s. 2.

CHAPTER IX.

OFFENCES RELATING TO GAME.

We proceed to treat of poaching and the attendant offences. We shall find hereafter that animals *feræ naturæ* (including game) in their live state are not the property of any one, and on this account are not the subjects of larceny. The Legislature has, however, made special provisions for their protection.

Night poaching is treated as a much more serious offence than poaching by day.

The principal statute on the subject is 9 Geo. IV. c. 69, amended by 7 & 8 Vict. c. 29 and 25 & 26 Vict. c. 114. The following are the chief offences:

(i) Any person by night (declared to commence one hour after sunset, and to conclude at the beginning of the last hour before sunrise (*f*)) unlawfully *taking* or *destroying* any game (hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards), or rabbits, in any land open or enclosed (*g*), or on public roads, highways, gates, outlets, or openings, between such lands and roads (*h*).

(ii) Any person *entering* or *being* by night in such places, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game (*i*).

The punishment for the *first* offence in each case on summary conviction is imprisonment not exceeding three months, and at the expiration of such period to be bound over to good behaviour for a year or, in default of sureties, further imprisonment not exceeding six months, or until such sureties

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(*f*) 9 Geo. IV. c. 69, s. 12.
(*g*) *Ibid.* s. 1.
(*h*) 7 & 8 Vict. c. 29, s. 1.
(*i*) 9 Geo. IV. c. 69, s. 1.

be found. For the *second*, likewise summarily dealt with, each of the above periods is doubled. The *third* offence against the same section is an indictable misdemeanour, punishable by penal servitude to the extent of seven years (*k*).

When any person is found committing such offence, it is lawful for the owner or occupier of the land (or in the case of a public road, &c., of the adjoining land), or for any person having the right of free warren or free chase therein, or for the lord of the manor, or for the gamekeeper or servant of such persons, or for any one assisting them, to apprehend the poacher. If the latter assaults or offers any violence with an offensive weapon to such person, he is punishable for the misdemeanour with penal servitude to the extent of seven years (*l*).

A graver offence is dealt with in a later section of the same statute. For *three* or more persons by night to unlawfully enter, or be in any land (or road, &c., 7 & 8 Vict. c. 29), for the purpose of taking or destroying game or rabbits, any of the party being *armed* with fire-arms or other offensive weapons, is a misdemeanour in each, punishable by penal servitude to the extent of fourteen years (*m*). It should be observed that all the party may be convicted of this offence if any of them be armed to the knowledge of the others (*n*). Sticks and large stones are arms within the meaning of the Act, if the jury is satisfied that they were taken with the object of being used as such, and were of such a nature that they might, if used, cause serious injury (*o*).

Any person may arrest those who are found committing the last-mentioned offence (*p*).

The prosecution for every offence within this Act, if punishable on summary conviction, must be commenced within six months after the offence; if punishable by indict-

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(*k*) 9 Geo. IV. c. 69, s. 1. *R.* v. *Lines*, [1902] 1 K. B. 199; 71 L. J. K. B. 125; 85 L. T. 790; 50 W. R. 303; 66 J. P. 24.
(*l*) 9 Geo. IV. c. 69, s. 2.
(*m*) *Ibid.* s. 9.
(*n*) *R.* v. *Smith*, [1818] R. & R. 368; *R.* v. *Southern*, [1821] R. & R. 444.
(*o*) *R.* v. *Sutton*, [1877] 13 Cox, 648.
(*p*) 14 & 15 Vict. c. 19, s. 11; *R.* v. *Sanderson*, [1859] 1 F. & F. 598.

ment, or otherwise than by summary conviction, within twelve months (*q*).

Unlawfully taking, killing, &c., hares, rabbits, and deer is punishable under the Larceny Act, 1861 (*r*).

The law as to *day poaching* is principally contained in the Act 1 & 2 Wm. IV. c. 32. That Act also provides close seasons for the various kinds of game. By section 30 persons trespassing by day in pursuit of game or rabbits are liable on summary conviction to a fine of £2, or £5 each if five or more go together for that purpose.

Poaching fish in private waters not adjoining or belonging to the dwelling-house of the owner is punishable under 24 & 25 Vict. c. 96, s. 24, by a fine (*s*).

By 43 & 44 Vict. c. 35, and 44 & 45 Vict. c. 51, a close time is appointed for most kinds of wild birds, and the destruction of such birds or their eggs during the close season is punishable by fine.

In connection with this subject it may be noticed that, although any innocent means may be employed to prevent game from being taken, and land from being trespassed on, it is criminal to adopt certain extreme measures. Setting a *spring-gun*, man-trap, or other engine calculated to destroy life, or inflict grievous bodily harm, with intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, is a misdemeanour punishable by penal servitude to the extent of five years. But this does not prevent a man-trap, &c., being set to protect a dwelling-house from sunset to sunrise (*t*).

(*q*) 9 Geo. IV. c. 69, s. 4.
(*r*) v. p. 198.
(*s*) As to poaching fish in waters adjoining or belonging to the dwelling-house, v. p. 198.
(*t*) 24 & 25 Vict. c. 100, s. 31.

PART II.

OFFENCES AGAINST INDIVIDUALS.

Offences which immediately affect individuals are regarded as crimes, and not merely as violations of private rights, on several grounds. First, because they are considered as contempts of public justice and the Crown; secondly, because they almost always include in them a breach of the public peace; thirdly, because, by their example and evil tendency, they threaten and endanger the subversion of all civil society (*u*).

Offences against individuals may be divided into two classes —those

Against their *Persons*.
Against their *Property*.

(*u*) 4 Bl. 176.

OFFENCES AGAINST INDIVIDUALS—THEIR PERSONS.

CHAPTER I.

HOMICIDE.

HOMICIDE—the destroying of the life of a human being—includes acts varying from those which imply no guilt at all to those which deserve and meet with the extreme punishment of the law. Three kinds of homicide are usually distinguished, each class admitting of sub-division.

Justifiable: Excusable: Felonious.

It may be stated at the outset that if the mere fact of the homicide is proved, the law presumes the malice which is necessary to make it amount to murder; and it therefore lies on the accused to show that the killing was justifiable or excusable, or that it only amounted to manslaughter (*w*).

Justifiable Homicide, that is, where no guilt, nor even fault, attaches to the slayer.—For one species of homicide the term "justifiable" seems almost too weak, inasmuch as not only is the deed justifiable, but also obligatory. Three cases of justifiable homicide are recognised:—

(1) Where the proper officer executes a criminal in strict conformity with his legal sentence. A person other than the proper officer (*i.e.*, the sheriff or his deputy) who performs the part of an executioner is guilty of murder. The criminal must have been found guilty by a competent tribunal; so that it would be murder otherwise to kill the greatest of

(*w*) *R.* v. *Greenacre*, [1837] 8 C. & P. 35.

malefactors. The sentence must have been legally given—that is, by a Court or Judge who has authority to deal with the crime. If judgment of death is given by a Judge who has not authority, and the accused is executed, the Judge is guilty of murder. The sentence must be strictly carried out by the officer (*i.e.*, the sentence as it stands after the remission of any part which the Sovereign thinks fit), so that if he beheads a criminal whose sentence is hanging, or *vice versa*, he is said to be guilty of murder. Though the Sovereign may remit a part of the sentence, he may not change it (*x*).

The two following instances of justifiable homicide are permitted by the law as necessary; and the first, at least, for the advancement of public justice.

(2) Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. Homicide is justifiable on this ground in the following cases (*y*): (i) When a peace officer, in due execution of his office, whether in a civil or criminal case, or a private person assisting a peace officer, or lawfully making an arrest, kills one who is resisting his arrest, provided that no more force was used than was necessary. (ii) When prisoners in gaol, or going to gaol, assault the gaoler or officer, and he, in his defence, to prevent an escape, kills any of them. (iii) When an officer, or private person, having legal authority to arrest or prevent escape, attempts to do so, and the other flies, and is killed in the pursuit. But here the ground of the arrest must be either treason felony or the infliction of a dangerous wound, and it must be shown that the criminal could not be arrested without killing him. (iv) When an officer, in endeavouring to disperse the mob in a riot or rebellious assembly, kills one or more of them, he not being able otherwise to suppress the riot. In this case the homicide is justifiable both at common law and by the Riot Act (*z*).

(*x*) Except in the case of treason; as to which v. p. 39.
(*y*) v. Archbold, 868.
(*z*) 1 Geo. I. st. 2, c. 5.

In all these cases, however, it must be shown that the killing was apparently a necessity.

But it is not difficult to instance cases in which the officer would be guilty (a) of *murder*—for example, if the intentional killing in pursuit as above were in case of one charged with a misdemeanour only, or of one arrested merely in a civil suit (*a*); (b) of *manslaughter*—for example, if the killing in case of one so charged with a misdemeanour were occasioned by means not likely to kill, as by striking a blow with an ordinary stick.

(3) When the homicide is committed in defence of person or property against some forcible and atrocious crime. Such crimes, it is said, are the following: Attempting to rob or murder another in or near the highway or in a dwelling-house; or attempting to break into a dwelling-house with intent to rob. The killing need not be in self-defence, but may be in defence of another against whose person or property a serious crime is threatened. In such cases, therefore, not only the owner, his servants, and members of his family, but also any strangers present, are justified in killing the assailant. So under circumstances which induced the belief that a man was cutting the throat of his wife, their son shot at and killed his father; it was held that if the accused had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was justifiable (*b*).

It should be noticed that this justification does not apply to felonies without force, *e.g.*, pocket-picking; nor to misdemeanours, save that in defence of a man's house the owner or his family may kill a trespasser trying forcibly to dispossess him of it (*c*). But this will not justify a person firing upon every one who forcibly enters his house, even at night. He ought not to proceed to the last extremity until he has taken all other steps to prevent the crime which is being attempted (*d*).

(*a*) *R.* v. *Dadson*, [1850] 20 L. J. M. C. 57.
(*b*) *R.* v. *Rose*, [1884] 15 Cox, 540.
(*c*) Archbold, 871; *R.* v. *Symondson*, [1896] 60 J. P. 645.
(*d*) *R.* v. *Bull*, [1839] 9 C. & P. 22.

A woman is justified in killing one who attempts to ravish her; and so, too, the husband or father may kill a man who attempts a rape on his wife or daughter.

It is said that the party whose person or property is attacked is not obliged to retreat, but he may even pursue the assailant until he finds himself or his property out of danger (*dd*). In so doing, however, killing will not be justifiable except in self-defence and to overcome resistance offered to him (*e*).

Excusable Homicide.—It may perhaps be doubted whether there is any substantial ground for the distinction between justifiable and excusable homicide. But in the former case the killer is engaged in an act which the law enjoins or allows *positively*, while in the latter he is about something which the law *negatively* does not prohibit. In neither case is there the malice which is an essential of a crime. In former times, a very substantial difference was made between the two kinds of homicide. That styled "excusable" did not imply that the party was altogether excused; so much so that Coke says (*f*) that the penalty was death. But early records show that the defendant received a complete pardon, and the restitution of his goods (*g*), though he probably had to pay a sum of money to procure the pardon. Now it is expressly declared by statute (*h*) that no forfeiture or punishment shall be incurred by any person who kills another by misfortune or in self-defence, or in any other manner without felony.

The two kinds of so-called excusable homicide are homicide in self-defence, on a sudden affray; homicide by accident or misfortune.

(1) *Se defendendo*, upon sudden affray.—We have noticed above the case of a man killing another when the latter is

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(*dd*) *R.* v. *Scully*, 1 C. & P. 319.
(*e*) Archbold, 851; v. *R.* v. *Deana*, [1909] 73 J. P. 255; 25 T. L. R. 299.
(*f*) 2 Inst. 148, 315.
(*g*) v. 6 Edw. I. c. 9.
(*h*) 24 & 25 Vict. c. 100, s. 7, re-enacting 9 Geo. IV. c. 31, s. 10.

engaged in the performance of some forcible crime. What we have now to deal with is a kind of self-defence, the occasion of which is more uncertain in its origin, and in which it seems natural to impute some moral blame to both parties. It happens when a man kills another, upon a sudden affray, in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling. This is one species of what is called *chance* (casual) or *chaud* (in heat) *medley* (*i*).

To bring the killing within this excuse, the accused must show that he endeavoured to avoid any further struggle, and retreated as far as he could, until no possible, or at least probable, means of escaping remained; that then, and not until then, he killed the other in order to escape destruction. It matters not that the defendant gave the first blow, if he has terminated his connection with the affray by declining further struggle before the mortal wound is given. To excuse the mortal stroke it must be made entirely in self-defence against imminent danger; for if the struggle is over, or the other has already been disabled or is running away, this is revenge and not self-defence (*k*).

Nor can self-defence be an excuse if there are any circumstances indicative of express malice in the party killing, as for instance, if the killer entered into the quarrel intending to use a deadly weapon or if the affray is a renewal of a previous quarrel (*l*).

It should be observed that a man has no right to sacrifice an innocent and unoffending person by killing him, even if it affords the only chance of saving his own life. If he does so he is guilty of murder (*m*).

(2) *By misadventure.*—When a person doing a lawful act, without any intention of hurt, by accident kills another;

(*i*) For manslaughter in a sudden affray, v. p. 149.
(*k*) *R.* v. *Ayes*, R. & R. 136; *R.* v. *Smith*, [1837] 8 C. & P. 160.
(*l*) Archbold, 842—3.
(*m*) *R.* v. *Dudley*, [1884] 14 Q. B. D. 273; 54 L. J. M. C. 39.

as, for example, a man is at work with a hatchet, the head flies off by accident, and kills a bystander.

To bring the slaying within the protection of the excuse, the act about which the slayer is engaged must be a lawful one. For if the slaying happen in the performance of an illegal act it is manslaughter at least, and murder if such act was a felony (*n*), unless the act was one which could not of itself be likely to cause any danger to life. It must also be done in a proper manner. Thus it is a lawful act for a parent to chastise his child, and therefore if the parent happens to occasion the death of the child, if the punishment is moderate, the parent will be innocent. But if the correction exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of the punishment, and death ensues, it is manslaughter at the least, and in some cases murder. Thus it will, as a rule, be murder if the instrument used is one likely to cause death; manslaughter, if the instrument is not of such a character, though an improper one (*o*).

The act must also (iii) be done with due caution to prevent danger; and therefore with more caution by those using dangerous instruments or articles. Due caution is such as to make it improbable that any danger or injury should arise from the act to others. Thus, if a workman throw stones or rubbish from a house, whereby the death of some one is caused, it may be murder, manslaughter, or homicide by misadventure; murder, if the thrower knew that people were passing, and gave no notice; manslaughter, if at a time when it was not likely that any people were passing; excusable homicide, if in a retired place where persons were not in the habit of passing or likely to pass (*p*).

(*n*) v. *R.* v. *Hodgson*, [1730] 1 Leach, 6. There is no doubt authority for saying that killing in the course of the commission of *any* felony is murder, whether the act was one likely to cause death or not. But the qualification given in the text is in conformity with the more modern opinion and the mode in which juries are now usually directed. v. *R.* v. *Serné*, [1887] 16 Cox 311; *R.* v. *Whitmarsh*, [1898] 62 J. P. 711; *R.* v. *Lumley*, 22 Cox, 635; 76 J. P. 208.

(*o*) *R.* v. *Hopley*, [1860] 2 F. & F. 202; *R.* v. *Griffin*, [1869] 11 Cox, C. C. 402; *R.* v. *Cheeseman*, [1836] 7 C. & P. 455.

(*p*) Archbold, 854.

SUICIDE OR SELF-MURDER.

Suicide is a felony if the act be committed deliberately, and by one who has arrived at years of discretion and is in his right mind. The supposed absence of the last requisite is often taken advantage of by a coroner's jury in order to save the reputation of the deceased.

If one persuades another to kill himself, and he does so, the adviser is guilty of murder. So, also, if two persons agree to commit suicide together, if one escapes and the other dies, the survivor is guilty of murder (*q*).

At one time the punishment for this crime was an ignominious burial in the highway, without Christian rites, with a stake driven through the body, and the forfeiture of all the deceased's goods and chattels to the Crown. But some time back the law was altered, the only consequence now being the denial of the right of burial according to the rites of the Church of England (*r*). The forfeiture has been done away with in this as well as in other kinds of felony (*s*).

An *attempt* to commit suicide is an attempt to commit a felony and is a common law misdemeanour, punishable by fine and imprisonment (with hard labour) (*t*). But it is not an attempt to commit murder within the Offences Against the Person Act (*u*).

The felonious killing of *another* is either murder or manslaughter. In dealing with the crime of murder, we shall anticipate, to some extent, the law of manslaughter, a great part of the law on the subject consisting in a distinction of the two crimes.

MURDER.

We may adopt Coke's definition of murder for the purpose of explaining the crime. "When a person of sound memory and discretion unlawfully killeth any reasonable creature

(*q*) *R.* v. *Abbott*, [1903] 67 J. P. 151.
(*r*) 45 & 46 Vict. c. 19.
(*s*) 33 & 34 Vict. c. 23, s. 1.
(*t*) *R.* v. *Mann*, [1914] 2 K. B. 107; 83 L. J. K. B. 648; 110 L. T. 781; 78 J. P. 200; 24 Cox, 140; 30 T. L. R. 310.
(*u*) 24 & 25 Vict. c. 100, ss. 11-15.

in being and under the King's peace with malice aforethought, either express or implied " (*w*).

(a) *The offender must be of sound memory and discretion.*—Thus are excluded all idiots, lunatics, and young children, in accordance with the rules as to capability of committing crimes which have already been set forth (*x*). But a person procuring an idiot, &c., to commit murder, or, indeed, any crime, is guilty himself of the crime.

(b) *Unlawfully killeth*, that is, kills without justification or excuse.—As we have seen, the presumption is against the accused, and it is for him to purge the act of its felonious character by proving such justification or excuse.

It is perfectly immaterial what may be the particular form of death, whether by an act as poisoning, striking, &c., or an omission such as neglect to provide food. Any voluntary act and any voluntary and *culpable* omission, the result of which is death, may be murder, although the death is not the immediate result and even although it was not desired, if it was a probable result—for example, where a mother hid her child in a pig-sty, where it was devoured (*y*). So if one, being threatened and under a well-grounded apprehension of personal violence which would endanger his life, does an act which causes his death, as, for instance, jumps out of a window, he who threatens is answerable for the consequences as if he had himself thrown the deceased out of the window (*z*). A person may also be guilty of murder through mere nonfeasance; as if it was his duty and in his power to supply food to a child in his charge and unable to provide for itself, and the child died because no food was supplied (*a*). But a mere nonfeasance or omission to act is not culpable unless there is some duty to act (*b*).

(*w*) Archbold, 385.
(*x*) v. p. 14, *et seq.*
(*y*) 1 Hale, P. C. 433.
(*z*) *R.* v. *Hickman*, 5 C. & P. 151; *R.* v. *Pitts*, [1842] C. & Mar. 284; Archbold, 837.
(*a*) *R.* v. *Marriott*, [1838] 8 C. & P. 425.
(*b*) *R.* v. *Smith*, 2 C. & P. 448.

It is no defence to show that the deceased was in ill-health and likely to die when the wound was given (*c*). Nor is it a defence that the immediate cause of death was neglect or the refusal of the party to submit to an operation; though it would be otherwise if the death were caused by improper applications to the wound, and not by the wound itself (*d*). To make the killing either murder or manslaughter the death must follow within a year and a day after the wound or other cause; for if the death is deferred beyond that length of time the law will presume that it arose from some other cause (*e*).

It is a rule of long standing that upon merely circumstantial evidence a man is not to be convicted of murder or manslaughter unless the body of the person alleged to have been killed has been found. But this is not absolutely necessary where the evidence brought before the jury is sufficiently strong to satisfy them that a murder has really been committed (*f*).

(c) *Any reasonable creature in being and under the King's peace.*—Therefore killing a child in its mother's womb is not murder (*g*), but it is otherwise if the child is born alive, and dies from wounds or drugs received in the womb. "Under the King's peace" excludes only alien enemies who are actually engaged in the exercise of war (*h*).

(d) *With malice aforethought.*—The term "malice aforethought," or malice *prepense*, does not imply any premeditation on the part of the person who kills another. Nor does it imply the existence of any express and actual malice or ill-will; a man may be guilty of murder although he had no desire to kill the person murdered or indeed to kill anyone.

(*c*) *R.* v. *Martin*, [1832] 5 C. & P. 130.
(*d*) *R.* v. *Holland*, [1841] 2 M. & R. 351.
(*e*) *R.* v. *Dyson*, [1908] 2 K. B. 454; 77 L. J. K. B. 813.
(*f*) Archbold, 833.
(*g*) But v. p. 164.
(*h*) Archbold, 832. v. also 24 & 25 Vict. c. 100, s. 9, under which homicide committed by a British subject upon a foreigner abroad is punishable in our Courts.

Though, however, express malice is not an essential element of murder, it may be relevant to prove intent, and its existence may defeat a plea of provocation or self-defence (*i*).

Malice aforethought occurs in three cases:—

(i) Where the killing is the result of an act done in the course of committing or attempting to commit a felony. Thus if A. shoots at B. and misses him but kills C., it is murder. The modern limitation of this rule has already been pointed out (*k*).

(ii) Where the killing is the result of an act done in resisting an officer of justice, whether civil or criminal, in the execution of his duty, or any person acting in aid of him. But in such a case the killing is murder only if the officer or person aiding him is acting with legal authority and executing his authority in legal manner and the offender knows of his authority. If any of these requisites is absent the killing is only manslaughter (*l*).

(iii) Where the killing is the result of an unlawful act done with intent to cause death or grievous bodily harm from which death is likely to result. Here, as has been already explained, malice is implied from the fact that the killing was intentional and without justification or excuse. And, as has been also pointed out, the law presumes that everyone intends the natural consequences of his acts. If therefore a person voluntarily does an unlawful act which ordinarily causes death, he is presumed to have intended to cause death and to have acted with malice aforethought. Intent may also be inferred from the existence of express malice. But it should be particularly noticed that it is not necessary that the intent should be to kill or injure the person who is actually murdered; it is sufficient if there is what is sometimes termed universal or general malice. Thus if A.,

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(*i*) 48 & 49 Vict. c. 69, s. 5, sub-s. 1.
324; v. also *post*, p. 149.
(*k*) *Ante*, p. 143. It would seem, however, that the rule, so limited, ceases to exist, as the case then falls within (iii).
(*l*) 48 & 49 Vict. c. 69, s. 5, sub-s. 2.
killing is murder only if violence is used to prevent arrest or to effect a rescue or escape, not if it occurs accidentally in the course of a struggle with officers of justice (*Ibid.*, p. 862).

intending to injure B., by mistake or accident injures C., he is guilty of maliciously injuring C., because both elements of the offence are present, viz., he has injured C. and his intent was malicious (*m*).

On an indictment for murder, the jury may convict the prisoner of manslaughter, or of an attempt to murder (*n*), or of concealment of birth (*o*). And so a person charged as accessory after the fact to murder may be convicted as accessory to manslaughter, if the principal felon be convicted of manslaughter only (*p*).

As to the punishment of murder, nothing further need be said here than that the sentence is death (*q*), with regard to which, and its execution, particulars will be given in a later chapter. Accessories after the fact to murder are liable to penal servitude to the extent of life (*r*).

MANSLAUGHTER.

The unlawful killing of another without malice; two kinds of manslaughter are distinguished:—

(1) Upon a sudden heat (termed *voluntary*).

(2) In the commission of an unlawful act (termed *involuntary* (*s*)).

(1) *Voluntary* (so-called).—The distinguishing mark of this kind of manslaughter is the provocation giving rise to sudden anger, during which the deed causing death is done. If upon a sudden affray two persons fight and one of them kills the

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(*m*) *R.* v. *Latimer*, 17 Q. B. D. 359; 55 L. J. M. C. 135.

(*n*) And here the punishment is not limited to the ordinary term of two years' imprisonment, but may be penal servitude for life, as for a statutory attempt under 24 & 25 Vict. c. 100, ss. 11—15 (*R.* v. *White*).

(*o*) As to conspiracy to murder, v. p. 107.

(*p*) *R.* v. *Richards*, [1877] 2 Q. B. D. 311; 46 L. J. M. C. 200.

(*q*) 24 & 25 Vict. c. 100, s. 1.

(*r*) 24 & 25 Vict. c. 100, s. 67.

(*s*) The objection to the terms "voluntary" and "involuntary," as opposed to each other, to denote varieties of the same crime, is obvious. There is no such thing as an involuntary crime. If the action be not a voluntary one it is not criminal (v. p. 10). What seems to be meant is that in the one case death is intended, in the other it is not.

other, the former will be guilty of manslaughter only, unless there are special circumstances which indicate evil design. But the act will be viewed in the less serious light of manslaughter only so long as the outburst of passion continues; not that the struggle need take place on the spot, for if the two at once adjourn to another place to fight, it will still be only manslaughter.

The distinction, where killing occurs in a sudden affray, between excusable homicide and manslaughter is that in the former case the accused has done all that he can to avoid the struggle or its continuation and his *motive* is self-defence, in the latter he has not and his motive is a "desire to fight" (*t*). In the latter case the killing, being in fact intended, and not being justified or excused, would be murder but for the provocation which prevents the proper exercise of reason (*u*).

So, also, in other cases of grave *provocation*, as if one man pulls another's nose, or is taken in adultery with another's wife. But here again, on the same grounds, to reduce the homicide to manslaughter, the blow which is the cause of death must be inflicted at once, while the provocation is still exercising its full influence. Otherwise the slaying will be regarded as a deliberate act of revenge (*w*). The plea of provocation will not avail if the provocation was sought for and induced by the slayer, nor, as has already been stated, if express malice on his part is shown to exist. Mere words, however insulting, will not as a rule be considered a sufficient provocation to reduce homicide from murder to manslaughter, where the death is caused intentionally, or by a deadly weapon (*x*).

(*t*) Archbold, p. 845; *R.* v. *Knock*, 14 Cox, 1.

(*u*) *R.* v. *Kirkham*, 8 C. & P. 115.

(*w*) *R.* v. *Maddy*, 1 Ventr. 158; *R.* v. *Hayward*, [1833] 6 C. & P. 157; *R.* v. *Fisher*, 8 C. & P. 182.

(*x*) *R.* v. *Lynch*, 5 C. & P. 324; Archbold, 848. But where a wife has unexpectedly confessed her adultery to her husband, it has been held that if he at once kills her this may be manslaughter only, *R.* v. *Rothwell*, [1871] 12 Cox, 145; *R.* v. *Jones*, [1908] 72 J. P. 215; *R.* v. *Palmer*, [1913] 2 K. B. 29; 82 L. J. K. B. 531. In any case, however, this principle applies only to confessions by a wife, not to confessions by a woman with whom the prisoner was living or to whom he was merely engaged (*R.* v. *Greening*, [1913] 3 K. B. 846;

The instrument used when the person is acting under provocation is also a material consideration. It may be said that the provocation must be of the gravest nature to render guilty of manslaughter only one who uses a deadly weapon or otherwise shows an intention to do the deceased grievous bodily harm. But a slighter provocation will suffice if the instrument used is one not likely to cause death, as a stick, or a blow with the fist. In fact, to reduce the offence to manslaughter, the mode of resentment must bear a reasonable proportion to the provocation (*y*).

(2) *Involuntary* (so-called), when the death, not being intended, is caused (i) in the commission of an unlawful act not amounting to a felony; or (ii) of an act which, although it amounted to felony, was nevertheless one which could not of itself be likely to cause any danger to life (*z*); or (iii) by culpable negligence. The unlawfulness of the act in which the accused is engaged is the ground of the homicide being regarded as manslaughter, and not homicide by misadventure merely. But if a man commit a mere tort or civil wrong in consequence of which the death of another is caused, if there has been no criminal negligence on his part he is not guilty of manslaughter (*a*).

Here, again, we may observe that it is immaterial whether the unlawfulness is in the act itself or in the mode in which it is carried out. An instance of manslaughter in the commission of an unlawful act is furnished when one person kills another while the two are playing at an unlawful pastime; of manslaughter in doing a lawful act in an unlawful manner—when a workman throws down stones into a street where persons may but are not likely to be passing.

One form of doing an act in an unlawful manner is *negligence*. This consideration very frequently presents itself

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83 L. J. K. B. 195; *R.* v. *Palmer*, *ubi supra*), nor to admissions by a person who has committed adultery with the prisoner's wife (*R.* v. *Birchall*, 23 Cox, 579).

(*y*) *R.* v. *Stedman*, [1704] Fost. 292.

(*z*) v. p. 143.

(*a*) *R.* v. *Franklin*, [1883] 15 Cox, 163; but v. *R.* v. *Fenton*, [1830] 1 Lew. C. C. 179.

in manslaughter. It may be said generally that whatever constitutes murder when done by fixed design, constitutes manslaughter when it arises from culpable negligence; for example, when a near-sighted man drives at a rapid rate, without having proper control of his horse, and thereby causes the death of a foot-passenger (*b*). Again, when a person without taking proper precautions does an act which is dangerous, though not unlawful in itself; as, for instance, where a man shot at a target from a distance of 100 yards with a rifle which would carry a mile, in the course of which he killed another person, although at a spot distant 393 yards from the firing-point, it was held that he was guilty of manslaughter (*c*). A large class of cases is that in which the death ensues from the treatment of disease. In such cases the person, whether a medical practitioner or not, who causes death is not indictable unless his conduct is marked by gross ignorance or gross inattention (*d*). Mere neglect on the part of a parent to provide medical aid for his child of tender years, in consequence of which his child dies, is not manslaughter, unless it is proved affirmatively that the death was caused or accelerated by such neglect; and medical evidence on behalf of the prosecution that the child's life *probably* might have been prolonged or saved by the parent calling in medical aid is not sufficient evidence to support a conviction (*e*). Where the prisoner had charge of a woman who was unable by illness and old age to attend to herself, but who provided for the expenses necessary to maintain both, and her death was occasioned by the prisoner's neglect to provide her with the necessaries of life, it was held that the prisoner was rightly convicted of manslaughter (*f*). When the negligence of the prisoner is the "effective" or "proximate" cause of the death it is no defence that the deceased was also guilty of negligence which contributed to his own death (*g*). It

(*b*) *R.* v. *Grout*, [1834] 6 C. & P. 629.
(*c*) *R.* v. *Salmon*, [1880] 6 Q. B. D. 79; 50 L. J. M. C. 25.
(*d*) *R.* v. *Long*, [1830] 4 C. & P. 398.
(*e*) *R.* v. *Morby*, [1881] 8 Q. B. D. 571; 51 L. J. M. C. 85; v. also p. 181, *post*.
(*f*) *R.* v. *Instan*, [1893] 1 Q. B. 450; 62 L. J. M. C. 86.
(*g*) *R.* v. *Swindall*, [1846] 2 C. & K. 230; *R.* v. *Jones*, [1870] 11 Cox, 544.

would seem, however, that the prisoner might set up as a defence that the deceased's own negligence was the proximate cause of his death (*gg*).

It is not every act of slight negligence, even though it has been the cause of death, which will subject a person to an indictment for manslaughter. The negligence must have been so culpable as to have been "criminal," and it is for the jury to say whether it was of such a degree that the accused ought to be convicted of manslaughter (*h*).

Manslaughter is a felony, punishable by penal servitude to the extent of life—or in lieu of, or in addition to, the penal servitude or imprisonment, a fine may be imposed (*i*).

Having inquired into the nature of the crimes of murder and manslaughter, we are now in a position to examine certain classes of acts and determine by the circumstances whether they fall under the head of murder, manslaughter, or excusable homicide.

Killing by *fighting*:—

(i) Murder.—Deliberately fighting a duel—or after time for cooling, or under any other circumstances indicating deliberate ill-will.

(ii) Manslaughter.—In a sudden quarrel where the parties immediately fight—or where the parties are fighting in an unlawful amusement.

(iii) Excusable.—In a sparring match with gloves, or other lawful amusement, fairly conducted. But in the case of a sparring match there must be no intention to carry it on until one of the parties is incapacitated by exhaustion or injury, or the match will be unlawful (*k*).

Killing by *correction*:—

(i) Murder.—With weapon likely to cause death, *e.g.*, an iron bar.

(*gg*) v. Archbold, 856; *Dublin, &c., Railway Co.* v. *Slattery*, 3 A. C., at 1166.
(*h*) *R.* v. *Markuss*, [1864] 4 F. & F. 356; *R.* v. *Doherty*, [1887] 16 Cox, 306, 309.
(*i*) 24 & 25 Vict. c. 100, s. 5.
(*k*) *R.* v. *Orton*, [1878] 14 Cox, 226.

(ii) Manslaughter.—With an instrument not likely to kill, though improper for use in correction—or where the quantity of punishment exceeds the bounds of moderation.

(iii) Excusable.—Correcting in moderation a child, servant, scholar, or criminal entrusted to one's charge.

Killing *without intending to kill whilst doing another act:—*

(i) Murder.—If that other act is a felony, and likely in itself to cause danger.

(ii) Manslaughter.—If that other act is unlawful.

(iii) Excusable.—If that other act is lawful, and not negligent.

[But see next paragraph.]

Killing *whilst doing a lawful but dangerous act, e.g.*, driving:—

(i) Murder.—If the accused perceived the probability of the mischief, and yet proceeded with his act.

(ii) Manslaughter.—Where he might have seen the danger if, as he ought to have done, he had looked before him—or if, though he previously gave warning, this warning was not likely to prove entirely effectual, *e.g.*, driving in a crowded street.

(iii) Excusable.—If he used such a degree of caution as to make it improbable that any danger or injury would arise to others.

Killing *officers or others engaged in effecting the ends of justice:—*

(i) Murder.—If the officer or other person is acting with due legal authority, and executing such authority in a legal manner, the defendant knowing that authority—or, in the case of a private person interfering, the intention of such person being intimated expressly.

(ii) Manslaughter.—If any one of these requisites is absent (*l*).

(*l*) "The guilt of the accused may, under the law as it now stands, depend entirely upon nice and difficult questions belonging to the civil branch of the law, such as the technical regularity of civil process or the precise duty of a minister of justice in its execution."—Broom, C. L. 1044.

Killing *by officers and others in the execution of their duty*:—

(i) Murder.—If the killing happens in the pursuit of a person not resisting, but fleeing, such person being charged with a misdemeanour only, or the arrest being only in a civil suit.

(ii) Manslaughter.—As above, if the death is caused by means not likely or intended to kill—or if, in an apprehension for felony, there is no need for the violence used by the officer.

(iii) Justifiable.—If the officer is carrying out a lawful sentence; or if the person killed resisted his lawful arrest in a civil or criminal cause, or was attempting to escape from custody, or if he fled to avoid an arrest for felony or inflicting a dangerous wound, or if the death was caused in dispersing an unlawful assembly or putting down a riot, provided that in each case the killing was an apparent necessity.

ATTEMPT TO MURDER.

The Offences against the Person Act, 1861, deals in several sections with attempts to murder effected in various ways. The punishment in every case is the same, namely, penal servitude to the extent of life. The various attempts specified are the following:—

Administering poison, wounding, or causing grievous bodily harm, with intent to murder (*m*).

Attempting to poison, drown, suffocate, or strangle, or shooting or attempting to discharge loaded arms with like intent, whether any bodily injury be effected or not (*n*).

Destroying or damaging any building by gunpowder or other explosive substance, with like intent (*o*).

Setting fire to any vessel or its belongings, or casting away or destroying any vessel, with like intent (*p*).

Attempting to murder by any other means than those above specified (*q*).

(*m*) 24 & 25 Vict. c. 100, s. 11.
(*n*) *Ibid.* s. 14.
(*o*) *Ibid.* s. 12.
(*p*) *Ibid.* s. 13.
(*q*) *Ibid.* s. 15.

CHAPTER II.

RAPE, ETC.

RAPE.

THE offence of having carnal knowledge of a woman against her will by force, fear, or fraud.

Certain persons cannot be convicted of this crime. An infant under the age of fourteen is deemed in law to be incapable of committing, or even, perhaps, of attempting this offence, on account of his presumed physical incapacity (*r*). And this is a presumption which cannot be rebutted by evidence of capacity in the particular case. Neither can a husband be guilty of a rape upon his wife. But both a husband (*s*) and a boy under fourteen, and even a woman (*t*) may be convicted as principals in the second degree, and may be punished for being present aiding and abetting.

To constitute the offence, the act must be committed without the consent of the female and by force, fear, or fraud. If, however, she yielded through fear of death or duress, it is nevertheless rape; for here the consent is at most imperfect; or if she were insensibly drunk or asleep, or if she submitted under a false representation, such as that she was about to undergo medical treatment, she being ignorant of the nature of the act (*u*). So also carnal knowledge of a woman of weak intellect, and incapable of exercising judgment so as to give any real consent, is rape, although she

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(*r*) 1 Hale, P. C. 631. See *R.* v. *Waite*, [1892] 2 Q. B. 600; 61 L. J. M. C. 187.

(*s*) *R.* v. *Lord Audley*, [1631] 3 Cobbett's St. Trials, 402.

(*t*) *R.* v. *Ram*, [1893] 17 Cox C. C. 609.

(*u*) *R.* v. *Flattery*, [1877] 2 Q. B. D. 410; 46 L. J. M. C. 130. In such cases, however, it may be desirable to proceed under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 3; v. p. 159.

made no resistance (*w*). And a man, who induces a married woman to permit him to have connection with her by personating her husband, is guilty of rape (*x*). It is equally rape though the female is a common prostitute or the concubine of the prisoner; but circumstances of this nature will probably operate with the jury in their consideration as to whether there was consent. It is necessary to prove penetration, but the slightest penetration will be sufficient (*y*), and if the prosecution fail to prove this, the prisoner may nevertheless be convicted of the attempt, or of an indecent assault.

At almost every trial for this crime the words of Sir Matthew Hale are recalled: "It is an accusation easy to be made and hard to be proved, but harder to be defended by the party accused, though innocent." It will be necessary to estimate the degree of credibility of the testimony of the woman who makes the charge. On this point we cannot do better than remember the words of Blackstone (*z*). The credibility of her testimony, and how far she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence (*a*), and made search for the offender; if the party accused fled for it—these and the like are concurring circumstances which give greater probability of her evidence. But, on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed was where it was possible she might have been heard, and she made

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(*w*) In such cases also, owing to the difficulty which sometimes arises of proving absence of consent (see *R.* v. *Fletcher*, [1866] L. R. 1 C. C. R. 39; 35 L. J. M. C. 172), it may be expedient to proceed under 48 & 49 Vict. c. 69, s. 5, sub-s. 2, v. p. 158. The jury may, however, on an indictment for rape convict of an offence under this section (v. p. 158), or of an offence under section 56 of the Mental Deficiency Act (v. p. 159).

(*x*) 48 & 49 Vict. c. 69, s. 4.

(*y*) 24 & 25 Vict. c. 100, s. 63, and *R.* v. *Hughes*, [1841] 2 Mood. C. C. 190; 9 C. & P. 752.

(*z*) v. Archbold, 980.

(*a*) As to evidence of complaints by the prosecutrix, v. p. 394.

no outcry—these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned. The prisoner may call evidence to her generally bad character for want of chastity, or indecency (*b*), and of her having had connection with him previously (*c*), but not of her having had connection with others. As to the last point she may be asked the question, but she would probably not be compelled to answer it; if she denies it, the person referred to cannot be called to contradict her (*d*).

Upon the trial of an indictment for rape the prisoner's wife is a competent witness either for the prosecution or defence, and without his consent; but she cannot be compelled to disclose any communication made to her by him during their marriage, nor, indeed, to give any evidence against him (*e*).

The punishment for this crime, which is a felony, is penal servitude to the extent of life (*f*).

CARNALLY ABUSING CHILDREN, LUNATICS, ETC., AND OTHER OFFENCES AGAINST WOMEN.

The former law on this subject was materially altered by the Criminal Law Amendment Act, 1885, which provided that to unlawfully and carnally know any girl under the age of *thirteen* years is a felony, punishable to the extent of penal servitude for life (*g*); and any attempt to have unlawful carnal knowledge of any girl under the age of thirteen years is a misdemeanour, punishable by imprisonment for any term not exceeding two years, with or without hard labour (*h*).

(*b*) *R.* v. *Clay*, [1851] 5 Cox, 146.
(*c*) *R.* v. *Riley*, [1887] 18 Q. B. D. 481; 16 Cox, 191.
(*d*) *R.* v. *Holmes*, [1871] L. R. 1 C. C. R. 334; 41 L. J. M. C. 12.
(*e*) 61 & 62 Vict. c. 36, ss. 1 (d), 4; *Leach* v. *R.*, [1912] A. C. 305; v. p. 367.
(*f*) 24 & 25 Vict. c. 100, s. 48.
(*g*) 48 & 49 Vict. c. 69, s. 4.
(*h*) *Ibid.* A boy under the age of fourteen cannot be convicted of the full offence, nor probably even of the attempt. But he may be convicted under section 9 of an indecent assault, although the indictment charges him with the felony. *R.* v. *Waite*, [1892] 2 Q. B. 600; 61 L. J. M. C. 187; *R.* v. *Williams*, [1893] 1 Q. B. 320; 62 L. J. M. C. 69.

In either case, if the offender is under sixteen years of age, the Court may, instead of imprisonment, order him to be whipped. Again, to unlawfully and carnally know, or attempt to have unlawful carnal knowledge of, any girl aged between *thirteen* and *sixteen* years, is also a misdemeanour, punishable like the last-mentioned offence; but the accused must be acquitted if he satisfies the jury that he had reasonable cause to believe that the girl was sixteen years old (*i*). Although the girl may consent or even incite to the commission of the offence, she cannot be convicted of aiding or abetting it (*k*). Having, or attempting to have, unlawful carnal knowledge of any female idiot, or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, is a misdemeanour punishable in the same way (*l*). Again, for the owner or occupier, or any person assisting in the management of premises, to induce or suffer any girl to resort to such premises for the purpose of being carnally known by any man, is, if the girl is under the age of thirteen years, a felony, punishable by penal servitude to the extent of life; and if she is between thirteen and sixteen years of age, a misdemeanour, punishable by imprisonment for two years with or without hard labour, unless it be shown that the accused had reasonable cause to believe that the girl was sixteen years of age (*m*). Any person who, having the custody, charge, or care of a girl under the age of sixteen, causes or encourages the seduction or prostitution or unlawful carnal knowledge of the girl commits a misdemeanour and is liable to imprisonment for two years (*n*).

Under the Criminal Law Amendment Act, 1885, the jury may on the trial of an indictment for rape, or for any offence made felony by section 4 thereof, convict the accused of the

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(*i*) 48 & 49 Vict. c. 69, s. 5, sub-s. 1.
(*k*) *R.* v. *Tyrrell*, [1894] 1 Q. B. 710; 63 L. J. M. C. 58.
(*l*) 48 & 49 Vict. c. 69, s. 5, sub-s. 2.
(*m*) *Ibid.* s. 6; v. *R.* v. *Webster*, [1885] 16 Q. B. D. 134; 55 L. J. M. C. 63; v. also p. 182.
(*n*) 8 Edw. VII. c. 67, s. 17; 10 Edw. VII. & 1 Geo. V. c. 25, s. 1.

misdemeanours mentioned in sections 3, 4, or 5 of the Act, or of an indecent assault, if in their opinion the accused is guilty of such offence (*o*), or of incest or of an offence under section 56 (i) (a) of the Mental Deficiency Act, 1913. The misdemeanours just referred to are:—

(a) Procuring the defilement by any person of a woman or girl by threats, or by false representations, or by administering drugs (*p*).

(b) Attempting to have unlawful carnal knowledge of a girl under thirteen years of age (*q*).

(c) Defilement of a girl between thirteen and sixteen years of age (*r*), or of any female idiot or imbecile, under circumstances not amounting to rape, but showing that the offender knew of the idiocy or imbecility (*s*).

It should be observed that a prosecution under the Act, for carnally knowing a girl between the ages of thirteen and sixteen years or of an idiot or imbecile woman, or for attempting to commit such an offence, must be commenced within six months after the commission of the offence (*t*); and no person can be convicted of those offences upon an indictment for rape or for any offence made felony by section 4 unless the prosecution was commenced within that time (*u*).

In addition to the above the following acts have by the same Act been made misdemeanours, punishable by imprisonment, with or without hard labour, for two years, and in the case of a male, with a whipping (*w*), viz.:—

(1) To procure or attempt to procure any girl or woman, under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection with another person, either within or without the King's Dominions (*x*).

(*o*) 48 & 49 Vict. c. 69, s. 9.
(*p*) *Ibid.* s. 3; *punishment, imprisonment, two years, and if male, whipping*, provided, in the case of false representations, the woman is not of known immoral character.
(*q*) *Ibid.* s. 4, p. 157.
(*r*) *Ibid.* s. 5, sub-s. 1, p. 158.
(*s*) *Ibid.* s. 5, sub-s. 2, p. 158.
(*t*) Ibid. s. 5, as amended by 4 Edw. VII. c. 15, s. 27.
(*u*) *R.* v. *Cotton*, [1896] 60 J. P. 824.
(*w*) 2 & 3 Geo. V. c. 20, s. 3.
(*x*) 48 & 49 Vict. c. 69, s. 2, sub-s. 1.

(2) To procure or attempt to procure any woman or girl, either within or without the King's Dominions, to become a common prostitute (*y*).

(3) To procure or attempt to procure any woman or girl to leave the United Kingdom, with intent that she may become the inmate of or frequent a brothel elsewhere (*z*).

(4) To procure or attempt to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become the inmate of or frequent a brothel within or without the King's Dominions (*a*).

The Criminal Law Amendment Act, 1885, also provides that in cases of unlawful procuration, and defiling women by means of false pretences or the administration of drugs, or attempting to commit those offences, the accused person shall not be convicted on the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused (*b*).

It should be observed that in all prosecutions under this Act, and also in the case of indecent assault, and offences within the Mental Deficiency Act, 1913, mentioned later, the wife or husband of the accused person may be called as a witness not only for the defence but also for the prosecution, and without the consent of the person charged (*c*). But such a witness cannot be compelled to give evidence for the prosecution, nor, if he or she does so, to disclose any communication made to her or him by the accused during their marriage (*d*).

All misdemeanours under this Act are subject to the provisions of the Vexatious Indictments Act (*e*).

(*y*) 48 & 49 Vict. c. 69, s. 2, sub-s. 2.
(*z*) *Ibid.* sub-s. 3; 2 & 3 Geo. V. c. 20, s. 2.
(*a*) 48 & 49 Vict. c. 69, s. 2, sub-s. 3.
(*b*) *Ibid.* s. 2, sub-s. 4.
(*c*) 61 & 62 Vict. c. 36, s. 4.
(*d*) *Ibid.* s. 1 (d); *Leach* v. *R.*, [1912] A. C. 305; v. p. 367.
(*e*) 48 & 49 Vict. c. 69, s. 17; v. p. 330.

If any person employed in an institution for lunatics or any person having the charge of, or any attendant on, any single lunatic patient, carnally knows any female under treatment as a lunatic in such institution, or as a single patient, or attempts to commit that offence, he is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years. The consent of the lunatic will be no defence to such a charge (*f*).

To commit an indecent assault upon any female is a misdemeanour, punishable by imprisonment not exceeding two years (*g*).

It is no defence to a charge of indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency (*h*).

The Mental Deficiency Act, 1913 (3 & 4 Geo. V. c. 28), s. 56, makes certain provisions of the same kind for the protection of female "*defectives*." It will be observed that these provisions to some extent overlap those of the Criminal Law Amendment Act, 1885, relating to female idiots and imbeciles above set forth.

Any person who (1) unlawfully and carnally knows or attempts to have carnal knowledge of a female defective under care or treatment in such an institution or approved home as is mentioned in the Act, or whilst out on licence or under guardianship under the Act (*i*),

(2) Or procures or attempts to procure a female defective to have unlawful connection, whether within or without the King's Dominions, with any person.

(3) Or causes or encourages her prostitution whether within or without the King's Dominions,

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(*f*) 53 Vict. c. 5, s. 324.
(*g*) 24 & 25 Vict. c. 100, s. 52.
(*h*) 43 & 44 Vict. c. 45, s. 2.
(*i*) If on the trial of an indictment for rape the jury are satisfied that the accused is guilty of the above offence but are not satisfied that he is guilty of rape they may acquit him of rape and convict him of the above offence; s. 56, sub-s. 5.

(4) Or who being the owner or occupier or assisting in the management or control of premises induces or suffers any female defective to resort to or be in such premises for the purpose of being carnally known by any man,

(5) Or who with such intent takes or causes to be taken a female defective out of the possession and against the will of her parent or any other person having the lawful care or charge of her,

is guilty of a misdemeanour and is liable on conviction on indictment to imprisonment for *two* years, unless he proves that he did not know, and had no reason to suspect, that she was a defective. Upon a trial for any of the above offences the wife or husband of the accused is a competent but not compellable witness, either for the prosecution or the defence, and without the consent of the person charged (*k*).

In the case of an indecent assault upon a defective of any age consent will afford no defence if the accused knew or had reason to suspect that the person assaulted was a defective within the meaning of the Act (*l*).

Defectives for the purposes of the Act are:—

(i) Idiots, *i.e.*, persons so deeply defective in mind from birth or an early age as to be unable to guard themselves from common dangers.

(ii) Imbeciles who from birth, etc., have been so mentally defective as to render them incapable, though they are not idiots, of managing themselves or their affairs, or, if children, being taught to do so.

(iii) Feeble-minded persons, *i.e.*, persons in whose case the mental defectiveness which has existed from birth, etc., does not amount to imbecility but is so pronounced that they require care and control for their own protection or the protection of others, or, if children, appear permanently incapable of receiving benefit from instruction in ordinary schools.

(*k*) Section 56, sub-s. 6; 61 & 62 Vict. c. 36, s. 4; v. p. 367.
(*l*) Section 56, sub-s. 3.

(iv) Moral imbeciles, *i.e.*, persons who from an early age display permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect (*m*).

UNNATURAL CRIMES.

To commit the crime against nature, with mankind or with any animal, is a felony, punishable by penal servitude to the extent of life (*mm*). The evidence is similar to that in rape, with two exceptions—(i) The consent of the person upon whom it was perpetrated is no defence. (ii) Both parties, if consenting, are equally guilty; but if one of the parties is a boy under the age of fourteen years, it is felony in the other only.

To attempt to commit the crime, or to make an assault with intent to commit the same, or to make any indecent assault upon a male person, is a misdemeanour, punishable by penal servitude to the extent of ten years (*n*).

By the Criminal Law Amendment Act, 1885, for a male person, either in public or private, to commit or be a party to the commission, or to procure or attempt to procure the commission, by any male person, of any act of gross indecency with another male person, is a misdemeanour, punishable by imprisonment for not more than two years, with or without hard labour (*nn*).

INCEST.

A male person who has carnal knowledge of a female, who is to his knowledge his grand-daughter, daughter, sister, or mother, is guilty of a misdemeanour and liable to penal servitude for seven years, or if the female is under the age of thirteen years, for life. It is immaterial that the carnal

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(*m*) Section 1.
(*mm*) 24 & 25 Vict. c. 100, s. 61; 54 & 55 Vict. c. 69, s. 1.
(*n*) 24 & 25 Vict. c. 100, s. 62. As to obtaining money by threatening to accuse of this crime, v. pp. 87-88.
(*nn*) 48 & 49 Vict. c. 69, s. 11.

knowledge was with the consent of the female person. An attempt by a male person to commit the offence is also a misdemeanour punishable by imprisonment with or without hard labour for two years. Upon a conviction for either of these offences upon a female under twenty-one years of age the Court may divest the offender of all authority over such female and may appoint any person to be her guardian during minority (*o*).

Similarly a female of or above the age of sixteen years who, with consent, permits her grandfather, father, brother, or son (knowing him to be such) to have carnal knowledge of her commits a misdemeanour and may be sentenced to penal servitude for seven years (*p*).

It is equally an offence whether the brother or sister be the half-brother or half-sister of the offender, and whether the relationship is illegitimate or traced through lawful wedlock (*q*).

The provisions of the Vexatious Indictments Act (*r*) apply to prosecutions for incest. A Court of Quarter Sessions has no jurisdiction to try an offence of this kind, and all proceedings for incest or attempted incest must be held *in camera* (*s*).

No prosecution for incest, except when it is undertaken by the Director of Public Prosecutions, can be commenced without the sanction of the Attorney-General (*t*).

ATTEMPTS TO PROCURE ABORTION.

Three classes of persons may be guilty of crimes under this heading. The woman herself, the person who procures or supplies the drug, &c., any other person assisting.

For a woman being with child, with intent to procure her own miscarriage, to administer to herself any poison

(*o*) 8 Edw. VII. c. 45, s. 1. As to the nature of the evidence which is admissible in support of a charge of incest, v. *R.* v. *Ball*, [1911] A. C. 47. The husband or wife is a competent but not a compellable witness for the prosecution, *Leach* v *R.*, [1912] A. C. 305; v. p. 367.

(*p*) 8 Edw. VII. c. 45, s. 2.

(*q*) *Ibid.* s. 3.

(*r*) 22 & 23 Vict. c. 17, v. p. 330.

(*s*) 8 Edw. VII. c. 45, ss. 4, 5. As to conviction for other offences, v. p. 409.

(*t*) *Ibid.* s. 6.

or other noxious thing, or to use any instrument or other means; or

For any person to do the same with intent to procure the miscarriage of any woman, whether she be with child or not, is a felony, punishable by penal servitude to the extent of life (*u*). It is not necessary that the drug administered should produce miscarriage or even have a tendency to do so; it is enough if it is "noxious," and is given with the intent charged (*w*); and even if it is not noxious or calculated to produce the desired effect, the parties may be convicted of "attempting" to procure abortion (*x*).

For any person to procure or supply poison or other noxious thing, or any instrument or other thing, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of a woman, whether she be with child or not, is a misdemeanour, punishable by penal servitude to the extent of five years (*y*).

CONCEALMENT OF BIRTH.

If a woman is delivered of a child, every person who by any secret disposition of the dead body of the child, whether it died before, at, or after its birth, endeavours to conceal the birth thereof, is guilty of a misdemeanour, punishable by imprisonment not exceeding two years. A person tried for and acquitted of murder of a child may be convicted upon the same indictment of concealment of birth, if the facts justify that conclusion (*z*).

The denial by the defendant of the birth is not sufficient to constitute the offence. There must have been some act of disposal of the body after the child was dead (*a*). In order to convict a woman of attempting to conceal the birth of her child, a dead body must be found and reasonably identified as that of the child of which she is alleged to have

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(*u*) 24 & 25 Vict. c. 100, s. 58.
(*w*) *R.* v. *Cramp*, [1880] 5 Q. B. D. 307; 49 L. J. M. C. 44.
(*x*) *R.* v. *Brown*, [1899] 63 J. P. 790.
(*y*) 24 & 25 Vict. c. 100, s. 59.
(*z*) 24 & 25 Vict. c. 100, s. 60.
(*a*) *R.* v. *Turner*, [1839] 8 C. & P. 755.

been delivered (*b*). It will be noticed that the offence may be committed by others, and not only by the mother.

ABDUCTION.

We may distinguish four classes of cases:—

(i) Of a woman on account of her *fortune*.

Where a woman of any age has any interest, present or future, in any real or personal estate, or is a presumptive heiress, or presumptive next of kin to any one having such interest—(i) whosoever, from motives of *lucre*, takes away or detains such woman against her will, with intent himself, or to cause some other person, to marry her, or have carnal knowledge of her—or (ii) whosoever fraudulently allures, takes away, or detains such woman, being under the age of *twenty-one*, out of the possession or against the will of her father or mother, or other person having the lawful care or charge of her, with like intent, is guilty of felony, punishable by penal servitude to the extent of fourteen years. The convicted person is also rendered incapable of taking any interest in her property; and if he is married to her, the property will be settled as the Chancery Division, upon an information at the suit of the Attorney-General, appoints (*c*). The intent to marry or have carnal knowledge only need be proved, not the carrying out of that intent.

(ii) By *force*, with *intent to marry*.

The same punishment attends the *forcible* taking away or detaining against her will a woman of any age with intent to marry or carnally know her, or cause her to be married or carnally known by any other person (*d*).

(iii) Of an unmarried girl under the age of *eighteen* years, *with intent to have carnal knowledge*.

Whoever, with intent that any unmarried girl under the age of eighteen years shall be unlawfully and carnally known by any man, takes such girl out of the possession and against

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(*b*) *R.* v. *Williams*, [1871] 11 Cox, 684.
(*c*) 24 & 25 Vict. c. 100, s. 53.
(*d*) *Ibid.* s. 54.

the will of her father, or mother, or other person having the lawful care or charge of her, is guilty of a misdemeanour, and liable to imprisonment for not more than two years, with or without hard labour. It is a defence that the person charged had reasonable cause to believe that the girl was not under the age of eighteen (*e*).

It is also a misdemeanour, punishable in like manner, to detain any woman or girl against her will, either in a brothel or in any premises, with intent that she may be unlawfully and carnally known by any man (*f*).

Withholding her wearing apparel or other property, or using threats of legal proceedings against her if she should take away with her any wearing apparel lent or supplied to her, constitutes a detention under this Act (*g*).

(iv) Of a girl under *sixteen* years of age.

To unlawfully take or cause to be taken any unmarried girl under the age of sixteen out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, is a misdemeanour, punishable by imprisonment not exceeding two years (*h*).

If the girl leaves her father, &c., without any persuasion on the part of the defendant, and then goes to him, he is not within the statute even though he conceals her and persuades her not to return (*i*). Nor is he, if he did not know, and had no reason to know, that she was under the lawful charge of her father or other person; and it is necessary for the prosecution to give some evidence from which such knowledge may properly be assumed (*k*). A mere absence for a temporary purpose and with the intention of returning does not interrupt the possession of the father, &c. It is no defence that the defendant did not know her to be under sixteen, or might suppose from her appearance that she was older, or even that he believed upon reasonable

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(*e*) 48 & 49 Vict. c. 69, s. 7.
(*f*) *Ibid.* s. 8.
(*g*) *Ibid.*
(*h*) 24 & 25 Vict. c. 100, s. 55.
(*i*) *R.* v. *Olifier*, [1866] 10 Cox, 402; *R.* v. *Jarvis*, 20 Cox. 249.
(*k*) *R.* v. *Hibbert*, [1869] L. R. 1 C. C. R. 184; 38 L. J. M. C. 65.

grounds that she was over that age (*l*). A taking by force is not necessary to constitute the offence. It is immaterial whether or not there was any bad motive (*m*), or whether the girl consented to or suggested the elopement, if the defendant persuaded her or actively assisted her in carrying it out (*n*), but if she suggested it, and the defendant merely yielded to her suggestion without taking any active part in the matter, he would be entitled to an acquittal (*o*). A woman may be convicted of this offence (*p*).

In all the above cases of abduction the husband or wife of the accused is a competent but not compellable witness for the prosecution or defence, even without the consent of the person charged; but such a witness cannot be compelled to disclose any communications made to him or her by the accused during their marriage (*q*).

CHILD-STEALING, ABANDONING, ETC.

To unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain a child under the age of fourteen years, with intent to deprive the parent, or other person having lawful care or charge, of the possession of the child, or with intent to steal any article upon or about the child, or, with any such intent, to receive or harbour any such child, knowing the same to have been so led away, &c., is a felony, punishable by penal servitude to the extent of seven years. But persons claiming any right to the possession of the child, or its mother or father if it is illegitimate, do not fall within the statute (*r*). It is not necessary that the force or fraud should have been practised upon the child, as the case is within the statute if force or fraud is employed against the parent or guardian (*s*).

(*l*) *R.* v. *Prince*, [1875] L. R. 2 C. C. R. 154; 44 L. J. M. C. 122.
(*m*) *R.* v. *Booth*, [1872] 12 Cox, 231.
(*n*) *R.* v. *Mankletow*, [1853] 22 L. J. M. C. 115.
(*o*) *R.* v. *Jarvis*, 20 Cox, 249.
(*p*) *R.* v. *Handley*, [1859] 1 F. & F. 648.
(*q*) 61 & 62 Vict. c. 36, ss. 1 (d) and 4.
(*r*) 24 & 25 Vict. c. 100, s. 56.
(*s*) *R.* v. *Bellis*, [1893] 62 L. J. M. C. 155; overruling *R.* v. *Barrett*, [1885] 15 Cox, 658.

To unlawfully abandon or expose any child under the age of two years in such a manner that its life is endangered or its health is, or is likely to be, permanently injured, is a misdemeanour, punishable by penal servitude to the extent of five years (*t*).

(*t*) 24 & 25 Vict. c. 100, s. 27; v. *R.* v. *Falkingham*, [1870] L. R. 1 C. C. R. 222; 39 L. J. M. C. 47; see also 8 Edw. VII. c. 67, s. 12, *post*, p. 180.

CHAPTER III.

ASSAULTS, ETC.

UNDER this head we shall consider all the remaining offences against the person.

COMMON ASSAULT.

An *assault* is an attempt or offer to do a corporal hurt to another, even without touching him, as if one lifts up his cane, or his fist, in a threatening manner, at another; or strikes at him, but misses him; this is an assault. Other instances are striking at a man with or without a weapon, or presenting a gun at him at a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or any other such like act done in an angry, threatening manner. It will be noticed that there need not be an actual touching of the person assaulted. But mere words never amount to an assault (*u*).

The legal idea of an assault is so wide that it includes a variety of offences which do not at first sight seem to be assaults, at least in the popular signification of the term; for example, putting a child into a bag, hanging it on some palings, and there leaving it (*w*). And indeed it was held that detaining a child at a board school, after the regular school hours, and preventing such child from leaving the school, for not learning "home lessons" which the master had directed the child to learn, but which the master had no power under the Elementary Education Acts to do, amounted to a criminal assault (*x*).

(*u*) Archbold, 892.
(*w*) *R.* v. *Marsh*, [1844] 1 C. & K. 496.
(*x*) *Hunter* v. *Johnson*, [1884] 53 L. J. M. C. 182.

A *battery* is not necessarily a forcible striking with the hand or stick or the like, but includes every touching or laying hold (however trifling) of another person, or his clothes, in an angry, revengeful, rude, insolent, or hostile manner; for example, jostling another out of the way (*y*). Thus, if a man strikes at another with a cane, or fist, or throws a bottle at him, if he miss, it is an *assault;* if he hit; it is a *battery*. Every battery includes an assault.

As a rule, consent on the part of the complainant, if he is a rational person, deprives the act of the character of an assault, unless, indeed, non-resistance has been brought about by fraud (*z*). But the fact of consent will be immaterial where the alleged assault is of such a nature that its infliction is injurious to the public as well as to the person injured, or involves an actual breach of the peace. Thus, the principals at a prize fight, and all persons aiding and abetting them, are guilty of an assault (*a*).

A common assault may also be the subject of a civil action for damages; and the party injured may either prosecute or bring his action first. The Court will not, however, pass judgment during the pendency of a civil action for the same assault (*b*), the reason obviously being that otherwise the issue of the civil action might be prejudiced. And, in certain cases (*c*) the fact that a charge of assault or battery has already been disposed of summarily by justices is a bar to any civil proceedings for the same cause.

A common assault—that is, a mere assault which may or may not have proceeded to a battery—is a misdemeanour, punishable by imprisonment not exceeding one year (*d*). But the justice of the case is often more adequately met by compensation to the person injured. Therefore, with the assent of the prosecution, if the circumstances appear to

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(*y*) Archbold, 893; v. *Coward* v. *Baddeley*, [1859] 4 H. & N. 478.

(*z*) Except in the case of an indecent assault on a child under thirteen years of age; v. 43 & 44 Vict. c. 45, s. 2; also the judgments of Wills and Stephen, JJ., in *R.* v. *Clarence*, [1889] 22 Q. B. D. 23; 58 L. J. M. C. 10.

(*a*) *R.* v. *Coney*, [1882] 8 Q. B. D. 534; 51 L. J. M. C. 66.

(*b*) *R.* v. *Mahon*, [1826] 4 A. & E. 575.

(*c*) v. pp. 173, 458.

(*d*) 24 & 25 Vict. c. 100, s. 47.

warrant that course, the Court may allow the defendant to plead guilty, and inflict upon him a merely nominal fine, on the understanding that he shall make a compensation to the prosecutor (*e*).

Common assaults are often disposed of by the magistrates at Petty Sessions (*f*). A Court of summary jurisdiction has, however, no power to convict of a common assault unless the complaint to the Court is made by the party aggrieved, or some one on his behalf, but this does not apply to aggravated assaults (*g*).

A recent statute (*h*) has much extended the power which the Court possessed under the Matrimonial Causes Act, 1878, of making an order having the effect of a decree for a judicial separation in a case of aggravated misconduct by a husband towards his wife.

It is now provided that a married woman whose husband has been convicted *summarily* of an aggravated assault upon her, or has been convicted *upon indictment* of any assault upon her, and sentenced to a fine of more than £5 or to imprisonment for a term not exceeding two months, or whose husband shall have deserted her or been guilty of persistent cruelty to her, or of wilful neglect to provide reasonable maintenance for her or her infant children, and shall thus have caused her to live apart from him [or whose husband is a habitual drunkard (*i*)], may apply to a Court of summary jurisdiction, or to the Court before whom her husband has been convicted on indictment, for an order under the Act (*k*). The Court may thereupon make an order having the effect of a judicial separation, and may also give to the wife the legal custody of the children of the marriage while under the age of sixteen, and order the husband to pay her for

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(*e*) *R.* v. *Roxburgh*, [1871] 12 Cox, 8.

(*f*) See *post*, pp. 457, 458.

(*g*) *Nicholson* v. *Booth*, [1888] 57 L. J. M. C. 43; but the defendant may be committed for trial and convicted *on indictment* although the party aggrieved has not made complaint, *R.* v. *Gaunt*, [1895] 73 L. T. 585; 18 Cox, C. C. 210.

(*h*) 58 & 59 Vict. c. 39.

(*i*) 2 Edw. VII. c. 28. s. 5.

(*k*) 58 & 59 Vict. c. 39, s. 4.

maintenance a sum not exceeding £2 per week (*l*). An order cannot be made under this Act if it is proved that the wife has committed adultery, unless the husband has condoned or connived at, or by his wilful neglect or misconduct conduced to, such adultery; and if the wife, after the making of the order, either commits adultery or voluntarily resumes cohabitation with her husband the order is to be discharged (*m*). If the Court thinks that the matter would be more conveniently dealt with by the High Court it may refuse to make an order (*n*). A right of appeal is given to the Probate, Divorce, and Admiralty Division of the High Court (*o*).

There is no similar provision in favour of the husband where the wife has been cruel to or has deserted him, but if he can show that she is an habitual drunkard he can obtain from a Court of summary jurisdiction an order having the effect of a decree for judicial separation and making provision for the custody of the children and a weekly allowance to the wife for maintenance, and the Court may direct her to be sent to a home for inebriates (*p*).

The accused, under the plea of not guilty, may prove (i) that the facts of the case do not amount to an assault or battery, as, *e.g.*, that there was consent to the acts complained of; or (ii) that he was justified or excused. He may also specially plead the statutory defence of previous acquittal or conviction by justices (*q*). As to matters of justification or excuse it may be stated generally that the same facts which would excuse a homicide on the ground of misadventure are a good defence upon an indictment for a battery. Other defences are, that it was committed merely in self-defence, or in the proper administration of moderate correction, or in the execution of public justice, or in some lawful game (*q*).

So much for *common* assaults; we have now to deal with those of a more serious character.

(*l*) *Ibid.* s. 5.
(*m*) *Ibid.* ss. 6, 7.
(*n*) *Ibid.* s. 10.
(*o*) *Ibid.* s. 11.
(*p*) 2 Edw. VII. c. 28, s. 5.
(*q*) Archbold, 895; see also *post*, p. 458.

ACTUAL AND GRIEVOUS BODILY HARM.

If the assault occasions *actual bodily harm*, and the indictment so alleges, the punishment is penal servitude to the extent of five years (*r*) for the misdemeanour. Actual bodily harm will include any hurt or injury calculated to interfere with the health or comfort of the prosecutor; it need not be an injury of a permanent character (*s*). The communication by the prisoner of a venereal disease to his wife is not assaulting her, nor does it amount to inflicting upon her actual bodily harm within the meaning of the Act (*t*).

Unlawfully and maliciously *wounding* or inflicting any *grievous bodily harm* upon any person, with or without any weapon or instrument, is a misdemeanour, punishable by penal servitude to the extent of five years (*u*). If any person (a) wound, or cause grievous bodily harm to, (b) shoot at, or (c) attempt to shoot at any other person, *with intent* in either case to (i) maim, (ii) disfigure, or (iii) disable any person, or (iv) to do some other grievous bodily harm to him, or (v) to resist or prevent the lawful apprehension of any one, he is guilty of a felony, punishable by penal servitude to the extent of life (*w*).

To constitute a *wounding*, the continuity of the skin must be broken. The nature of the instrument is immaterial, whether it be a stab by a knife, a kick, or a gunshot wound, &c. (*x*).

To *maim* is to injure any part of a man's body, which may render him less capable of fighting. The injury is termed *mayhem*.

The term "*disfigure*" explains itself. To *disable* refers to the causing of a permanent and not merely a temporary disablement (*y*).

(*r*) 24 & 25 Vict. c. 100, s. 47.
(*s*) Archbold, 893.
(*t*) *R.* v. *Clarence*, [1889] 58 L. J. M. C. 10; 22 Q. B. D. 23.
(*u*) 24 & 25 Vict. c. 100, s. 20.
(*w*) *Ibid.* s. 18.
(*x*) *R.* v. *Wood*, [1830] 1 Mood. C. C. 278; *R.* v. *Briggs*, [1831], *Ibid.* 318.
(*y*) *R.* v. *Boyce*, [1824] 1 Mood. C. C. 29.

The *grievous bodily harm* need not be either permanent or dangerous, so long as it seriously interferes with health or comfort (*z*).

The intent can of course only be proved by presumptive evidence gathered from the facts of the case: but here, as always, it will be presumed that the person intended the natural consequences of his acts. The intent need not be to maim, &c., the particular person who is injured, or indeed any particular person; thus, if a person wounds A. while intending to inflict grievous bodily harm on B., or even while doing an unlawful act as a mere piece of foolish mischief, provided that act is one likely to injure others, he is guilty of wounding with intent, &c. (*a*).

ASSAULT WITH INTENT TO COMMIT A FELONY.

This crime is a misdemeanour, punishable with imprisonment not exceeding two years. If the intent cannot be proved, the defendant may be convicted of a common assault (*b*).

ATTEMPT TO CHOKE, ETC., WITH INTENT, ETC.

Whosoever attempts to *choke, suffocate, or strangle* any other person, or by any means calculated to choke, &c., renders any other person insensible, unconscious, or incapable of resistance, with *intent* to enable himself or any other person to commit, or assist in committing, any indictable offence, is guilty of felony, and punishable with penal servitude to the extent of life, with or without whipping in addition (*c*).

With like intent, to apply, or administer, or cause to be taken, or to attempt to administer, &c., or to attempt to

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(*z*) v. *R.* v. *Ashman*, [1858] 1 F. & F. 88.
(*a*) *R.* v. *Martin*, [1881] 8 Q. B. D. 54; 51 L. J. M. C. 36; *R.* v. *Latimer*, [1886] 17 Q. B. D. 359; 55 L. J. M. C. 135.
(*b*) 24 & 25 Vict. c. 100, s. 38.
(*c*) *Ibid.* s. 21; 26 & 27 Vict. c. 44.

cause to be administered, &c., any chloroform, laudanum, or other *stupefying or overpowering drug*, matter, or thing, is a felony punishable in the same way, with the exception of the whipping (*d*).

ADMINISTERING POISON, ETC.

To maliciously administer, &c., any poison, or other destructive or noxious thing, so as thereby to endanger life or to inflict grievous bodily harm, is a felony punishable by penal servitude to the extent of ten years (*e*). If the administering, though it does not so endanger life or inflict harm, is with intent to injure, aggrieve, or annoy the person, the offence is a misdemeanour, punishable by penal servitude to the extent of five years (*f*). A person indicted for the first of these offences may be found guilty of the second (*g*).

INJURING BY EXPLOSIVE OR CORROSIVE SUBSTANCES.

By explosion of gunpowder or other explosive substance, to maliciously burn, maim, disfigure, disable, or do any grievous bodily harm to any person, is a felony, punishable by penal servitude to the extent of life (*h*). The same punishment is awarded for causing any gunpowder, or other explosive substance, to explode, or sending or delivering to, or causing to be taken or received by any person, any explosive or other dangerous or noxious thing, or putting or laying at any place, or throwing at or upon or otherwise applying to any person any corrosive fluid or any destructive or explosive substance, with *intent* to burn, maim, disfigure, or disable, or do any grievous bodily harm to any person, and this whether any bodily injury be effected or not (*i*). If

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(*d*) 24 & 25 Vict. c. 100, s. 22.
(*e*) *Ibid.* s. 23.
(*f*) *Ibid.* s. 24.
(*g*) *Ibid.* s. 25.
(*h*) *Ibid.* s. 28.
(*i*) *Ibid.* s. 29.

the gunpowder or other explosive substance is placed, or thrown in, upon, or near any building, ship, or vessel, with intent to do any bodily injury to any person, whether such purpose be effected or not, the offender is guilty of a felony, punishable by penal servitude to the extent of fourteen years (*k*).

ENDANGERING SAFETY OF RAILWAY PASSENGERS.

The following acts are felonious, punishable by penal servitude to the extent of life, and in case of a male under sixteen by whipping:—

(i) Unlawfully and maliciously to put or throw upon or across any railway any wood, stone, or other thing; (ii) to take up, remove, or displace any rail, sleeper, or other thing belonging to a railway; (iii) to move or divert any points or other machinery belonging to any railway; (iv) to make, show, hide, or remove any signal or light upon or near to any railway; (v) to do or cause any other thing to be done with intent to endanger the safety of passengers (*l*) or with intent to obstruct, injure, or destroy any engine, &c. (*m*); or (vi) to throw against or into any railway engine, carriage, or truck, any wood, stone, or other thing, with intent to injure or endanger the safety of any person in the train (*n*). If committed by a child or young person, these offences may be dealt with summarily and punished in one of the ways specially provided for the punishment of such persons (*o*).

It is a misdemeanour, punishable with imprisonment not exceeding two years, by any unlawful act, or by any wilful omission or neglect, (i) to endanger the safety of any person conveyed or being in or upon a railway, or to aid or assist therein (*p*); (ii) to obstruct any engine, &c., or aid or assist therein (*q*).

(*k*) *Ibid.* s. 30.
(*l*) 24 & 25 Vict. c. 100, s. 32.
(*m*) 24 & 25 Vict. c. 97, s. 35.
(*n*) 24 & 25 Vict. c. 100, s. 33.
(*o*) As to which v. 42 & 43 Vict. c. 49, s. 11, and p. 453, *et. seq.*
(*p*) 24 & 25 Vict. c. 100, s. 34.
(*q*) 24 & 25 Vict. c. 97, s. 36.

It may be observed here that an acquittal upon an indictment for felony under the above enactments is no bar to a subsequent indictment for a misdemeanour although on the same facts (*r*).

As to injuries from furious driving, v. p. 126.

ASSAULTS, ETC., CONNECTED WITH WRECKS.

To assault, and strike or wound any magistrate, officer, or other person lawfully authorised in or on account of his exercising his duty in the preservation of any vessel in distress, or any wrecked vessel or goods, is a misdemeanour punishable by penal servitude to the extent of seven years (*s*).

To impede any person endeavouring to escape from a wreck or vessel in distress, or endeavouring to save another, is a felony, punishable by penal servitude to the extent of life (*t*).

FORCING SEAMEN ON SHORE.

For a person belonging to a British ship wrongfully to force on shore or leave behind any seaman, whether within or without the King's Dominions, is a misdemeanour (*u*).

Other misdemeanours against the Merchant Shipping Acts are to discharge or leave behind any seaman in any place abroad, except in the country where he was shipped, without obtaining the proper sanction specified in the Act (*w*); and for a master of a ship to deliver a false account or make a false representation as to the effects or wages of any seaman left behind abroad (*x*). Each of these misdemeanours is punishable by fine or by imprisonment not exceeding two years, or may be dealt with on summary conviction, and in that case is punishable by imprisonment not exceeding

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(*r*) *R.* v. *Gilmore*, [1882] 15 Cox, 85.
(*s*) 24 & 25 Vict. c. 100, s. 37.
(*t*) *Ibid.* s. 17.
(*u*) 6 Edw. VII. c. 48, s. 43.
(*w*) *Ibid.* ss. 30, 36.
(*x*) *Ibid.* s. 28, sub-s. 10.

six months or a penalty not exceeding £100 (*y*). The Acts also provide penalties enforceable by summary conviction for a very large number of other acts or defaults.

ASSAULTS ON OFFICERS.

To assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or to assault any person with intent to resist or prevent the lawful apprehension of oneself or of any other person for any offence, is a misdemeanour, punishable by imprisonment not exceeding two years (*z*).

ASSAULTS ON OTHERS IN THE EXECUTION OF THEIR DUTY.

Clergymen.—(i) By threats or force to obstruct or prevent a clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or (ii) to strike, or offer violence to, one so engaged, or (iii) to arrest upon civil process one so engaged, or who, to the knowledge of the accused, is going to or coming from such performance is a misdemeanour, punishable by imprisonment not exceeding two years (*a*).

Gamekeepers, v. p. 134.

ASSAULTS ON THOSE IN A DEFENCELESS POSITION.

Apprentices or Servants.—Whosoever, being legally liable either as master or mistress to provide for any apprentice or servant necessary food, clothing, or lodgings, wilfully and

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(*y*) 57 & 58 Vict. c. 60, s. 680.
(*z*) 24 & 25 Vict. c. 100, s. 38; v. also 34 & 35 Vict. c. 112, s. 12; and 48 & 49 Vict. c. 75. For assaulting, &c., officers of the customs, v. p. 96.
(*a*) 24 & 25 Vict. c. 100, s. 36.

without lawful excuse refuses or neglects to do so, or unlawfully and maliciously does or causes to be done any bodily harm so that the life of the apprentice or servant is endangered or his health likely to be permanently injured, is guilty of a misdemeanour, and is punishable by penal servitude to the extent of five years (*b*).

Children.—Abandoning or exposing:—

By the Children Act, 1908 (*c*), for a person over sixteen years of age who has the custody, charge, or care (*d*) of a child or young person (a "child" for the purposes of the Act meaning a person under the age of fourteen years, and a "young person" meaning one who is fourteen, but is under the age of sixteen years (*e*)), to wilfully assault, ill-treat, neglect, abandon, or expose such child or young person in a manner likely to cause it unnecessary suffering or injury to its health, is a misdemeanour punishable, upon conviction on indictment, by imprisonment for two years, or a fine of £100, or both; and the fine may be increased to £200 or a sentence of five years' penal servitude be inflicted if it be shown that the accused was directly or indirectly interested in any money payable on the child's death, and knew that it was so payable. A Court of summary jurisdiction may deal with the matter by a sentence of six months' imprisonment or a fine of £25, or both (*f*). If a parent or other person legally liable to maintain a child or young person fails to provide for him adequate food, clothing, medical aid, or lodging, or if, being unable to provide it, he fails to take steps to procure it under the Acts relating to the relief of the poor, he will be deemed to have neglected the child or young person in a manner likely to cause injury to his health (*g*). The deliberate omission to supply proper medical attendance will be a "wilful neglect" within the meaning

(*b*) 24 & 25 Vict. c. 100, s. 26 (v. also p. 168).
(*c*) 8 Edw. VII. c. 67.
(*d*) As to the respective meanings of these words, see section 38.
(*e*) *Ibid.* s. 131.
(*f*) 8 Edw. VII. c. 67, s. 12.
(*g*) *Ibid.*

of this Act, even if the parent conscientiously objects to medical aid in the case of disease, and if the child or young person dies from the effects of the cruelty or neglect forbidden by the Act, the offender is guilty of manslaughter (*h*). Upon the trial of any person over the age of sixteen indicted for manslaughter of a child or young person of which he has had the custody, charge, or care, the jury may convict the accused of cruelty under this Act (*i*).

The Act does not take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment (*k*).

When the person convicted of cruelty to or ill-treatment of a child or young person is its parent or is living with the parent and is an habitual drunkard within the meaning of the Inebriates Acts, 1879 to 1900 (*l*), the Court instead of passing a sentence of imprisonment may, with the consent of the accused, direct him to be detained for any period not exceeding two years in a retreat under those Acts (*m*). It is also provided that where a person having the custody of a child or young person is convicted or committed for trial for cruelty or any ill-treatment of it, or for abandoning it or taking it out of the possession of its father or mother, or is bound over to keep the peace towards the child or young person, the Court may take the child or young person out of the custody of such person and commit it to the custody of a relation or other fit person until it attains the age of sixteen, and may compel the parent to contribute to its maintenance (*n*). Magistrates are also empowered to issue a warrant authorising a police-constable to search for any child who is alleged to be ill-treated or neglected, and to

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(*h*) *R.* v. *Senior*, [1899] 1 Q. B. 283; 68 L. J. Q. B. 175. This case was decided under the Prevention of Cruelty to Children Act, 1894, which also made "wilful neglect" a misdemeanour. See also *Oakey* v. *Jackson*, [1914] 2 K. B. 216; 83 L. J. K. B. 712.

(*i*) 8 Edw. VII. c. 67, s. 12, sub-s. 4.

(*k*) *Ibid.* s. 37.

(*l*) v. p. 440, *post*.

(*m*) 8 Edw. VII. c. 67, s. 26.

(*n*) *Ibid.* ss. 21, 22.

bring it before a Court of summary jurisdiction in order that due provision for its safety may be made (*o*). Moreover, a constable may without warrant arrest any person who in his sight commits any of the above-mentioned offences if the name and residence of such person cannot be ascertained by the constable, or any person whom he has reason to believe has committed any such offence if he has reasonable grounds for believing that such person will abscond, or if his name and address cannot be ascertained (*p*).

For a person having the custody, charge, or care of a child or young person between the ages of four and sixteen to reside in or frequent a brothel is a misdemeanour and is punishable either on indictment or summary conviction by a fine of £25 or imprisonment for six months (*q*).

If a person having the custody, charge, or care of a girl under the age of sixteen causes or encourages her seduction, prostitution, or unlawful carnal knowledge, he is guilty of a misdemeanour and is liable to imprisonment for two years; and he will be deemed to have caused or encouraged the seduction, &c., if he has knowingly allowed her to consort with persons of known immoral character and the girl is seduced (*r*).

The Children Act, 1908, contains provisions inflicting on summary conviction a penalty of £25 or imprisonment for six months upon persons who, for reward, undertake the nursing and maintenance of infants under the age of seven years apart from their parents, without complying with the provisions of the Act as to notices to the local authority and otherwise, or if such persons insure the lives of such infants (*s*).

It is an offence, punishable by a Court of summary jurisdiction with imprisonment for three months or a fine

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(*o*) *Ibid.* s. 24.

(*p*) *Ibid.* s. 19.

(*q*) *Ibid.* s. 16, sub-s. 1. This section does not affect the liability of a person to be indicted under section 6 of the Criminal Law Amendment Act, 1885 (v. p. 158), but on the trial of a person under that section he may be found guilty of an offence under this section. *Ibid.* s. 16, sub-s. 2.

(*r*) 8 Edw. VII. c. 67, s. 17; 10 Edw. VII. & 1 Geo. V. c. 25, s. 1.

(*s*) 8 Edw. VII. c. 67, ss. 1—11

of £25, or both, (i) to cause or allow a child or young person to be in any street or place for the purpose of begging, whether under the pretence of singing, selling, &c., or otherwise (*t*); (ii) to cause or allow a boy under the age of fourteen, or a girl under the age of sixteen, to be in a street or public-house (*u*) for singing, playing, or performing for profit, or offering anything for sale, between 9 P.M. and 6 A.M., which hours may be extended or restricted by the local authority (*w*); (iii) to cause or allow any child under *eleven* years of age to be *at any time* in a street, or public-house (*x*), or in a circus or place of amusement or public entertainment, for the purpose of singing, playing, or performing for profit, or offering anything for sale, or to cause or allow a child under *sixteen* years of age to be trained as an acrobat, or circus performer, or for any dangerous exhibition; but a licence may be granted by magistrates, subject to proper restrictions for the protection of the child, for the employment of a child above *ten* years of age, to take part in such entertainment or to be so trained (*y*).

It is forbidden to cause any male child or young person under *sixteen* years of age, or any female under *eighteen* years of age, to take part in any public exhibition or performance whereby its life or limbs might be endangered. The penalty for the offence is £10; but if an accident happens to the child, causing it actual bodily harm, the employer is liable to be indicted for an assault, and the Court has power to order him to pay £20 compensation for the benefit of the child (*z*).

It has also been made illegal to employ any child under the age of *eleven* in any street trading, or in any occupation likely to be injurious to its life, health, or education; and power has been given to local authorities to make by-laws

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(*t*) *Ibid.* s. 14.

(*u*) A child under the age of fourteen must not be allowed *at all* in the bar of a public-house, except during the hours of closing, under a penalty of £2 upon the licence-holder, *ibid.* s. 120.

(*w*) 4 Edw. VII. c. 15, s. 2 (b).

(*x*) See note (*u*), *supra.*

(*y*) 4 Edw. VII. c. 15, s. 2 (*c*), (*d*).

(*z*) 42 & 43 Vict. c. 34, s. 3, as amended by 60 & 61 Vict. c. 52.

as to the age below which any employment shall be illegal, the number of hours during which children may be employed, and prohibiting absolutely or under conditions the employment of children in any specified occupation (*a*).

In proceedings under the Children Act, 1908, for the cruelty or ill-treatment of a child or young person the defendant's husband or wife is a competent but not compellable witness for the prosecution or defence, and without the consent of the person charged (*b*).

It is usual to prove the age of the child or young person in question by producing a certificate of birth with evidence of identity. But this may be proved by any legal evidence, such as the production of the child in Court or the statement of a witness, who has seen it, of his belief as to its age (*c*); and in the absence of any proof of age by the prosecution it will be sufficient if the child appears to the Court to have been of the specified age when the offence was committed unless the contrary is proved (*d*).

Upon a charge of cruelty to a child or young person or of any offence involving bodily injury to it, if the Court is satisfied that the attendance of the child or young person alleged to have been ill-treated is not essential to the just hearing of the case it may proceed in his absence (*e*).

EMPLOYMENT OF CHILDREN ABROAD.

By the Children (Employment Abroad) Act, 1913, it is made an offence for any person to cause or procure a child or young person, or having the custody, charge, or care of any child, &c., to allow such child, &c., to go out of the United Kingdom for playing or performing for profit, unless,

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(*a*) 3 Edw. VII. c. 45, ss. 1 and 3.
(*b*) 8 Edw. VII. c. 67, s. 27; *Leach* v. *R.*, [1912] A. C. 305; v. p.
(*c*) *R.* v. *Cox*, [1898] 1 Q. B. 179; 67 L. J. Q. B. 293.
(*d*) 8 Edw. VII. c. 67, s. 123, sub-s. 2. This sub-section applies to all offences under the Act or in the First Schedule to the Act, except offences under the Criminal Law Amendment Act, 1885.
(*e*) 8 Edw. VII. c. 67, s. 31.

in the case of a *young person*, a licence under the Act has been granted. This offence is punishable on summary conviction by fine of £100 or alternatively, or in addition, by imprisonment for three months. If, however, the offender has procured the child, &c., to go out of the United Kingdom by any false pretence or representation, he is liable, on conviction on indictment, to imprisonment for two years. Proceedings in respect of an offence under the Act must be instituted within three months from the discovery of the commission of the offence by the person taking the proceedings. The wife or husband of the person charged is a competent but not compellable witness for the prosecution or defence, and without the consent of the person charged (*f*).

Lunatics.—Ill-treating or wilfully neglecting a patient in an institution for lunatics by any person employed therein, or by any one having charge of a lunatic, is a misdemeanour, punishable on indictment by fine or imprisonment, or on summary conviction by a fine not exceeding £20 (*g*). The expression "institution for lunatics" includes any house licensed for their reception, and it is a misdemeanour, punishable by a fine of £50 and by imprisonment, to take charge of, receive, or detain a lunatic for payment in any house not so licensed, or to receive or detain two or more lunatics in an unlicensed house, even if no payment is required (*h*).

The Lunacy Act, 1890, contains many other provisions for the protection of lunatics, and inflicts severe penalties if these provisions are not complied with (*i*).

(*f*) 3 & 4 Geo. V. c. 7, ss. 1 and 3.
(*g*) 53 Vict. c. 5, s. 322 (The Lunacy Act, 1890).
(*h*) *Ibid.* s. 315.
(*i*) See, in particular, section 316, Neglect to send notices on admission to institution, or on discharge or death; section 317, Wilful misstatements in petitions, medical certificates, reports, &c.; section 318, False entries in books or returns; section 319, Omission to give notice of lunatic's death to coroner; section 321, Obstructing Lunacy Commissioners or visitors; section 40, Using mechanical means of bodily restraint on lunatics without necessity or contrary to regulations of Act; section 214, Making untrue statements for the purpose of obtaining a licence for a house for the reception of lunatics; section 222, Detaining lunatics more than two months after the licence for the house has expired; section 233, Lodging lunatics in premises not included in the licence. Offences against any of these sections are declared to be misdemeanours.

DEFECTIVES.

By the Mental Deficiency Act, 1913, the following are made misdemeanours punishable on indictment by fine or imprisonment for two years, or, if prosecuted summarily, by imprisonment for three months and (or) a fine of £50 (*k*):

(i) Undertaking without consent of the Board of Control constituted by the Act the care and control of more than one defective (*l*).

(ii) For the manager of an institution for defectives, or for the guardian of a defective, to detain a patient or exercise the powers conferred by the Act after he knows that such powers have expired (*m*).

(iii) Obstructing a commissioner or inspector or any officer appointed by a local authority under the Act (*n*).

(iv) For a manager, officer, nurse, &c., in an institution or certified house, or for any person having charge of a defective, to ill-treat or wilfully neglect the defective (*o*).

(v) Knowingly making false entries in any book, statement, or return as to any matter in respect of which an entry is required under the Act (*p*).

(vi) Supplying any untrue information, description, or notice for the purpose of obtaining any certificate or approval under the Act (*q*).

FALSE IMPRISONMENT.

Wrongful imprisonment is a misdemeanour at common law, punishable by fine or imprisonment, or both. All that the prosecutor has to prove is the imprisonment; it is for the defendant to justify what he did (*r*). The indictment also usually alleges an assault.

Every confinement or restraint of the liberty of a person is an imprisonment; for example, forcibly detaining a man in

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(*k*) 3 & 4 Geo. V. c. 28, s. 60.
(*l*) s. 51, sub-s. 1.
(*m*) s. 51, sub-s. 3.
(*n*) s. 54, sub-s. 1.
(*o*) s. 55.
(*p*) s. 57.
(*q*) s. 58.
(*r*) Archbold, p. 959.

the street. Though a party, on being shown a magistrate's warrant, goes willingly upon the requirement of the constable, this is an imprisonment which the person giving him into custody may be called upon to justify (*s*).

We shall see, under the title "Arrest," in what cases one person is justified in detaining another (*t*).

(*s*) *Chinn* v. *Morris*, [1826] 2 C. & P. 361; but v. also *Arrowsmith* v. *Le Mesurier*, [1806] 2 B. & P. N. R. 211.

(*t*) v. p. 288 *et. seq.*

PART III.

OFFENCES AGAINST INDIVIDUALS—THEIR PROPERTY.

CHAPTER I.

LARCENY.

We have now to consider three offences which are often confused—larceny, embezzlement, false pretences. Before attempting to distinguish them it is necessary to understand the meanings of the terms "property" and "possession."

A person has the property in things of which he is the owner. If, for example, I buy a motor-car from a person who can give me a good title to it, I have the right of ownership over it, and it is my property. Possession, on the other hand, simply implies physical control over a thing, whether exercised rightfully or wrongfully. My customer to whom I let my car, or a thief who steals it, each has possession, but I retain my property. If, however, a person has possession of a thing and also for any reason has a right to retain possession of it as against the true owner, as, *e.g.*, in virtue of a bailment or loan, he is said to have a "special property" in the thing.

I may, however, have possession of a thing although I am not, in fact, exercising control over it. My possession is then said to be constructive. This occurs (i) where the thing is in some place over which I exercise general control, as, *e.g.*, money in the till of my shop; (ii) where it is in the hands of my servant, for the possession of a servant is deemed to be

the possession of his master and the servant himself is said to have merely the custody (*a*).

We can now distinguish between larceny, embezzlement, and false pretences.

In larceny the *possession* is *taken* (actually or constructively) *from a person who has the possession*, whether or not he is the owner; as when my motor-car is stolen from me or from my bailee, or money is stolen from my till or my servant. In embezzlement, *possession is taken* of something which is my *property*, but it is taken *before it has come into my actual or constructive possession*, as, *e.g.*, where my shopman, instead of paying to me money which he has received from a customer for me, intercepts it and converts it to his own use (*b*). In false pretences the person committing the offence acquires the *property* in something from me. I give it to him, intending to pass not merely the possession but the property, but I am induced to do so by his false pretences, as, *e.g.*, where he obtains money or goods from me by false representations made in a begging letter.

The difference between these offences is not now of so much importance as formerly, for by the Larceny Act, 1916 (*c*)—

(i) On the trial of a person indicted for embezzlement and fraudulent application or disposition of property under section 17 of the Act, if it is proved that he stole the property in question, the jury may find him guilty of larceny; and *vice versa*, if indicted for larceny, he may be convicted of embezzlement or of fraudulent application or disposition.

(ii) A person indicted for larceny may be convicted of obtaining by false pretences.

(iii) If a person is indicted for obtaining property by false pretences and it is proved that he stole it, he can nevertheless be convicted of obtaining by false pretences.

The common law and statute law relating to larceny have now been modified by the Larceny Act, 1916 (*d*).

(*a*) *R.* v. *Cooke*, L. R. 1 C. C. R. 299; 40 L. J. M. C. 68.
(*b*) *R.* v. *Masters*, 2 C. & K. 936.
(*c*) s. 44, sub-ss. 2, 3, and 4.
(*d*) 6 & 7 Geo. V. c. 50. In the chapters relating to larceny, embezzlement, false pretences, and burglary, etc., the quotation merely of a section refers to this Act; the figures (1861) refer to the Larceny Act, 1861.

By section 1 it is provided that, for the purposes of the Act,

1. A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof; provided that a person may be guilty of stealing any such thing, notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use, or the use of any person other than the owner.

2. (i) The expression "takes" includes obtaining the possession (a) by any trick; (b) by intimidation; (c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; (d) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps; (ii) the expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached only if it has been completely detached; (iii) the expression "owner" includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

3. Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen; provided that (a) save as hereinafter expressly provided with respect to fixtures, growing things, and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof: and (b) the carcase of a creature wild by nature and not reduced into possession while living shall not be capable of being stolen by the person who has killed such creature, unless after killing it he has abandoned possession of the carcase.

This section, every word of which is of importance, may be considered under the following heads:—

1. What kinds of property may be the subjects of larceny.

2. What must be the criminal intent.
3. What constitutes a taking and carrying away.

1. *The subjects of larceny.*—At common law certain kinds of property could not be the subjects of larceny. These were (*e*):—

A. Things real or savouring of or attached to the realty.

B. Bonds, bills, and other *choses in action.*

C. Things which are not the subjects of property.

As to these in order:—

A. The first and chief example of the common law exclusion was—Things *real*, as lands and houses; and things attached or *belonging to the realty*, as trees, growing crops, grass, the stones or lead of a house; also *title-deeds* and other writings relating to real estate, inasmuch as they savour of the realty, and pass like real property to the heir or devisee. If the rights of the owner of such property are violated, he must seek a remedy in a civil action of trespass. He cannot, as a rule (see exceptions below), appeal to the criminal law for the punishment of the offender. But if the things have been severed from the land, &c., *e.g.*, mown grass, and are then feloniously taken away, these may be made the subjects of an indictment for larceny, inasmuch as by the severance they have become personal goods. However, to give them this quality where the severance has been by the wrongdoer himself a substantial interval must have elapsed between the severance and the removal, so that the acts are perfectly distinct. And in this interval the wrongdoer must have intended to have abandoned the wrongful possession begun at the time of the severance; for example, it will not be larceny to sever the article and then conceal it till one can conveniently return and carry it away, however long the interval may be, for the whole is regarded as one continuous act (*f*). This common law rule is preserved by section 1 (3) (a) of the Larceny Act, 1916.

(*e*) Archbold, 523, 524.
(*f*) *R* v. *Townley*, [1871] L. R. 1 C. C. R. 315; 40 L. J. M. C. 144.

The following are the statutory modifications of the old common law rule excluding this class of property:—

α *Materials of buildings, fixtures, &c.*—To steal or to rip, cut, sever, or break, with intent to steal, any glass or wood-work belonging to any building whatsoever; or any metal; or any utensil or fixture fixed in or to any building whatsoever; or anything made of metal fixed in any land being private property or for a fence to a dwelling-house, garden, or area, or in any square or street, or in any place dedicated to the public use or ornament, or in any burial-ground, is a felony punishable as simple larceny (*g*).

β. *Mines, &c.*—To steal, or sever with intent to steal, the ore of any metal, or any manganese, blacklead, &c., or any coal from any mine, bed, or vein, is a felony, punishable by imprisonment not exceeding two years with or without hard labour (*h*).

The same consequences attend thefts of a similar nature by any one employed about the mine (*i*).

γ. *Trees.*—To steal, cut, destroy, or damage with intent to steal, the whole or any part of any tree, sapling, shrub, or underwood growing in a park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house, if the injury done or the value of the article stolen amounts to the value of more than £1, or, if growing elsewhere, more than £5, is a felony punishable as simple larceny (*k*). If the injury is to the value of 1s., wherever the tree, &c., may be growing, the accused may be dealt with summarily and punished for the first offence by fine not exceeding £5 over and above the injury done; for the second, imprisonment not exceeding twelve months (*l*); on a third conviction, the offence is a felony, punishable as simple larceny (*m*).

(*g*) s. 8, sub-s. 1.
(*h*) s. 11.
(*i*) s. 39 (1861).
(*k*) s. 8, sub-s. 2.
(*l*) s. 33 (1861).
(*m*) s. 8, sub-s. 2.

δ. *Plants, &c.*—To steal, or destroy, or damage with intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hothouse, or conservatory, is punishable on summary conviction by imprisonment not exceeding six months, or fine not exceeding £20 (*n*). The second offence is punishable as simple larceny (*o*).

ε. *Deeds, &c.*—To (i) steal (*p*), or (ii) for any fraudulent purpose to destroy, cancel, obliterate, or conceal (*q*) any or part of any documents of title to lands is a felony punishable by penal servitude to the extent of five years.

B. A second exclusion by the common law was of *choses in action* (*i.e.*, mere rights to demand property by action or other proceedings), and documents which are merely evidence of such rights.

Larceny of *choses in action* and securities is now, however, punishable under section 2 of the Larceny Act, 1916 (*r*). By section 46 the expression "valuable security" includes any writing entitling or evidencing the title of any person to any share or interest in any public stock, annuity, fund, or debt of any part of His Majesty's Dominions, or of any foreign State, or in any stock, &c., of any body corporate, company, or society, whether within or without His Majesty's Dominions, or to any deposit in any bank, and also includes any scrip, debenture, bill, note, warrant, order, or other security for payment of money, or any accountable receipt, release, or discharge, or any receipt or other instrument evidencing the payment of money, or the delivery of any chattel personal and any document of title to lands or

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(*n*) s. 36 (1861). It should be noticed that by section 37 stealing cultivated roots or plants used for the food of man or beast growing in *any* land is punishable on summary conviction by fine and imprisonment, v. pp. 458.

(*o*) s. 8, sub-s. 3.

(*p*) s. 7, sub-s. 1.

(*q*) s. 28 (1861). As to concealment of instruments of title or falsification of pedigree by a vendor or mortgagor, or his solicitor or agent, v. 22 & 23 Vict. c. 35, s. 24.

(*r*) Also, in case of theft by persons in the public service, under s. 17, sub-s. 2, v. p. 212; and, in case of theft of postal packets by Post Office officers, under s. 18, and under the Post Office Act, 1908, s. 55, v. p. 216.

goods (*s*). The expression "document of title to lands" includes any deed, map, register, &c., being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate. The term "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant, or order for the delivery or transfer of any goods or valuable things, bought or sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to (*t*).

The fraudulent destruction, cancellation, &c., of any valuable securities other than documents of title to land is a felony punishable in the same manner as the larceny of the property represented by the security (*w*).

It will be convenient to notice here the other exceptional cases of stealing written instruments.

Wills.—To (i) steal any will, codicil, or other testamentary instrument, either of a dead or living person (*w*), or (ii) for any fraudulent purpose to destroy, cancel, obliterate, or conceal, either during the life or after the death of the testator, the whole or any part of any will, codicil, or other testamentary instrument, whether of real or personal property (*x*), is a felony, punishable by penal servitude to the extent of life. Neither in case (i) nor case (ii) can a person be convicted if, before he is charged with the offence, he has first disclosed such act on oath in consequence of any compulsory process of a Court of law or equity in any action

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(*s*) It also includes currency notes (4 & 5 Geo. V. c. 14, s. 1, sub-s. 5) and money orders (Post Office Act, 1908, s. 59 (1)).

(*t*) Similar but not precisely the same definitions occur in section 1 of the Larceny Act, 1861, which should be referred to for such offences as are within unrepealed sections of that Act.

(*u*) s. 27 (1861).

(*w*) s. 6.

(*x*) s. 29 (1861).

or proceeding instituted by the party aggrieved (*y*); in case (ii) he has the same protection if the act was first disclosed in any compulsory examination or disposition in bankruptcy (*z*); but in case (i) the Larceny Act, 1916 merely provides that any statement or admission made in such examination or deposition shall not be admissible in evidence against him (*a*).

Records.—To (i) steal (*b*) or (ii) for any fraudulent purpose to remove, or to unlawfully and maliciously injure, obliterate, or destroy (*c*) records, writs, affidavits, orders, or other original documents belonging to a Court of record, or relating to any matter, civil or criminal, depending in any such Court, or any document relating to the business of any office, or employment under His Majesty, and being in any office appertaining to any Court of justice, or in any Government or public office, is a felony punishable by penal servitude to the extent of five years.

C. A third exclusion of the common law is of *things which are not the subjects of property at all.*

The chief example of this is in the case of certain animals. But, in addition to these, in certain other things there is no property, as a corpse (*d*), and, it has been said, of treasure-trove (*e*), waifs, &c.

Water supplied by a water company to a customer, and standing in his pipes, is a subject of larceny at common law (*f*); so also is gas (*g*). To maliciously or fraudulently abstract, consume, or divert electricity is by statute punishable as simple larceny (*h*).

(*y*) s. 29 (1861); s. 43, sub-s. 2.
(*z*) s. 29 (1861).
(*a*) s. 43, sub-s. 3. The protection given by s. 29 (1861) applies also to documents of title to land (v. p. 194); that given by s. 43, sub-ss. 2 and 3, applies to offences against ss. 6, 7 (1), 20, 21, and 22 (v. pp. 194, 195, 224—229).
(*b*) s. 7, sub-ss. 2 and 3.
(*c*) s. 30 (1861).
(*d*) It is, however, a misdemeanour to disinter a dead body for the purpose of dissection, or to sell it for gain or profit (*R.* v. *Lynn*, [1788] 2 T. R. 733); see also p. 123.
(*e*) But v. p. 53, and Archbold, 524.
(*f*) *Ferens* v. *O'Brien*, [1883] 11 Q. B. D. 21; 52 L. J. M. C. 70.
(*g*) *R.* v. *White*, [1853] Dears. C. C. 203; 22 L. J. M. C. 123.
(*h*) s. 10.

Animals.—At common law there can be no larceny of animals in which there can be no property. Such are beasts that are *feræ naturæ* and unreclaimed, *e.g.*, deer, hares, or conies in a forest, chase, or warren; fish in an open river or pond; or birds at their natural liberty, or their eggs (*i*); and this notwithstanding that the right to take the animals in the particular place is enjoyed exclusively by one or more persons. Thus it is not larceny to shoot and take a hare on another person's land; the offence will be one against the Game Laws. On the other hand, *dead* animals, whether to be used for food or not, may be the subjects of larceny. But where the killing and the taking are both by the accused, the rule noticed above as to a break in the proceedings by abandoning possession must be borne in mind (*k*). This rule also is preserved by section 1 (3) of the Larceny Act, 1916.

Again, if the animals are evidently reclaimed, or are practically under the care and dominion of any person, and may serve for food (*e.g.*, pheasants in a pheasantry), they could, at common law, be the subjects of larceny. So, also, valuable domestic animals, as horses; and all animals *domitæ naturæ* which serve for food, as swine, poultry, and the like; and the products of any of them, as eggs, milk, wool, &c. But other animals which do not serve for food were not the subjects of larceny at common law, *e.g.*, dogs, bears and foxes, though they might be recovered in a civil action.

Now, however, by section 1 (3) of the Larceny Act, 1916, any creature, alive or dead, whether serving for food or not, is capable of being stolen if it has any value and is the property of any person, *i.e.*, has been reduced into possession. But offences which at the commencement of the Act were punishable only on summary conviction remain only so punishable (*l*), as, *e.g.*, the stealing of any animal not the subject of larceny at common law.

(*i*) *R.* v. *Stride*, [1908] 1 K. B. 617, 627; 77 L. J. K. B. 490. But it will be otherwise if the eggs have been reduced into possession and are afterwards stolen, *ibid.*

(*k*) v. p. 192. *R.* v. *Read*, [1877] 3 Q. B. D. 131; 47 L. J. M. C. 50.

(*l*) s. 47, sub-s. 2.

Larceny of the following animals, &c., is governed by special sections.

α. *Deer.*—To unlawfully and wilfully course, hunt, snare, carry away, or kill or wound, or attempt to kill or wound, any deer kept in an unenclosed part of a forest, chase, or purlieu is punishable, on summary conviction, by a penalty not exceeding £50. The second offence is a felony punishable by imprisonment not exceeding two years (*n*). If the act is done in an enclosed place, the first or any offence is a felony, punishable by imprisonment not exceeding two years (*o*). To have in possession, without satisfactorily accounting for the same, any deer, or the head, skin, or other part thereof, or a snare or engine for taking deer (*p*), or to set or use any such snare, or destroy any part of the fence of any land where any deer are kept (*q*), is punishable, on summary conviction, by a fine of £20.

The sections creating these offences are, however, only applicable where the deer has been hunted or killed within the forest, chase, or purlieu, and not to the hunting, killing, or being in possession of a deer which has escaped beyond the boundary (*r*).

β. *Hares and Rabbits.*—To unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit in a *warren* or ground (whether enclosed or not) lawfully used for the breeding or keeping of hares or rabbits is a misdemeanour. To do the above at any other time, or at any time to set a snare, is punishable, on summary conviction, by a penalty not exceeding £5 (*s*).

γ. *Fish.*—To unlawfully and wilfully take or destroy any fish in any water adjoining or belonging to the dwelling-

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(*n*) s. 12 (1861).
(*o*) s. 13 (1861).
(*p*) s. 14 (1861).
(*q*) s. 15 (1861).
(*r*) *Threlkeld* v. *Smith*, [1901] 2 K. B. 531; 70 L. J. K. B. 921.
(*s*) s. 17 (1861).

house of the owner of such water is a misdemeanour; to do so in water not so situated, but which is private property, or in which there is any private right of fishery, is punishable, on summary conviction, by a penalty not exceeding £5 above the value of the fish (*t*). This provision does not apply to taking fish by angling in the daytime, which in all cases is only punishable by fine.

Oysters.—To steal oysters or oyster brood is now simple larceny under the Larceny Act, 1916 (*u*). To unlawfully and wilfully use any net, instrument, or dredge within any oyster bed or fishery, for the purpose of taking oysters, &c., although none are taken, is a misdemeanour, punishable by imprisonment not exceeding three months, with or without hard labour (*w*).

δ. *Dogs.*—Stealing a dog is punishable, on summary conviction, by imprisonment not exceeding six months or with a penalty not exceeding £20 above the value of the dog. A second offence is a misdemeanour, punishable by imprisonment not exceeding eighteen months, with or without hard labour (*x*). The same consequences, without the alternative of imprisonment for the first offence, attend the unlawfully having possession of a stolen dog or its skin, knowing it to have been stolen (*y*). To corruptly take money for aiding any person to recover a dog which has been stolen, or which may be in the possession of any person not the owner thereof, is a misdemeanour punishable by imprisonment not exceeding eighteen months (*z*).

ε. *Horses, Cattle, Sheep.*—One reason for increasing the severity of the punishment is the ease with which the crime

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(*t*) s. 24 (1861).
(*u*) s. 1, sub-s. 3; s. 2.
(*w*) s. 26 (1861); see also 31 & 32 Vict. c. 45, pt. 3, ss. 28, 42, 43, 51, 52, 55; also 47 & 48 Vict. c. 27.
(*x*) s. 18 (1861); s. 5, sub-s. 1.
(*y*) s. 19 (1861); s. 5, sub-s. 2; see also s. 22 (1861).
(*z*) s. 5, sub-s. 3

can be committed, so that the deterrent effect of the consequences may be proportioned to the inducements to commit it. On this account the punishment imposed by statute for stealing any of these animals exceeds that for simple larceny at common law.

To steal any horse, cattle, or sheep is a felony, punishable by penal servitude to the extent of fourteen years (*a*).

To wilfully kill any animal, with intent to steal the carcase, skin, or any part, is a felony, punishable as if the offender had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have been felony (*b*).

Further, with regard to the goods.—As a rule, the *value* of the thing stolen is no longer of any moment in larceny; except, indeed, where some amount is specially mentioned in the statute as of the essence of the crime, for example, in the case of trees (*c*); or where the value of the thing determines whether the case may be dealt with in a summary way (*d*). But now in ordinary cases no statement of value or price is necessary in the indictment (*e*). Formerly it was otherwise. There was a division into *grand* and *petty larceny;* the former comprising cases of larceny of goods of the value of twelve pence and upwards; such offences being attended with more serious punishment than petty larcenies, which comprised cases of theft where the value did not reach that sum. But this distinction has been abolished, and every simple larceny is now of the same nature, and subject to the same incidents, as grand larceny. Though, to make a thing the subject of an indictment for larceny, it must be of *some* value, yet it need not be of the value even of a farthing (*f*).

(*a*) s. 3.
(*b*) s. 4.
(*c*) v. p. 193.
(*d*) 42 & 43 Vict. c. 49, s. 12, and Sched. I.
(*e*) Indictments Act, 1915, rule 6; v. p. 311.
(*f*) *R.* v. *Morris*, [1840] 9 C. & P. 349.

2. *What must be the intent.*

The particular *mens rea*, or criminal intent, necessary to constitute larceny is defined by the Act. The goods must be taken "*fraudulently and without a claim of right made in good faith—with intent, at the time of such taking, permanently to deprive the owner thereof* (*g*). The intent must be permanently to deprive the owner (*h*). Thus if I take my neighbour's horse out of his stables, intending merely to ride it for a few miles and then return it, this is not larceny. The goods must be taken fraudulently and without a claim of right. There is no larceny if goods are taken under a *bona-fide* claim of right, however unfounded in law that claim may be. Thus a person who takes the goods of another under an illegal distress, but imagining that he has a right to do so, is liable to civil but not to criminal proceedings (*i*).

The criminal intent or *animus furandi* must exist at the time of taking possession. If possession was obtained innocently and without any fraudulent design, no subsequent misappropriation could at common law amount to larceny. Whether or not the criminal intent existed at the time of taking possession is a question for the jury (*ii*). Its existence may be inferred from the circumstances of the case, as, *e.g.*, from the fact that possession was taken secretly or from the denials of the prisoner when questioned. Returning the goods is strong evidence that the intent was not criminal, but it is not conclusive, inasmuch as the prisoner should be convicted if from other circumstances it were proved that the criminal intent was present at the time of taking, though it was afterwards abandoned. On the other hand, the mere fact that the prisoner pawned the goods is not conclusive against him, as he may have intended to redeem them; but if there are repeated pawnings without any reasonable probability that the prisoner would have been able to redeem the goods,

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(*g*) s. 1, sub-s. 1.
(*h*) *R.* v. *Holloway*, 2 C. & K. 942.
(*i*) Archbold, 493, 494.
(*ii*) *R.* v. *Farnborough*, [1895] 2 Q. B. 484; 64 L. J. (M. C.) 270.

this may be evidence upon which a jury may find that possession was obtained with a fraudulent intention (*k*).

In consequence of the rule that where possession was obtained innocently a subsequent conversion could not amount to larceny, a bailee who had obtained possession innocently could not at common law be convicted of larceny if, before the bailment had determined, he converted goods to his own use. So also one of several joint tenants, tenants in common, or partners could not at common law commit larceny of the property owned by them jointly or in common or as partners, because he was lawfully in possession of it. Now, however, it is provided (*l*) that a person may be guilty of stealing a thing of which he has lawful possession if, being *a bailee, or a part owner* thereof, he fraudulently converts the same to his own use or to the use of any person other than the owner. And as to partners and co-owners, it is further provided that if any person who is a member of a partnership or is one of two or more beneficial owners of any property, steals or embezzles any property belonging to such partnership or beneficial owners, he may be tried and punished as if he were not a partner or one of the beneficial owners (*m*).

A man can as a rule be convicted of larceny as a bailee only when he has to deliver back the very same chattel or money which is entrusted to him (*n*). But this rule has been extended so as to include cases where goods have been entrusted to a man for sale and he has converted the proceeds to his own use; and, conversely, where money has been put into his hands to buy goods and he has appropriated the goods. In both such cases there may be a conviction for larceny as a bailee (*o*).

(*k*) *R.* v. *Wynn*, [1887] 16 Cox, 231.

(*l*) s. 1, sub-s. 1. The common law rule had previously been altered by the Larceny Act, 1861, s. 3, as to bailees, and by the Larceny Act, 1868, as to partners.

(*m*) s. 40, sub-s. 4.

(*n*) *R.* v. *Hassall*, [1861] 30 L. J. M. C. 175.

(*o*) *R.* v. *De Banks*, [1884] 13 Q. B. D. 29; 53 L. J. M. C. 132; *R.* v. *Bunkall*, [1884] 53 L. J. M. C. 75; *R.* v. *Holloway (Governor)*, [1897] 66 L. J. Q. B. 830.

A somewhat common instance of larceny by a bailee may be mentioned. If furniture be hired under a hire-purchase contract and the hirer remove and sell it without the knowledge or consent of the person from whom it is hired, he is guilty of this offence (*p*).

As we shall see, the Larceny Act deals specifically with the cases of certain persons who are entrusted with money or goods, such as factors, bankers, and brokers. Other cases of fraudulent appropriation by those to whom property has been delivered by some other person than the owner will be dealt with in the chapter on Embezzlement.

At common law the possession of husband and wife was the same, so that they could not steal each other's goods; if, therefore, the goods of the husband were taken with the consent or privity of the wife, it was not larceny unless the taker was the adulterer of the woman (*q*). And so the adulterer could not be convicted merely of receiving the goods of the husband which had been taken by the wife alone and received by him from the wife, if he were no party to the stealing (*r*). But now by the Larceny Act, 1916 (*s*), every wife has the same remedies and redress under the Act for the protection and security of *her own separate property* as if such property belonged to her as a *feme sole*. But it is provided that no proceedings under the Act can be taken by any wife against her husband, while they are living together, concerning any property claimed by her; nor, while they are living apart, as to any act done by the husband, while they were living together, concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife; the indictment need not, however, allege that the case does not come within these exceptions (*t*). In like manner a wife doing any act with respect to any property of

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(*p*) *R.* v. *Macdonald*, [1885] 15 Q. B. D. 323.

(*q*) *R.* v. *Tolfree*, [1823] 1 Mood. C. C. 243; see also *R.* v. *Flatman*, [1880] 14 Cox, 396.

(*r*) *R.* v. *Kenny*, [1877] 2 Q. B. D. 307; 46 L. J. M. C. 156.

(*s*) s. 36, reproducing ss. 12 and 16 of the Married Women's Property Act, 1882.

(*t*) *R.* v. *James*, [1902] 1 K. B. 540; and see Indictments Act, 1915, Rule 5.

her husband, which if done by the husband with respect to the property of the wife would make the husband liable to criminal proceedings by the wife, is liable to criminal proceedings by her husband. In any such proceedings the husband and wife respectively are competent witnesses and, except when defendant, compellable to give evidence for or against each other (*u*).

3. *What constitutes taking and carrying away.*

Taking is either actual or constructive: *Actual*, when the thief directly takes the goods out of the possession of the owner or his bailee *invito domino* (*w*), by force or by stealth: *Constructive*, when the owner delivers the goods, but either does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by a trick and in pursuance of a previous intent to steal them.

The law on this subject may be considered under the following heads:

A. Where, by the delivery, the owner of the goods intends to pass not only the possession, but the right of property also.

B. Where the delivery does not alter the possession in law.

C. Where there is a constructive taking.

A. *Where the right of property as well as the possession is intentionally parted with by the delivery* there can be no larceny, however fraudulent are the means by which the delivery of the goods is procured. The person, however, who committed the fraud may be open to a charge for another offence, namely, obtaining goods by false pretences. If the property has once passed, no subsequent act by the person in whom the right of property has vested can be construed into larceny, whatever the intent of that person may be. Thus A. buys a horse from B., mounts it, says he will return immediately and pay, intending all the time to defraud the

(*u*) 47 & 48 Vict. c. 14.

(*w*) A slight apparent exception to the rule that the taking must be *invito domino* occurs in the case of the owner receiving intimation of the proposed theft, and resolving to allow it to be carried out in order to convict the thief, *R.* v. *Eggington*, [1801] 2 Leach, 913.

seller. B. says, "Very well." A. rides away and never returns. There is no larceny, because the property as well as the possession is parted with (*x*). So in all cases of selling on credit.

It is the same if the property is passed by the servant of the owner, provided that the servant has authority to part with the property, but not if he has authority to part merely with the possession. Thus, if the servant of B. is authorised only to let out horses on hire, and he, in the case given above, purports to sell the animal to A., it is larceny in A. (*y*).

B. *Where the delivery does not alter the possession in law*, in other words, where, although there is a delivery of the goods by the owner, yet the possession in law remains in him, the goods may be stolen by the person to whom they are thus delivered. Thus it is larceny at common law for a servant who has merely the care and oversight of the goods of his master, as the butler of the plate, to appropriate those goods. And here the felonious intention need not exist at the time of the delivery, inasmuch as the delivery is merely for custody, the possession legally remaining in the master. The master must, however, have been in possession; for if the goods are delivered to the servant for the master's use, and the servant does not deliver, but converts them to his own use, this is not larceny, but embezzlement; as if a shopman receives money from one of his master's customers, and, instead of putting it into the till, secretes it (*z*).

There are other cases in which the possession, though physically parted with, still remains unchanged in the eye of the law. For example, when the owner is present all the time the goods are in the physical possession of the accused, and has no intention of relinquishing his dominion, as when a lady handed a sovereign to the prisoner, asking him to procure her a ticket, and he ran off with it, he was convicted of larceny (*a*).

(*x*) *R.* v. *Harvey*, [1787] 1 Leach, 467.
(*y*) v. *R.* v. *Middleton*, [1873] L. R. 2 C. C. R. 38; 42 L. J. M. C. 73.
(*z*) *R.* v. *Bull*, [1797] 2 Leach, 841.
(*a*) *R.* v. *Thompson*, [1862] 32 L. J. M. C. 53.

So a bare use of the goods of another does not divest the owner of his possession in law. Thus it is larceny for a person to fraudulently convert to his own use the plate he is using at an inn (*b*).

C. *Where there is a constructive taking.* This, under the Act, occurs where the *possession* is obtained in four ways:—

(a) *By any trick.* Where the possession of goods is obtained *animo furandi*, by the offender employing some trick or device, the owner not intending to part with the *property* in the goods, though he does with the temporary possession, this is larceny, though there be a delivery in fact. Thus, A. goes to B.'s shop, and, with the intention of stealing the goods, says that C. wants some shawls to look at, which is untrue. B. gives A. some shawls for C. to select from. A. converts them to her own use. This is larceny in A., because B. only intended to part with the possession and not the property until the selection was made by C. (*c*). But where a seller intends to pass the property in the goods, or to confer a power to pass the property, the person obtaining the goods, however fraudulently he may have acted, does not commit larceny. So where a person by fraudulent misrepresentation obtains the delivery of a specific chattel to himself on approbation, or on sale or return, from a person intending to sell it, and then converts it to his own use, the offence is obtaining by false pretences and not larceny, as by converting the article the defendant is taken to have approved it in pursuance of his power under the contract, and so to have effectually passed the property either to himself or to the person to whom he may have sold or pledged it (*d*).

Ring-dropping.—Another example of larceny of this class is the practice of "ring-dropping." The prisoner pretends to find a ring wrapped in paper appearing to be a jeweller's receipt for a "rich brilliant diamond ring." He offers to

(*b*) Archbold, 514.
(*c*) *R.* v. *Savage*, [1831] 5 C. & P. 143.
(*d*) *Whitehorn* v. *Davison*, [1911] 1 K. B. 463.

leave the ring with the victim if the latter will deposit his watch as security for the return of the ring. The watch is taken away by the prisoner, and the victim afterwards finds that the ring is almost valueless. This is larceny, as the owner of the watch did not intend to part with his property in it (*e*).

Welshing.—What is known as "welshing" falls also within the category of larcenies by trick. In one of these cases the prisoner, just before a race was run, obtained from the prosecutor, who made with him two bets, two sums of five shillings, on the representation that if the horse which the prosecutor backed won he would receive back the moneys deposited and more besides; and the horse which was backed did win, but the prisoner during the race went off with the money, and when later in the day found by the prosecutor declined to pay; this was held to be larceny, inasmuch as the prosecutor never intended to part with the property in the money, except in a certain event, which did not happen, and there was evidence of a preconcerted design on the part of the prisoner to get the prosecutor's money by a fraud and a trick (*f*). Again, where the prisoner agreed to sell a horse to the prosecutor for £23, of which £8 was paid at once, the agreement being that the balance should be paid on delivery of the horse, but the prisoner drove the horse away and never delivered it, it was held that the prisoner was rightly convicted of larceny of the £8, as the prosecutor only paid it as a deposit and did not intend to part with his property in it except upon condition that he received the horse (*g*). Many cases of this kind show how very narrow the line is between this offence and that of obtaining by false pretences (*h*). The true distinction between them is that in the former case the owner does not intend to part with the property in the goods, but in the latter he does, as a rule, mean to part with it (*i*).

(*e*) *R.* v. *Patch*, [1782] 1 Leach, 238.
(*f*) *R.* v. *Buckmaster*, [1888] 20 Q. B. D. 182; 57 L. J. M. C. 25.
(*g*) *R.* v. *Russett*, [1892] 2 Q. B. 312; 67 L. T. (N. S.) 124.
(*h*) v. *Oppenheimer* v. *Frazer and Wyatt*, [1907] 2 K. B. 50; 76 L. J. K. B. 806. See also *R.* v. *McKale*, L. R. 1 C. C. R. 125; 37 L. J. M. C. 97.
(*i*) v. p. 190.

(b) *By intimidation.*—The fact that there is an actual delivery of goods does not divest the deed of the character of larceny, if the defendant, having the *animus furandi*, obtains them by frightening or threatening the owner. Thus the prisoner, who was conducting a mock auction, knocked down goods to the prosecutrix for 26s., knowing that she had not bid. He and a confederate then intimidated her by telling her that she could not leave the auction-room until she had paid, in consequence of which she did pay. It was held that this was larceny, as there was no real consent on her part (*k*). And, if menaces are used to extort an excessive price, it is immaterial that some money is at the time owing to the prisoner from the prosecutor (*l*).

(c) *Under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained.*—Thus, A. was a depositor in a Post Office savings bank and had 11s. to his credit. He gave notice to withdraw 10s., and a warrant for that amount was sent to him and a letter of advice to the Post Office. The clerk, in paying, by mistake referred to another letter of advice and paid to A. the sum of £6 8s. 10d. A. took up the money, knowing of the mistake and having at the time the *animus furandi*. It was held that A. was guilty of larceny (*m*).

But if property is given by the owner to the accused under a mistake of which the accused was not aware when he received it, it is doubtful whether he is guilty of larceny if, afterwards, on discovering the mistake, he fraudulently converts the property to his own use (*n*).

(d) *By finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable*

(*k*) *R.* v. *McGrath*, [1870] L. R. 1 C. C. R. 205; 39 L. J. M. C. 7.
(*l*) *R.* v. *Lovell*, [1881] 8 Q. B. D. 185; 50 L. J. M. C. 91.
(*m*) *R.* v. *Middleton*, [1873] L. R. 2 C. C. R. 38; 42 L. J. M. C. 65.
(*n*) Archbold, 509; *R.* v. *Ashwell*, [1885] 16 Q. B. D. 190; 55 L. J. M. C. 65. If the receipt of the property was innocent the subsequent fraudulent appropriation does not amount to larceny (*R.* v. *Flowers*, 16 Q. B. D. 643; 55 L. J. M. C. 179). But the receipt does not necessarily in all cases take place at the time when physical possession is first taken (*R.* v. *Mortimer*, 1 Cr. App. R. 21).

steps.—It must be noticed that this part of the section only defines a species of "taking." In order to constitute larceny there must also *at the time of the taking*, as here defined, be the criminal intent specified in section 1 (1). This was also the common law rule (*o*).

The taking must be of another's goods. Therefore a person cannot steal his own goods, if they are in his own possession, though he may be guilty of larceny by fraudulently taking possession of them from a bailee (*p*). And, as this example shows, there may be larceny though the person from whom possession is taken has not the complete ownership, for, by the Act, "owner" includes any part owner, or person having possession or control of or a special property in the goods (*q*).

Asportation.—In addition to the "taking" there must also be a *carrying away* or *asportation.* This asportation must be proved as well as a bare taking. Thus to handle a bale of goods is not larceny; but the slightest removal from the place which it occupies will suffice to make it so; it is not necessary that the prisoner should succeed in carrying the goods away. Thus, removing the goods from the head to the tail of a wagon, with intent to steal; or, with like intent, drawing a book from a coat an inch above the pocket, though it fall back again, is enough to constitute an asportation (*r*). But if a thing is attached to something else, it must be completely detached, and, therefore, where the goods could not be carried off because of a string attaching them to the counter, the prisoner was acquitted (*s*). The offender may, however, be indicted for an attempt to steal, or upon the indictment for larceny he may be found guilty of, and punished for, an attempt to steal (*t*).

It is not necessary that the taking should be *lucri causa*, or with the object of gain of a pecuniary character. For

(*o*) *R.* v. *Thurborn*, 2 C. & K., at p. 839; 18 L. J. M. C. 143; *R.* v. *Glyde*, [1868] L. R. 1 C. C. R. 139; 37 L. J. M. C. 107.
(*p*) *R.* v. *Wilkinson*, R. & R. 470.
(*q*) s. 1, sub-s. 2 (iii).
(*r*) *R.* v *Thompson*, [1825] 1 Mood. C. C. 78. Larceny Act, 1916, s. 1, sub-s. 2 (ii).
(*s*) s. 1, sub-s. 2 (ii).
(*t*) 14 & 15 Vict. c. 100, s. 9.

example, it was held to be larceny for a man to take another's horse, back it into a pit, and thereby kill it, the object here being to screen an accomplice who had been charged with stealing it (*u*). And so a person was convicted of larceny who destroyed a letter in order to suppress enquiries as to her character, which enquiries she supposed were contained therein (*w*). It was formerly held to be larceny for a servant to supply his master's horses, &c., with food belonging to the master additional to the quantity usually allowed, even if the intent of obtaining a private benefit (*e.g.*, ease in looking after the horses) was negatived (*x*). Cases of this kind are, however, now provided for by statute (*z*), which enacts that such conduct shall be punished on summary conviction by imprisonment not exceeding three months, or fine not exceeding £5, and that the magistrate may dismiss the case if he thinks it too trifling.

Stealing for which no special punishment is provided under this Act or any other Act for the time being in force is simple larceny, and is a felony punishable with penal servitude for five years and, in case of a male under sixteen, also with whipping (*a*).

The punishment for stealing by any tenant or lodger any chattel or fixture let to be used in or with the house or lodging is imprisonment not exceeding two years. If the value of the property exceeds £5, penal servitude to the extent of seven years may be awarded. In either case a male under sixteen may also be once whipped (*b*).

Larceny by clerks or servants of money or goods belonging to, or in the possession or power of, their master or employer, is punishable by penal servitude to the extent of fourteen years (*c*).

Penal servitude for ten years may be awarded even for simple larceny if the offender has been previously convicted

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(*u*) *R.* v. *Cabbage*, [1815] R. & R. 292.
(*w*) *R.* v. *Jones*, [1847] 2 C. & K. 236.
(*x*) *R.* v. *Privett*, [1846] 2 C. & K. 114.
(*z*) 26 & 27 Vict. c. 103, s. 1.
(*a*) s. 2.
(*b*) s. 16.
(*c*) s. 17, sub-s. 1.

of felony. Penal servitude for seven years may be awarded for simple larceny, or any offence punishable like simple larceny if the offender has been previously convicted (i) of any indictable misdemeanour punishable under this Act, (ii) *twice* summarily of any offence punishable under the Larceny Act, 1861, or the Malicious Damage Act, 1861, or this Act (*d*).

AGGRAVATED LARCENY.

Larceny attended by circumstances of aggravation is punishable more severely than simple larceny. This increased severity is the test to indicate what the law regards as aggravations. If the prosecution fail to prove such additional circumstances, the prisoner may be found guilty of simple larceny.

"The principal aggravations now in force are either in respect of the *nature of the thing stolen*, as in the case of cattle, goods in the process of manufacture, and wills; or in respect of the *manner* in which they are stolen, as with or without arms and violence; or in respect to the *place* from which they are stolen, as from the person, in a dwelling-house to the value of £5, in a church or chapel, from a ship in harbour, and from a ship in distress; or in respect of the *person* by whom they are stolen, as in the case of agents, bankers, and fraudulent trustees, servants, public officers, and persons previously convicted (*e*).

Some of these have already been noticed; the others now demand our consideration.

(a) *Goods in process of manufacture.*

The goods which are under the protection of the severer penalties are the following: Woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca, or mohair, or of any of these materials mixed with each other or with some other material, while placed

(*d*) s. 37, sub-ss. 1 and 2.
(*e*) St. Dig. 138 (1st ed.).

during any stage of manufacture in any building, field, or other place. The stealing of any of these (to the value of ten shillings) during any stage of manufacture is punishable by penal servitude to the extent of fourteen years (*f*).

(b) *From Vessels, Docks, &c.*

Stealing (i) any goods *in* any vessel, barge, or boat of any description, in a haven, port of entry or discharge, or upon a navigable river or canal; (ii) any goods *from* a dock, wharf, or quay adjacent to any such haven, port, river, canal, creek, or basin; (iii) any part of a ship or vessel in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, is punishable by penal servitude to the extent of fourteen years (*g*).

(c) *By those in the Public Service, or Police Constables.*

For any one employed in the public service of His Majesty, or in the police, to steal any chattel, money, or valuable security, belonging to or in possession or power of His Majesty, or entrusted to, or received or taken into possession by the offender by virtue of his employment, is punishable by penal servitude to the extent of fourteen years (*h*).

(d) *Robbery.*

Larceny from the person is either by privately stealing or by open and violent assault. The latter, usually termed "robbery," will be treated of first, the former comprising all other cases of stealing from the person.

Robbery is the felonious and forcible taking from the person of another, or in his presence, against his will, of any money or goods to any value, by violence, or by putting him to fear by threats of any kind of injury, whether to the person, property, or reputation (*i*). The rules as to larceny in general

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(*f*) s. 9.
(*g*) s. 15
(*h*) s. 17, sub-s. 2 (a).
(*i*) 2 East, P. C. 707. As to extorting money by means of threats, v. *ante*, pp. 86—88.

apply, and therefore the prosecution must prove the same points as in larceny and certain others in addition.

The gist of the aggravation in this case is the *force* or *bodily fear*. It is not necessary to show that both were present. Though no violence was used, it will suffice if it can be proved that the goods were delivered to the prisoner by the party robbed under the impression of a certain degree of *fear* and apprehension. The fear is not confined to an apprehension of bodily injury, but, on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed (*k*). It is not necessary that the danger should be impending on the person of the party robbed; it may be on those dear to him, as his children, or on his house (*l*). It is not, however, necessary to prove that the fear actually existed, if it be shown that the circumstances were such as were calculated to create a fear of the nature indicated (*m*). And if this be shown, the resort to some pretence by the offender will not divest the act of the character of robbery; as if a person flourishing a sword begs alms; or by the same means compels some one to swear that he will return with money, the fear of the menaces still continuing to operate when the money is delivered.

Though there be no fear, yet if there is actual *force* or *violence*, it is a robbery; as where the prisoner knocks down the prosecutor from behind, and steals from him his property while he is insensible on the ground. But the rule appears to be well established that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it (*n*).

(*k*) *R.* v. *Donnally*, [1779] 2 East, P. C. 713, 715.
(*l*) *R.* v. *Astley*, [1792] 2 East, P. C. 729.
(*m*) Archbold, 616.
(*n*) Archbold, 616; *R.* v. *Steward*, [1690] 2 East, P. C. 702.

The force or fear must precede or accompany the taking, so that a subsequent scuffle or putting to fear in order to keep the property will not constitute a robbery (*o*).

To constitute a taking, the robber must actually obtain possession of the goods; so that it would not be robbery to cut a man's girdle in order to get his purse, the purse thereby falling to the ground, if the robber was compelled to run off before he could take it up. In the case of simple larceny there must be some severance of the property. In robbery there must be something more, namely, a complete removal from the person of the party robbed. Removal from the place where it is, if it remains throughout with the person, is not sufficient (*p*).

The taking must be *from the person* or *in the presence* of the party robbed. Thus it is robbery to put a man in fear, and then in his presence to drive away his cattle. So also by threats to compel him to deliver up his property, though the robber never touched his person (*q*).

The taking must be *against the will* of the person robbed. Therefore when the prosecutor, through a third party, procured others to commit a robbery upon him in order that he might get the reward upon the conviction, it was held not to be a robbery (*r*).

Robbery may be punished by penal servitude to the extent of fourteen years. If a robbery is accompanied by violence, either at the time of, or immediately before, or immediately after such a robbery; or if a robbery or assault with intent to rob (i) is by a person armed with any offensive weapon or instrument, or (ii) is by two or more persons, penal servitude to the extent of life may be awarded, and, in the case of a male, whipping (*s*).

(*o*) *R.* v. *Gnosil*, [1824] 1 C. & P. 304.

(*p*) *R.* v. *Thompson*, [1825] 1 Mood. C. C. 78; but see *R.* v. *Lapier*, [1784] 1 Leach, 320. Where there is not a complete severance the jury may convict of simple larceny, *R.* v. *Taylor*, [1911] 1 K. B. 674.

(*q*) Archbold, 619.

(*r*) *R.* v. *Macdaniel*, [1756] Fost. 121, 128.

(*s*) s. 23, sub-ss. 1 and 2.

(e) *Stealing from the person.*

Under this head fall all other cases of stealing from the person, without violence or putting to bodily fear, as ordinary pocket-picking. An actual taking must be proved, as the nature of the case precludes there being merely a constructive taking, such as a delivery under threats, which would, in robbery, amount to a taking.

The principles of robbery as to the severance, taking, intent, &c., generally apply. The punishment is the same as for simple robbery, namely, penal servitude to the extent of fourteen years (*t*).

(f) *Assault with intent to rob.*

It is convenient to notice this offence here, seeing that the evidence upon an indictment for such assault usually proves a robbery, with the exception of the taking and carrying away, which for some reason are not effected. No actual violence need be done, but anything done in the presence of the party intended to be robbed, with reference to him, in furtherance of the intent to rob him, will constitute the assault (*u*). Nor need there be any demand of money, if the intent to rob is proved by other evidence.

The punishment for this felony (save and except where a greater punishment is provided by the Act) (*w*) is penal servitude to the extent of five years (*x*).

If on an indictment for robbery the jury are of opinion that the prisoner did not commit robbery, but did commit an assault with intent to rob, they may find him guilty of the latter offence, and he will be punished accordingly (*y*). But on an indictment for assault with intent to rob, the defendant cannot be convicted of a common assault (*z*).

(*t*) s. 14.
(*u*) Archbold, 623.
(*w*) These cases are noticed above, v. p. 214.
(*x*) s. 23, sub-s. 3.
(*y*) s. 44, sub-s. 1.
(*z*) *R.* v. *Woodhall*, [1872] 12 Cox, 240; see *post*, p. 401, where the reason is stated.

LARCENY, ETC., IN RELATION TO THE POST OFFICE.

The law on this subject is contained chiefly in the Post Office Act, 1908 (*a*). Two classes of offences may be distinguished according as the offenders are (a) Post Office employees; (b) persons generally, whether so employed or not.

(a) For an *officer of the Post Office*,

To steal, or for any purpose whatever embezzle, secrete, or destroy a postal packet in course of transmission by post, is a felony, punishable by penal servitude not exceeding seven years, or imprisonment not exceeding two years. If the postal packet contains any chattel, money, or valuable security, the penal servitude may be to the extent of life (*b*).

Contrary to his duty, to open or procure or suffer to be opened a postal packet in course of transmission by post, or to wilfully detain, delay, or procure to be detained, &c., such a postal packet, is a misdemeanour, punishable by fine or imprisonment, or both. This does not extend to the opening of a letter which is misdirected or refused by the addressee, nor where the opening is authorised in writing by a Secretary of State (*c*).

To issue a money order with a fraudulent intent is a felony punishable by penal servitude for seven years or imprisonment for two years, and an officer who reissues a money order previously paid is to be deemed to have issued it with a fraudulent intent (*d*).

(b) For *any* person,

To steal a mail bag or to steal therefrom or from a post office or mail or from an officer of the post office any postal packet in course of transmission by post, or to steal out of such postal packet any chattel, money, or valuable security,

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(*a*) 8 Edw. VII. c. 48.
(*b*) *Ibid.* s. 55; Larceny Act, 1916, s. 18.
(*c*) 8 Edw. VII. c. 48, s. 56. Carelessness, negligence, drunkenness, and other misconduct by officers of the Post Office are punishable on summary conviction by a fine of £20, *Ibid.* s. 57.
(*d*) *Ibid.* s. 58.

or to stop a mail with intent to rob or search the same, is a felony, punishable by penal servitude to the extent of life, or imprisonment not exceeding two years (*e*).

To unlawfully take away or open a mail-bag sent by any vessel employed by the Post Office under contract, or to unlawfully take a postal packet out of any such bag, is a felony, punishable with penal servitude to the extent of fourteen years, or imprisonment not exceeding two years (*f*).

To fraudulently retain, or wilfully secrete, keep, or detain, or neglect or refuse to deliver up when required by an officer of the Post Office, any postal packet in course of transmission by post and which ought to have been delivered to any other person, or which has been found by him or by any other person, is a misdemeanour, punishable by fine and imprisonment (*g*).

To solicit or endeavour to procure any other person to commit an offence punishable by the Post Office Act, 1908, is a misdemeanour, and is punishable by imprisonment not exceeding two years (*h*).

For any person not employed under the Post Office wilfully and maliciously and with intent to injure another person to open or cause to be opened a postal packet which ought to have been delivered to the latter person, or to do anything whereby the due delivery of such letter is prevented or impeded, is a misdemeanour punishable by a fine of £50, or by imprisonment for six months. This provision does not apply where the person opening or impeding the delivery of the letter stands *in loco parentis* to the person to whom it is addressed, and no prosecution for this offence can be commenced except with the consent of the Postmaster-General (*i*).

In connection with this subject, it should be noticed that the expression "postal packet" includes a telegram, and that written or printed messages delivered at a post office for the purpose of being transmitted by telegraph are deemed post-

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(*e*) *Ibid.* s. 50; Larceny Act, 1916, s. 12.
(*f*) *Ibid.* s. 51.
(*g*) *Ibid.* s. 53.
(*h*) *Ibid.* s. 69.
(*i*) *Ibid.*, s. 54.

letters (*k*). For officials of the Post Office contrary to their duty to disclose or intercept telegraphic messages is a misdemeanour, punishable by imprisonment not exceeding twelve months (*l*).

RECEIVING STOLEN GOODS.

The offence of receiving stolen property, knowing it to have been stolen, was at common law a misdemeanour only.

This was, however, altered by various statutes, and now, by the Larceny Act, 1916 (*m*),

(i) Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour is guilty of an offence of the like degree, and is liable to penal servitude for fourteen years in case of felony and seven years in case of misdemeanour, and in either case also, if a male under sixteen, to a whipping.

(ii) A person who receives any mail-bag, postal packet, or any chattel, or money, or valuable security, the stealing, or taking, or embezzling, or secreting whereof amounts to a felony under the Post Office Act, 1908, or this Act, knowing the same to have been feloniously stolen, &c., and to have been sent or to have been intended to be sent by post, is guilty of felony and liable to the same punishment as if he had stolen, &c., the same.

(iii) Every such person may be indicted and convicted, whether the principal offender has or has not been previously convicted, or is or is not amenable to justice.

By the Larceny Act, 1861 (*n*), if the principal offence is punishable on summary conviction, the receiver is liable, on summary conviction, to the same punishment as the principal.

The larceny or other felonious taking must be proved. For this and every other purpose the principal felon is a

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(*k*) *Ibid.* s. 89; 32 & 33 Vict. c. 73, s. 23.

(*l*) 31 & 32 Vict. c. 110, s. 20; v. 47 & 48 Vict. c. 76, s. 11, as to similar offences by the servants of private telegraph companies.

(*m*) s. 33.

(*n*) 24 & 25 Vict. c. 96, s. 97.

competent witness; but of course the jury will form their own opinion as to the weight of his testimony; and if the thief is the only witness, the Judge will advise an acquittal (*o*).

If after the larceny the goods have again come into the possession of the rightful owner, who for the purpose of entrapping the supposed receiver allows them to be delivered to him, the latter cannot be convicted of receiving them knowing them to have been stolen (*p*).

Next it must be proved that the goods were received by the prisoner into his actual possession; though a manual possession is not necessary, and a joint possession with the thief is sufficient (*q*). The goods being found in his possession is good presumptive evidence of his having received them (*r*).

The knowledge of the prisoner *at the time he received the goods* that they were stolen is proved either directly by the evidence of the principal felon, or circumstantially, as by showing that the prisoner bought them much under their value, or denied that he had them in his possession.

By the Larceny Act, 1916 (*s*), it is provided that upon the trial of any person for receiving stolen property or having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings (a) the fact that other property stolen within twelve months preceding the date of the offence charged was found or had been in his possession; (b) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. This last may not be proved unless (i) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given; (ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession.

(*o*) *R.* v. *Robinson*, [1864] 4 F. & F. 43.

(*p*) *R.* v. *Villensky*, [1892] 2 Q. B. 597; 61 L. J. M. C. 218; *R.* v. *Dolan*, [1855] Dears. 436.

(*q*) *R.* v. *Smith*, [1855] 24 L. J. M. C. 135.

(*r*) Archbold, 703.

(*s*) s. 43, sub-s. 1. Such evidence ought not to be admitted merely because a count for receiving is added if the real offence charged is that of stealing and not receiving (*R.* v. *Girod*, [1906] 22 T. L. R. 720).

Any number of receivers, though they received the property, or any part thereof, at different times, may be charged in the same indictment, and tried together (*t*). And in any case, upon the trial of two or more convicted for jointly receiving, the jury may convict one or more of separately receiving (*u*).

With a view to the prevention of crimes of this and similar descriptions, it has been provided that any one who keeps a lodging, public, beer, or other house or place where intoxicating liquors are sold, or any place of public entertainment or public resort, or a brothel, and knowingly lodges or harbours thieves or reputed thieves, or allows the deposit of goods therein, having reasonable cause for believing them to be stolen, is liable to a penalty not exceeding £10, or, in default of payment, imprisonment not exceeding four months; or instead of, or in addition to, such punishment, the Court may require him to enter into recognisances for keeping the peace or being of good behaviour. There are also provisions for the forfeiture of licences on conviction for such conduct (*w*).

If a pawnbroker is convicted on indictment of receiving stolen goods knowing them to be stolen (or of any fraud in his business) the Court may direct that his licence shall cease to have effect (*x*).

Formerly when property was stolen abroad no indictment would lie for receiving such property within the jurisdiction, knowing it to have been stolen. But it has now been provided that if any person without lawful excuse, knowing the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in the United Kingdom it would have been a felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside the United Kingdom he is guilty of an offence of the like degree (whether felony or misdemeanour) and punishable by penal servitude for seven years (*y*).

(*t*) Ibid. s. 40, sub-s. 3.
(*u*) Ibid. s. 44, sub-s. 5.
(*w*) 34 & 35 Vict. c. 112, ss. 10, 11.
(*x*) 35 & 36 Vict. c. 93, s. 38.
(*y*) s. 33, sub-s. 4.

We frequently hear of the so-called doctrine of *Recent Possession*, that is, of the possession of property within a short time after it has been stolen. What is meant is that, according to the circumstances of the case, the recent possession is some evidence that the person in possession stole the property, or received it knowing it to have been stolen. This evidence may be of the strongest or of hardly any weight at all. It will vary not only according to the length of time which may have elapsed between the stealing and the receiving, but also according to other considerations, one of the chief of which is the nature of the property, whether it be of a description which can easily pass from one person to another. Thus the possession of a diamond ring a year after the theft might be more indicative of a felonious receiving than the possession of a pound of cheese after the lapse of a week (*z*).

The onus of proving guilty knowledge, however, always remains upon the prosecution. If the prosecution proves recent possession of stolen property by the accused the jury *may*, in the absence of any explanation by the accused, find him guilty of stealing or receiving. But if an explanation is given which the jury think may reasonably be true, although they are not convinced of its truth, the prisoner is entitled to be acquitted, as in that case the prosecution has failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused (*a*).

(*z*) *R.* v. *Partridge*, [1836] 7 C. & P. 551; *R.* v. *Langmead*, [1864] L. & C. 427; *R.* v. *Deer*, [1862] 32 L. J. M. C. 33.

(*a*) *R.* v. *Schama*; *R.* v. *Abramovitch*, 84 L. J. K. B. 396; 11 Cr. App. R. 45.

CHAPTER II.

EMBEZZLEMENT.

EMBEZZLEMENT may be defined as the unlawful appropriation to his own use by a servant or clerk of money or chattels received by him for and on account of his master or employer; the term is, however, often applied to frauds by trustees and other persons acting in a fiduciary character. It differs from larceny by clerks or servants in this respect: embezzlement is committed in respect of property which is not at the time in the actual possession of the owner, whilst in larceny it is. An example will illustrate the distinction. A clerk receives £20 from a person in payment for some goods sold by his master; he at once puts it into his pocket, appropriating it to his own use; this is embezzlement. The clerk appropriates to his own use £20 which he takes from the till; this is larceny.

The Larceny Act, 1916 (*b*), provides that whosoever, being a clerk or servant, or person employed in the capacity of a clerk or servant, shall fraudulently embezzle the whole or any part of any chattel, money, or valuable security delivered to or received, or taken into possession by him for or in the name or on the account of his master or employer, shall be guilty of felony, punishable by penal servitude for fourteen years, and, if a male under sixteen, also a whipping (*c*).

The principal points to be noticed are the following:

(i) Proof that the prisoner was employed as clerk or servant.

(ii) Proof of his receipt for, or in the name of, or on account of, the employer or master.

(iii) Proof of the unlawful appropriation.

(*b*) 6 & 7 Geo. v. c. 50. (*c*) s. 17, sub-s. 1.

(i) *Proof of the Employment as Clerk or Servant.*

It is for the jury to determine whether the prisoner is a clerk or servant within the meaning of the statute, the Judge explaining what is necessary to constitute such a relation.

A clerk or servant need not be in the employment of a person in trade. The particular name by which he is called, as accountant, collector, overseer, &c., is not material if the general relationship of master and servant can be proved (*d*). It is sometimes difficult to determine whether the required relationship exists. The employment need not be continuous, for it was held to be embezzlement though the prisoner was employed to receive in a single instance only (*e*). The mode of remuneration for service is not decisive—that is, whether by commission or by salary. This will not distinguish an agent from a servant (*f*). Nor will a participation in the profits of the business necessarily prevent the character of servant from arising (*g*). The question is not conclusively decided by the consideration whether the whole or only a part of the man's time is devoted to the other's business (*h*). Probably the safest criterion is whether the prisoner was bound to obey the prosecutor's orders so as to be under his control, or whether (as is frequently the case with mere commission agents) he was at liberty to work or not as he pleased (*i*); and it has been several times decided that a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money where and when he thinks proper, is not a clerk or servant within the meaning of the Act (*k*).

The embezzlement or fraudulent application or disposal by persons in the public service or by police-constables of any

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(*d*) v. *R.* v. *Squire*, [1818] R. & R. 349.
(*e*) *R.* v. *Hughes*, [1832] 1 Mood. C. C. 370
(*f*) *R.* v. *Bailey*, [1871] 12 Cox, 56.
(*g*) *R.* v. *M'Donald*, [1861] L. & C. 85.
(*h*) *R.* v. *Tite*, [1861] L. & C. 29; 30 L. J. M. C. 142.
(*i*) The reader is referred to the cases given by Archbold (591) for a fuller examination of this question; v. especially *R.* v. *Negus*, [1873] L. R. 2 C. C. R. 34; 42 L. J. M. C. 62.
(*k*) *R.* v. *Bowers*, [1866] L. R. 1 C. C. R. 41; 35 L. J. M. C. 206; *R.* v. *Harris*, [1893] 17 Cox, 656.

chattel, money, or valuable security, which is entrusted to, or received, or taken into possession by them by virtue of their employment, is subjected to generally the same consequence as if the embezzlement were from an ordinary master (*l*). Similar provisions have also been made in respect of such offences by persons employed under local marine boards (*m*).

(ii) *The Receipt for, &c., the Master.*

The mere fact of receipt is usually proved by the person who paid the money, &c., to the prisoner, or by his own admission. That he received it for, in the name of, or on account of his master, the jury may infer from the circumstances of the case. But it will not be embezzlement if the prisoner received the money from his master in order to pay it to a third person (*n*). It is immaterial that the money was not really due to the master. The receipt need not now be by virtue of the servant's employment in order to constitute embezzlement; and therefore it may be embezzlement, though he had no authority to receive. But it is necessary that the money, &c., should be the property of the master when received by the servant, and therefore money appropriated by a servant in consideration of work which the prisoner did by the unauthorised use of his master's tools, the payer contracting with the servant only, does not constitute embezzlement (*o*).

(iii) *The unlawful Appropriation.*

The usual evidence given of the appropriation is that, having received the money, &c., the prisoner denied the receipt, or accounted for other moneys received at the same time, or after, and not for it, or rendered a false account, or practised some other deceit in order to prevent detection.

The mere non-payment to the master of money which the prisoner has charged himself in his master's book with receiv-

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(*l*) s. 17, sub-s. (b). Larceny by the above, v. p. 212.
(*m*) s. 17, sub-s. 3.
(*n*) *R.* v. *Smith*, [1814] R. & R. 267. But the servant will be punishable under s. 20, sub-s. 1 (iv), v. p. 226.
(*o*) *R.* v. *Cullum*, [1873] L. R. 2 C. C. R. 28; 42 L. J. M C. 64.

ing is not by itself a sufficient evidence of embezzlement (*p*). But, on the other hand, it is no defence merely to show that he entered the receipt correctly in the master's book if there be other sufficient evidence of a fraudulent intention (*q*). If, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right to the money in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, he ought not to be convicted of embezzlement (*r*). But where it is the prisoner's duty, at stated times, to account for and pay over to his employer the moneys received during those intervals, his wilfully omitting to do so is embezzlement, and equivalent to a denial of the receipt of them (*s*).

As the law now stands some specific sum must be proved to have been embezzled. It will not suffice to prove a general deficiency in the prisoner's accounts (*t*).

An allegation in an indictment that money or banknotes have been embezzled or obtained by false pretences can, so far as regards the description of the property, be sustained by proof that the offender embezzled or obtained any piece of coin or any banknote, or any portion of the value thereof, although such piece of coin, &c., may have been delivered to him in order that some part of the value thereof should be returned to any person and such part has been returned accordingly (*u*).

Falsification of Accounts.

For a clerk, officer, servant, or other employee in those capacities, to wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, account, &c., belonging to or in the possession of his employer, or to make

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(*p*) *R.* v. *Hodgson*, [1828] 3 C. & P. 422.
(*q*) *R.* v. *Lister*, [1856] D. & B. 118.
(*r*) *R.* v. *Norman*, [1842] C. & Mar. 501.
(*s*) *R.* v. *Jackson*, [1844] 1 C. & K. 384.
(*t*) *R.* v. *Lloyd Jones*, [1838] 8 C. & P. 288; *R.* v. *Wolstenholme*, [1869] 11 Cox, 313; see Rosc. 475.
(*u*) s. 40, sub-s. 2.

false entries therein, is a misdemeanour punishable by penal servitude to the extent of seven years (*w*).

Embezzlement by Persons entrusted with Property, and Agents.

Whosoever (i) being entrusted, either solely or jointly with any other person, with any property in order that he may retain it in safe custody, or apply, pay, or deliver it, or the proceeds, for any purpose or to any person; or (ii) having either solely, &c., received any property for or on account of any other person, fraudulently converts the same or the proceeds thereof to his own use or the use of any other person, is guilty of a misdemeanour and liable to penal servitude for seven years. This, however, does not apply to acts done by any trustee on any express trust created by a deed or will, or any mortgagee of any real or personal property in relation to the property affected by the trust or mortgage (*x*).

For any person entrusted either solely or jointly with any other person with a power of attorney for the sale or transfer of any property to fraudulently sell, transfer, or otherwise convert it to his own use, or that of any person other than the one by whom he is entrusted, is also a misdemeanour, punishable with penal servitude for seven years (*y*).

Factors or agents entrusted, either solely, &c., for the purpose of sale or otherwise, with the possession of any goods or of any documents of title to goods, who (i) without the authority of the principal, for their own use or that of any person other than the one by whom they are so entrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any such goods or documents, by way of pledge, lien, or security for any money or valuable security,

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(*w*) 38 & 39 Vict. c. 24, s. 1; v. also *R.* v. *Butt*, [1884] 15 Cox, 564. The falsification of a mechanical means of accounting, *e.g.*, a taximeter, has been held to be within the section. *R.* v. *Solomons*, [1909] 2 K. B. 980; 79 L. J. K. B. 8. As to use of false receipts by agents, v. p. 74.

(*x*) s. 20, sub-ss. 1 (iv) and 2. As to the meanings of "entrusted" and "received," see *R.* v. *Grubb*, [1915] 2 K. B. 683; 84 L. J. K. B. 1744; 113 L. T. 510; 11 Cr. App. R. 153.

(*y*) s. 20, sub-s. 1 (i).

borrowed by them (the factors, &c.); or (ii) without authority, &c., accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, &c., such goods or documents, are guilty of a misdemeanour, and punishable with penal servitude for seven years. A saving clause is added that the factor or agent will not be liable for consigning, depositing, &c., if the property is not made a security for or subject to the payment of any greater sum of money than the amount which, at the time of the consignment, &c., was due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by the factor or agent (*z*)

Embezzlement by Trustees.

For a trustee of property for the benefit of some other person, or for any public or charitable purpose, with intent to defraud, (i) to convert or appropriate the same to his own use, or that of any other person or purpose than the person or purpose aforesaid; or (ii) to otherwise dispose of or destroy the property, is a misdemeanour punishable by penal servitude to the extent of seven years. But no criminal proceedings may be taken without the sanction of the Attorney-General. And, if civil proceedings have been taken against the trustee, the person who has taken such proceedings may not commence any prosecution under this section without the sanction of the Court or Judge before whom such civil proceedings have been taken (*a*).

It must be noticed, however, that an offence against this section is only committed where there is an express trust created by some deed, will, or instrument in writing; but the word "trustee" includes a trustee's heir or representative and any other person upon whom the trust may have devolved, and also an executor and administrator, and an official

(*z*) s. 22, sub-s. 1. A factor, etc., so entrusted with and in possession of any document of title to goods shall be deemed to have been entrusted with the goods represented by such document of title, s. 22, sub-s. 2.
(*a*) s. 21.

manager, assignee, liquidator, or other like officer, acting under any Act of Parliament relating to joint stock companies or bankruptcy (*b*).

Embezzlement by partners and other joint beneficial owners has already been dealt with (*c*).

Embezzlement and other Offences by Directors, Officers, and Members of Public Companies and Corporate Bodies.

The following offences are misdemeanours, punishable by penal servitude to the extent of seven years:—

α. For a director, member, or public officer of a body corporate or public company to fraudulently take or apply to his own use, or any use or purpose other than the uses or purposes of such body or company, any of the property of the body or company (*d*).

β. For a director, public officer, or manager of such body or company to receive or possess himself of any of the property of the company, &c., otherwise than in payment of a just debt or demand, and, with intent to defraud, to omit to make or have made a full and true entry thereof in the books and accounts of the company (*e*).

γ. For a director, manager, public officer, or member, with intent to defraud, (i) to destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body or company; or (ii) to make or concur in making any false entry, or to omit or concur in omitting any material particular in any book of account or other document (*f*).

(iii) For a director, manager, or public officer to make, circulate, or publish, or concur in making, &c., any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body or company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body or company, or to enter into any security for the benefit thereof (*g*).

(*b*) s. 46.
(*c*) *Ante*, p. 202.
(*d*) s. 20, sub-s. 1 (ii).
(*e*) 24 & 25 Vict. c. 96, s. 82.
(*f*) *Ibid.* s. 83.
(*g*) *Ibid.* s. 84.

With regard to these cases of embezzlement by bankers, merchants, attorneys, agents, or factors, trustees, directors, officers, or members of bodies corporate or public companies, it is to be noted that no person can be prosecuted for any of these offences if they have first been disclosed by him on oath in any proceeding instituted by a party aggrieved, and also that any admission made by an accused person in bankruptcy proceedings is not admissible in evidence against him upon his prosecution for any of these offences (*h*).

For a director, officer, or contributory of a company being wound up to destroy, mutilate, alter, or falsify any books, papers, or securities, or to make or be privy to making any false or fraudulent entry in any register, book, or other document of the company, with intent to defraud or deceive any person, is a misdemeanour, punishable by imprisonment not exceeding two years (*i*).

If any person in any return, report, certificate, balance-sheet, or other document required by the Companies (Consolidation) Act, 1908, wilfully makes a statement false in any material particular knowing it to be false, he is guilty of a misdemeanour, punishable, when the conviction is on indictment, by imprisonment with hard labour for two years; or, if the conviction is summary, by the like imprisonment for four months; and in either case by a fine which, if it is imposed on a summary conviction, is not to exceed £100 (*k*).

For an officer of a savings bank to receive any deposit and not pay over the same is a misdemeanour, punishable by fine or imprisonment, or both (*l*).

(*h*) Larceny Act, 1861, s. 85; Bankruptcy Act, 1914, s. 166; Larceny Act, 1916, s. 43, sub-ss. 2 and 3. By section 85 of the Act of 1861 it is also provided that nothing in ss. 82—84 shall entitle any person to refuse to answer a question in a civil proceeding on the ground that it tends to criminate himself. The criminal proceeding is not to deprive any party of his civil remedy, but the conviction is not to be evidence in such civil suit (s. 86).

(*i*) 8 Edw. VII. c. 69, s. 216.

(*k*) 1 & 2 Geo. V. c. 6, s. 5; 8 Edw. VII. c. 69, s. 281, see 5th Sched. as to what returns, &c., are specified as being required by or for the purposes of this Act. As to false statements, returns, &c., by railway companies, v. 29 & 30 Vict. c. 108. ss. 15—17: 31 & 32 Vict. c. 119, s. 5; 34 & 35 Vict. c. 78, s. 10.

(*l*) 26 & 27 Vict. c. 87, s. 9.

CHAPTER III.

FALSE PRETENCES.

THE Larceny Act, 1916, provides that every person who by any false pretence, with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person, shall be guilty of a misdemeanour, punishable by penal servitude for any term not exceeding five years (*m*). This offence is subject to the Vexatious Indictments Act (*n*).

It is difficult to define the offence of obtaining property by false pretences. It may be described as the offence of obtaining property by means of a false representation made by words, writing, or conduct, that some fact exists or existed. In some cases there seems little to distinguish it from larceny; the difficulty of discriminating arises chiefly where there has been a constructive taking only, as where the owner delivers over the goods though the possession is obtained from him by fraud. The most intelligible distinction between false pretences and larceny has been thus set forth (*o*): "In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." The line between the two crimes is very narrow. Thus, A. entrusts B. with a parcel to carry to C. D. meets B. and alleges that

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(*m*) s. 32.
(*n*) v. p. 330.
(*o*) Archbold, 506; v. *White* v. *Garden*, [1851] 10 C. B. 927.

he is C., whereupon B. gives him the parcel. It will be larceny if B. had not the authority to pass the property; false pretences if he had (*p*).

In this offence (as in larceny) there must be an intention on the part of the accused to deprive the prosecutor wholly of his property in the goods obtained. If a chattel is borrowed or hired by means of false pretences, the intention being to return it, the offence is not committed (*q*). This does not, however, apply to a loan of *money* obtained by false pretences, as the property in money passes at the time of the lending (*r*).

The matters to be proved on an indictment for false pretences are the following:—

i. The pretence and its falsity.

ii. That the property or some part thereof was obtained by means of the pretence.

iii. The intent to defraud.

i. The pretence must be wholly or in part of an *existing fact;* for example, a false statement of one's name and circumstances in a begging letter. Wherever a person fraudulently represents as an existing fact that which is not an existing fact, and so gets money or property, he commits the offence of obtaining by false pretences. But a mere exaggeration will not suffice, as if a person actually in business pretends that he is doing a good business (*s*); otherwise, if he were not carrying on any business at all (*t*), or if his statements are more than merely exaggerated praise and amount to a definite misrepresentation as to the nature or extent of his business (*u*). So, also, exaggerated praise of goods is not a false pretence if it is merely as to something which is a matter of opinion. Where, therefore, the defendant stated that some poorly plated spoons were equal to Elkington's A spoons it was held that this was a mere

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(*p*) v. *R.* v. *Wilkins*, [1789] 1 Leach, 520.
(*q*) *R.* v. *Kilham*, [1870] L. R. 1 C. C. R. 261; 39 L. J. M. C. 109.
(*r*) *R.* v. *Crossley*, [1837] 2 M. & R. 17; *R.* v. *Burgon*, [1856] D. & B. 11.
(*s*) *R.* v. *Williamson*, [1869] 11 Cox, 328.
(*t*) *R.* v. *Crabb*, [1868] 11 Cox, 85.
(*u*) *R.* v. *Cooper*, 2 Q. B. D. 510; see also *R.* v. *Rhodes*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83

expression of opinion (*w*). But, on the other hand, it was held to be a misrepresentation of fact where the defendant falsely represented a chain as being of fifteen carat gold when it was merely of nine carat gold, this being a specific fact and not a matter of opinion (*x*). Again, it was held to be a misrepresentation of fact where the defendant falsely represented that certain packages which he sold contained good tea, whereas in fact they contained a mixture of three-quarters sand and one-quarter tea (*y*).

It will be noted that the mere fact that there is a contract between the parties does not secure from punishment the obtaining of money by false pretences (*z*).

The fact must be an *existing* fact; therefore it is not within the Act for a person to pretend that he *will* do something which he does not mean to do (*a*). But where a promise to do a thing is coupled with a false representation by words or otherwise that the promiser has the power to do that thing, an indictment will lie, as, *e.g.*, where the defendant was indicted for obtaining money from the prosecutrix by stating that he *was* unmarried and *would* marry her and furnish a house for her, it was held that the statement that he was unmarried was sufficient to justify a conviction, although his promise to marry the prosecutrix and to furnish a house would not by themselves have been sufficient (*b*). So, also, a promise may involve a representation that certain facts or circumstances exist. Thus, where A. obtained money by the representation that he was shortly about to publish a directory, it was held that this involved a representation of fact that the directory was in process of publication (*c*).

(*w*) *R.* v. *Bryan*, [1857] 26 L. J. M. C. 84; 3 Jur. (N. S.) 620; 7 Cox, 313.
(*x*) *R.* v. *Ardley*, [1871] L. R. 1 C. C. R. 301; 40 L. J. M. C. 85.
(*y*) *R.* v. *Foster*, [1877] 2 Q. B. D. 301; 46 L. J. M. C. 128; 36 L. T. (N. S.) 34; 13 Cox, 393.
(*z*) See *R.* v. *Kenrick*, 5 Q. B. 49; and cases cited Archbold, 676.
(*a*) *R.* v. *Lee*, [1863] 9 Cox, 304. See also *R.* v. *Speed*, [1882] 46 L. T. (N. S.) 174; and 62 & 63 Vict. c. 22, s. 3.
(*b*) *R.* v. *Jennison*, [1862] L. & C. 157; *R.* v. *Giles*, [1865] 34 L. J. M. C. 50; v. also *R.* v. *Gordon*, [1889] 23 Q. B. D. 354; 58 L. J. M. C. 117.
(*c*) *R.* v. *Bancroft*, 3 Cr. App. R. 20.

The false pretence need not be expressed in words; it will suffice if the pretence is signified in the conduct and acts of the party; for example, obtaining goods by giving in payment a cheque upon a banker with whom the defendant has no account, he knowing that it will not be paid on presentation (*d*); or by a person, who was not a member of the university, obtaining goods fraudulently at Oxford by assuming a commoner's cap and gown (*e*). So where a farmer, having granted a bill of sale on all the farm stock upon his farm, sold a large portion of such stock without saying anything as to the ownership of it, or as to the existence of the bill of sale, he was held to be guilty of false pretences, for the act of selling the stock was in itself a representation that he was the absolute owner (*f*). But a person who enters a restaurant and orders and consumes refreshments, having to his own knowledge no money to pay for them, cannot be convicted of obtaining the food by false pretences, although he is liable to be indicted under the Debtors Act, 1869 (*g*), for obtaining credit by means of a fraud (*h*).

A false pretence may be made through the medium of an innocent agent, and the person who causes it to be made is punishable as if he made it himself.

The indictment must state to whom the pretences were made, and from whom the goods, &c., were obtained. But where the false pretence is made by means of a public advertisement it has been held sufficient to allege in the indictment that the pretence was made to His Majesty's subjects, provided it is also alleged that by means of that false pretence money was obtained from some particular person, as the general

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(*d*) *R.* v. *Hazleton*, [1874] L. R. 2 C. C. R. 134; 44 L. J. M. C. 11.
(*e*) *R.* v. *Barnard*, [1837] 7 C. & P. 784.
(*f*) *R.* v. *Sampson*, [1885] 52 L. T. (N. S.) 772; not following *R.* v. *Hazelwood*, [1883] 48 J. P. 151; v. also *Eichholz* v. *Bannister*, [1864] 17 C. B. (N. S.) 723.
(*g*) 32 & 33 Vict. c. 62, s. 13; v. p. 101.
(*h*) *R.* v. *Jones*, [1898] 1 Q. B. 119; 67 L. J. Q. B. 41; *R.* v. *Wyatt*, [1904] 1 K. B. 188; 73 L. J. K. B. 15.

allegation becomes particular as regards the particular person who acts upon it (*i*).

If the goods are obtained by means of a forged order, note, or other document, the party may be indicted for forgery, the punishment for which offence is more severe. But the prisoner will not be acquitted for the false pretence on the ground that he might have been indicted for forgery (*k*).

The false pretence alleged must be set out in the indictment, but it will suffice if the falsity of the substance of the pretence alleged is proved, although every particular is not established (*l*). In an indictment for *receiving* goods obtained by false pretences it is not necessary to specify by what false pretence the goods were obtained (*m*).

ii. That the property or some part thereof was obtained by means of the pretence.

It is no defence to an indictment for obtaining by false pretences that the goods obtained were not in existence at the time when the false pretence was made, provided the subsequent delivery of the goods is directly connected with the false pretence, as, *e.g.*, where the defendant by false pretences induced a wheelwright to make him a van which was afterwards delivered to him (*n*). The mere fact that the prosecutor has the *means* of knowing the falsity of the misrepresentation is no defence (*o*), but if the falsity of the pretence is known to the prosecutor, who, nevertheless, parts with his goods with the intention of entrapping the defendant, or for some other reason, the defendant cannot be convicted of obtaining the goods by false pretences (*p*). But in such a case he may be convicted upon the same

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(*i*) *R.* v. *Silverlock*, [1894] 2 Q. B. 766; 63 L. J. M. C. 233; see Archbold, 678. In the case cited the indictment also contained a count stating that the defendant made the false pretence to the person actually defrauded.
(*k*) 14 & 15 Vict. c. 100, s. 12.
(*l*) *R.* v. *Hill*, [1811] R. & R. 190.
(*m*) *Taylor* v. *Reg.*, [1895] 1 Q. B. 25; 64 L. J. M. C. 11.
(*n*) *R.* v. *Martin*, [1867] L. R. 1 C. C. R. 56.
(*o*) *R.* v. *Jessop*, D. & B. 442; 27 L. J. M. C. 70.
(*p*) *R.* v. *Mills*, [1857] D. & B. 205.

indictment of *attempting* to obtain them (*q*), which is a common law misdemeanour.

Again, where goods are offered to a prosecutor for sale or in pledge and he parts with his money, relying not on the defendant's statements, but upon his own examination of the goods, the defendant may be convicted of attempting to obtain money by false pretences, though not of obtaining it, as it was not his false pretence which actually operated upon the prosecutor's mind (*r*). So also where a competitor in a race entered himself in the name of another person and gave an untrue account of his previous performances, thereby obtaining a start which he would not otherwise have had, it was held that he was rightly convicted of attempting to obtain the prize by false pretences (*s*).

iii. The intent to defraud.

As in other cases, the intent is generally to be gathered from the facts of the case. It is sufficient to allege in the indictment, and to prove at the trial, an intent to defraud generally, without alleging or proving an intent to defraud any particular person (*t*).

The intention on the part of the prisoner to pay for goods obtained by false pretences when he might be able to do so is no defence (*u*), the defendant in such a case having no right to expose the prosecutor to either actual or possible injury by means of the deceit which he practised.

If there be a debt due to the defendant, and he, being unable to obtain payment of the same from his debtor, obtains goods from him by false pretences, he does not thereby commit this offence (*w*), there being no real intention to defraud.

Where the defendant is charged with an isolated act of fraud proof that he has *subsequently* obtained other property

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(*q*) *R.* v. *Roebuck*, [1856] D. & B. 24; 25 L. J. M. C. 101; 14 & 15 Vict. c. 100. s. 9; and see *R.* v. *Light*, 84 L. J. K. B. 865; 11 Cr. App. R. 111.

(*r*) *R.* v. *Roebuck*, *supra*.

(*s*) *R.* v. *Button*, [1900] 2 Q. B. 597; 69 L. J. Q. B. 901.

(*t*) s. 40, sub-s. 1.

(*u*) *R.* v. *Naylor*, [1865] L. R. 1 C. C. R. 4; 35 L. J. M. C. 61; 13 L. T. (N. S.) 381; 11 Jur. (N. S.) 910; 14 W. R. 58; 10 Cox, 151; *R.* v. *Carpenter*. 22 Cox. 618; 76 J. P. 158.

(*w*) *R.* v. *Williams*, [1836] 7 C. & P. 354.

from some other person by the same pretence is not admissible as evidence of an intent to defraud (*x*); evidence, however, of a similar false pretence on a *prior* occasion is admissible (*y*); and the latter principle was applied where a defendant was charged under section 13 of the Debtors Act with having obtained credit by means of fraud, he having hired apartments and obtained food without the means or intention of paying for them, evidence of a similar obtaining shortly before the offence charged being held to be admissible (*z*). And if the charge against the defendant is that he has been systematically committing similar frauds, as, *e.g.*, that by carrying on a bogus business and by pretending that his business was a genuine one he has obtained the goods or money mentioned in the indictment, then evidence of other obtainings by similar false pretences even subsequent to the particular offence charged is admissible, provided that they are not too distant in point of time or that there is some connection between them (*a*). Conversely, receipts given to him by firms who had sold him goods and entries in his bank pass book showing payments by him are admissible to show that he was carrying on a genuine business (*b*).

Winning at play or at wagering by fraud is punishable as for obtaining money by false pretences (*c*).

Receiving.—As to receiving goods obtained by false pretences, v. pp. 218—219.

Closely allied to the offence of false pretences is that of *inducing persons by fraud to execute valuable securities.*

(*x*) *R.* v. *Holt*, [1860] 30 L. J. M. C. 11.

(*y*) *R.* v. *Francis*, [1874] L. R. 2 C. C. R. 128; 43 L. J. M. C. 97. But not where the obtaining has been by means of a *different* false pretence, as such evidence would not be relevant to the inquiry whether he had intentionally made the particular false pretence in question, *R.* v. *Fisher*, [1910] 1 K. B. 149; 79 L. J. K. B. 187.

(*z*) *R.* v. *Wyatt*, [1904] 1 K. B. 188; 73 L. J. K. B. 15.

(*a*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; *R.* v. *Ollis*, [1900] 2 Q. B. 758; 69 L. J. Q. B. 918; *R.* v. *Smith*, [1905] 92 L. T. 208.

(*b*) *R.* v. *Sagar*, 84 L. J. K. B. 303; [1914] 3 K. B. 1122.

(*c*) 8 & 9 Vict. c. 109, s. 17. See also *R.* v. *O'Connor*, [1881] 45 L. T. (N. S.) 512.

For any person, with intent to defraud or injure another, by any false pretence (a) to fraudulently cause or induce any person to execute, make, accept, indorse, or destroy the whole or any part of any *valuable security;* or (b) to write, impress, or affix his name, or the name of any other person or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made, or converted into, or used, or dealt with as a valuable security, is a misdemeanour, punishable as obtaining money by false pretences (*d*).

It has been enacted that if a money-lender by any false or deceptive statement *or promise,* or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is to be borrowed, he is guilty of a misdemeanour, and liable to imprisonment with hard labour for two years or to a fine of £500 or both (*e*).

It will be observed that the words "or promise" in this statute denote an important difference between this offence and that of obtaining money or goods by false pretences, for, as we have seen (*f*), in the latter case the false pretence, to be criminal, must be of an existing fact and not a mere promise to do something in the future. Now, however, if a money-lender by a false promise induces his customer to borrow money he will be punishable under the above section; whereas the borrower who by a false promise induces a money-lender to lend him money commits no legal offence, although the fraudulent intent may be the same in each case.

FALSE PERSONATION.

The obtaining goods, money, or other advantage by false personation is a crime similar to false pretences. At common law false personation is punishable as a cheat or fraud; but

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(*d*) s. 32, sub-s. 2.

(*e*) 63 & 64 Vict. c. 51, s. 4.

(*f*) v. p. 231.

certain particular cases are dealt with by statute. This crime is also closely connected with forgery; and many statutes providing against forgery at the same time provide against false personation.

Of *seamen, soldiers,* &c.—For a person, in order to receive any pay, wages, prize money, &c., payable, or supposed to be payable, or any effects or money in charge or supposed to be in charge of the Admiralty, falsely and deceitfully to personate any person entitled, or supposed to be entitled, to receive the same, is a misdemeanour, punishable by penal servitude to the extent of five years; or, on summary conviction, by imprisonment not exceeding six months (*g*).

To knowingly and wilfully personate or falsely assume the name or character of, or to procure others to personate, &c., a soldier or other person who shall have really served, or be supposed to have served, in His Majesty's Army or in any other military service, or his representatives, in order to receive his wages, prize money, &c., due or payable, or supposed to be due or payable, for service performed, is a felony, punishable by penal servitude to the extent of life (*h*). It is no defence to such an indictment that the person was authorised by the soldier to personate him, or that he had bought from him the prize money to which the latter was entitled (*i*).

Owners of Stock, &c.—To falsely and deceitfully personate (i) the owner of any share or interest in any stock, annuity, or public fund, which is transferable at the Bank of England or Bank of Ireland; or (ii) the owner of any share or interest in any capital stock of any body corporate, company, or society established by charter or Act of Parliament; or (iii) the owner of any dividend or money payable in respect of any such share or interest, and thereby to transfer, or endeavour to transfer, any such share or interest, or receive, or endeavour

(*g*) 28 & 29 Vict. c. 124, s. 8; v. s. 9.
(*h*) 2 & 3 Will. IV. c. 53, s. 49; 7 Geo. IV. c. 16, s. 38.
(*i*) *R.* v. *Lake*, [1869] 11 Cox, 333.

to receive, any money so due, as if the offender were the true and lawful owner, is a felony, punishable by penal servitude to the extent of life (*k*).

To obtain Property in general.—By the False Personation Act, 1874, it is provided that, for any person to falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, chattel, money, valuable security, or property, is a felony, punishable by penal servitude to the extent of life (*l*).

Bail.—Without lawful authority or excuse (which it lies on the accused to prove), in the name of another person to acknowledge any recognisance or bail, or any *cognovit actionem*, or judgment, or any deed or other instrument, before any Court, Judge, or other person lawfully authorised in that behalf, is a felony, punishable by penal servitude to the extent of seven years (*m*).

As to personating voters at parliamentary and municipal elections, v. *ante*, p. 73.

CHEATING.

Cheating is a comprehensive term, including in its wider signification False Pretences, False Personation, and other crimes which are specially provided for. A cheat at common law is the fraudulent obtaining the property of another by any deceitful and illegal practice or token which *affects or may affect the public* (*n*). Thus, the leading characteristic of such a cheat is the publicity of its consequences. Therefore a cheat or fraud effected by an unfair dealing and imposition on an individual, in a private transaction between the parties,

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(*k*) 24 & 25 Vict. c. 98, s. 3; v. also National Debt Act, 1870 (33 & 34 Vict. c. 58, s. 4); India Stock (26 & 27 Vict. c. 73), s. 14; Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 38.

(*l*) 37 & 38 Vict. c. 36, s. 1; v. also s. 2.

(*m*) 24 & 25 Vict. c. 98, s. 34.

(*n*) 2 East, P. C. c. 18, s. 2.

is not the subject of an indictment at common law (*o*). Indeed, many acts which morally amount to cheating are not punishable at all by the criminal law, the person wronged being left to his remedy by civil action.

The chief classes of offences regarded as cheats at common law are the following:—

Against public justice, *e.g.*, counterfeiting a discharge from gaol.

Against public health, *e.g.*, selling unwholesome provisions.

Against public economy, *e.g.*, by using false weights or measures (*p*).

But it is not an offence at common law to make short delivery under a contract, unless false weights, measures, or tokens are used as the general course of dealing to all or many customers, or there is a conspiracy to cheat (*q*).

Apart from the common law, a number of statutes have been passed to restrain and punish particular deceits, or deceits in particular trades. Amongst the more general we may notice the laws preventing cheating by:—

Counterfeit trade-marks (*r*),

Fraudulent conveyances (*s*).

The general punishment for this misdemeanour is fine or imprisonment, or both.

(*o*) 2 Russ. 1510.

(*p*) As to this offence, v. 52 & 53 Vict. c. 21, ss. 3, 4, and 33; also 41 & 42 Vict. c. 49, s. 26.

(*q*) *R.* v. *Wheatly*, 2 Burr., at 1127; Archbold, 696.

(*r*) v. p. 102.

(*s*) 13 Eliz. c. 5; 27 Eliz. c. 4.

CHAPTER IV.

BURGLARY, ETC.

THE offence of burglary (in the strict signification of the term) is thus defined at common law: The breaking and entering of the dwelling or mansion-house of another in the night-time with intent to commit a felony therein (*t*). The limits of burglary proper have been extended; and the punishment of other crimes closely connected with burglary has been also separately provided for by statute. The Larceny Act, 1916, provides that "Every person who in the night (i) breaks and enters the dwelling-house of another with intent to commit any felony therein; or (ii) breaks out of the dwelling-house of another, having (a) entered the said dwelling-house with intent to commit any felony therein; or (b) committed any felony in the said dwelling-house, shall be guilty of felony called burglary, and on conviction thereof liable to penal servitude for life" (*u*).

Four points present themselves for consideration: the time, place, manner, and intent.

i. *Time.*—Formerly great uncertainty existed as to what constituted *night*—whether it was the interval between sunset and sunrise, whether it included twilight, &c. The matter has been settled by statute as far as regards burglary and other offences treated of in the Larceny Act, 1916, and the night is deemed to commence at *nine* o'clock in the evening, and to conclude at *six* o'clock on the following morning (*w*).

Both the breaking and the entering must take place at night. If either be in the daytime, it is not burglary. But

(*t*) Archbold, 634. (*u*) s. 25.

(*w*) s. 46, sub-s. 1.

the breaking may take place on one night and the entering on another, provided that the breaking be with intent to enter, and the entering with intent to commit a felony (*x*).

ii. *Place.*—It must be the dwelling-house of another. To constitute a *dwelling-house* for the purposes of the statute dealing with burglary and similar offences (the Larceny Act, 1916), the house must be either the place where one is in the habit of residing, or some building between which and the dwelling-house there is a communication, either immediate or by means of a covered and inclosed passage leading from one to the other (*y*), the two buildings being occupied in the same right (*z*). It must be the house of *another*; therefore a person cannot be indicted for a burglary in his own house, though he breaks and enters the room of his lodger and steals his goods; but he may be convicted of the larceny (*a*).

The decisions as to what places satisfy the requirements of burglary have been numerous and to some extent conflicting. We may gather the following facts:—

The building must be of a permanent character; therefore a tent or booth will not suffice, although the owner lodge there. The tenement need not be a distinct building; thus chambers in a college or inn of court will suffice provided the occupier resides there (*b*).

As to the nature of the *residence* which is necessary.—The temporary absence of the tenant is not material if he has an intention of returning, though no one be in during the interval. It will suffice if any of the family reside in the house, even a servant (*c*), unless the servant is there merely for the purpose of protecting the premises (*d*). It seems that sleeping is necessary to constitute residence (*e*).

(*x*) *R.* v. *Smith*, [1820] R. & R. 417.
(*y*) s. 46, sub-s. 2.
(*z*) *R.* v. *Jenkins*, [1813] R. & R. 224.
(*a*) Archbold, 634.
(*b*) *Ibid.* 635.
(*c*) *R.* v. *Westwood*, [1822] R. & R. 495.
(*d*) *R.* v. *Flannagan*, [1810] R. & R. 187.
(*e*) *R.* v. *Martin*, [1806] R. & R. 108.

In the case of hiring a part of a house, the part let off may be considered as the dwelling-house of the hirer if the owner does not himself dwell in the house, or if he and the hirer enter by different doors; that is, of course, provided that the hirer satisfies the other requirements of residence given above. If he does not, the place cannot be the subject of burglary at all; it is not the dwelling-house of the lodger or tenant, because there is no residence; nor of the owner, because it is severed by the letting (*f*). But if the owner himself, or any of his family, live in the house, and there is only one outward door at which they and the lodger enter, the lodger is regarded as an inmate; and therefore the house must be described as that of the owner (*g*).

At common law a church might be the subject of burglary; but this case is now specially provided for by statute (*h*).

iii. *Manner.*—There must be both a breaking and an entering.

As to the *breaking.*—It must be of part of the house; therefore it will not suffice if only a gate admitting into the yard is broken. But the breaking is not restricted to the breaking of the outer wall, or doors, or windows; if the thief gains admission by the outer door or window being open, and afterwards breaks or unlocks an inner door for the purpose of plundering one of the rooms, it is burglary (*i*). This will apply especially to the case of servants, lodgers, &c., who are lawfully in the house. Breaking chests or cupboards does not satisfy the requirements of burglary.

The breaking is either actual or constructive. *Actual*, when the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention breaks a hole in the wall of a house, breaks a door or window, picks the lock of a door, or opens it with a key or even by lifting the latch, or undoes any other fastening to doors or windows which the owner has

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(*f*) v. Archbold, 636, 637, and cases cited there.
(*g*) v. *R.* v. *Rogers*, [1772] 1 Leach, 89, 428.
(*h*) v. p. 247.
(*i*) *R.* v. *Johnson*, [1786] 2 East, P. C. 488.

provided. It is not burglary if the entry is made through an open window or door, or through an aperture (other than a chimney), provided that the thief does not break any inner door (*k*). Nor is raising a window which is already partly open; but it has been decided that lifting the flap of a cellar which was kept down by its own weight was sufficient to constitute a burglary (*l*). So also to obtain admission to a house by coming down the chimney is sufficient, for the chimney is as much closed as the nature of things will admit; but getting through a hole in the roof left to admit light is not (*m*).

The breaking is *constructive*, where admission is gained by some device, there being no actual breaking. As, for example, to knock at the door and then rush in under pretence of taking lodgings, and fall on and rob the landlord; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house. These are breaches sufficient to constitute burglary, for the law will not suffer itself to be trifled with by such evasions (*n*). So for a servant to conspire with a robber, and let him into the house at night, is a burglary in both (*o*). If the servant, acting on his master's instructions, opens the door, there is no burglary, as the door is lawfully open (*p*); but if the servant, to effect the arrest of the prisoner, with his master's knowledge gives a key to the prisoner, from which he makes a false key and opens the door, this is burglary (*q*).

As to the *entry*.—The least degree of entry with any part of the body, or with any instrument held in the hand, will suffice; for example, stepping over the threshold, putting a hook in at the open window in order to abstract goods, but not if the instrument was merely used to effect the breaking,

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(*k*) v. *R.* v. *Smith*, [1820] R. & R. 417; Archbold, 641; *R.* v. *Hall*, [1818] R. & R. 355; *R.* v. *Smith*, [1827] 1 Mood. 178; *R.* v. *Robinson*, [1831] 1 Mood. 327; *R.* v. *Hyams*, [1836] 7 C. & P. 441.
(*l*) *R.* v. *Russell*, [1833] 1 Mood. C. C. 377.
(*m*) *R.* v. *Brice*, [1821] R. & R. 450.
(*n*) Archbold, 642.
(*o*) *Ibid.* 642.
(*p*) *R.* v. *Johnson*, C. & M. 218.
(*q*) *R.* v. *Chandler*, [1913] 1 K. B. 215; 82 L. J. K. B. 106.

and not as a means in itself of taking the goods, as, *e.g.*, a crowbar (*r*). If larceny is proved but not burglary the prisoner may be convicted, as the case may be, of simple larceny, or larceny in a dwelling-house (*s*).

When the breaking with intent to commit a felony is proved, but there is no proof of entry, the jury may convict the prisoner of an attempt to commit burglary (*t*).

iv. The *intent.*—To constitute a burglary, there must be an intent to commit some felony (not necessarily a larceny) in the dwelling-house. This intent must be either proved from evidence of the actual commission of the felony, or implied from some overt act if the felony is not actually carried out. For it is none the less burglary because the felony which is intended is not perpetrated. The nature of the intended felony must be alleged in the indictment (*u*).

Burglary is a felony, punishable by penal servitude to the extent of life.

Certain other crimes connected with the subject of burglary remain to be considered:—

Being found by night (i) *armed* with any dangerous or offensive weapon or instrument, with intent to break *or* enter into any *building* and to commit a felony therein; an intent either to break or to enter will suffice, and the offence is not confined to *dwelling*-houses. Proof must be given of an intent to break into or enter a particular building; proof of a general intent will not suffice (*w*).

ii. In possession, without lawful excuse, the proof whereof lies on the accused, of any *housebreaking implement;*

iii. With the face blackened or disguised, with intent to commit a felony;

iv. In any building, with intent to commit a felony therein; is a misdemeanour, punishable by penal servitude to the

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(*r*) *R.* v. *Hughes*, [1785] 1 Leach, 406; *R.* v. *Rust*, [1828] 1 Mood. C. C. 183; Archbold, 644.
(*s*) Archbold, 645.
(*t*) *R.* v. *Spanner*, [1872] 12 Cox, 155.
(*u*) Archbold, 644.
(*w*) *R.* v. *Jarrold*, [1863] L. & C. 301; 32 L. J. M. C. 258.

extent of five years. If any of the above misdemeanours be committed after a previous conviction for felony, or after a previous conviction for such misdemeanour, the penal servitude may be for ten years (*x*).

HOUSEBREAKING.

The chief distinction between this crime and burglary is, that the former may be committed by *day*, the latter by *night* only. There is also a difference to be noticed as to the structure which may be the subject of the crimes. Housebreaking extends to school-houses, shops, warehouses, and counting-houses and other buildings as well as dwelling-houses.

Nature of crime.

The Larceny Act, 1916, deals with two classes of offences.

A. Every person who (i) breaks and enters any dwelling-house, or any building within the curtilage thereof and occupied therewith, or any school-house, shop, warehouse, counting-house, office, store, garage, pavilion, factory, or any building belonging to His Majesty, or to any Government department, or to any municipal or other public authority, and commits any felony therein; or (ii) breaks out of the same, having committed any felony therein, shall be guilty of felony and liable to penal servitude for fourteen years (*y*).

B. Every person who with intent to commit any felony therein (i) enters any dwelling-house in the night, (ii) breaks and enters any dwelling-house, place of Divine worship, or any building within the curtilage of any schoolhouse, shop (&c., as above) shall be guilty of felony and liable to penal servitude for seven years (*z*).

(*x*) s. 28.

(*y*) s. 26. If proof of breaking or entering fails the prisoner may be convicted of simple larceny, Archbold, 657.

(*z*) s. 27.

Sacrilege.

Breaking and entering any place of Divine worship, and committing a felony therein, or, if already therein, committing a felony and breaking out, is a felony, punishable by penal servitude to the extent of life (*a*).

Larceny in a dwelling-house.

This crime differs from housebreaking inasmuch as there need not be any breaking, nor any entry with a view to the commission of the larceny. As in burglary, the building must be proved to be a dwelling-house, or some building occupied therewith or communicating in the manner before described (*b*).

Stealing in such dwelling-house any chattel, money, or valuable security to the value in the whole of £5 or more, is a felony, punishable by penal servitude to the extent of fourteen years. And although the value does not amount to £5, the punishment is the same if the thief by any menace or threat puts any one in the dwelling-house in bodily fear (*c*).

The goods must be under the protection of the house, and not in the personal care of the owner. Thus to steal a sum of money from a person's pocket while he is in the house is not within the statute unless, indeed, the clothes containing such pocket had been put off, in which case they would be under the protection of the house (*d*). It was decided in the same case that it is a question for the Judge and not for the jury whether the goods are under the protection of the house or in the personal care of the owner. The fact that the larceny was committed in the thief's own house does not take the case out of the statute (*e*).

(*a*) s. 24.
(*b*) v. p. 242.
(*c*) s. 13.
(*d*) *R.* v. *Thomas*, Car. Sup. 295.
(*e*) *R.* v. *Bowden*, [1843] 1 C. & K. 147.

CHAPTER V.

FORGERY.

FORGERY at common law was a *misdemeanour*, and was said to be the false or fraudulent making (or alteration) of an instrument or writing (or part thereof) to the prejudice of another man's right, or, in other words, with a design or intent to defraud (*f*). By various statutes the forgery of certain specified instruments, including indeed nearly all instruments which are usually forged, has been declared to be *felony* and made punishable by penal servitude. But as regards documents not so specified the forgery of such documents still remains a misdemeanour at common law, and is declared by the Forgery Act, 1913 (3 & 4 Geo. V, c. 27, s. 4), to be punishable by imprisonment with hard labour for two years. Examples of such common law forgeries are: Forging a testimonial to character in order to obtain an appointment (*g*), a pass on a railway (*h*), a certificate of a clergyman's ordination (*i*).

The statute law making the forgery of certain documents felony has recently been to a large extent consolidated by the Forgery Act, 1913 (*k*). This statute defines forgery as being, for the purposes of the Act, the making of a false

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(*f*) Archbold, 793; *R.* v. *Riley*, [1896] 1 Q. B. 309, 312; 65 L. J. M. C. 74.

(*g*) *R.* v. *Sharman*, [1854] Dears. C. C. 285; 23 L. J. M. C. 51. Forging a servant's character and giving a false character are also punishable under 32 Geo. III. c. 56, upon summary conviction, by a fine of £20 (see *R.* v. *Costello*, [1910] 1 K. B. 28; 79 L. J. K. B. 90); as to forged statements as to character and certificates of discharge by soldiers and sailors, see 6 Edw. VII. c. 5.

(*h*) *R.* v. *Boult*, [1848] 2 C. & K. 604.

(*i*) *R.* v. *Etheridge*, [1901] 19 Cox, C. C. 676, 678.

(*k*) 3 & 4 Geo. V. c. 27. This Act came into force on 1st January, 1914.

document (*l*) in order that it may be used as genuine, and in the case of the seals and dies mentioned in the Act the counterfeiting of such a seal or die, and forgery with intent to defraud or deceive, as the case may be, is made punishable as provided by the Act (*m*).

A document is declared to be *false* within the meaning of the Act if the whole or any material part of it purports to be made by or on behalf of a person who did not make it or authorise its making; or if, though the document is made or authorised by that person, the time or place of making, if material, is falsely stated in it. So also the document is false if any material alteration has by any means been made in it, or if it purports wholly or partially to be made by or on behalf of a fictitious or deceased person, or if, though made in the name of the existing person, it is made by him or with his authority with the intention that it should pass as having been made by some other person, real or fictitious (*n*).

It is immaterial, for the purposes of the Forgery Act, 1913, in what language the document is made, or in what place within or without the King's dominions it is expressed to take effect; and forgery of the document may be complete even if the document when forged is incomplete or does not purport to be such a document as would be binding or sufficient in law (*o*).

An alteration, whether by addition, erasure, or otherwise, must, to amount to forgery, be of a material part of the

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(*l*) There is no definition of "document" given by the Act, but it is probably synonymous with "instrument," the word used in 24 & 25 Vict. c. 98, s. 38, now repealed, and with the word "writing"; see the judgments in *R.* v. *Riley*, *supra*, followed in *R.* v. *Cade*, 83 L. J. K. B. 796; [1914] 2 K. B. 209. At common law the forgery must be of a writing; so where the defendant had put upon a picture the name of an artist by whom it had not been painted it was held that he was not guilty of forging the artist's name (*R.* v. *Closs*, [1858] Dears. & B. 460; 27 L. J. M. C. 54), though he might have been convicted of a common law cheat if he had placed the false name on the picture in the course of his trade and had obtained money for so doing (*ibid.* v. p. 239 of this work). Such an offence is also now punishable summarily by fine under 25 & 26 Vict. c. 68, ss. 7, 8, and the defendant may also be ordered to make compensation to the person aggrieved.

(*m*) 3 & 4 Geo. V. c. 27, s. 1, sub-s. 1.

(*n*) *Ibid.* sub-s. 2.

(*o*) *Ibid.* sub-s. 3.

document, but it is expressly declared by the Forgery Act, 1913, that the crossing of a cheque, draft, postal order, or other document, the crossing of which is authorised or recognised by law, is a material part of such document (*p*). The test of whether an alteration or addition to a document is material is whether it gives to the document a different meaning or effect (*q*).

From the lists of documents given below it will be seen that to constitute forgery under the Forgery Act, 1913, in some cases an intention to *defraud* is necessary, whereas in other cases it is sufficient that there should be an intention to either *defraud* or to *deceive*. Speaking generally, it is in the case of public documents purporting to be of an official nature that an intention to *deceive* is sufficient to constitute forgery, whereas as regards documents of a private nature, such as wills, deeds, bills of exchange, powers of attorney, &c., it will be necessary to show that the intention of the accused was to *defraud*. That there is a material distinction between the two intentions or states of mind will be seen by the following extract from a judgment of Buckley, J.: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action" (*r*).

It is not necessary to allege in the indictment or to prove at the trial an intent to defraud or to deceive any particular person; it is sufficient to prove that the accused did the act alleged with intent to defraud or to deceive, as the case may be (*s*)—that is, a general intent as it is called. Nor need it be shown that any one was actually defrauded or deceived,

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(*p*) 3 & 4 Geo. V. c. 27, s. 1, sub-s. 3.
(*q*) *R.* v. *Griffiths*, [1858] Dears. & B. 548.
(*r*) *London and Globe Finance Corporation, Lim., In re*, [1903] 1 Ch. 728, 732; 72 L. J. Ch. 368.
(*s*) 3 & 4 Geo. V. c. 27, s. 17, sub-s. 2.

nor even that any person would be in a situation to be defrauded or deceived by the forgery (*t*). If the accused has fabricated and uttered a false document, intending that it should pass as a genuine one, the fact that he intended to repay the money obtained by that means, or that he used the document to support a legal or *bona-fide* claim, will not be sufficient to negative the intention to defraud (*u*). And if it is proved that the accused has forged a document such as a bill of exchange, and uttered it as genuine, the jury are bound to infer that he did so with an intent to defraud (*w*).

The following is an abstract statement of the documents specified in the Forgery Act, 1913, the forging of all of which is *felony*, the punishment being fixed according to the nature of the document.

Forging of the following documents, if committed *with intent to defraud*, is punishable with penal servitude for life (*x*):—

A will, codicil, or other testamentary document, either of a dead or a living person, or probate or letters of administration.

A deed or bond, or assignment thereof, or any attestation thereof.

A banknote (*y*) or any indorsement or assignment thereof.

Forgery of the following if committed with intent *to defraud* is punishable by penal servitude for *fourteen* years (*z*).

A valuable security (*a*), or any assignment thereof or indorsement thereon, or an acceptance of a bill of exchange.

(*t*) *R.* v. *Nash*, [1852] 2 Den. C. C. 493; 21 L. J. M. C. 147.

(*u*) *R.* v. *Hill*, [1838] 8 C. & P. 274; *R.* v. *Wilson*, [1847] 1 Den. C. C. 284; *R.* v. *Parker*, [1910] 74 J. P. 208.

(*w*) *R.* v. *Hill*, *supra*; *R.* v. *Cooke*, [1838] 8 C. & P. 582, 586.

(*x*) 3 & 4 Geo. V. c. 27, s. 2, sub-s. 1.

(*y*) For definition of a "banknote," see s. 18, sub-s. 1.

(*z*) *Ibid.* s. 2, sub-s. 2.

(*a*) By s. 18, sub-s. 1, " valuable security " in this Act includes any writing evidencing the title of any person to any share or interest in the public funds, either English or foreign, or in any stock, fund, or debt of any company within or without the King's Dominions, or to any deposit at a bank, and also any scrip, debenture, *bill*, *note*, *warrant*, or other security for the payment of money, or any accountable receipt, or discharge or any receipt evidencing the payment of

A document of title to lands or to goods (*b*), or an assignmen thereof or indorsement thereon.

A power of attorney to transfer stock or to receive dividends.

An entry in a share register.

A policy of insurance, or assignment thereof or indorsement thereon.

A charterparty or assignment thereof.

Certain declarations, certificates, &c., made under the Government Annuities Acts, 1829 and 1832, or by the Commissioners of Inland Revenue, or Income Tax Commissioners, or under the Slave Trade Acts.

Forgery of the following documents if committed *with intent to defraud or deceive* is punishable with penal servitude *for life* (*c*):

Any document having the stamp or impression of the Great Seal, the King's Privy Seal, or his Privy Signet or Royal Sign Manual, the Great Seal or Privy Seal of Ireland.

Forgery of the following if committed with intent to *defraud or deceive* is punishable by penal servitude for *fourteen* years (*d*):

Any register or record of births, baptisms, deaths, burials, cremations, or marriages authorised by law to be kept in the United Kingdom, or any certified copy or any part thereof.

A certified copy of a record purporting to be signed by an Assistant Keeper of the Public Records in England.

A wrapper or label provided or authorised by the Commissioners of Inland Revenue, Customs, or Excise.

Forgery of the following if committed with intent to *defraud or deceive* is punishable by penal servitude for *seven* years (*e*):

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money or delivery of a chattel. It will be seen that this is a somewhat different definition of a "valuable security" to that given in the Larceny Act, 1916, for the purposes of that Act, the terms of which are stated on p. 195. A Post Office money order is a "valuable security" within the meaning of the Forgery Act, 1913, v. 8 Edw. VII. c. 48, s. 59.

(*b*) See the definitions in s. 18, sub-s. 1, of such documents of title. A document of title to goods includes *inter alia* dock warrants and delivery orders. As to the forgery of certificates or documents of title under the Declaration of Title Act, 1862, see 25 & 26 Vict. c. 67, s. 45.

(*c*) 3 & 4 Geo. V. c. 27, s. 3, sub-s. 1.

(*d*) *Ibid.* s. 3, sub-s. 2.

(*e*) *Ibid.* s. 3, sub-s. 3.

Any official document of a Court of Justice or issued by the Judge or any officer of such a Court (*f*).

A register or book kept under the provisions of any law in or by the authority of any Court of Justice, and any certificate, official or certified copy thereof or of any part thereof.

A document which a magistrate or a Master or Registrar in Lunacy is authorised by law to make or issue.

A document which any person authorised to administer an oath under the Commissioners of Oaths Act, 1889, is authorised to make or issue.

A document made by a law officer or officer of State upon which any Court of Justice or any officer might act.

A document or copy intended to be used in evidence in any Court of Record, or any document made evidence by law.

A certificate required by any Act for the celebration of marriage.

A marriage licence.

Any certificate, declaration, or order under any Act relating to the registration of births or deaths.

Certain certificates, declarations, bills of sale, &c., under the Merchant Shipping Act, 1894.

A permit, certificate, or similar document granted by the Commissioners of Customs and Excise.

There are certain other statutory provisions still remaining unaltered by the Forgery Act, 1913, which should be noticed. They are as follows:

Wilfully and fraudulently making a false entry or alteration in books of the Bank of England or Bank of Ireland in which the accounts of the public funds are kept, or making a transfer of any such funds in the name of a person not the true owner. Felony, penal servitude for life (24 & 25 Vict. c. 98, s. 5).

For a clerk of such bank to make a false dividend warrant. Felony, penal servitude for seven years (*ibid.* s. 6).

Printing Acts, proclamations, &c., falsely purporting to

(*f*) As to clerks or officers of a Court who issue false copies or certificates, see 24 & 25 Vict. c. 98, s. 28, repealed in part by 3 & 4 Geo. V. c. 27.

have been printed by the Government printer or His Majesty's Stationery Office. Felony, penal servitude for seven years (31 & 32 Vict. c. 37, s. 4 (1); 45 & 46 Vict. c. 9, s. 3).

To deliver to any person a paper falsely purporting to be the process of any Court, or a copy, or knowingly acting or professing to act under such false process. Felony, penal servitude for seven years (24 & 25 Vict. c. 98, s. 28) (*g*).

Forging or defacing a ballot-paper at an election. Misdemeanour, v. p. 73.

To make, utter, deal in, or sell a fictitious postage stamp, whether English or foreign, or to have such a stamp in possession without lawful excuse, or to make or have a die, &c., for making such a stamp is punishable on summary conviction by a fine of £20 (*h*).

Fraudulently counterfeiting trade-marks and trade-mark registers (50 & 51 Vict. c. 28; 7 Edw. VII, c. 29, s. 89) (*i*).

Forging or wilfully altering a telegram, whether there be an intention to defraud or not, is punishable on conviction summarily by a fine of £10, and on indictment by imprisonment for twelve months (*k*).

Falsification of accounts by clerks, officers, servants, and other employees (38 & 39 Vict. c. 24) (*l*).

The punishment of common law forgeries is provided for as follows: The forgery of any document which is not made felony by the Forgery Act, 1913, or any other statute, if committed with intent *to defraud* is declared to be a misdemeanour and punishable by imprisonment with hard labour for two years and a fine; and the forgery of *public* documents not so made felony, if committed with intent to defraud *or deceive*, is punishable in the same way (*m*).

The Forgery Act, 1913, contains also (*n*) provisions with regard to the forgery of official seals and dies:

(*g*) This section has been in part repealed by the Forgery Act, 1913.
(*h*) 8 Edw. VII. c. 48, s. 65.
(*i*) 47 & 48 Vict. c. 76, s. 11.
(*k*) 3 & 4 Geo. V. c. 27, ss. 4, 12, sub-s. 2 (a).
(*l*) v. p. 235.
(*m*) 3 & 4 Geo. V. c. 27, s. 4.
(*n*) 3 & 4 Geo. V. c. 27, s 5.

To forge with intent to defraud *or deceive* the Great or Privy Seals of the United Kingdom or Ireland, the Royal Sign Manual, or the Seal of any Public Record Office in England or of any Court of Record or of the Registrar-General of Births, Deaths, and Marriages is punishable by penal servitude *for life*; and to forge the seals of any register, office of births, &c., or of a burial board, or of the registry of deeds or titles to land, by penal servitude for *fourteen years*. The forgery of the seal of a Court of Justice other than of a Court of Record or of a Master or Registrar in Lunacy is punishable by penal servitude for *seven years*. Forgery of dies, provided or used by the Commissioners of Inland Revenue, or of Customs and Excise, or of any die required or authorised by law to be used for the marking or stamping of gold or silver plate or wares, is punishable by *fourteen years'* penal servitude, and of a stamp or die made or used under the Local Stamp Act, 1869, by *seven years'* penal servitude (*o*).

For the purpose of proving that the alleged forgery was not written by the person in whose handwriting it purports to be, the best evidence is the denial of such person on his being produced as a witness. Whether, however, he be or be not called as a witness, the handwriting may be proved not to be his by any person acquainted with his handwriting or by comparison with writing proved to be genuine (*p*). An expert will probably be allowed to give evidence as to whether the writing is in his opinion in a feigned hand merely from its appearance, but there are some decisions to the contrary (*q*). It is sufficient to disprove the handwriting of the person whose signature has been copied, and he need not necessarily be called to disprove any authority to others to use his name (*r*), unless there should be some evidence of such authority which it is necessary to contradict.

In an indictment for an offence against the Forgery Act, 1913, it is not necessary to set out any copy or facsimile of

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(*o*) 3 & 4 Geo. V. c. 27, s. 5.
(*p*) v. p. 405.
(*q*) See Archbold, 433.
(*r*) *R.* v. *Hurley*, [1843] 2 M. & Rob. 473.

the whole or any part of the document; it is sufficient to describe it by any name by which it is usually known, or by its purport (*s*); nor need the indictment allege an intent to defraud or deceive any particular person (*t*). A second count may be added to the indictment charging the prisoner with uttering the same document.

A person *utters* a forged document, seal, or die who, knowing it to be forged and with either of the intents necessary to constitute the offence of forging it (*i.e.*, with intent to defraud or to deceive as the case may be (*u*)), uses, offers, publishes, delivers, disposes of, tenders in payment or exchange, exposes for sale or exchange, tenders in evidence or puts off the forged document, seal, or die. It is immaterial *where* it was forged (*w*). A person who so utters a forged document, seal, or die is guilty of an offence of the like degree (whether felony or misdemeanour) and is subject to the same punishment as if he himself had committed the forgery (*x*); that is to say, if the forgery is a felony so is the uttering, if the forgery is a misdemeanour the uttering will only amount to a misdemeanour. The guilty knowledge of the accused may be shown by evidence that he has uttered other similar forged documents (*y*).

There are certain forged documents and implements of forgery, the bare possession of which without lawful authority or excuse is criminal. And a man is deemed to be in possession not only when he has the documents, &c., in his personal custody or possession, but also if he knowingly and wilfully has it in the custody of any other person or in any building, lodging, field, or other place, whether occupied by himself or not, it being immaterial whether the document, &c., is in such custody, possession, or place for the use of the accused or for the use or benefit of another person (*z*). The offence

(*s*) 3 & 4 Geo. V. c. 27, s. 17, sub-s. 1.
(*t*) *Ibid.* sub-s. 2.
(*u*) As to which, v. p. 250, *ante*.
(*w*) 3 & 4 Geo. V. c. 27, s. 6.
(*x*) *Ibid.*
(*y*) *R.* v. *Aston*, [1838] 2 Russ. 732; *R.* v. *Colclough*, [1882] 10 L. R. Ir. 241; 15 Cox, C. C. 92. As to evidence of this class, v. p. 390.
(*z*) 3 & 4 Geo. V. c. 27, s. 15.

consists in the mere having it in possession without authority or excuse.

Thus a person is guilty of felony and liable to penal servitude for fourteen years, who without lawful authority or excuse, the proof whereof lies on the accused, has in his custody or possession (or in the case of a banknote, purchases or receives) any forged banknote (*a*), or any die authorised by law to be used for marking gold or silver articles, or any wares whether of gold, silver, or base metal bearing the impression of such forged die, or any forged stamp or die as defined by the Stamp Duties Act, 1891, or any forged wrapper or label provided by the Commissioners of Inland Revenue, or of Customs and Excise (*b*). The possession of a forged stamp or die resembling the stamps or dies used under the Local Stamp Act, 1869, is felony punishable by penal servitude for seven years (*c*).

With regard to the implements of forgery, it is provided that a person is guilty of felony and liable to penal servitude for seven years who without lawful authority or excuse, which it is for him to prove, makes, uses, or knowingly has in possession any paper intended to resemble the special paper used for making banknotes, Treasury bills, or revenue paper, or an instrument for making the same, or who engraves or otherwise makes upon any plate, stone, &c., any words, &c., resembling a banknote or stock, share, or debenture certificate, or any paper so printed (*d*). And even the possession without lawful authority of *genuine* special paper used for making Treasury bills or any revenue paper before it has been duly stamped and issued for public use is a misdemeanour punishable by imprisonment for two years or a fine (*e*).

Power is given to any justice of the peace, upon reasonable cause being shown on oath, to issue a search warrant

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(*a*) For a definition of "banknote," see s. 18. It includes foreign as well as English banknotes, bank post bills, &c.
(*b*) 3 & 4 Geo. V. c. 27, s. 8.
(*c*) *Ibid.*
(*d*) *Ibid.* s. 9.
(*e*) *Ibid.* ss. 10 and 12, sub-s. 2.

authorising the search for and seizure of implements or material intended to be used for the forgery of any document (*f*).

A person is guilty of felony and liable to penal servitude for fourteen years who, with intent to defraud, demands or obtains or causes to be paid or delivered to any person, or endeavours to do so, any money or other property, whether real or personal, under any forged instrument knowing it to be forged, or under any probate or letters of administration knowing that the will on which the probate or letters of administration were granted was forged or that the probate or letters of administration were obtained by any false oath or affidavit (*g*).

(*f*) *Ibid.* s. 16. (*g*) *Ibid.* s. 7.

CHAPTER VI.

INJURIES TO PROPERTY.

One of the Criminal Consolidation Acts, 1861 (*h*), deals with arson and malicious injuries to property. Of these offences the present chapter will treat.

ARSON.

Arson at common law was the malicious setting fire to the *dwelling-house* of another person, or to an outhouse forming part of the same premises as the dwelling-house.

But the offence has been much extended by the above statute, which in different sections deals with setting fire unlawfully and maliciously to:—

Churches, chapels, and other places of Divine worship (section 1).

Dwelling-house, any person being therein (section 2) (*i*).

House, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or farm, or any farm building, or any building or erection used in farming land, or in carrying on any trade or manufacture, *with intent thereby to injure or defraud any person* (section 3).

Station, warehouse, or other building belonging to any railway, port, dock, or harbour, or any canal or other navigation (section 4).

(*h*) 24 & 25 Vict. c. 97. When merely a section is quoted in this chapter it must be understood to refer to that statute.

(*i*) This section has been held to apply although the only person in the house was the prisoner himself. *R.* v. *Pardoe*, [1894] 17 Cox, 715.

Public building, as described in the Act (section 5).

All these cases of arson are felonies, punishable by penal servitude to the extent of life. In the case of any other building the maximum penal servitude is fourteen years (*k*).

Besides the above enactments with regard to setting fire to buildings, there are others dealing with the burning of other kinds of property.

Unlawfully and maliciously setting fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to, the offence would amount to felony, is a felony, punishable by penal servitude to the extent of fourteen years (*l*). But, for a conviction under this section, it is not enough to show that the firing of goods in a building is malicious; it must be shown that, if the house had been set fire to, the firing of *the house* would have been wilful and malicious; if, therefore, a person maliciously, with intent to injure another by burning his goods, set fire to such goods in his house, that does not amount to a felony under the Act, even though the house catches fire, unless the circumstances are such as to show that the person setting fire to the goods knew that by so doing he would probably cause the house also to take fire, and was reckless whether it did so or not (*m*). Attempting to set fire to a building or to any matter or thing mentioned above under such circumstances that if the same were set fire to the offender would be guilty of felony is punishable in the same way (*n*).

Corn, &c.—Setting fire to any *crop* of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, is a felony,

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(*k*) s. 6. In case of a male under 16 whipping may also be awarded under ss. 1—8, 16—18, 26 and 27, and 42—44.

(*l*) s. 7.

(*m*) *R.* v. *Child*, [1871] L. R. 1 C. C. R. 307; 40 L. J. M. C. 127; see also *R.* v. *Nattrass*, [1882] 15 Cox, 73.

(*n*) s. 8.

punishable by penal servitude to the extent of fourteen years (*o*).

Setting fire to any *stack* of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, is a felony, punishable by penal servitude to the extent of life (*p*).

Attempting to set fire to anything mentioned in the last two sections under such circumstances that, if the same were set fire to, the offender would be guilty of felony under either of those sections, is a felony punishable by penal servitude to the extent of seven years (*q*).

Mines.—Setting fire to any mine of cannel coal, anthracite, or other mineral fuel, is a felony, punishable by penal servitude to the extent of life (*r*). Attempting to do the same under such circumstances, &c. (v. above), is a felony, punishable by penal servitude to the extent of fourteen years (*s*).

We may notice here certain provisions as to destroying *ships*:—

Setting fire to, casting away, or in anywise destroying any ship or vessel, whether the same be complete or in an unfinished state, is a felony, punishable by penal servitude to the extent of life (*t*).

An attempt by any overt act to commit any such deed under such circumstances that it would be felony if actually committed is a felony, punishable by penal servitude to the extent of fourteen years (*u*).

It appears still to remain a felony, punishable with death, to set fire to any of His Majesty's *ships of war*, military

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(*o*) s. 16.
(*p*) s. 17.
(*q*) s. 18.
(*r*) s. 26.
(*s*) s. 27.
(*t*) ss. 42, 43.
(*u*) s. 44.

or naval stores (*w*); or works, or vessels in the docks of the Port of London (*x*).

In viewing the crime of arson and malicious injuries to property under this Act we may notice:—

i. The act must be done *unlawfully and maliciously*.—Therefore no mere negligence or mischance will amount thereto. But it is not necessary that the offence should be committed from malice conceived against the owner of the property (*y*). For example, if the accused, intending to set fire to his own house or to the house of A., accidentally sets fire to the house of B., it is equally arson (*z*). Nor is it necessary that he should have had any intention of setting fire to any one's house; he would be guilty of arson if, intending to commit some felony of a different nature, he accidentally set fire to another's house, provided he acted *recklessly* and the act he was committing was one which might probably cause a fire (*a*). As in the cases of "malicious" wrongs, if the act is proved to have been done wilfully, it will be inferred to have been done maliciously unless the contrary be proved. And though mere negligence is not malice, yet there may be such recklessness that a person may be presumed to have intended harm and so to have acted maliciously (*b*).

As to the "setting fire," from a *physical* point of view there must be an actual burning of some part, however trifling, of the house, &c. To support an indictment for setting fire to a house, it will not suffice merely to prove that something in the house was burnt (*c*).

(*w*) 12 Geo. III. c. 24, s. 1.

(*x*) 39 Geo. III., c. 69, s. 104 (local Act). See also Naval Discipline Act, 29 & 30 Vict. c. 109, s. 34.

(*y*) s. 58. This section applies to all offences coming within the Malicious Injuries Act, 1861.

(*z*) Archbold, 715.

(*a*) *R.* v. *Faulkner*, [1877] 11 Ir. R. C. L. 8; 13 Cox, 550; *R.* v. *Harris*, [1882] 15 Cox, 75.

(*b*) See cases cited in note (*m*), p. 260.

(*c*) But in such a case the circumstances may be such as to fall under s. 7, as if the prisoner intended that the house should also catch fire or was reckless whether it did so or not; v. p. 260.

ii. *The intent to injure or defraud.*—When it is necessary to allege this, there is no need to allege an intent to injure or defraud *any particular person* (*d*).

When a person wilfully sets fire to the house of another, the intent to injure that person is inferred from the act. But if the setting fire is the result of accident, though the accused be engaged in the commission of some other felony not likely in itself to cause a fire, there can be no intent to defraud. Where the prisoner sets fire to his own house the intent to defraud cannot be inferred from the act but must be proved by other evidence (*e*). It will be remembered that an intent to injure or defraud is a necessary ingredient of an offence against section 3 of the Act.

It is specially declared in the Act that its provisions apply to every person who, with intent to injure or defraud any other person, does any of the acts made penal, although the offender be in possession of the property in respect of which such act is done (*f*).

MALICIOUS INJURY.

Having noticed one of the most dangerous forms of malicious injury—arson—it remains to consider others which are dealt with in the same Act (*g*). It will be remembered that here "malicious" is to be taken in its technical signification. Of this one example will suffice. The prisoner in striking at A. had accidentally wounded B., whom he had no desire to injure. It was held that he could be convicted of unlawfully and maliciously wounding, his act being unlawful and malicious, *i.e.*, intended to do harm (*h*). All the acts which we shall notice must be done maliciously and wilfully.

Houses, &c.—To destroy or damage a dwelling-house by the explosion of gunpowder or other explosive substance, any

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(*d*) s. 60. This section also applies to the Act generally.
(*e*) Archbold, 718.
(*f*) s. 59. This section also applies to the Act generally.
(*g*) 24 & 25 Vict. c. 97.
(*h*) *R.* v. *Latimer*, 17 Q. B. D. 359; 55 L. J. (M. C.) 135.

person being therein, or in the same way to destroy or damage any building whereby the life of some person is endangered, is a felony, punishable by penal servitude to the extent of life (*i*). To place or throw gunpowder, &c., in, into, upon, under, against, or near any building, with intent to destroy the same or any machinery or goods, is a felony, punishable by penal servitude to the extent of fourteen years (*k*).

It is provided by another statute that any person unlawfully and maliciously causing, by any explosive substance, any explosion likely to endanger life or cause serious injury to property is guilty of felony, and liable to penal servitude for life, and this whether any injury to person or property is actually caused or not (*l*). Attempting to cause any such explosion, or making or having in one's possession any explosive with intent to cause such an explosion, is punishable by twenty years' penal servitude. Making or having explosives in one's possession under such circumstances as to cause a reasonable suspicion that they are to be used for an unlawful object is a felony, punishable by penal servitude for fourteen years, unless the accused can show that his object was a lawful one (*m*).

To riotously and with force demolish, or begin to demolish, buildings, machinery, mine bridges, ways, &c., is a felony, punishable by penal servitude to the extent of life (*n*). If the offenders do not proceed farther than to injure or damage the above, they are guilty of a misdemeanour, punishable by penal servitude to the extent of seven years (*o*). If indicted under the former section, the defendants may be found guilty of the offence set out in the latter. If the injury done be in the *bona fide* assertion of an alleged claim of right, the offenders do not fall within this provision of the statute (*p*).

(*i*) s. 9. A male under 16 may also be sentenced to a whipping in cases within ss. 9, 10, 14, 15, 28, 29, 45—48, 30, 31, 33, 32, 20, 21, 22 (3rd offence), 23 (2nd offence), 19, 39, 54. These sections follow in the above order.
(*k*) s. 10.
(*l*) 46 & 47 Vict. c. 3, s. 2.
(*m*) *Ibid.* ss. 3 and 4.
(*n*) 24 & 25 Vict. c. 97, s. 11.
(*o*) s. 12.
(*p*) *R.* v. *Phillips*, [1842] 2 Mood. C. C. 252; v. also p. 270, *post*.

For a tenant holding a dwelling-house or other building for any term, or at will, or after the termination of any tenancy, to unlawfully demolish or begin to demolish the building of which he is tenant, or to sever any fixture, is a misdemeanour, punishable by fine or imprisonment, or both (*q*).

Manufactures and Machinery (*r*).—(i) To break, destroy, or damage with intent to destroy, or render useless, certain goods, viz., silk, woollen, linen, cotton, hair, mohair, or alpaca, in process of manufacture, or the machinery employed in the manufacture, or (ii) by force to enter any place in order to commit such offence, is a felony, punishable by penal servitude to the extent of life (*s*). In the case of machines used in agricultural operations, or in the manufacture of goods other than those mentioned above, the extent of the penal servitude is seven years (*t*).

Mines (*u*).—To cause water to be conveyed into a mine with intent to destroy or damage the mine or hinder the working, or with like intent to obstruct an air-way, water-way, shafts, &c., is a felony, punishable by penal servitude to the extent of seven years (*w*).

Subject to the same punishment is the offence of destroying, damaging with intent to destroy or obstruct, the engines, erections, ways, ropes, &c., used in mines (*x*).

Regulations for the proper use of gunpowder and other explosives, when used in coal and metalliferous mines, are contained in the Acts 35 & 36 Vict. c. 77, and 1 & 2 Geo. V., c. 50.

Vessels (*y*).—To place or throw in, against, or near a ship or vessel, any gunpowder or other explosive substance with

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(*q*) s. 13.
(*r*) See also ss. 11 and 12, which, however, only apply to damage by riotous assemblies.
(*s*) s. 14.
(*t*) s. 15.
(*u*) See also ss. 11 and 12.
(*w*) s. 28.
(*x*) s. 29.
(*y*) See also ss. 42—44, p. 261.

intent to destroy the vessel, machinery, working tools, goods, or chattels, although the explosion does not take place and no injury is effected, is a felony, punishable by penal servitude to the extent of fourteen years (*z*). To damage otherwise than by fire, gunpowder, or other explosive substance, any vessel, complete or unfinished, with intent to destroy the same, or render it useless, is a felony, punishable by penal servitude to the extent of seven years (*a*).

To mask, alter, or remove any light or signal, or to exhibit any false sign or signal, with intent to bring a vessel into danger, or to do anything tending to its immediate loss or destruction, is a felony, punishable by penal servitude to the extent of life (*b*). For cutting away or otherwise interfering with any buoy, mark, &c., used or intended for the guidance of seamen or the purpose of navigation, the extent of the penal servitude is seven years (*c*).

To unlawfully and maliciously destroy any part of a vessel in distress, wrecked, stranded or cast on shore, or any article belonging to such ship, is a felony, punishable by penal servitude to the extent of fourteen years (*d*).

Sea and River Banks, &c.—To break down, or otherwise damage banks, dams, walls, &c., so that the land or buildings are, or are in danger of being, overflowed; or to destroy any quay, wharf, jetty, lock, sluice, weir, towing-path, drain, or other work belonging to any port, harbour, dock, reservoir, navigable river, or canal, is a felony, punishable by penal servitude to the extent of life (*e*). To remove, &c., piles, &c., used for securing such banks, &c., or to open flood-gates or sluices, or do any other injury to a navigable river or canal, with intent and effect to obstruct the navigation, is a felony, the extent of the penal servitude for which is seven years (*f*).

Bridges, Viaducts, and Aqueducts.—To destroy any bridge, viaduct, or aqueduct, over or under which any highway,

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(*z*) s. 45.
(*a*) s. 46.
(*b*) s. 47.
(*c*) s. 48.
(*d*) s. 49.
(*e*) s. 30.
(*f*) s. 31.

railway, or canal passes, or to do anything so as to render either the bridge, &c., or the railway, &c., dangerous or impassable, is a felony, punishable by penal servitude to the extent of life (*g*).

Turnpikes.—To destroy the gates, toll-bars, chains, or houses thereof, is a misdemeanour, punishable by fine or imprisonment, or both (*h*).

It may be noticed here that to destroy any fences, walls, stiles, or gates is punishable on summary conviction by a fine of £5 (over and above the damage done), and upon a second offence, with imprisonment with hard labour for twelve months (*i*).

Telegraphs.—To injure anything used in or about the telegraph, or in the working thereof, or to obstruct the sending or delivery of any message by such telegraph, is a misdemeanour, punishable by imprisonment not exceeding two years. But the magistrates, instead of sending the case for trial, may summarily dispose of it, awarding imprisonment not exceeding three months or fine (*k*). To attempt by any overt act any of the offences included in the last section is also visited with the same punishment on summary conviction (*l*).

To unlawfully and maliciously cut or injure any electric line or work, with intent to cut off any supply of electricity, is a felony punishable by penal servitude to the extent of five years, or imprisonment with hard labour for not more than two years (*m*).

Ponds and Fish.—Unlawfully and maliciously to destroy the dam, flood-gate, or sluice of a fish-pond or private water with intent to take or destroy, or so as to cause loss or destruction of any of the fish; or to put in such pond or water lime, or other noxious material, with intent to destroy the

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(*g*) s. 33.
(*h*) s. 34.
(*i*) s. 25.
(*k*) s. 37.
(*l*) s. 38.
(*m*) 45 & 46 Vict. c. 56, s. 22.

fish; or to destroy the dam or flood-gate of any mill-pond, reservoir, or pool, is a misdemeanour, punishable by penal servitude not exceeding seven years (*n*).

Animals.—To kill, maim, or wound any cattle is a felony, punishable by penal servitude not exceeding fourteen years (*o*).

To kill, maim, or wound any dog, bird, or beast, or other animal, not being cattle, but being either the subject of larceny at common law or being ordinarily kept in a state of confinement, or for any domestic purpose, is punishable, on summary conviction, for the first offence, by imprisonment not exceeding six months, or penalty not exceeding £20 above the injury; for the second offence, imprisonment not exceeding twelve months (*p*). It is not, however, an offence to kill or wound such an animal if the defendant honestly believed at the time that what he did was necessary for the protection of his own or his master's property (*q*).

To cruelly beat, ill-treat, over-drive, overload, torture, infuriate, or terrify a *domestic or captive animal* of any kind, or to convey or carry any such animal in such a manner as to cause it unnecessary suffering, or to cause or assist the fighting or baiting of any such animal or to keep premises for that purpose, or to wilfully and without reasonable excuse administer to it any poisonous or injurious substance or to subject it to any operation which is performed without due care and humanity, is punishable on summary conviction by a fine of £25 or imprisonment with or without hard labour for three months, or by both (*r*). It is not, however, forbidden to hunt or course a captive animal which is not

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(*n*) s. 32; v. 36 & 37 Vict. c. 71, s. 13, as to salmon rivers. As to injuries to railway trains dealt with by ss. 35 and 36, see *ante*, p. 177.

(*o*) s. 40.

(*p*) s. 41.

(*q*) *Daniel* v. *Janes*, [1877] 2 C. P. D. 351; *Miles* v. *Hutchings*, [1903] 2 K. B. 714; 72 L. J. K. B. 775.

(*r*) 1 & 2 Geo. V. c. 27, s. 1; 2 & 3 Geo. V. c. 17, s. 1. This Act contains numerous other provisions for the prevention of cruelty to animals, and particularly for the proper management of knackers' yards. As to vivisection, v. 39 & 40 Vict. c. 77.

liberated in an injured, mutilated, or exhausted condition (*s*). To employ a dog to draw a cart or barrow is punishable by a fine of £2 for the first and £5 for a subsequent offence (*t*).

Trees, Plants, &c.—To destroy or damage any tree, sapling, shrub, or underwood growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, provided that the amount of the injury done exceeds the sum of £1, or, if the tree, &c., is growing elsewhere, provided that the amount exceeds £5, is a felony, punishable by penal servitude to the extent of five years (*u*). If the injury amounts to the value of one shilling at the least, wheresoever the tree, &c., is growing, the offence is punishable, on summary conviction, by imprisonment not exceeding three months, or fine not exceeding £5 above the amount of the injury; for the second offence, imprisonment not exceeding twelve months; the third offence is a misdemeanour, punishable by imprisonment not exceeding two years (*w*).

To destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, is punishable, on summary conviction, by imprisonment not exceeding six months, or penalty not exceeding £20 above the amount of the injury; the second offence is a felony, punishable by penal servitude to the extent of five years (*x*). If the plant, &c., was not growing in any such place, the offence is punishable, on summary conviction, by imprisonment to the extent of a month, or fine of twenty shillings; for the second offence, imprisonment not exceeding six months (*y*).

To cut, or otherwise destroy, any hopbinds growing on poles in any plantation of hops is a felony, punishable by penal servitude to the extent of fourteen years (*z*).

(*s*) 1 & 2 Geo. V. c. 27, s. 1.
(*t*) *Ibid* s. 9.
(*u*) 24 & 25 Vict. c. 97, ss. 20, 21.
(*w*) s. 22.
(*x*) s. 23.
(*y*) s. 24.
(*z*) s. 19.

Works of Art, &c.—To destroy or damage (a) books, works of art, &c., in public museums, &c., or (b) pictures, statues, or monuments belonging to places of worship or public bodies, or in public places, is a misdemeanour, punishable by imprisonment not exceeding six months (*a*).

Such are the particular cases provided for by the statute; but in addition to these there are the following general provisions:—

Whosoever unlawfully and maliciously commits any damage to any real or personal property, either of a public or private nature, for which no punishment has been provided in the Act, is guilty of a misdemeanour, punishable by imprisonment not exceeding two years. If the offence is committed at night (*i.e.*, between the hours of nine in the evening and six in the morning), the offender is liable to penal servitude to the extent of five years (*b*).

It is necessary to show that in doing the damage the defendant acted maliciously, *i.e.*, intentionally, or, at least, that he acted recklessly with full knowledge that his conduct might result in damage being done. For instance, if in the course of a street fight the defendant threw a stone intending to hit an opponent and the stone broke a window, he ought not to be convicted of doing wilful damage unless the jury are satisfied that he threw the stone recklessly, knowing that it might break a window (*c*).

It is a defence to such a prosecution that the defendant acted as he did in the exercise of a supposed right, provided he did no more damage than he could reasonably suppose to be necessary for the assertion or protection of that right (*d*).

(*a*) s. 39.

(*b*) s. 51. But a Court of summary jurisdiction is not to commit any person for trial for an offence under this section unless it is of opinion that the damage exceeds £5, 4 & 5 Geo. V. c. 58, s. 14. As to summary convictions where the damage does not exceed £20, v. p. 455.

(*c*) *R.* v. *Pembliton*, [1874] L. R. 2 C. C. R. 119; 43 L. J. M. C. 91. Compare *R.* v. *Latimer*, p. 263.

(*d*) *R.* v. *Clemens*, [1898] 1 Q. B. 556; 67 L. J. Q. B. 482.

Making or knowingly having in possession any gunpowder, or any dangerous or noxious thing, or any instrument or thing, with intent, by means thereof, to commit any of the felonies mentioned in the Act, is a misdemeanour, punishable by imprisonment not exceeding two years (*e*).

(*e*) s. 54.

BOOK III.

CRIMINAL PROCEDURE.

We now have to consider the proceedings in criminal cases. But before entering upon the subject of Criminal Procedure it is necessary to consider what are the Courts with criminal jurisdiction.

CHAPTER I.

COURTS OF A CRIMINAL JURISDICTION.

In this chapter we shall treat of *Courts taking cognisance of indictable offences*, reserving for a subsequent chapter the consideration of Courts of summary jurisdiction.

THE HIGH COURT OF PARLIAMENT.

The jurisdiction of the High Court of Parliament, the highest Court of the kingdom, is exercised by the House of Lords in three ways:—

1. By Impeachment.
2. By Indictment.
3. On appeals from the Court of Criminal Appeal.

1. *Impeachment* before the Lords by the Commons.—The Commons act as prosecutors, the allegation being that it is the people, whom they are supposed to represent, who are injured; the Lords form the tribunal. In place of an ordinary bill of indictment the charge against the offender is contained in articles of impeachment, which are prepared by a committee of the House of Commons. A peer may be impeached for any crime; a commoner may be impeached, at any rate for a misdemeanour, and, according to some authorities, for any crime. No impeachment has taken place for more than a century.

2. *Indictment* before the House of Peers.—In this Court are tried peers and peeresses against whom an indictment for *treason* or *felony*, or for misprision of either (*a*), is found during a session of Parliament. The indictment—that is, a true bill—is found in the ordinary way by a grand jury in the King's Bench Division, or at the assizes; the indictment being removed to the House of Peers by writ of *certiorari* (*b*). At the trial the pleading and punishment are the same as at trials of any other accused person (*c*).

The Court is presided over by a Lord High Steward, appointed by commission under the Great Seal. He is not Judge, but chairman, and votes with the other peers. The privilege of being tried by this Court, which cannot be waived (*d*), depends upon nobility of blood rather than upon the right to a seat in the House. This kind of trial may therefore be claimed by a peer under age; by Scotch and Irish peers, though they be not representative, except an Irish peer who is a member of the House of Commons; by peeresses by birth, and also those by marriage unless when dowagers they have disparaged themselves by taking a commoner for a second husband (*e*). Bishops, however, are not tried in this Court, but in Courts which have jurisdiction over commoners. As to the right of bishops to take part in the trials in the House of Peers, a resolution of the House in *Danby's Case* has ever since been adhered to, "that the lords spiritual have a right to stay and sit in Court in capital cases till the Court proceeds to the vote of guilty or not guilty (*f*). They then retire voluntarily, with a protest "saving to themselves such rights in judicature as they have by law."

The trial by the House of Peers can only be held during the sitting of Parliament. During a recess the *Court of the*

(*a*) Peers are tried for *misdemeanours* before the ordinary tribunals.
(*b*) v. p. 335. For a recent instance of a trial of this kind, v. *R.* v. *Earl Russell*, [1901] A. C. 446; 70 L. J. K. B. 998.
(*c*) 4 & 5 Vict. c. 22; see, generally, Archbold, 165.
(*d*) Archbold, 165.
(*e*) *Ibid.*
(*f*) May, Parl. Prac., 669.

Lord High Steward takes its place for the trial of similar offences.

Here, unlike the former tribunal, the Lord High Steward is not merely chairman of the Court, giving his vote with the rest. He is Judge of matters of law, as the Lords-triers are of matters of fact. Therefore, as a Judge, he has no right to vote. A commission under the Great Seal confers the office of Lord High Steward for the particular occasion on some member of the House of Lords. When the indictment has been found, and removed by writ of *certiorari*, the Steward directs a precept to the serjeant-at-arms to summon the Lords to attend the trial. In cases of treason or misprision thereof, there must be summoned all the peers who have a right to sit and vote in Parliament (*g*). The decision is by the majority, which must consist of twelve at the least. Bishops cannot be summoned to this Court, nor have they the right of being tried there. But they have the right to stay and sit in such Court (*h*).

3. *Appeals from the Court of Criminal Appeal.*—By the Criminal Appeal Act, 1907 (*i*), it is provided that if the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal shall be brought, he may appeal from the decision to the House of Lords.

In this case the constitution of the Court is governed by the Appellate Jurisdiction Act, 1876. It is, in practice, composed only of Lords of Appeal, of whom not less than three must be present. It may sit during the dissolution of Parliament (*k*).

(*g*) 7 & 8 Will. III. c. 3, s. 11.
(*h*) v. *supra*.
(*i*) 7 Edw. VII. c. 23, s. 1, sub-s. 6.
(*k*) 39 & 40 Vict. c. 49, ss. 3, 5, 9.

COURT OF CRIMINAL APPEAL.

This Court is constituted by the Criminal Appeal Act, 1907, and consists of the Lord Chief Justice of England and the Judges of the King's Bench Division of the High Court. It has no original jurisdiction and can only deal with criminal cases brought before it by way of appeal, but over such cases it has very wide powers. In certain cases, however, as above mentioned, an appeal lies from it to the House of Lords.

THE HIGH COURT OF JUSTICE.

Courts forming part of the High Court of Justice which exercise criminal jurisdiction are (1) the King's Bench Division; (2) Courts sitting under Commissioners of Assize, of oyer and terminer, and gaol delivery (*l*).

1. The *King's Bench Division* is the successor of the old Court of King's Bench, which on its Crown side had jurisdiction to try all indictable offences against the law of England, with a general superintendence over all other Courts of criminal jurisdiction and power to remove indictments into itself by writ of *certiorari* (*m*). The criminal jurisdiction of the King's Bench Division is not now exercised except (*n*): (i) Where the indictment is removed into it by *certiorari* (*o*); (ii) Where an indictment is found in London or Middlesex by a jury summoned specially for the purpose by the Master of the Crown Office; (iii) In the case of criminal informations.

A trial in the King's Bench Division may be either before one Judge, as at assizes, or may be *at bar*, *i.e.*, before two

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(*l*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

(*m*) Archbold, 103, 109.

(*n*) The King's Bench Division has a special jurisdiction to try certain offences, as, for example, treason committed out of the realm (*R.* v. *Lynch*, [1903] 1 K. B. 444) and crimes committed out of England by Crown officials in the execution of their office (Archbold, 103). It is also the only Court before which a corporation can be tried on indictment, since a corporation can plead only by attorney, which is allowed only in the King's Bench Division (Archbold, 110).

(*o*) v. p. 335, *et seq.*

or more (usually three) Judges sitting *in banc* (*p*). Trial at bar can now, with some exceptions, be obtained only by order of the Court, which is granted as of right to the Attorney-General prosecuting on behalf of the Crown, but otherwise only for exceptional reasons (*q*).

2. *Courts of Assize, Oyer and Terminer, and Gaol Delivery.*—Since the Common Law Courts sat only at Westminster, it became the practice in the thirteenth century to grant commissions to special justices to take particular assizes or do some other particular judicial business in the counties. By various statutes of Edward I., Edward II., and Edward III., this became an organised system; the whole country was divided into groups of counties, and two Judges went twice a year to each *Circuit* with a general commission to take all assizes and deliver all gaols on the Circuit.

The arrangement of Circuits is now governed by various Orders in Council, made under the Judicature Act, 1875 (s. 23). There are at present eight Circuits—(i) Northern, (ii) North Eastern, (iii) Midland, (iv) South Eastern, (v) Oxford, (vi) Western, (vii) North Wales, (viii) South Wales.

On all Circuits Summer and Winter Assizes are held for both civil and criminal business; an Autumn Assize is held for criminal business only, except in a few towns, where civil business is directed to be taken by Order in Council or by the Lord Chief Justice under powers given by Order in Council (*r*), and an Easter Assize is held for civil and criminal business at Leeds, Liverpool and Manchester.

At the assizes the Judges sit under the following commissions:—

(i) Of *Assize*.—This confers upon them a civil jurisdiction, to which is incidental the jurisdiction to try cases at *nisi*

(*p*) Trial at bar was formerly a trial before *all* the Judges of the Court; it now takes place before a Divisional Court, which, as a rule, is composed of three Judges.

(*q*) Archbold, 120.

(*r*) Order in Council of May 14, 1912. See *The Annual Practice*, 1918, p. 2371.

prius. Under the Commission of Assize only such criminal offences can be dealt with as are sent for trial at the assizes from the King's Bench Division (*s*).

(ii) Of *Oyer and Terminer*.—Giving authority to enquire, *hear and determine* concerning treasons, felonies and misdemeanours committed within the Circuit. Under this commission the Judges can try only prisoners against whom an indictment is found at the same assizes, for they cannot "hear and determine" by a petty jury before they have enquired by a grand jury (*t*).

(iii) Of *Gaol Delivery*.—Empowering the Judges to try any prisoner in gaol or released on bail.

The Judges of assize do not sit in virtue of their position as Judges of the High Court of Justice, but as Commissioners specially sent down. Accordingly, when the state of business requires it, the Judges are often assisted by King's Counsel, who are included in the Commission, and try some of the prisoners. But by the Judicature Act, 1873, all Courts of assize, oyer and terminer, and gaol delivery are branches of the High Court, and every Commissioner, whether or not he is a High Court Judge, has for the purposes of his Commission all the jurisdiction of a Judge of the High Court (*u*).

For London and the suburbs the place of the assizes is taken by the Central Criminal Court, which has generally the same criminal jurisdiction as the assizes. It was established in 1834 for the trial of treasons, felonies, and misdemeanours committed within the City of London and county of Middlesex, and in certain specified parts of the counties of Essex, Kent, and Surrey; such district for this purpose being regarded as one county. Under the Judicature

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(*s*) v. pp. 318, 337.
(*t*) v., however, p. 307.
(*u*) 36 & 37 Vict. c. 66, ss. 16, 29, 37.

Act, 1873, it has become a branch of the High Court (*w*). The Judges sit under commissions of oyer and terminer and gaol delivery. The sessions of the Court are required to be holden at least twelve times a year, and oftener if need be; the particular dates being fixed each year at a meeting of the Judges.

The Commissioners or Judges of the Court include the Lord Chancellor, the Judges of the High Court, the Lord Mayor, Aldermen, Recorder, and Common Serjeant of London, and such others as the Crown from time to time may appoint. Usually at each session the Recorder and Common Serjeant sit on the first two days; after which they are joined by one or two of the Judges of the High Court, who try the more serious cases.

We shall see that offences committed within jurisdiction of the Admiralty may be tried here (*x*); also that certain cases may be sent by the King's Bench Division to this Court (*y*). Here also by an order of that Division may be tried persons subject to the Mutiny Acts for the murder or manslaughter in England or Wales of any person subject to those Acts (*z*).

The Central Criminal Court has also a transferred jurisdiction. Indictments found at the various Quarter Sessions within the district of its jurisdiction may be removed to it by *certiorari* (*a*), or transmitted to it by such Courts of Quarter Sessions as to the Judges on Circuit (*b*).

The sitting of the Central Criminal Court does not interfere with the sessions of the peace held within the district, that is, the latter may be held notwithstanding that the former tribunal is sitting (*c*).

(*w*) 36 & 37 Vict. c. 66, ss. 16, 29.
(*x*) v. p. 326.
(*y*) v. p. 337.
(*z*) 25 & 26 Vict. c. 65. As to indictments under Corrupt Practices Act, v. 46 & 47 Vict. c. 51, s. 50.
(*a*) 4 & 5 Will. IV. c. 36, s. 16.
(*b*) *Ibid.* s. 19.
(*c*) Ibid. s. 21.

QUARTER SESSIONS.

These Courts, which are held for the trial of criminals as well as for other objects, are of two kinds:—

i. The General (Quarter) Sessions of the Peace for the County.

ii. The Borough Sessions.

i. *The General County Sessions* must be held in every county once every quarter at stated times, in which case they are termed the "General Quarter Sessions of the Peace." And if, on account of the amount of business, it is necessary that Courts of this description should be held intermediately, they are termed "General Sessions of the Peace." The authority and jurisdiction of the Court under either title are the same, except where the jurisdiction is given by statute expressly to the Court of Quarter Sessions (*d*).

The dates fixed by statute for the holding of the county Quarter Sessions are the first weeks after each of the following days—March 31, June 29, October 11, December 28 (*e*). But the justices may at any time either at Quarter Sessions or at a special meeting, when it may appear desirable for any purpose, fix or alter the date of holding the next Quarter Sessions to some time not earlier than fourteen days before nor later than fourteen days after the week in which they would otherwise be held (*f*).

The Court is held before two or more justices of the peace. When the number of prisoners is large, a second Court may be formed with the same authority as the first (*g*). In each Court a chairman presides, and acts in general as a Judge, consulting the other justices present when he thinks fit.

(*d*) As to the extent of the local jurisdiction of the Sessions for the Administrative County of London, v. 51 & 52 Vict. c. 41, s. 40.

(*e*) 11 Geo. IV. and 1 Will. IV. c. 70, s. 35, except as to the London County Sessions, which, by virtue of 7 & 8 Vict. c. 71, and 22 & 23 Vict. c. 4, are held twice in each month; there are also intermediate sessions held in the County of Middlesex.

(*f*) 8 Edw. VII. c. 41, s. 3.

(*g*) 21 & 22 Vict. c. 73, ss. 9—11.

Formerly this Court had the power of trying any felony or misdemeanour committed in the county, except perjury at common law and forgery. But the justices usually remitted the more serious felonies to the assizes; and now the criminal jurisdiction of the sessions is expressly by statute confined to the trial of certain minor felonies and misdemeanours. And it is said that the justices in session cannot try any newly created offence unless the statute which creates it expressly gives them power (*h*). The chief statute limiting their jurisdiction (*i*) precludes them from trying any of the following crimes:—

Treason, murder, or any capital felony.

Any felony which, when committed by a person not previously convicted of felony, is punishable by penal servitude for life. Burglary is, however, an exception, as later Acts (*k*) have given Quarter Sessions jurisdiction to try this crime; but nevertheless a committing justice is to commit the person charged to the assizes unless, owing to the absence of any circumstances which make the case a grave or difficult one, he thinks it expedient to commit him for trial before a Court of Quarter Sessions.

Misprision of treason.

Offences against the King's title, prerogative, person, or government, or against either House of Parliament.

Blasphemy and offences against religion.

Administering and taking unlawful oaths.

Forgery [and any offence against the Forgery Act, 1913, or punishable under that or any other Act as forgery (3 & 4 Geo. V. c. 27, s. 13)].

Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern.

(*h*) 2 Hawk. P. C. 47; 4 St. Com. 302; *R.* v. *James*, 2 Str. 1256; *R.* v. *Buggs*, [1695], 4 Mod. 379. There is other old authority for the proposition stated in the text, but it is believed that in practice Courts of Quarter Sessions do now try many such cases, and the commissions under which they sit do not prohibit them from doing so. See 1 St. Hist. Cr. Law, p. 115; 2 Oke Mag. Syn. 718; Archbold Q. S. 271.

(*i*) 5 & 6 Vict. c. 38.

(*k*) 59 & 60 Vict. c. 57, repealed but re-enacted by the Larceny Act, 1916, s. 38.

Bigamy and offences against the laws relating to marriage.

Abduction of women and girls.

Endeavouring to conceal the birth of a child.

Composing, printing, or publishing blasphemous, seditious, or defamatory libels.

Bribery (except under the Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict. c. 69, s. 6) [Also, by various statutes, corrupt practices and undue influence at parliamentary and municipal elections (*l*)].

Unlawful combinations and conspiracies, except conspiracies and combinations to commit any offence which the quarter sessions have jurisdiction to try when committed by one person.

Stealing or fraudulently taking, or injuring, or destroying, records or documents belonging to any Court of law or equity, or relating to any proceeding therein.

Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments.

By other statutes their jurisdiction does not extend to the trial of:—

Perjury, subornation of perjury, the making of false declarations, and other offences against the Perjury Act, 1911 (1 & 2 Geo. V. c. 6, s. 10).

The misdemeanour of three or more armed persons pursuing game by night (9 Geo. IV. c. 69, s. 9).

Fraudulent misdemeanours by agents, trustees, bankers, factors, &c., made punishable by the Larceny Act, 1861, ss. 82—86, and the Larceny Act, 1916, ss. 20—22 (24 & 25 Vict. c. 96, s. 87; 6 & 7 Geo. V. c. 50, s. 38 (1) (*b*)).

Offences against 37 & 38 Vict. c. 36, s. 3, by personating holders of stock.

Offences against women and young girls punishable by the Criminal Law Amendment Act, 1885, or the Mental Deficiency Act, 1913, s. 56.

(*l*) Archbold, 106.

Offences against the Official Secrets Act, 1911 (1 & 2 Geo. V. c. 28, s. 4).

Incest, or attempted incest (8 Edw. VII. c. 45, s. 4).

Bribery of agents or servants under 6 Edw. VII. c. 34.

Although a Court of Quarter Sessions has no jurisdiction to try a person accused of any of the above-mentioned offences, the grand jury may at such a Court find a true bill against him. In that case the indictment must be remitted to the assizes for trial (*m*).

An indictment may be preferred against a corporation at the quarter sessions and a true bill found there, but it cannot be tried in that Court. The prosecutor must apply to the King's Bench Division of the High Court for a writ of *certiorari* to remove the indictment into the latter Court for trial (*n*).

There are also other circumstances, as will be seen later, in which an indictment may be removed from the sessions to the King's Bench Division by *certiorari* (*o*).

In order to prevent cases falling within the jurisdiction of the sessions being unnecessarily sent to the assizes for trial, it was provided by 52 & 53 Vict. c. 12, that in such cases prisoners should not be committed to take their trial at the assizes unless the committing justices for special reasons, or the High Court Justice, thought fit so to direct.

To the Court of Quarter Sessions also lie *appeals* against summary convictions.

In appeals and other cases where the justices in sessions are made Judges of the fact as well as of the law, their decision is final, and cannot be reversed by any Court without their consent. But if they have a difficulty upon a question of law, they may under a long-established practice

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(*m*) Archbold, 107.

(*n*) *R.* v. *Birmingham and Gloucester Railway Co.*, [1842] 9 C. & P. 469; 3 Q. B. 223. The reason is that at a Court of Quarter Sessions a defendant must plead personally, whereas a corporation aggregate can only appear and plead by attorney.

(*o*) v. p. 335.

put the facts in the form of a special case for the opinion of the King's Bench Division, meanwhile confirming or quashing the order before them (*p*). Their order will then be confirmed or quashed by the superior Court. In ordinary criminal cases the proceedings can be reviewed by appeal to the Court of Criminal Appeal.

ii. *Borough Quarter Sessions.*—Many corporate towns or boroughs have quarter sessions of their own. This exempts them in almost every matter from the jurisdiction of the County Quarter Sessions. The borough sessions have, in general, the same jurisdiction as the county sessions (*r*), being subject to the same limitations as to the trial of certain offences. The Court is held at least once in every quarter of a year at dates fixed by the recorder; or at such other and more frequent times as the recorder may think fit, or as the King may direct. The recorder of the borough, who must be a barrister of at least five years' standing, is the presiding Judge, though he may be assisted in the trial of criminals by some other barrister; and in the case of his absence he may appoint a deputy.

COURT OF THE CORONER.

The business of this Court is to enquire when any one dies in prison or comes to a violent or an unnatural death, or by a sudden death of which the cause is unknown, by what means he came to his end (*s*). A coroner has jurisdiction, and it is his duty, to hold an inquest when he has information, which he honestly believes, that a death may be due to some other cause than common illness; and his jurisdiction

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(*p*) See *R.* v. *Overseers of Walsall*, [1878] 3 Q. B. D., at p. 473; 4 A. C., at pp. 39, 40.

(*r*) 45 & 46 Vict. c. 50, s. 158. See also as to certain boroughs, 51 & 52 Vict. c. 41, s. 31, *et seq.*

(*s*) 50 & 51 Vict. c. 71. s. 3.

is not affected by such information eventually proving to be untrue; it is enough that he *bona fide* believes, and has reasonable grounds for believing, that the information is such as to call for an inquest (*t*).

The Coroner's Court also has jurisdiction to enquire as to treasure trove, who were the finders and who is suspected of concealing it (*u*).

There have been certain criminal Courts of a private or special jurisdiction, which are restricted both in respect of the place and of the cause. One example of this class remains, and it is not of any great importance.

UNIVERSITY COURTS IN OXFORD AND CAMBRIDGE.

Both Universities enjoy a certain exemption from the ordinary criminal tribunals; but at Cambridge the privilege cannot be claimed if any person not a member of the University is a party (*w*). In order to take advantage of this immunity, the proper course is *after* the indictment has been found by grand jury at the assizes or elsewhere against a resident scholar or other privileged person for the Vice-Chancellor to claim the cognisance of the matter, and then it will be sent to one of the following Courts:—

High Steward's Court.—It has jurisdiction over cases of treason, felony, or mayhem committed by a resident privileged person. The process at Oxford is as follows: A special commission is issued to the High Steward and others to try the particular case. The indictment is then tried in the Oxford Guildhall by a jury *de medietate*, half of freeholders and half of matriculated laymen. If the accused is found guilty of a capital offence, the sheriff must

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(*t*) *Ibid.*; *R.* v. *Stephenson*, [1884] 13 Q. B. D. 331; 53 L. J. M. C. 176; 52 L. T. N. S. 267; 33 W. R. 244; 15 Cox, 679. For further details as to the proceedings upon a Coroner's Inquisition, see *post*, p. 318.

(*u*) 50 & 51 Vict. c. 71, s. 36.

(*w*) 19 & 20 Vict. c. 17, s. 18.

execute the University process, to which he is bound by an oath (*x*).

Vice-Chancellor's Court.—This Court has authority to try all misdemeanours committed by resident members of the University. The Judge is the Vice-Chancellor. This exceptional jurisdiction is rarely, if ever, exercised, the Vice-Chancellor's Court meeting for other purposes. Formerly, however, on several occasions cases of murder and other crimes were tried in the High Steward's Court.

Petty sessions and summary proceedings before single magistrates will be noticed hereafter.

(*x*) 4 Bl. 278. As to the jurisdiction of the Vice-Chancellor over non-members of the University for the protection of the morals of undergraduates, v. 6 Geo. IV. c. 97; 57 & 58 Vict. c. 60.

CHAPTER II.

PROCESS TO COMPEL APPEARANCE.

THE first steps in criminal proceedings are those necessary to secure the appearance of the offender. This may be effected:—

A. By summons or arrest by warrant.

B. By arrest without warrant.

A. When a charge or complaint has been made before one or more justices that a person has committed or is suspected to have committed any treason, felony, or indictable misdemeanour, or other indictable offence, within his or their jurisdiction; or that, having committed it elsewhere (even within the Admiralty jurisdiction or on land beyond the seas (*a*)), he resides within the jurisdiction of the justice to whom the application is made; then, if the accused is not in custody, two courses are open to the justice: (i) to issue a *warrant* to apprehend and bring the accused specially before himself, or other justices of the jurisdiction; or (ii) to issue, in the first place, a *summons* directed to the accused, requiring him to appear before himself, or other justices of the jurisdiction; and afterwards, if the summons is disobeyed by non-appearance, to issue a warrant (*b*).

The issue, however, of either a warrant or a summons is discretionary on the part of the justice, and if in the exercise of his discretion he refuses to issue either, the High Court will not compel him to review his decision unless his discretion was exercised on improper and extraneous grounds (*c*).

(*a*) 11 & 12 Vict. c. 42, s. 2. This statute does not affect the Metropolitan Police or the London Police Acts.

(*b*) *Ibid.* s. 1.

(*c*) *R.* v. *Kennedy*, [1902] 86 L. T. 753; 20 Cox, C. C. 230.

It does not follow that in such a case the offender will go unpunished, as it will always be open to the prosecutor to prefer an indictment against him (*d*), or in a proper case (*e*) to give him into custody without a warrant.

To enable a justice to issue a warrant in the first instance, it is necessary that an information and complaint in writing on the oath or affirmation of the informant, or of some other witness on his behalf, should be laid before the justice. But if a summons only is to be issued in the first instance, the information may be by parol and without oath (*f*).

A warrant may also be issued by a Judge of the King's Bench Division for the arrest of any one charged on oath of felony (*g*).

A *summons* is directed to the accused. It states shortly the charge, and orders him to appear before the justice issuing it, or some other justice of the jurisdiction, at a certain time and place. It is served by a constable on the accused personally, or delivered to some person for him at his last or most usual place of abode (*h*).

A *warrant* is directed to a particular constable, or to the constables of the district where it is to be executed, or generally to the constables of the jurisdiction of the issuing justice. It states shortly the offence and indicates the offender, ordering the constable to bring him before the issuing justice, or other justices of the same jurisdiction. It remains in force until executed, the execution being effected

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(*d*) v. p. 330.

(*e*) v. pp. 294—296.

(*f*) 11 & 12 Vict. c. 42, s. 8.

(*g*) As to other cases in which a Judge or a Court may issue a warrant, v. pp. 332—333. As to a coroner's warrant, v. p. 320.

(*h*) *Ibid.* s. 9. The following is an example of a summons :—

"To John Styles, of, &c., labourer. Whereas you have this day been charged before the undersigned, one of His Majesty's justices of the peace in and for the said county of * * * *, for that you on, &c., at, &c., *(the offence stated shortly)* : These are therefore to command you, in His Majesty's name, to be and appear before me on Thursday, the 15th day of June, at eleven o'clock in the forenoon at * * * * or before such other justice or justices of the peace for the said county as may then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

"Given under my hand and seal, this 13th day of June, in the year of our Lord 1904, at * * * *, in the county aforesaid.

"J. H. (L. S.)."

by the due apprehension of the accused (*i*). It may be issued on Sunday as well as on any other day (*k*).

A warrant from a Judge of the King's Bench Division extends all over the kingdom, and is *tested, or dated,* England, not Oxfordshire, Berks, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be *backed,* that is, signed by a justice of the peace in another, as Middlesex, before it can be executed in the latter (*l*). A warrant issued in England may be backed not only in another jurisdiction in England, but also in Scotland, Ireland, or the Channel Islands, and *vice versa* (*m*).

When a warrant is received by the officer, he is bound to execute it so far as the jurisdiction of the justice and himself extends. And a warrant drawn up according to the statutory form will (even though the magistrate who issued it has exceeded his jurisdiction) at all events indemnify the officer who executes the same ministerially (*n*). The officer in his own jurisdiction need not show his warrant if he tells the substance of it. The officer may break open doors to execute a warrant for treason or felony, or any indictable misdemeanour, if upon demand of admittance it cannot otherwise be obtained (*o*). An arrest for any indict-

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(*i*) 11 & 12 Vict. c. 42, s. 10. An example of a warrant :—

"To the constable of * * * * and to all other peace officers in the said county of * * * *. Whereas A. B. of * * * *, labourer, hath this day been charged upon oath before the undersigned, one of His Majesty's justices of the peace, in and for the said county of * * * *, for that he on * * * * at * * * * did, &c. (*stating shortly the offence*) : These are therefore to command you, in His Majesty's name, forthwith to apprehend the said A. B. and to bring him before me, or some other of His Majesty's justices of the peace in and for the said county, to answer unto the said charge, and to be further dealt with according to law. Given under my hand," &c. (*as in the case of summons*).

(*k*) 11 & 12 Vict. c. 42, s. 4.

(*l*) 11 & 12 Vict. c. 42, s. 11. This rule does not apply to warrants of Metropolitan Police officers (2 & 3 Vict. c. 71, s. 17).

(*m*) 11 & 12 Vict. c. 42, ss. 12—15 ; 8 Edw. VII. c. 65, s. 25. See also 14 & 15 Vict. c. 55, s. 18. As to the colonies, see 44 & 45 Vict. c. 69. As to the extradition of fugitive foreign criminals, see 33 & 34 Vict. c. 52 ; 36 & 37 Vict. c. 60 ; and 58 & 59 Vict. c. 33.

(*n*) 24 Geo. II. c. 44, s. 6.

(*o*) As to killing a constable in the execution of his duty, v. p. 147 ; as to when he is justified in killing the accused, v. p. 139.

able offence may be made on a Sunday; and in the night-time as well as the day.

A *general* warrant is void, *e.g.*, a warrant to apprehend the authors, printers, and publishers of a libel, without naming them (*p*). General warrants to take up loose, idle, and disorderly people (*q*), and search warrants, are perhaps the only exceptions to this rule.

By section 27 of the Criminal Justice Administration Act, 1914, it has been provided that a warrant for arrest may be issued wherever either at common law or under any statute there is power to arrest without warrant.

Though not strictly belonging to the subject in hand, namely, the arrest of criminals, it may be convenient here to notice *search warrants*. On the oath of a complainant that he has probable cause to suspect that his property has been *stolen*, and that it is upon certain premises named by him, reason for his suspicion being shown, a justice may at common law issue a warrant to search such premises, and to seize the goods if they be found there (*r*). And as to property otherwise the subject of fraudulent practices, it is provided that if it is made to appear by information on oath before a justice that there is reasonable cause to suspect that any person has in his possession, or on his premises, any property with respect to which an offence punishable under the Larceny Act, 1916, has been committed, he may grant a warrant to search for such property, as in the case of stolen goods (*s*). Also any constable, if authorised in writing by a chief officer of police, may enter any premises and search for and seize any property believed to be stolen, and any person on whose premises such property is found may be summoned before a Court of summary jurisdiction, which may make such order as may be required as to the disposal of

(*p*) *Money* v. *Leach*, [1765] 1 W. Bl. 555.

(*q*) *e.g.*, any persons found in a gaming house or disorderly house.

(*r*) *Jones* v. *German*, [1896] 2 Q. B. 418; 65 L. J. M. C. 212. It is not necessary to specify the particular goods to be searched for (*ibid.*).

(*s*) 6 & 7 Geo. V. c. 50, s. 42, sub-s. 1. As to searching a pawnbroker's premises for goods entrusted to a person to be finished or washed, and which were then unlawfully pawned, v. 35 & 36 Vict. c. 93, s. 36.

the property. Such written authority may be given (i) when the premises are or within twelve months have been occupied by any person convicted of receiving stolen goods or harbouring thieves; or (ii) when the premises are occupied by any person who has been convicted of any offence involving fraud or dishonesty, and punishable with penal servitude or imprisonment. The authority need not specify any particular property, but may be given if there is reason to believe that the premises are being made a receptacle for stolen goods (*t*).

Again, by the Criminal Law Amendment Act, 1885, a justice of the peace may, on the oath of a parent, relative, or guardian of any woman or girl, or other person who, in the opinion of such justice, is *bona fide* acting in her interest, that there is a reasonable cause to suspect that such a woman or girl is unlawfully detained for immoral purposes in any place within his jurisdiction, issue a warrant to search such place for, and when found to detain, such woman or girl until she be brought before him, and then may order her to be delivered up to her parents or guardians. And he may also cause any person accused of unlawfully detaining such woman or girl to be apprehended and brought before him. A woman or girl is deemed to be unlawfully detained for immoral purposes if she is so detained for the purpose of being unlawfully and carnally known by any man, and either (1) is under the age of sixteen years; or (2) if of or over that age, and under the age of eighteen years, is detained against her will, or that of her father, mother, or other person having the lawful charge of her; or (3) if of or above the latter age, is detained against her will (*u*).

Search warrants may also be granted for explosive substances suspected to be intended for felonious purposes (*w*), forged documents and implements of forgery (*x*),

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(*t*) 6 & 7 Geo. V. c. 50, s. 42, sub-s. 2. By the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), ss. 10—13, penalties are imposed for harbouring thieves, purchasing less than specified quantities of old metal, etc.

(*u*) 48 & 49 Vict. c. 69, s. 10.

(*w*) 24 & 25 Vict. c. 100, s. 65.

(*x*) 3 & 4 Geo. V. c. 27, s. 16.

counterfeit coin and coinage tools (*y*), goods which infringe the provisions of the Merchandise Marks Act, 1887 (*z*), children believed to be ill-treated or neglected (*a*), obscene books and pictures (*b*), sketches, plans and documents which are evidence of an offence under the Official Secrets Act, 1911 (*c*), blasphemous and obscene libels (*d*), and many other cases.

B. Arrests *without warrant*.

As to arrests by officers, they may be made by

i. *Justices of the Peace*, who may themselves apprehend, or cause to be apprehended, by words only, *i.e.*, without warrant, any person committing a felony or breach of the peace in their presence (*e*).

ii. The *sheriff* or *coroner* may apprehend any felon within the county (*f*).

iii. A *constable* may at common law arrest, without warrant, any one for treason, felony, or breach of the peace committed *in his view*, within his jurisdiction, and carry him before a magistrate. So, also, *on a reasonable and positive charge of felony*, though it should afterwards appear that no felony had been committed. And, if a felony has been actually committed, he may arrest a man on reasonable suspicion of his having committed it. But, as a rule, he may not arrest without warrant for a misdemeanour, though he may interpose to prevent a felony or a breach of the peace, and to accomplish this object he may arrest the person menacing, or any one who opposes him in the execution of his duty, and detain him in custody till the chance of the threat being executed is over (*g*). Also he may arrest without warrant, and then must take before a justice of the

(*y*) 24 & 25 Vict. c. 99, s. 27.
(*z*) 50 & 51 Vict. c. 28, s. 12.
(*a*) 8 Edw. VII. c. 67, s. 24.
(*b*) 20 & 21 Vict. c. 83, s. 1.
(*c*) 1 & 2 Geo. V., c. 28, s. 9.
(*d*) 60 Geo. III. and 1 Geo. IV. c. 8, s. 1.
(*e*) Archbold, 961.
(*f*) *Ibid.*
(*g*) v. Archbold, 961, 962.

peace as soon as reasonably may be, any person whom he finds lying or loitering in any highway, yard, or other place, during the night, and whom he has good cause to suspect of having committed, or of being about to commit, any felony against the Larceny, Malicious Injuries to Property, or Offences against the Person Acts respectively (*h*). Also he may take into custody any holder of a licence granted under the Penal Servitude Acts, or any person under police supervision, whom he reasonably suspects of having committed *any offence* (*i*). There are many other cases in which a constable is authorised by various statutes to arrest without warrant, as, *e.g.*, persons suspected of offences against section 2 of the Criminal Law Amendment Act, 1885 (see 2 & 3 Geo. V. c. 20, s. 1), or against the Children Act, 1908, or any of the offences specified in the First Schedule to that Act (see 8 Ed. VII. c. 67, s. 19), or against the Official Secrets Act, 1911.

If, upon a reasonable charge for which he may arrest without warrant, the constable refuses, he may be indicted and fined. When he acts without a warrant, by virtue of his office as constable, he should, unless the party is previously acquainted with the fact, or can plainly see it, notify that he is a constable, or that he arrests in the King's name, and for what.

The constable's right to break open doors, his justification in killing in the execution of his duty, and the consequences of his being killed, are generally the same as if he had proceeded upon a warrant (*k*).

iv. Arrest by *private persons*.—Any person who is present when a *felony* is committed not only may, but is bound, without warrant, to arrest the offender. And a private person is bound to assist an officer who demands his aid in

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(*h*) 24 & 25 Vict. c. 97, s. 57; c. 100, s. 66; 6 & 7 Geo. V. c. 50, s. 41, sub-s. 3.

(*i*) 54 & 55 Vict. c. 69, s. 2. As to arrest of persons likely to commit crimes under the Prevention of Crime Act, v. 34 & 35 Vict. c. 112, s. 7 (*post*, p. 431). Special Acts regulate the powers of constables within the Metropolitan Police District.

(*k*) v. p. 290.

the lawful taking of a felon, or the suppression of an affray, and if he refuses without good excuse he is liable to fine and imprisonment. A private person also may arrest (i) any person whom he finds committing an *indictable offence* by night (*i.e.*, 9 P.M. to 6 A.M. (*l*)); or (ii) a person committing *any* offence (except angling in the daytime) punishable under the Larceny Act, 1861 (*m*) or any offence against the Larceny Act, 1916 (except an offence against s. 31) (*n*); or (iii) a person committing an indictable offence against the Coinage Act (*o*). Also the owner of the property injured, or his servant, or any other person authorised by him, may apprehend a person committing any offence against the Malicious Injuries to Property Act (*p*). Any person to whom property is offered to be sold, pawned, or delivered, if he has reasonable cause to suspect that any offence punishable under the Larceny Act has been committed with respect to such property, is authorised and required to forthwith take the party offering and the property offered before a magistrate (*q*), who may make an order for the delivery of the property to the person appearing to him to be entitled to it (*r*).

A private person may also arrest, without warrant, on *reasonable suspicion* of felony. And for this purpose he may even break into a house to arrest the suspected person, if the latter be within the house and refuse to surrender (*s*). But the person arresting does so at his peril, and is liable to an action for false imprisonment, unless he can afterwards prove that a felony has actually been committed by some

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(*l*) 14 & 15 Vict. c. 19, s. 11.
(*m*) 24 & 25 Vict. c. 96, s. 103.
(*n*) 6 & 7 Geo. V. c. 50, s. 41, sub-s. 1.
(*o*) 24 & 25 Vict. c. 99, s. 31.
(*p*) *Ibid.* c. 97, s. 61.
(*q*) 6 & 7 Geo. V. c. 50, s. 41, sub-s. 2. As to arrest in game offences, v. p. 134, for offences in the Metropolis, v. 2 & 3 Vict. c. 47, s. 66; in other towns, 10 & 11 Vict. c. 89, s. 15; of persons twice previously convicted and found on private premises without giving a satisfactory account of themselves, 34 & 35 Vict. c. 112, s. 7; of deserters, 44 & 45 Vict. c. 58, s. 154; by pawnbrokers, 35 & 36 Vict. c. 93, s. 34; of brawlers in churches or chapels, 23 & 24 Vict. c. 32, s. 3; of railway passengers defrauding company, 8 & 9 Vict. c. 20, ss. 103, 104.
(*r*) 60 & 61 Vict. c. 30, s. 1.
(*s*) Archbold, 92.

one, and that there was reasonable ground to suspect the person apprehended (*t*). It will be remembered that a peace officer is not liable, although no crime has been committed, if there were reasonable grounds for suspicion.

A private person may arrest another for the purpose of putting a stop to a breach of the peace committed in his presence. He may also arrest to prevent the commission of a felony or the infliction of a deadly injury (*u*).

Arrest upon *Hue and Cry* was the old common law process of pursuing with horn and with voice all felons and such as have dangerously wounded others. The hue and cry might be raised by constables or private persons, all of whom had the same powers as if acting under the warrant of a magistrate.

Rewards for the Apprehension of Offenders.

In connection with the subject of arrest, we may notice some encouragements which the law holds out for exertions in bringing certain classes of criminals to justice. When any person appears to a Court of oyer and terminer and gaol delivery to have been active in the apprehension of any person charged with any of the following offences, viz., murder, feloniously and maliciously shooting at any person, stabbing, cutting, poisoning, administering anything to procure miscarriage, rape, burglary or felonious housebreaking, robbery from the person, arson, horse, bullock, or sheep stealing; or with being accessory before the fact to any of the offences aforesaid; or with receiving stolen property knowing the same to have been stolen, the Court is authorised to order the sheriff to pay to such person such sum of money as it thinks proper to compensate for his expense, exertion, and loss of time in the apprehension. This reward is to be over and above the ordinary payments to prosecutors and witnesses (*w*). By a later statute, at the sessions the Court may order such compensation to be paid in case of any of

(*t*) *Beckwith* v. *Philby*, [1827] 6 B. & C. at p. 638; 5 L. J. M. C. 132; 30 R. R. 484.
(*u*) *Handcock* v. *Baker*, [1800] 2 B. & P. 260; 5 R. R. 587; Archbold, 92.
(*w*) 7 Geo. IV. c. 64, s. 28.

the above offences which they have jurisdiction to try; but the payment to one person must not exceed £5 (*x*). If any one is killed in endeavouring to apprehend a person charged with one of these offences, the Court may order compensation to be paid to the family (*y*). The amount to be paid in all such cases is subject to regulations which may be made from time to time by the Secretary of State (*z*).

(*x*) 14 & 15 Vict. c. 55, s. 8.
(*y*) 7 Geo. IV. c. 64, s. 30.
(*z*) 14 & 15 Vict. c. 55, s. 5.

CHAPTER III.

PROCEEDINGS BEFORE THE MAGISTRATE.

When an arrest has been made the accused must be taken before a magistrate or magistrates as soon as possible.

The magistrate is bound to forthwith examine into the circumstances of the charge. In order to secure the attendance of witnesses to the fact, they may, if necessary, be served with a summons or warrant. If a witness refuses to be examined, he is liable to imprisonment for seven days (*a*). The room in which the examination is held is not to be deemed an open Court; and the magistrate may exclude any person if he thinks fit (*b*). When the witnesses are in attendance, the magistrate takes, in the presence of the accused (who is at liberty by himself or his counsel to put questions to any witness produced against him), the statement on oath or affirmation of those who know the facts of the case, and the magistrate's clerk puts the same in writing. These statements (technically termed *depositions*) are then read over to and signed respectively by the witnesses who have been examined and by the magistrate taking such statements (*c*). If the person called to give evidence object to be sworn, and state as the ground of such objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief, he may be permitted to make a solemn affirmation instead of taking an oath (*d*).

(*a*) 11 & 12 Vict. c. 42 (The Indictable Offences Act, 1848), s. 16. As this is the chief Act dealing with the subject of this chapter, reference merely to a section must be understood of that statute.

(*b*) s. 19. But the contrary is the case where magistrates deal with matters falling within their *summary jurisdiction*, v. 11 & 12 Vict. c. 43, s. 12.

(*c*) s. 17.

(*d*) 51 & 52 Vict. c. 46, s. 1

Children, as will be seen later, may give evidence not upon oath (*e*).

The depositions, having been completed, are read over in the presence of the accused, and the magistrate asks him if he wishes to say anything in answer to the charge, cautioning him that he is not obliged to say anything, but that whatever he does say will be taken down in writing, and may be used in evidence against him at his trial; at the same time explaining that he has nothing to hope from any promise and nothing to fear from any threat which may have been held out to him to induce him to make any confession of guilt. Whatever the accused then says is taken down in writing, and signed by the magistrate, and may be read at the trial without further proof (*f*). The right which the defendant has to make an unsworn statement of this kind is not in any way affected by the Criminal Evidence Act, 1898 (*g*), and he may either make such a statement or give sworn evidence on his own behalf like any other witness (*h*). The accused is then asked whether he desires to call any other witnesses, and if he does, their evidence is taken. Their depositions, in the same way as those on the part of the prosecution, are read to and signed by the witnesses and by the magistrate, and the witnesses on both sides (other than those merely to character) are bound by recognisance to give evidence at the trial (*i*). If a witness refuses to enter into such recognisances, he may be committed to prison until the trial. The recognisances, depositions, &c., are transmitted to the Court in which the trial is to take place (*k*).

If the investigation before the magistrate cannot be completed at a single hearing, he may from time to time *remand* the accused to gaol for any period not exceeding eight days, unless the person remanded and the prosecutor

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(*e*) *Post*, p. 369.
(*f*) s. 18.
(*g*) 61 & 62 Vict. c. 36, s. 1.
(*h*) As to the defendant giving evidence see p. 565, *et seq.*
(*i*) 11 & 12 Vict. c. 42, ss. 16, 20; 30 & 31 Vict. c. 35, s. 3.
(*k*) s. 26.

consent to a longer remand, or may allow him his liberty in the interval upon his entering into recognisances, with or without sureties, for reappearance (*l*).

If, when all the evidence against the accused has been heard, the magistrate does not think that it is sufficient to put the accused on his trial for an indictable offence, he is forthwith *discharged*. But if he thinks otherwise, or the evidence raises a strong or probable presumption against the accused, he *commits* him for trial, either at once sending him to gaol so as to be forthcoming for trial, or admitting him to bail (*m*). Under certain circumstances a third course is open to the magistrate; he may dispose of the case and punish the offender himself (*n*).

It will be noticed that there are two forms of commitment to prison: (a) *for safe custody;* (b) *in execution*, either as an original punishment, or as a means of enforcing payment of a pecuniary fine, or of enforcing obedience to the sentence or order of a magistrate or the sessions. The warrant of commitment, under the hand and seal of the committing magistrate, directed to the gaoler, contains a concise statement of the cause of commitment. By the Habeas Corpus Act (*o*) the gaoler is required, under heavy penalties, to deliver to the prisoner, or other person on his behalf, a copy of the warrant of commitment or detainer within six hours after demand. The imprisonment of which we are now speaking is merely for safe custody and not for punishment; therefore, those so imprisoned are treated with much less rigour than those who have been convicted. Thus, they may have sent to them food, clothing, &c., subject to examination and the rules made by the visiting magistrates. They have the option of employment, but are not compelled to perform any hard labour; and if they choose to be employed, and are acquitted, or no bill is found against them, an allowance is paid for the work (*p*).

(*l*) s. 21; 4 & 5 Geo. V. c. 58, s. 20, sub-s. 2.
(*m*) s. 25.
(*n*) v. p. 454, *et seq.*
(*o*) 31 Car. II. c. 2, s. 5.
(*p*) 28 & 29 Vict. c. 126, ss. 20, 32, 33.

BAIL.

The admitting to bail consists, in theory, in the delivery (or bailment) of a person to his sureties, on their giving security (he also entering into his own recognisances) for his appearance at the time and place of trial, there to surrender to take his trial. In the meantime, he is allowed to be at large; being supposed to remain in their friendly custody. But a justice may dispense with sureties and release the accused person on his own recognisances, if in the opinion of the magistrate this course will not tend to defeat the ends of justice (*q*).

A *magistrate* may not admit to bail a person accused of *treason*. In that case it is allowed only by order of a Secretary of State, or by the King's Bench Division, or a Judge thereof in vacation (*r*). If the prisoner is charged with some other *felony*, or one of the misdemeanours enumerated below, or an attempt to commit a felony, the magistrate may, in his discretion, but is not obliged to, admit to bail. The misdemeanours above mentioned are: Obtaining, or attempting to obtain, property by false pretences; receiving property, stolen or obtained by false pretences; perjury or subornation of perjury; concealing the birth of a child by secret burying or otherwise; wilful or indecent exposure of the person; riot; assault in pursuance of a conspiracy to raise wages; assault upon a peace officer in the execution of his duty or upon any person acting in his aid; neglect or breach of duty as a peace officer, or any misdemeanour for the prosecution of which the costs may be allowed out of the county rate. In other misdemeanours it is imperative on the magistrate to admit to bail (*s*). Where a Court of summary jurisdiction commits for trial a person charged with any misdemeanour and does not admit him to bail, the Court must inform the person accused of his right to apply for bail to a Judge of the High Court (*t*).

(*q*) 61 & 62 Vict. c. 7.
(*r*) 11 & 12 Vict. c. 42, s. 23; 36 & 37 Vict. c. 66, ss. 16, 34; 38 & 39 Vict. c. 77, s. 19.
(*s*) s. 23.
(*t*) 4 & 5 Geo. V. c. 58, s. 23.

In cases where, in the exercise of their discretion, the magistrates have the power of admitting to bail or refusing it, the principle which is to guide them is the probability of the accused appearing to take his trial, and not his supposed guilt or innocence (*u*), though this latter point may be one element to be considered in applying the test. Thus it has been laid down that the points which the Courts will consider in exercising their discretion include the seriousness of the charge, the evidence in support of it, and the punishment which the law awards for the offence (*w*). Practically, in charges of murder bail is never allowed.

Who may be bail? The magistrate (or Court, v. *infra*) will act according to his discretion as to the sufficiency of the bail, and the proposed bail may be examined upon oath as to their means. An infant, or a prisoner in custody, cannot be bail; nor can a person who has been convicted of an infamous crime, as perjury (*x*); there is now no objection to a married woman becoming bail if she has separate estate. The usual number of bail is two; but sometimes only one is required, and sometimes three or more. The sureties or bail are not compelled to act as such for a longer time than they wish. If they surrender the accused before the magistrate or Court by whom he has been bailed, he will be committed to prison, and they will be discharged of their obligation. But the accused may then find fresh sureties. If the bail agree with the defendant or other persons that, in case the defendant is not forthcoming to take his trial, the bail shall be indemnified against loss, the parties to the agreement are punishable for conspiracy (*y*).

Both at common law and by statute (*z*), to refuse or delay to admit to bail any person bailable is a misdemeanour in the magistrate. But it has been held that the duty of a

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(*u*) *R.* v. *Scaife*, [1841] 9 Dowl. P. C. 553; 5 Jur. 700.

(*w*) *Barronet, In re*, [1852] 1 E. & B. 1; 22 L. J. M. C. 25; *Robinson, In re*, [1854] 23 L. J. Q. B. 286. See also *R.* v. *Stephen Butler*, [1881] 14 Cox, 530.

(*x*) v. *R.* v. *Edwards*, [1791] 4 T. R. 440.

(*y*) *R.* v. *Porter*, [1910] 1 K. B. 369; 79 L. J. K. B. 241.

(*z*) 31 Car. II. c. 2 (Habeas Corpus); 1 Will. & M. Sess. 2, c. 2 (Bill of Rights).

magistrate in respect of admitting to bail is a judicial duty; and therefore that not even an action can be maintained against him for refusing to admit to bail, where the matter is one as to which he may exercise his discretion (*a*). It is provided by the Bill of Rights that excessive bail ought not to be required; though what is excessive must be left to be determined by the Court in considering the circumstances of the case. If the magistrate or other authority admits to bail where this is not allowable, or if he takes wholly insufficient bail, he is liable to punishment on the non-appearance of the accused (*b*).

The stage in the proceedings where the question of bail usually arises is when the accused is before the magistrates. But when a person charged with an indictable offence has been committed to prison to await his trial, it is lawful at any time afterwards, before the first day of the sessions or assizes at which he is to be tried, for the magistrate who signed the warrant for his commitment to admit him to bail (*c*).

As to bail in other cases than in proceedings before the magistrates: —

The *King's Bench Division* has a discretionary power of admitting to bail a prisoner charged with any indictable offence or on suspicion thereof; and this whether he is brought before the Court by a writ of *habeas corpus* or otherwise. The application for bail is, in the first instance, made by summons before a Judge at Chambers (*d*). The Judge may admit to bail where bail has been refused by the magistrate, and it is usually in such cases that applications are made to the King's Bench Division. He may order the accused to be admitted to bail before a magistrate when it is inconvenient to bring him and his bail up to town. If the Judge refuses bail, an application may be made *de novo* to a Divisional Court, or to any other branch of the High Court

(*a*) *Linford* v. *Fitzroy*, [1849] 13 Q. B. 240; 18 L. J. M. C. 108; *R.* v. *Badger*, [1843] 4 Q. B. 468; 12 L. J. M. C. 66.
(*b*) Archbold, 87.
(*c*) 11 & 12 Vict. c. 42, s. 23.
(*d*) Crown Office Rules, 1906, r. 111.

or the Lord Chancellor, but no *appeal* lies to the Court of Appeal (*e*).

It seems to be a general rule that where any persons are Judges of any crime, they have the power of bailing a person indicted before them of such crime (*f*); so that:

Justices in Session may bail persons indicted at the sessions.

Judges of Gaol Delivery, &c., may bail those indicted at the Assizes or Central Criminal Court when they are sitting. If one accused of treason or felony is not tried at the first sessions of gaol delivery after commitment, he may demand to be released or bailed, unless it appears on oath that the witnesses for the prosecution could not be present at those sessions. If he is not tried at the second sessions, he must be discharged from imprisonment (*g*).

Coroners are authorised to admit to bail persons charged with manslaughter by verdict of the coroner's jury (*h*).

In addition to judicial officers, police officers have a limited power of taking bail.

Police Officers.—If a person is taken into custody for an offence without a warrant, a Court of summary jurisdiction within twenty-four hours from the time when he is arrested, a superintendent or inspector of police, or the officer in charge of any police station, may in any case, and must, if such person cannot be brought before a Court of summary jurisdiction within twenty-four hours after he was taken into custody, enquire into the case, and, except where the offence appears to him to be of a serious nature, he must discharge the prisoner upon his giving bail with or without sureties for a reasonable amount to appear before the Court, and if such person is retained in custody, he must be brought before a Court of summary jurisdiction as soon as practicable (*i*). And if the person arrested is apparently

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(*e*) *R.* v. *Foote*, [1883] 10 Q. B. D. 378; 52 L. J. Q. B. 528; 48 L. T. (N. S.) 394; 31 W. R. 490; 48 J. P. 36; 15 Cox, 250.

(*f*) Archbold, 86.

(*g*) 31 Car. II. c. 2, s. 7. But see *R.* v. *Bowen*, [1840] 9 C. & P. 509.

(*h*) 50 & 51 Vict. c. 71, s. 5. As to personating bail, v. p. 239.

(*i*) 4 & 5 Geo. V. c. 58, s. 22.

under the age of sixteen years and cannot at once be brought before the Court, the superintendent or officer in charge of the police-station must release him on bail, with or without sureties, unless the charge is one of homicide or other grave crime, or unless it is necessary in the interest of the person arrested to remove him from association with any reputed criminal or prostitute, or unless the officer has reason to believe that his release would defeat the ends of justice (*k*). If such person is not released he must be kept in a special place of detention and prevented from associating with other persons charged with offences (*l*). The police must inform his parent or guardian of his arrest (*m*).

It may be noticed here that at any time between the conclusion of the examination before the magistrate and the first day of the trial at the assizes or sessions, the accused, whether held to bail or committed to prison for trial, may have on demand copies of the examination of the witnesses upon whose depositions he has been so held to bail or committed, on payment of a reasonable sum for the same, not exceeding three-halfpence for each folio of ninety words (*n*). And at the time of trial he may inspect the depositions without any fee (*o*). The same rules apply also to depositions on behalf of the prisoner (*p*).

The recognisances whereby the prosecutor and witnesses are bound over to appear at the trial, together with the written information (if any); the depositions; the statement of the accused; the recognisances of bail (if any); are remitted by the magistrate to the proper officer of the Court where the trial is to be had (*q*).

(*k*) 8 Edw. VII. c. 67, s. 94.
(*l*) *Ibid.* ss. 95, 96.
(*m*) *Ibid.* s. 98.
(*n*) 11 & 12 Vict. c. 42, s. 27.
(*o*) 6 & 7 Will. IV. c. 114, s. 4.
(*p*) 30 & 31 Vict. c. 35, s. 4.
(*q*) 11 & 12 Vict. c. 42, s. 20; 30 & 31 Vict. c. 35, s. 3

CHAPTER IV.

MODES OF PROSECUTION.

THE accused has either been committed to prison for safe custody, or has been left at liberty in virtue of his having found sureties for his appearance. The next point to be considered is the prosecution (*r*), or manner of formal accusation. This may be either:—

A. Upon a presentment upon oath by the jury at an inquest, or by a grand jury.

B. Without such a presentment.

A. The most usual mode is by indictment, and it is desirable, in the first place, to say a few words on—

Presentment.—This term, taken in a wide sense, includes both an indictment found by a grand jury and an inquisition of office. In a narrow sense it is the formal notice taken by a grand jury of any matter or offence from their own knowledge or observation, without the intervention of any prosecutor or the examination of any witness, as the presentment of a nuisance by non-repair of highways (*s*). Such presentments are extremely rare.

An *Inquisition* is the record of the finding of a jury summoned to enquire of matters relating to the Crown upon evidence laid before them. The most common kind of inquisition is that of the coroner, which is held with a view to find out the cause of a death. The accused is afterwards arraigned upon the inquisition (*t*).

(*r*) In a wide sense the term "prosecution" is applied to the whole of the proceedings for bringing the offender to justice.

(*s*) Archbold, 72.

(*t*) v. p. 318.

An *Indictment* is a written or printed accusation of one or more persons of a crime, preferred to, and presented on oath by, a grand jury (*u*). It lies for all treasons and felonies, for misprisions of either, and for all misdemeanours of a public nature at common law (*w*). Statutory offences are punishable by indictment if the statute specifies no other mode of proceeding (*x*). If the statute specifies a mode of proceeding different from that by indictment, then, if the matter was already an indictable offence at common law, and the statute introduces merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law, or by the mode pointed out by the statute (*y*).

The law relating to indictments has been much modified by the Indictments Act, 1915, which has greatly simplified the form of indictments and given the Court wide powers of amending defects. By section 2 of the Act, moreover, a Rule Committee has been established, with power to vary and add to the existing rules contained in the first schedule to the Act (*z*). By section 3 of the Act it is provided that "Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which an accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge." And, "notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act."

As to the material, &c., for indictments, it is provided by *Rule 1* (1, 2, 3) that the indictment may be on parchment

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(*u*) By the Grand Juries (Suspension) Act, 1917 (7 Geo. V. c. 4), provision was made for the suspension of grand juries during the war and for six months after its termination.

(*w*) Archbold, 1.

(*x*) *Ibid.* *R.* v. *Hall*, [1891] 1 Q. B. 747; 60 L. J. M. C. 124; v. p. 5.

(*y*) *R.* v. *Robinson*, [1759] 2 Burr. 799.

(*z*) 5 & 6 Geo. V. c. 90, s. 2. Since the Act additional rules have been made.

or paper (of specified size), and either written, printed, or partly written and partly printed. (4) Figures and abbreviations may be used for anything commonly expressed thereby. (5) On the back of the indictment there must be endorsed the name of every witness examined or intended to be examined by the grand jury, and the foreman must initial the name of every witness examined. (6) No indictment shall be open to objection by reason only of any failure to comply with this rule.

The form of the indictment is prescribed by the Rules, to which is added an appendix of forms. The following is an example (*a*):—

The King v. A.B.

Court of Trial [*e.g.*, Central Criminal Court [or] Durham County Assizes held at Durham [or] Hants Quarter Sessions held at Winchester].

Presentment of the Grand Jury.

A.B. is charged with the following offences:

Statement of Offence.

First Count (*b*).

Arson, contrary to s. 2 of the Malicious Damage Act, 1861.

Particulars of Offence.

A.B., on the day of , in the County of , maliciously set fire to a dwelling-house, one F.G. being therein.

Statement of Offence.

Second Count.

Arson, contrary to s. 3 of the Malicious Damage Act, 1861.

Particulars of Offence.

A.B., on the day of , in the County of , maliciously set fire to a house with intent to injure or defraud.

[A.B. is a habitual criminal (*c*)].

(*a*) Further examples are given in Appendix A to this book.
(*b*) If there is only one count the words "first count" are omitted.
(*c*) v. p. 315.

An indictment consists of three parts—the commencement, the statement of offence (or statements of offences), and the particulars of offence (or offences).

The form of the commencement is prescribed by Rule 2. Two points here require comment.

The *venue* is now indicated by simply stating the Court of trial at the commencement of the indictment in the prescribed manner. The further consideration of this matter will be reserved for a separate chapter.

By section 4 and Rule 3 of the Act charges for more than one felony or misdemeanour and charges for both felonies and misdemeanours may be formed in the same indictment if these charges are founded on the same facts or are a part of a series of offences of the same or a similar character (*d*). But where a felony is tried together with a misdemeanour, the jury must be sworn and the person accused will have the same right of challenging jurors as if all the offences charged were felonies. And if, before trial, or any stage of a trial, the Court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the Court may order a separate trial of any count or counts in an indictment [Section 5 (3)]. But Rule 12 provides that nothing in these rules or in any rules made under the Act shall affect the provisions of s. 32 (4) of the Children Act, 1908. That sub-section provides that when any offence under Part II. of the Act, or any offence mentioned in the First Schedule to the Act, is a continuous offence, it shall not be necessary to specify in the summons, information, or indictment the date of the acts constituting the offence.

(*d*) Formerly a count for a felony could not be joined with a count for a misdemeanour. It was no objection in point of law to an indictment that it contained charges of distinct felonies in different counts, but subject to certain statutory exceptions, the prosecution might be required to elect upon which count it would proceed. And even in case of misdemeanours, where an indictment contained several counts the prosecution might be compelled to elect if the accused would otherwise be embarrassed in his defence.

The description of the offence charged in an indictment, or, where more than one offence is charged, of each offence, is set out in the indictment in a separate paragraph, called a *Count* [Rule 4 (1)]. Each count is for the purposes of evidence and judgment equivalent to a separate indictment.

A count commences with a statement of the offence charged, called the "statement of offence." This must "describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by statute, shall contain a reference to the section of the statute" [Rule 4 (2) (3)].

After the statement of offence the particulars of offence must be set out "in ordinary language, in which the use of technical terms shall not be necessary" [Rule 4 (4)].

At common law it was necessary to set out with certainty all the facts, circumstances, and intent constituting the crime and directly to charge the defendant with having committed it (*e*). Now the rules deal with this subject as follows:—

Rule 5 provides as to *statutory offences* (1) that where the offence is "the doing or the omission to do any one of any different acts in the alternative, or the doing or omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities, or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence (*f*); (2) that it shall not be necessary, in any count charging a statutory offence, to negative any exception or exemption from or qualification to the operation of the statute creating the offence.

(*e*) Formerly the use of the proper technical words was necessary as, *e.g.*, "feloniously and burglariously" or "feloniously and of malice aforethought."

(*f*) This is an important change, as formerly in case of alternative acts, omissions, or intentions it was necessary to have a separate count for each alternative charge. Thus where, for example, an act was a statutory offence if done with intent to injure or defraud, it was usual to have two counts, one charging an intent to injure and another charging an intent to defraud. Now one count may charge an intent to injure or defraud.

Rule 6, as to *property*, provides (1) that the description of property in a count in an indictment shall be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and if the property is so described it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs (*g*) or the value of the property; (2) that where property is vested in more than one person, and the owners of the property are referred to in an indictment, it shall be sufficient to describe the property as owned by one of those persons by name with others, and if the persons owning the property are a body of persons with a collective name, such as "inhabitants," "trustees," "commissioners," or "club" or other such name, it shall be sufficient to use the collective name without naming any individual.

Rule 7, as to the description of *persons*, provides that the description or designation in an indictment of the accused person or of any other person to whom reference is made therein shall be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as "*a person unknown.*"

Rule 8, as to description of *documents*, provides that when it is necessary to refer to any document or instrument in an indictment, it shall be sufficient to describe it by any name or description by which it is usually known, or by the purport thereof, without setting out any copy thereof.

(*g*) Before the Act it was necessary to name the owner of property in respect of which the offence was committed. In spite of this rule, Forms 9 and 10 contain the name of the owner of the property and should be followed. In Form 10 the value is stated because it is an essential ingredient of the offence. Property stolen from a bailee may be described as the property either of the bailor or the bailee.

Rule 9, as to *descriptions generally*, provides that, subject to any other provision of the rules, it shall be sufficient to describe any place, time, thing, matter, act, or omission whatsoever to which it is necessary to refer in any indictment, in ordinary language in such a manner as to indicate with reasonable clearness the place, time, &c., referred to.

Rule 10, as to *statements of intent*, provides that it shall not be necessary in stating any intent to defraud, deceive, or injure to state an intent to defraud, &c., any particular person where the statute creating the offence does not make an intent to defraud, &c., a particular person an essential ingredient of the offence (*h*).

By section 5 wide powers of amending an indictment are given, and it is provided that (1) where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the Court thinks fit.

(2) When an indictment is so amended, a note of the order for amendment shall be indorsed in the indictment, which shall be treated as having been found by the grand jury in the amended form.

(3) [*Proviso for separate trial of different offences charged, see p.* 309.]

(4) Where before trial, or at any stage of a trial, the Court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the Court to amend an indictment or to order a separate trial of a Court, the Court shall make such order as to the postponement of the trial as appears necessary.

(*h*) The rule, therefore, does not apply to indictments under section 24 of the Offences against the Person Act, 1861, where the intent must be to injure, etc., the particular person to whom the poison, etc., is administered; v. p. 176.

(5) Where an order for postponement or separate trial is made—(a) if such an order is made during a trial, the Court may order the jury to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be; (b) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced; and (c) the Court may make such order as to costs and as to admitting the accused person to bail, and as to the enlargement of recognisances and otherwise as the Court thinks fit.

By section 6, if an indictment is of unnecessary length or is materially defective, the Court may make such order as it thinks fit as to the payment of any part of the costs of the prosecution which have been incurred thereby (*i*).

By section 7, "Nothing in this Act shall prevent an indictment being open to objection if it contravenes or fails to comply with the Vexatious Indictments Act, 1859, as amended by section 1 of the Criminal Law Amendment Act, 1867, or any other enactment: Provided that an indictment shall not be open to objection under those Acts on the ground that a count is joined with the rest of the indictment which could not at the time of the passing of the Criminal Law Amendment Act, 1867, be lawfully joined, if that count can be lawfully joined under the law for the time being in force."

By Rule 13 it is the duty of the Clerk of Assize or, at Quarter Sessions, the Clerk of the Peace, after a true bill has been found on any indictment, to supply to the accused person, on request, a copy of the indictment free of charge.

By section 8, nothing in the Act or rules is to affect the law or practice relating to the jurisdiction of a Court or the place where an accused person can be tried, or prejudice

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(*i*) The indictment is usually prepared by an officer of the Court, *e.g.*, the Clerk of Assize or the Clerk of the Peace at sessions, but, where the case requires more time or care than usual, it is often drawn by counsel.

or diminish the obligation to establish by evidence according to law any acts, omissions, or intentions which are legally necessary to constitute the offence with which the person accused is charged, nor otherwise affect the law of evidence in criminal matters.

The Counts of an Indictment.—An indictment, as we have seen, may contain several counts. This may be done either (i) to charge distinct offences committed at different times or by different acts; (ii) to charge the same act as constituting two different offences, as, *e.g.*, where the accused person is charged in two counts with rape and with connection with an imbecile woman, there being some doubt as to whether the woman in question was capable of giving consent to the connection. The necessity for adding a second count is now much obviated by the wide powers of amendment given to the Court and the power given to the jury of finding the defendant guilty of certain offences other than those named in the indictment (*k*). As a rule more than one offence cannot be charged in the same count, except alternatively (*l*), or the count will be bad for *duplicity*. But acts which form part of a single transaction may be charged in one count without making it bad for duplicity. Thus, in robbery, the prisoner may be charged with having assaulted A. and B. and stolen from A. one shilling, and from B. two shillings, if it was all one transaction (*l*).

An exception to the rule against duplicity occurs in indictments for burglary, where it is usual and proper to charge the accused in one count with having broken and entered the house with intent to commit a felony and also with having committed the felony intended. Also in indictments for continuous offences within section 32 (4) of the Children Act, 1908, no dates need be specified in the indictment, but a series of acts may be treated as constituting one offence (*m*). In certain cases, if the prisoner has been previously convicted

(*k*) Before the Act additional counts were used largely for the purpose of charging *alternative* intents, etc. This, as we have seen, is now unnecessary; v. p. 310.

(*l*) Archbold, p. 54.

(*m*) v. p. 309.

or is a habitual drunkard or habitual criminal, a charge to this effect is inserted in the indictment because of the additional power of punishment thereby given to the Court. By Rule 11 any such charge must be charged at the end of the indictment by means of a statement—in the case of a previous conviction that the person accused has been previously convicted of that offence at a certain time and place without stating the particulars of the offence, and in the case of a habitual criminal or habitual drunkard, that the offender is a habitual criminal or habitual drunkard, as the case may be (*n*).

As to the *joinder of two or more defendants* in one indictment.—When several persons take part in the commission of an offence, they may all be indicted together, or any number of them together, or each separately; and, of course, some may be convicted and others acquitted. But certain offences do not admit of a joint commission—for example, perjury. The misjoinder of defendants may be made the subject of demurrer, or motion in arrest of judgment or appeal; or the Court will in general quash the indictment.

As a rule there is no *time limited* after the commission of a crime within which the indictment must be preferred (*o*). By particular statutes, however, there are exceptions to this rule, a stated time being fixed, after which criminal proceedings cannot be commenced. The chief cases, times, and the statutes regulating them, are the following:—

Treason (except by endeavouring to assassinate the Sovereign), if committed in Great Britain, three years, 7 & 8 Wm. III. c. 3, s. 5.

Offences against the Riot Act, 1 Geo. I. st. 2, c. 5, s. 8, twelve months.

Unlawful drilling, six months, 60 Geo. III. & 1 Geo. IV. c. 1, s. 7.

(*n*) See the form given, *ante*, p. 308.

(*o*) It must be understood that this applies only to indictable offences and not to offences punishable upon summary conviction. With regard to the latter, criminal proceedings must, as a general rule, be commenced within six months from the commission of the offence, 11 & 12 Vict c. 43, s. 11, but there are many exceptions.

Night-poaching offences punishable under 9 Geo. IV. c. 69, twelve months (*Ibid.*, s. 4).

Offences under the Customs Act, three years, 39 & 40 Vict. c. 36, s. 257.

Corrupt or illegal practices at elections, one year, 46 & 47 Vict. c. 51, s. 51; 47 & 48 Vict. c. 70, s. 30.

Indictments or informations upon any statute penal, whereby the forfeiture is limited to the Sovereign, and unless such statute provides a shorter limitation, two years, or, where the forfeiture is limited to the Sovereign and prosecutor, one year, 31 Eliz. c. 5.

Carnally knowing a girl between the ages of thirteen and sixteen years, or attempting the same, six months, 48 & 49 Vict. c. 69, s. 5; 4 Edw. VII. c. 15, s. 27.

Prosecutions for acts done in execution or intended execution of any Act of Parliament or of any public duty or authority, or for neglect or default in the execution of such act or duty, must be brought within six months, 56 & 57 Vict. c. 61, s. 1.

B. *Information.*

A criminal information is a complaint on behalf of the Crown in the King's Bench Division in respect of some offence not a felony, whereby the offender is brought to trial *without a previous finding by a grand jury* (*p*).

These criminal informations are of two kinds:—

i. Informations *ex officio.*

ii. Informations by the Master of the Crown Office.

i. An information *ex officio* is a formal written allegation of an offence, filed by the Attorney-General in the King's Bench Division. It lies for misdemeanours only; for in treason and other felonies it is the policy of the English law that a man should not be put upon his trial until the necessity for that course has been shown by the oath of

(*p*) This species of information is, of course, quite distinct from an "information" made to a magistrates of some offence punishable on summary conviction. The term "information" is also used of several other kinds of proceedings, as, *e.g.*, proceedings taken to recover statutory penalties and actions by the Attorney-General in his official capacity. *The Annual Practice*, pp. 2 and 3.

the grand jury. The objects of this kind of information are such enormous misdemeanours as peculiarly tend to disturb or endanger the Government, or to interfere with the course of public justice, or to molest public officers; for example, seditious libels or riots, obstructing officers in the execution of their duties, oppression, bribery, &c., by magistrates or officers (*q*). If the Attorney-General delays for twelve months to bring the case on for trial, after due notice the Court may authorise the defendant to do so. The form of an information is now governed by the Indictments Act, 1915, and is the same as that of an indictment, except that the heading is as follows (*r*):—

The King v. A.B.

In the High Court of Justice, King's Bench Division.

Criminal Information filed by the King's Attorney-General.

A.B. is charged with the following offence:

Statement of Offence, &c.

ii. Information by the *Master of the Crown Office*.—A formal written suggestion of an offence, filed in the King's Bench Division at the instance of an individual, by the Master of the Crown Office, without the intervention of a grand jury. Here, a point in which this differs from the former kind of information, the leave of the Court has to be obtained, which must be applied for in open Court (*s*). It lies for all misdemeanours; but the Court usually will only allow this proceeding in the case of misdemeanours of a gross and notorious kind, which, on account of their magnitude or pernicious example, deserve the most public animadversion (those peculiarly tending to disturb the Government being usually left to the Attorney-General as above)—for example, bribery, aggravated libels, and offences against the administration of justice.

(*q*) Archbold, 125; *R.* v. *Russell*, [1905] 93 L. T. 407; 69 J. P. 450.

(*r*) Archbold, 126. By rules of May 23, 1916, it is provided that Rule 1 (5) of the Rules in the Schedule to the Indictments Act, 1915, shall not apply to informations.

(*s*) Crown Office Rules, 1906, r. 35.

The modern rule with regard to granting criminal informations for libel is that leave will in such cases only be granted when the person libelled occupies some public office or position, and that leave will not be granted at the suit of a private person (*t*).

The course of proceedings is the following: An application, which must be by counsel, is made for a rule to show cause why a criminal information should not be filed against the party complained of. This application must be founded upon an affidavit disclosing all the material facts of the case. If the Court grants a rule *nisi*, it is afterwards, upon cause being shown, discharged or made absolute as in ordinary cases.

The form of this kind of information is similar to that of an information *ex officio*, substituting the name of the King's coroner and attorney for that of the Attorney-General.

The trial of a criminal information takes place at the High Court of Justice in London and Middlesex, or on the civil side at assizes in other counties (*u*) before a Judge and a common or special jury. It is conducted in the same manner as the trial of an indictment, but if the defendant is found guilty he must afterwards receive judgment from the King's Bench Division.

Coroner's Inquisition (*w*).

A coroner's inquisition is the record of the finding of the jury sworn to enquire, *super visum corporis*, concerning a death. On this a person may be prosecuted for murder or manslaughter without the intervention of a grand jury, for the finding of the coroner's jury is itself equivalent to the finding of a grand jury. The defendant is arraigned on the inquisition as on an indictment; and the subsequent proceedings are the same. It is the usual, but by no means a necessary, practice when a prisoner stands charged on a coroner's inquisition with murder or manslaughter, to take

(*t*) *R.* v. *Labouchere*, [1884] 12 Q. B. D. 320; 53 L. J. Q. B. 362. As to criminal informations against justices, v. p. 472.
(*u*) v. p. 279. As to trial at bar, v. p. 277.
(*w*) v. pp. 285, 306.

him before a magistrate, and, upon the magistrate committing him for trial, to prefer an indictment against him. He is then tried both on the inquisition and the indictment at the same time.

The proceedings upon a coroner's inquest are shortly the following: On receiving notice of the death, the coroner issues his warrant for summoning a jury (which must consist of not more than twenty-three nor less than twelve), and names the time and place of holding the enquiry. At the Court the jury are sworn, and then view the body. The witnesses are examined on oath, and their evidence is put into writing by the coroner (*x*). He has authority to bind by recognisance all material witnesses to appear at the assizes to prosecute and give evidence; and he must certify and subscribe the evidence and all such recognisances and the inquisition taken before him, and (if a verdict is found against any person and he is committed for trial) deliver the same to the proper officer of the Court in which the trial is to be, before or at the opening of the Court (*y*).

The inquisition consists of three parts: the caption or *incipitur*, the verdict of the jury, and the attestation. Its form is governed by the Coroners Act, 1887, as modified by rules of May 23, 1916, made under the Indictments Act, 1915. By these rules it is provided (i) that Rule 1 (5) and Rule (2) in the First Schedule to the Indictments Act, 1915, shall not apply to inquisitions; (ii) that the form provided in Schedule II. of the Coroners Act may be used; but (iii) that any offence charged shall be stated in accordance with the form of indictment relating thereto prescribed by the Indictment Rules, 1915—1916 (*z*). It is also provided that the Clerk of Assize must on request supply free of charge to a person committed for trial on a coroner's inquisition so much of the inquisition as charges him with an offence.

If the jury (twelve of whom at least must concur in the verdict (*a*)) return a verdict of murder or manslaughter, or

(*x*) 50 & 51 Vict. c. 71, ss. 3, 4.
(*y*) *Ibid.* s. 5.
(*z*) See Archbold, 141.
(*a*) 50 & 51 Vict. c. 71, s. 4, sub-s. 5.

of being accessory before the fact to a murder, against a person, the coroner must commit him for trial, if present, and if not in custody the coroner must issue a warrant for his apprehension (*b*).

If an inquest ought to be held over a dead body, it is a misdemeanour so to dispose of the body as to prevent the coroner from holding the inquest (*c*).

From the foregoing enquiry we find that, apart from proceedings by way of summary conviction, the only modes of criminal procedure are by way of indictment, information, or inquisition. Of these, proceedings by indictment are much the most common; and, unless anything be stated to the contrary, it will be this mode that will be kept in view in the succeeding pages.

In order to provide more effectually for the prosecution of offences, Acts have been passed to provide for the appointment of a *Director of Public Prosecutions* with a staff of assistants (*d*).

The duty of the Director of Public Prosecutions is set forth to be—to institute, undertake, or carry on, under the superintendence of the Attorney-General, criminal proceedings, and to give such advice and assistance to chief officers of police, clerks to justices, and other persons concerned in any criminal proceeding respecting the conduct of that proceeding, as may be for the time being prescribed by rules made under the Act, or may be directed in a special case by the Attorney-General (*e*).

The rules referred to were to provide for the Director of Public Prosecutions taking action in cases which appeared to him to be of importance or difficulty, or which from any other reason required his intervention (*f*).

(*b*) *Ibid.* s. 5. In such a case also the inquisition and depositions must be sent to the Public Prosecutor, see Archbold, 143.

(*c*) *R.* v. *Price*, [1884] 12 Q. B. D. 247; 53 L. J. M. C. 51; v. also *R.* v. *Stephenson*, [1884] 13 Q. B. D. 331; 53 L. J. M. C. 176.

(*d*) 42 & 43 Vict. c. 22; amended by 47 & 48 Vict. c. 58, and 8 Edw. VII. c. 3.

(*e*) 42 & 43 Vict. c. 22, s. 2.

(*f*) 8 Edw. VII. c. 3, s. 2.

These regulations are to the following effect:—

The cases in which it is the duty of the Director of Public Prosecutions to carry on a criminal proceeding are: where the offence is punishable with death, or is of a class the prosecution of which had hitherto been undertaken by the Solicitor to the Treasury; or where an order in that behalf is given by the Secretary of State or the Attorney-General; or where it appears to the Director that the offence is of such a character that a prosecution is required in the public interest, and that, owing to the importance or difficulty of the case or other circumstances, his action is necessary to secure the due prosecution of the offender.

The Director of Public Prosecutions is also to give, in any case which appears to be of importance or difficulty, advice to clerks of justices of the peace, and to chief officers of police, and to such other persons as he may think right.

The Director may also assist prosecutors by authorising them to incur special costs for obtaining scientific evidence, and plans or models, and in the payment of extra fees to counsel.

The Director may employ any solicitor to act as his agent in the conduct of a prosecution. His own action is in all respects subject to the direction of the Attorney-General.

It is the duty of the Director of Public Prosecutions, under the Criminal Appeal Act, 1907, to appear for the Crown on appeals to the Court of Criminal Appeal, unless some other Government Department, or a private prosecutor, undertakes the defence of the appeal (*g*).

(*g*) 7 Edw. VII. c. 23, s. 12.

CHAPTER V.

PLACE OF TRIAL.

THE venue, indicated by stating the Court of trial at the commencement of an indictment, is the district from which the jurors are to come and, as a general rule, the district in which the offence was committed (*h*). The general common law rule is that the venue should be the jurisdiction within which the offence is committed; whether such jurisdiction be a county, a division of a county, a district including more than a county, as in the case of the Central Criminal Court, or a borough. To the general rule many *exceptions* have been made by statute, of which the following are the most important:

i. The venue may be laid in *any* county (*i*) for the following offences:—

Resisting or assaulting officers of the excise (*k*).

Offences against the Customs Acts (*l*).

Inciting soldiers or sailors to mutiny (*m*).

Offences against section 1 of the Dockyards Protection Act, 1772 (*n*).

Offences against the Unlawful Oaths Acts of 1797 and 1802 (*o*).

(*h*) See Archbold, 28.

(*i*) By "county" in this chapter must be understood county, division of county, district, or borough, as the case may be. Offences committed in detached parts of counties may be dealt with as if committed in the county wholly or in part surrounding, 2 & 3 Vict. c. 82, s. 1.

(*k*) 7 & 8 Geo. IV. c. 53, s. 43.

(*l*) 39 & 40 Vict. c. 36, s. 258.

(*m*) 37 Geo. III. c. 70, s. 2; 57 Geo. III. c. 7.

(*n*) 12 Geo. III. c. 24, s. 2.

(*o*) v. pp. 42, 43.

ii. The venue may be laid in the county where the offence was committed, or where the offender is apprehended, or is in custody·

Forgery, or uttering forged matter (*p*).

Bigamy (*q*).

Murder and manslaughter committed on land out of the United Kingdom by a British subject (*r*).

Offences against the Larceny Act, 1916 (*s*). This Act also provides that any person who steals or otherwise feloniously takes any property in any part of the United Kingdom may be tried in any other part of the United Kingdom where he has the property in his possession (*t*); also that a person who receives in one part of the United Kingdom property stolen, etc., in another part may be tried in that part where he receives it (*u*).

Offences against the Perjury Act, 1911, or punishable as perjury or subornation of perjury under any other Act when committed out of the United Kingdom (*w*).

Offences relating to the Post Office: if committed upon a mail, or in respect of a chattel, money, &c., sent by post, the venue may be either as above, or in any county through any part of which the mail, chattel, &c., has passed in due course of conveyance by post (*x*).

iii. Either where the offence was committed, or in any adjoining county:—

Where the offence was committed within the county of a city or town corporate (except London, Westminster, or Southwark), *e.g.*, Berwick, Newcastle, Bristol, Chester, Exeter, and Hull, it may be tried in the next adjoining county (*y*).

Where a felony or misdemeanour is committed on the boundary of two or more counties, or within five hundred

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(*p*) 3 & 4 Geo. V. c. 27, s. 14.
(*q*) 24 & 25 Vict. c. 100, s. 57.
(*r*) 24 & 25 Vict. c. 100, s. 9.
(*s*) 6 & 7 Geo. V. c. 50, s. 39, sub-s. 1.
(*t*) *Ibid.* s. 39, sub-s. 2.
(*u*) *Ibid.* s. 39, sub-s. 3.
(*w*) 1 & 2 Geo. V. c. 6, s. 8.
(*x*) 8 Edw. VII. c. 48, s. 72.
(*y*) 38 Geo. III. c. 52; 51 Geo. III. c. 100; 14 & 15 Vict. c. 55, ss. 19, 23, 24; c. 100, s. 23.

yards of the boundary, or is begun in one county and completed in another, the venue may be laid in either county (*z*).

iv. In any place where the offender is, or is brought:—

Offences against the customs on the high seas, upon the offender coming to land (*a*).

Forcing on shore, or leaving behind in any place out of the King's dominions any of the crew (*b*).

Offences against the Foreign Enlistment Act, 1870 (*c*).

v. In either county, where the offence was committed partly in one, partly in another:—

Uttering counterfeit coin in one county and within ten days uttering in another; or two persons acting in concert in two or more counties (*d*).

Libels and threatening letters, which may be tried either in the county from which sent or where received (*e*).

And, generally, where the offence is begun in one county and completed in another, the venue may be laid in either county (*f*).

vi. In felonies or misdemeanours committed upon any person, or on, or in respect of, any property, in or upon any coach, cart, or other carriage employed in any journey, or any vessel employed in river, canal, or inland navigation, the venue may be laid in any county through which the coach, or through which or between which the vessel passed in the journey (*g*).

vii. In the case of felonies wholly committed within England or Ireland, accessories before the fact (who, however, may now be tried in *all* respects as if principal felons (*h*)), and accessories after the fact, may be tried by any Court which has jurisdiction to try the principal felony or any felonies committed in any county in which the act by reason of which such person is an accessory has been committed. In

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(*z*) 7 Geo. IV. c. 64, s. 12.
(*a*) 39 & 40 Vict. c. 36, s. 229.
(*b*) 57 & 58 Vict. c. 60, s. 684.
(*c*) 33 & 34 Vict. c. 90, ss. 16, 17.
(*d*) 24 & 25 Vict. c. 99, s. 28.
(*e*) Archbold, 37.
(*f*) 7 Geo. IV. c. 64, s. 12: v. Archbold, 36
(*g*) 7 Geo. IV. c. 64, s. 13.
(*h*) v. p. 27.

other cases (*i.e.*, when not wholly committed within England or Ireland), by any Court having jurisdiction to try the principal felony or any felonies committed in any county in which the accessory is apprehended or is in custody (*i*).

viii. Where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England and Ireland, dies in England or Ireland, or *vice versa*, the offence may be dealt with in any county in England or Ireland in which the death, or the stroke, poisoning, or hurt happened (*k*).

ix. In indictments for being at large before the expiration of a sentence of penal servitude, the venue may be laid either in the county where the defendant is apprehended or in that in which he was sentenced (*l*).

x. *As to offences committed abroad:—*

With one possible exception created by the Merchant Shipping Act, 1894 (*m*), no crime committed by a *foreigner* on foreign *land* is punishable in an English Court.

At common law crimes committed by British subjects in lands beyond the realm were not punishable in English Courts, but to this rule several exceptions have been made by various statutes. Of these we have already, in this chapter, noticed offences against the Dockyards Protection Act, 1772, unlawful oaths, bigamy, murder and manslaughter on land by a British subject, perjury and offences against the Foreign Enlistment Act, 1870. Other exceptions are treason and offences by Crown officials, triable in the King's Bench Division (*n*), and offences against the Official Secrets Act, 1911, triable in the King's Bench Division or the Central Criminal Court (*o*).

(*i*) 24 & 25 Vict. c. 94, s. 7.
(*k*) 24 & 25 Vict. c. 100, s. 10.
(*l*) 5 Geo. IV. c. 84, s. 22; 20 & 21 Vict. c. 3, s. 3.
(*m*) v. p. 326. It would appear, however, to be another exception that a foreigner employed as an English Consul or official abroad and committing an offence in the execution of his office can be tried in this country under 42 Geo. III. c. 85, s. 1.
(*n*) 35 Hen. VIII. c. 2; 11 Will. III. c. 12; 42 Geo. III. c. 85, s. 1; v. p. 277
(*o*) 1 & 2 Geo. V. c. 28, s. 10.

xi. *As to offences at sea:—*

The ancient Court of the Lord High Admiral had jurisdiction for the trial of offences at sea or on board ships lying in the rivers below bridge (*p*). By the Act 28 Hen. VIII. c. 15, the King was authorised to issue commissions under the Great Seal to the admiral and his deputies to try certain offences (*q*) committed at sea or within the jurisdiction of the admiral in the same way as if committed upon the land. In practice this jurisdiction was exercised by the Judge of the Admiralty Court.

The Central Criminal Court and the justices of assize and commissioners of Oyer and Terminer and General Gaol Delivery have now the power to try all offences committed on the high seas or within the jurisdiction of the Admiralty, although the power still exists of issuing a special commission under the Act of Hen. VIII. (*r*).

The jurisdiction of the Admiralty in the case of British ships and all persons on board them extends not only over the high seas, but also on foreign rivers as far as great ships go; although the municipal authorities of the foreign country may have concurrent jurisdiction (*s*). In the case of foreign ships and persons other than British subjects the jurisdiction extends over the territorial waters of His Majesty's Dominions, which include the high seas to a distance of one marine league from low-water mark (*t*).

By the Merchant Shipping Act, 1894, the jurisdiction of the Admiralty also extends over any offence against property or person committed, either ashore or afloat, by any person, British subject or foreigner, who is employed as a master,

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(*p*) 13 Rich. II. c. 5; 15 Rich. II. c. 3.

(*q*) Treasons, felonies, robberies, murders, and conspiracies; extended by 39 Geo. III. c. 37 to all offences.

(*r*) 4 & 5 Will. IV. c. 36, s. 22; 7 & 8 Vict. c. 2. The Courts in the Colonies have also cognisance of offences committed within the Admiralty jurisdiction, 11 & 12 Will. III. c. 7; 46 Geo. III. c. 54; 12 & 13 Vict. c. 96; 41 & 42 Vict. c. 73; 57 & 58 Vict. c. 60, s. 686.

(*s*) *R.* v. *Anderson*, [1868] L. R. 1 C. C. R. 161; 38 L. J. M. C. 12; *R.* v. *Carr*, [1882] 10 Q. B. D. 76; 52 L. J. M. C. 12.

(*t*) 41 & 42 Vict. c. 73.

seaman, or apprentice in a British ship, or was so employed within three months before the offence (*u*).

All indictable offences mentioned in the Criminal Law Consolidation Acts, 1861, if committed within the jurisdiction of the Admiralty, are subject to the same punishments as if committed on land, and may be tried in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner as if the offence had been committed in that county or place (*w*).

By a later statute it is also provided (*x*) that where any person is charged with having committed *any* offence on board a British ship on the high seas, and he is found within the jurisdiction of any Court in His Majesty's Dominions which would have had cognisance of the offence if committed within its ordinary jurisdiction, that Court shall have jurisdiction to try him. This provision includes both British subjects and foreigners, but as regards British subjects the section also extends to one who commits a criminal offence in a foreign port or harbour, or on board any foreign ship to which he may not belong.

(*u*) 57 & 58 Vict. c. 60, s. 687.

(*w*) 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; c. 100, s. 68.

(*x*) 57 & 58 Vict. c. 60, s. 686. In view of this statute the provisions in the Criminal Consolidation Acts seem no longer necessary; Archbold, 35.

CHAPTER VI.

THE GRAND JURY.

PROCESS AFTER A TRUE BILL IS FOUND. TIME OF TRIAL.

THE bill of indictment (as yet it is only a "bill," and is not correctly termed an indictment until found true by the grand jury) having been drawn up, the next step is to submit it to the grand jury.

Who are the grand jury? The sheriff of every county is required to return to every sessions of the peace, and every commission of oyer and terminer and of gaol delivery, twenty-four good and loyal men of the county, "to enquire into, present, do and execute all those things which, on the part of our Lord the King, shall then be commanded them." Grand jurors at the assizes, or at the borough sessions (at the latter they must be burgesses, 45 & 46 Vict. c. 50, s. 186), do not require any qualification by estate; at the county sessions they must have the qualification required of petty jurors (*a*). At the assizes, the grand jury usually consists of gentlemen of good standing in the county.

After the Court has been opened in the usual way by the crier making proclamation, the names of those summoned on the grand jury are called. As many as appear upon this panel are sworn. They must number twelve at least, but not more than twenty-three, so that twelve may be a majority (*b*). The person presiding in the Court—the Judge at the assizes, the chairman at the county sessions, the recorder at the borough sessions—then charges the grand jury. The object of this charge is to assist the grand jury in coming to a right

(*a*) 6 Geo. IV. c. 50, s. 1. (*b*) 2 Burr. 1088.

conclusion, by directing their attention to points in the various cases about to be considered by them which require special attention.

The charge having been delivered, the grand jury withdraw to their own room, having received the bills of indictment. The witnesses whose names are indorsed on each bill are sworn as they come to be examined in the grand jury room, the oath being administered by the foreman, who, as each witness is examined, should write his initials opposite to the name on the back of the bill (*c*). Only the witnesses for the prosecution are examined, as the function of the grand jury is merely to enquire whether there is sufficient ground to put the accused on his trial, and, notwithstanding the provision in the Criminal Evidence Act, 1898, that the defendant is a competent witness for the defence at every stage of the proceedings, he is not entitled to give evidence before the grand jury (*d*).

If the majority of them (which majority must consist of twelve at least) think that the evidence adduced makes out a sufficient case, the words "a true bill" are indorsed on the back of the bill: if they are of the opposite opinion, the words "no true bill" are so indorsed, and in this case the bill is said to be ignored or thrown out. They may find a true bill as to the charge in one count and ignore that in another; or as to one defendant and not as to another; but they cannot, like a petty jury, return a special or conditional finding, or select part of a count as true and reject the other part. Nor can they find that the prisoner was insane when he committed the crime (*e*). When one or more bills are found, some of the grand jury come into Court and hand the bills to the clerk of arraigns, or clerk of the peace, who states to the Court the name of each prisoner, the charge, and the indorsement of the grand jury. They then retire and consider other bills, until all are disposed of; after which they are discharged by the Judge, chairman, or recorder, presiding.

(*c*) Indictments Act, 1915, rule 1 (5).
(*d*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83.
(*e*) *R.* v. *Hodges*, [1838] 8 C. & P. 195.

If the bill is thrown out it may again be preferred to the grand jury during the same assizes or sessions, or it may be preferred and found at subsequent assizes or sessions, of course within the time limited for the prosecution if there be any time so limited (*f*). We may anticipate by reminding the reader that this cannot be done in respect of the same offence if the *petty* jury have returned a verdict (*g*).

We have pursued the ordinary method of criminal procedure by supposing that, in the first instance, there has been an examination before the magistrate. But this need not always take place. With certain exceptions, a person may prefer a bill of indictment against another before the grand jury without any previous enquiry into the truth of the accusation before a magistrate, and even where the magistrate may have refused to commit for trial. This general right was, at one time, a universal right, and was often the engine of tyranny and abuse. It is easy to conceive how an innocent man's character might be injured, or at least how he might be put to great expense and inconvenience in defending himself against a charge founded on a true bill returned by the grand jury, who have heard only the evidence for the prosecution.

A substantial check was put upon this grievance by the Vexatious Indictments Act (*h*). It provides that no bill of indictment for any of the offences enumerated below shall be presented to or found by a grand jury unless one of the following steps has been taken: (i) The prosecutor or other person presenting such indictment has been bound by recognisance to prosecute or give evidence against the accused; or (ii) the accused has been committed to or detained in custody, or has been bound by recognisance to appear to answer an indictment for such offence; or (iii) unless the indictment has been preferred by the direction, or with the consent in writing of a Judge of the High Court, or the Attorney- or Solicitor-General; or (iv) in case of an indictment for perjury, by the direction of any Court, Judge, or public functionary authorised to direct a prosecution for perjury.

(*f*) Archbold, 77. (*g*) v. p. 411.

(*h*) 22 & 23 Vict. c. 17, s. 1.

The offences referred to are: Conspiracy, obtaining money or property by false pretences, keeping a gambling-house, keeping a disorderly house, indecent assault; and now, by the Debtors Act, 1869, any misdemeanour under the second part of that Act and the Bankruptcy Act, 1914 (*i*); also by the Newspaper Libel and Registration Act, 1881 (*k*), libel and offences against that Act; misdemeanours under the Criminal Law Amendment Act, 1885 (*l*); indictable offences under the Merchandise Marks Act, 1887 (*m*); offences under the Prevention of Corruption Act, 1906 (*n*); and offences against the Incest Act, 1908 (*o*); misdemeanours against the second part of the Children Act, 1908 (*p*); and perjury, subornation of perjury, and other offences punishable under the Perjury Act, 1911 (*r*). The object of this salutary provision was furthered by a subsequent statute, which, in the event of an acquittal, empowers the Court trying an indictment for any such offences (unless the defendant has been detained in custody or bound over to answer the indictment) to order the prosecutor to pay the whole or any part of the costs incurred in or about the defence (*s*). The Vexatious Indictments Act does not, however, apply to cases where the Court itself has given leave for the indictment to be preferred (*t*).

If a magistrate refuses to commit for trial a person charged with any offence to which the Vexatious Indictments Act applies, the prosecutor is entitled to require him to take his recognisance to prosecute the person accused, and the magistrate must transmit the recognisance with the information and depositions to the Court in which the indictment

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(*i*) 32 & 33 Vict. c. 62, s. 18; 4 & 5 Geo. V. c. 59, s. 164.
(*k*) 44 & 45 Vict. c. 60, s. 6.
(*l*) 48 & 49 Vict. c. 69, s. 17. As to misdemeanours under this Act, v. p. 157 *et seq.*
(*m*) 50 & 51 Vict. c. 28, s. 13.
(*n*) 6 Edw. VII. c. 67, s. 25.
(*o*) 8 Edw. VII. c. 45, s. 4, sub-s. In this and in the last case the sanction of the Attorney-General is also required, unless, in cases within the Incest Act, 1908, the prosecution is commenced by the Director of Public Prosecutions.
(*p*) 8 Edw. VII. c. 67, s. 25.
(*r*) 1 & 2 Geo. V. c. 6, s. 11.
(*s*) 8 Edw. VII. c. 15, s. 6, sub-s. 2.
(*t*) 30 & 31 Vict. c. 35, s. 2.

ought to be preferred (*u*), and the indictment may then be preferred in spite of the magistrate's refusal to commit; this, however, does not apply where the magistrate has refused to grant a summons (*w*).

Subsequent process.—The grand jury having found a true bill, the next point to be considered is the process (the writs or judicial means) issued, or made to *proceed*, to compel the attendance of the accused to answer the charge. Of course this is not required if he is in custody, or if, having been bound by recognisance to appear and take his trial, he surrenders to his bail; in such case he may be tried as soon as is convenient. If he is in custody of another Court for some other offence, the course is to remove him by a writ of *habeas corpus*, and bring him up to plead. But if he is already in the custody of the same Court, there is no need for such writ (*a*).

If, however, an indictment has been found in the absence of the accused, and he is not in custody and has not been bound over to appear at the assizes or sessions, then process must issue to bring him into Court.

Process in ordinary cases is now regulated by 11 & 12 Vict. c. 42, s. 3. When an indictment has been found at the assizes or sessions against some person who is at large, the clerk of indictments, or clerk of the peace, after such assizes or sessions, upon the application of the prosecutor or any person on his behalf, will grant a certificate of such indictment having been found. Upon production of this certificate to any justice of the jurisdiction where the offence is alleged to have been committed, or in which the accused resides, or is, or is suspected of residing or being, such justice must issue his warrant to apprehend the person so indicted and bring him before some justice of the jurisdiction, who, upon proof by oath that the person present is the person indicted, will, without further enquiry or examination, commit

(*u*) 22 & 23 Vict. c. 17, s. 2.
(*w*) *Ex parte Reid*, [1885] 49 J. P. 600.
(*a*) 30 & 31 Vict. c. 35, s. 10.

him for trial or admit him to bail. Provision is also made for the backing of such warrant if the accused is out of the above jurisdiction (*b*). If he is already in prison, the justice must issue his warrant to the gaoler, ordering him to detain him until removed by *habeas corpus* or otherwise in due course of law (*c*).

Another mode of proceeding, though one not usually adopted unless the case is urgent, is for the Court before whom the indictment is found to issue a *bench warrant* for the arrest of the accused, and to bring him immediately before such Court. At the assizes it is signed by the Judge, at sessions by two justices of the peace. It has been said, however, that this process only applies to cases of misdemeanour (*d*). Any Judge of the King's Bench Division, upon affidavit or certificate that an indictment has been found, or information filed in that Court against any person for a misdemeanour, may issue his warrant for apprehending and holding the accused to bail, and in default of bail he may commit him to prison (*e*).

Outlawry.—If the accused person does not appear to plead to the indictment and summary process proves ineffectual to secure his apprehension, process of outlawry is issued and after the issue of certain writs and proclamations judgment of outlawry may be pronounced (*f*). An outlawry in treason and felony amounts to a conviction upon the indictment, but in cases of misdemeanour it amounts merely to a conviction for the contempt in not appearing. In any case, however, the defendant incurs forfeiture of his goods, and in treason or felony of his lands also, the Forfeiture Act, 1870, not applying to forfeiture on outlawry (*g*). Proceedings in outlawry are rare and may almost be said to be extinct (*h*).

(*b*) 11 & 12 Vict. c. 42, s. 11.
(*c*) *Ibid.* s. 3.
(*d*) Archbold, 84.
(*e*) 48 Geo. III. c. 58, s. 1.
(*f*) See Crown Office Rules, 1906, 88—101.
(*g*) v. p. 7.
(*h*) Archbold, 86.

Time of Trial.—Indictments for *felony* are tried at the same assizes or sessions at which they are found by the grand jury. The trial may, however, be postponed to the next assizes or sessions, on the application of either the prosecutor or the defendant. But he must satisfy the Court by affidavit that there is sufficient cause for the postponement, such as the illness or unavoidable absence of a material witness. The defendant will be detained in custody till the trial, or admitted to bail, as the Court thinks fit (*i*).

In *misdemeanours,* formerly when the defendant was not in custody it was the practice not to try him at the same assizes or sessions at which he pleaded not guilty to the indictment, but to require him to give security to appear at the next assizes or sessions. But now it is provided generally that—No person prosecuted is entitled to traverse or postpone the trial of any indictment found against him, provided that, if the Court be of opinion that the defendant ought to be allowed a further time either to prepare for his defence or otherwise, it may adjourn his trial to the next subsequent session, upon such terms as to bail or otherwise as may seem proper (*k*).

(*i*) As to postponement when an indictment has been amended, v. p. 312.
(*k*) 14 & 15 Vict. c. 100, s. 27.

CHAPTER VII.

CERTIORARI.

We have already ascertained where the trial of an offence will, in the regular course of things, take place. But any criminal proceeding may be removed by a writ of *certiorari* into the King's Bench Division, the supreme Court of criminal jurisdiction. This writ is directed to the inferior Court, requiring it to return the records of an indictment, or inquisition, depending before it, so that the party may have a trial in the King's Bench Division or before such justices as the King shall assign to hear and determine the cause. The result is that the jurisdiction of the inferior Court is superseded, and all subsequent proceedings there are illegal, unless the King's Bench remands the record back to the inferior Court for trial. The proper time to apply for this writ is before issue is joined on the indictment, or at least before the jury are sworn, though it may be allowed at a later stage (*l*).

The writ is demandable as of right by the Crown, and issues as of course when the Attorney-General or other officer of the Crown applies for it (*m*). Formerly, it was granted almost of course to private prosecutors; but now it is provided that no indictment (except indictments against bodies corporate not authorised to appear by attorney in the Court in which the indictment is preferred) shall be

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(*l*) Archbold, 112. Proceedings may be removed into the King's Bench Division from the Crown Court of Assize, even after judgment, without a *certiorari* by an *order* for removal, which is obtained in the same way as *certiorari*; *R.* v. *Dudley*, 14 Q. B. D. 273, 560; *R.* v. *Chambers*, W. N. 1919, p. 95.

(*m*) *R.* v. *Eaton*, [1799] 2 T. R. 89.

removed into the King's Bench Division or Central Criminal Court by writ of *certiorari* either at the instance of prosecutor or of defendant (except the Attorney-General on behalf of the Crown), unless it be made to appear to the Court from which the writ is to issue, (i) that a fair and impartial trial of the case cannot be had in the Court below; or (ii) that some question of law of more than usual difficulty and importance is likely to arise upon the trial; or (iii) that it may be necessary to have a view of premises [in "some other county" (*n*)] in respect whereof the indictment is preferred; or (iv) that a special jury may be required to ensure a satisfactory trial (*o*). But an application by the defendant will not be granted for the removal of an indictment for perjury or other heinous misdemeanours when the delay tends to defeat the prosecution, nor usually for murder or a serious felony (*p*). Nor in general will it be removed from a Court of competent jurisdiction where one of the Judges of the High Court presides (*q*), unless great local prejudice, likely to lead to an unfair trial, is shown to exist.

The *mode of obtaining the writ* by private prosecutors or by defendants as settled by the Crown Office Rules, 1906, is the following:—

Every application for a writ of *certiorari* to remove an indictment must, during the sittings, be made to a Divisional Court by motion for an order *nisi* to show cause, and in the vacation to a Judge at Chambers, for a summons to show cause; but where, from special circumstances, the Court or a Judge may be of opinion that the writ should issue forthwith, the order may be made absolute in the first instance. Every application must be supported by an affidavit showing the ground upon which it is made. Upon the return of the order *nisi*, or of the summons, as the case may be, the Court or Judge will, if sufficient cause be shown, order a writ of *certiorari* to issue. No writ of *certiorari* will be allowed

(*n*) *R.* v. *Martin*, L. R. 1 C. C. R. 378; 41 L. J. M. C. 113.
(*o*) Crown Office Rules, 1906, r. 13.
(*p*) Archbold, 112.
(*q*) *Ibid.*

unless the person at whose instance it has been issued enters into a recognisance with sufficient sureties, by which he undertakes to proceed forthwith to trial of the indictment, and to pay the costs of the opposite party subsequent to the removal of the indictment, in case such opposite party should succeed at the trial.

Provision is made by statute (*r*) for the trial at the Central Criminal Court of indictments or inquisitions for felonies or misdemeanours committed out of the jurisdiction of the Central Criminal Court, which have been removed by *certiorari* into the King's Bench Division; and for the removal of any such indictment or inquisition by order of the King's Bench Division directly into the Central Criminal Court from an inferior Court.

If the indictment is not tried at the Central Criminal Court it is tried at the sittings of the High Court in London and Middlesex or the Nisi Prius Court at the assizes for the county in which the indictment was found (*s*). If it is removed *from* the Central Criminal Court to the King's Bench Division the writ must specify the county in which it is to be tried (*t*).

Although the writ of *certiorari* is usually issued out of the King's Bench Division, it may also be issued by the Judges of the High Court who are on the commission of the Central Criminal Court and by the Recorder of London, to remove from Courts of Quarter Sessions within the Central Criminal Court district indictments found in such Courts for offences cognisable by the Central Criminal Court. It may also be issued by a Judge of assize to remove indictments from Quarter Sessions for any county within his commission for offences which they have no jurisdiction to try (*u*).

(*r*) 19 & 20 Vict. c. 16, ss. 1, 3.
(*s*) As to trial at bar, v. p. 277.
(*t*) Archbold, 119.
(*u*) Archbold, 108. As to the issue of *certiorari* by the House of Lords, v. p. 275.

CHAPTER VIII.

ARRAIGNMENT. CONFESSION. MOTION TO QUASH INDICTMENT. DEMURRER. PLEAS.

ARRAIGNMENT.

THE arraignment, or requiring the prisoner to answer to the charge of an indictable offence, consists of three parts:—

(a) Calling the prisoner to the bar by name.

(b) Reading the indictment to him.

(c) Asking him whether he is guilty or not of the offence charged.

The prisoner must be brought to the bar without irons, or any manner of shackles or bonds, unless there is evident danger of escape. In felonies he must be placed at the bar of the Court, though in misdemeanours this does not seem necessary (*a*). If several defendants are charged in the same indictment, they ought all to be arraigned at the same time. It is usual to arraign several prisoners immediately in succession, and then to proceed to the trial of one, the rest being put down for the time.

The indictment having been read, or its effect shortly stated, to the prisoner, the clerk of arraigns, or clerk of the peace, or other proper officer of the Court, demands of him, "How say you, John Styles, are you guilty or not guilty?" One of three courses will then be taken by the prisoner. He will either

(i) Stand mute. (ii) Confess, or say that he is guilty. (iii) Plead.

(*a*) *R.* v. *St. George*, [1840] 9 C. & P. 483.

Standing mute, that is, not answering at all, or answering irrelevantly. In former times, if, in cases of felony, this standing mute was obstinate, the sentence of *peine forte et dure* followed, and the prisoner was pressed to death (*b*); in treason and misdemeanour the standing mute was equal to a conviction. Later, in every case it had the force of a conviction (*c*). If the prisoner was dumb *ex visitatione Dei*, the trial proceeded as if he had pleaded not guilty. But now, if the prisoner stands mute of malice, or will not answer directly to the indictment or information, the Court may order the proper officer to enter a plea of not guilty on behalf of such person; and the plea so entered has the same force and effect as if the person had actually so pleaded (*d*). If it is doubtful whether the muteness be of malice or *ex visitatione Dei*, a jury of any twelve persons present may be sworn to discover this. If they find him mute of malice, 7 & 8 Geo. IV. c. 28 will apply; if mute *ex visitatione Dei*, the Court will use such means as may be sufficient to enable him to understand the charge and make his answer; and if this be found impracticable, a plea of not guilty will be entered and the trial proceed.

In the event of a doubt arising as to the sanity of a prisoner at the time of his arraignment, a jury will be sworn to ascertain the state of his mind. If they find him insane, so that he cannot plead to the indictment, it is lawful for the Court to order him to be kept in custody until His Majesty's pleasure be known (*e*). If he does not seem able to distinguish between a plea of guilty and not guilty, this is enough to justify the jury in finding him of unsound mind. So also if he has not sufficient intellect to comprehend the nature or course of proceedings, so as to make a proper defence, and challenge jurors, and the like (*f*); or if by

(*b*) v. Reeve's Hist. of Eng. Law, ii. 48, 512. The refusal to plead was usually to avoid the forfeiture which followed upon a conviction.
(*c*) 12 Geo. III. c. 20.
(*d*) 7 & 8 Geo. IV. c. 28, s. 2.
(*e*) 39 & 40 Geo. III. c. 94, s. 2.
(*f*) *R.* v. *Pritchard*, [1836] 7 C. & P. 303; *R.* v. *Berry*, [1876] 1 Q. B. D. 447; 45 L. J. M. C. 123; 13 Cox, 189.

reason of his defective faculties it is impossible to communicate to him the details of the trial (*g*).

We have noticed that no trial for felony can be had except in the presence of the prisoner (*h*). In cases of misdemeanour, after the defendant has pleaded, the trial may go on, though he is absent, as from illness (*i*). In indictments or informations for misdemeanour in the King's Bench, the accused may appear by attorney.

The trial must, as a rule, be perfectly open to the public so far as room is available for them, but it is not unusual for judges in certain cases to direct or advise women to leave the Court. In prosecutions for incest, however, all proceeding must be held *in camera* (*k*). Also in any case where a child or young person under sixteen years of age is a witness in any proceedings in relation to an offence against decency or morality, the Court may direct that all persons not being members or officers of the Court or parties to the case, or their solicitors or counsel, or persons otherwise directly concerned in the case, or the representatives of a newspaper or news agency, be excluded from the Court while the evidence of the child or young person is being taken (*l*). And no child under fourteen years of age is permitted to be in Court during the trial of any person charged with an offence, except when he is required to give evidence (*m*).

CONFESSION.

If the accused makes a simple, unqualified confession that he is guilty of the offence charged in the indictment and adheres to this confession the Court has nothing to do but

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(*g*) *R.* v. *Stafford Prison, Governor of*, [1909] 2 K. B. 81; 78 L. J. K. B. 629; where the prisoner, a deaf mute, was unable to read or write. Insanity at the time of the commission of the crime is quite another consideration, and is treated of elsewhere, v. p. 17.

(*h*) v. p. 7. But in a case where a prisoner charged with felony was so violent as to render a trial in his presence practically impossible, Wills, J., ordered him to be removed, and he was tried and convicted in his absence, *R.* v. *Berry*, [1897] 104 L. T. Jo., p. 110.

(*i*) Archbold, 169.

(*k*) 8 Edw. VII. c. 45, s. 5.

(*l*) 8 Edw. VII. c. 67, s. 114.

(*m*) 8 Edw. VII. c. 67, s. 115.

to award judgment, generally hearing the facts of the case from the prosecuting counsel, and also any statement which the prisoner or his counsel may wish to make. But the Court usually shows reluctance to accept and record such confession in cases involving capital punishment; often it advises the prisoner to retract the confession and plead not guilty to the indictment. When the prisoner has pleaded guilty, and sentence has been passed, he cannot retract his plea and plead not guilty (*n*). On the other hand, a prisoner who has pleaded not guilty may, by leave of the Court, on the advice of his counsel or otherwise, withdraw the plea and plead guilty.

By section 39 (1) of the Criminal Justice Administration Act, 1914 (*o*), when a prisoner is arraigned on indictment for any offence and can upon the indictment be convicted of some other offence, he may plead not guilty of the offence charged, but guilty of such other offence.

A free and voluntary confession by the defendant before the magistrate on the preliminary examination, if duly made and satisfactorily proved, is sufficient to warrant a conviction without further corroboration, but, of course, the whole of the confession must be taken into account, the part favourable to the prisoner as well as that against him. This confession, as also any free or voluntary confession made to any other person, is merely evidence (though if the fact of the confession be undisputed, no other evidence may be needed); and this is to be widely distinguished from the confession at the trial or plea of guilty.

In connection with this subject we must advert to the case of one of several co-defendants turning *King's evidence*. When sufficient evidence of a felony cannot be obtained from other quarters, and when it is perceived that the testimony of one of the accused would supply this defect, hope is sometimes held out to the latter that if he will give evidence so as to bring the others to justice he himself will escape punishment. The approval of the presiding Judge will have

(*n*) *R.* v. *Sell*, [1840] 9 C. & P. 346.
(*o*) 4 & 5 Geo. V. c. 58.

to be obtained (*p*). Even during the trial it sometimes happens that the counsel for the prosecution, with the consent of the Court, when such a course is necessary to secure a conviction, takes one of the defendants out of the dock and puts him in the witness-box, such prisoner obtaining a verdict of acquittal (*q*). But, as we shall see hereafter more fully, the evidence of an accomplice is to be regarded with suspicion, and requires corroboration (*r*).

MOTION TO QUASH INDICTMENT.

If an indictment is defective the defendant may move to quash it. If the defect is merely formal the motion to quash should be made before plea pleaded, and the defect may then be amended by the Court (*s*). If the defect is a substantial one, which cannot be met by amendment, as, *e.g.*, where an indictment has been found without jurisdiction, the motion to quash *may* be made after plea pleaded (*t*). If the indictment is clearly bad the Court may quash it, but if there is any doubt, especially in serious cases, the Court will refuse to quash it and will leave the defendant to his remedy by demurrer or motion in arrest of judgment (*u*).

DEMURRER.

A demurrer is an objection on the part of the defendant who admits the facts alleged in the indictment to be true, but insists that they do not in point of law amount to the crime with which he is charged. A demurrer should be made before plea, but the Court may allow a plea to be withdrawn in order that the defendant may demur (*w*). A demurrer

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(*p*) *R.* v. *Rudd*, [1775] 1 Leach, 115.
(*q*) *R.* v. *Rowland*, [1826] Ry. & M. 401.
(*r*) v. p. 376.
(*s*) See s. 5, sub-s. 1 of the Indictments Act, 1915, *ante*, p. 312.
(*t*) Archbold, 100; and see *R.* v. *Thompson*, [1914] 2 K. B. 99; 83 L. J. K. B. 643; 9 Cr. App. R. 252.
(*u*) *R.* v. *Lynch*, [1903] 1 K. B. 446; 72 L. J. K. B. 167.
(*w*) Archbold, 149.

must be written or printed and filed, and is in the following form (*x*):—

The King *v.* A.B.

Court of Trial.

A.B. says that the indictment is not sufficient in law and that he is not bound by law to answer it.

Issue is then joined by the Crown in the following form:—

The King *v.* A.B.

Court of Trial.

H.A. (the Clerk of the Court) joins issue on behalf of the King.

If judgment is given *against* the defendant in felonies the judgment is final; in misdemeanours it is final unless the Court should afterwards permit the defendant to plead over (*y*).

Demurrers in criminal cases seldom occur in practice. In cases of defects in substance apparent on the face of the indictment, generally the defendant may, instead of demurring, plead not guilty, and then, if convicted, move in arrest of judgment or appeal. Thus he has a double chance of escaping, first on the facts of the case, then on the point of law. But this course cannot be taken when the defect in the indictment is cured by verdict (*z*).

Formerly there was another kind of demurrer besides the general demurrer to which we have been referring, namely, a special demurrer, founded on some formal defect in the indictment. Such demurrers are now obsolete in view of the wide powers of amendment possessed by the Court.

(*x*) The form of all pleas, replications, and other pleadings is governed by the Indictments Act, 1915; see s. 8, sub-s. 3.

(*y*) This seems to be the state of the law as settled in *R.* v. *Faderman*, [1850] 1 Den. 569; 3 C. & K. 353; though some still contend that in felonies, after judgment against the defendant, he may still plead not guilty; v. Archbold, 150.

(*z*) v. p. 413.

PLEAS.

If the defendant neither stands mute nor confesses nor objects to the indictment, he pleads—that is, he alleges some defensive matter. The following are the names of the various pleas which may be pleaded:—

(i) Plea to the jurisdiction; (ii) special pleas in bar: (a) autrefois acquit, (b) autrefois convict, (c) pardon: (iii) general issue of not guilty.

It is not to be understood that a defendant may in turn go through the whole of these pleas, resorting to the subsequent plea as a previous one fails. The rule at common law is that not more than one plea can be pleaded to an indictment for misdemeanour or a criminal information, though the Court may allow the defendant to withdraw a special plea and plead not guilty (*a*). But in felonies, if the accused plead specially in bar, he may and, in strictness, should *at the same time* plead over to the felony—that is, plead the general issue of not guilty (*b*).

i. *Plea to the jurisdiction.*—When an indictment is taken before a Court which has no cognisance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged. This want of jurisdiction may arise either from the fact that the offence was not committed within the district of the jurisdiction—for example, if a person be indicted in Kent for stabbing a person in Sussex; or because the tribunal in question has not cognisance of that class of crimes—for example, if a person be indicted at the sessions for murder.

But this plea is very seldom resorted to, inasmuch as relief can be obtained in other ways. Thus the objection that the offence was committed out of the jurisdiction may generally be urged under the general issue, or, in certain cases, by demurrer, or by moving in arrest of judgment, or the

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(*a*) *R.* v. *Gilmore*, 15 Cox, 86.
(*b*) *R.* v. *Charlesworth*, [1861] 1 B. & S. 460; 31 L. J. M. C. 26; v. Archbold, 145, 155

defendant, if convicted, may appeal. If the objection is that the crime is not cognisable in a Court of that grade, though committed within the local jurisdiction, the defendant may demur, or have advantage of it under the general issue, or the High Court, upon the indictment being removed by *certiorari*, will quash it (*c*).

The plea to the jurisdiction must be in writing, in the following form:—

The King *v.* A.B.

Court of Trial.

A.B. says that the Court ought not to take cognisance of the indictment against him because, &c.

To this replication is made on behalf of the Crown in the same form as to a demurrer.

ii. *Special pleas in bar.*—These are termed "special" to distinguish them from the general issue; and "in bar" because they show reason why the defendant ought not to answer at all, nor put himself upon his trial for the crime alleged, and thus they are distinguished from dilatory pleas which merely raise technical objections.

All matters of excuse and justification may be given in evidence under the general issue; therefore it is hardly ever necessary to resort to a special plea in bar, except in the three cases to be examined more in detail (*d*).

(a) *Autrefois acquit.*—When a person has been charged with an offence and regularly acquitted, he cannot afterwards be indicted for the same offence, provided that the first indictment or charge were such that he could have been lawfully convicted on it (*e*). It is against the policy of the English law that a man should be put in peril more than

(*c*) Archbold, 147.

(*d*) In fact, the only other instance in which a special plea in bar seems requisite in criminal cases is where a parish or county is indicted for not repairing a road or bridge, &c., and wishes to throw the onus of repairing upon some person or persons not bound of common right to repair it, in which case they must plead specially the liability of the party to repair, and the reason of his liability, Archbold, 151. As to a plea of justification in libel, v. p. 92.

(*e*) v. *R.* v. *Miles*, [1890] 24 Q. B. D. at p. 431; 59 L. J. M. C. 56; 62 L. T. 572; 38 W. R. 334; 54 J. P. 549.

once for the same offence. And therefore if he is indicted a second time, he may plead *autrefois acquit*, and thus bar the indictment. It has sometimes not been easy to determine whether the second indictment bears such a relation to the first that the latter is a bar to the former. The test is whether the prisoner could upon the first indictment have been convicted of the offence charged in the second indictment; another way of stating the question is whether the acquittal on the first charge necessarily involves an acquittal on the second charge (*f*). An acquittal for murder may therefore be pleaded in bar of an indictment for manslaughter, and *vice versa* (*g*). So with larceny and embezzlement or obtaining by false pretences (inasmuch as upon the indictment for larceny the defendant might have been convicted of the embezzlement or obtaining by false pretences (*g*)); robbery, and assault with intent to rob; felony, and an attempt to commit the felony. But an acquittal on a charge of murder is no bar to an indictment for arson arising out of the same facts (*h*), and an acquittal for larceny is no bar to an indictment under section 7 of the Prevention of Crimes Act (*i*) for being found in a public place with intent to commit a felony, though the second indictment is tried on the same evidence as the first (*k*). An acquittal on an indictment charging him as principal will not bar an indictment charging him as an accessory before or after the fact (*l*). And an acquittal or conviction for assault would, if the person assaulted afterwards died, be no answer to a subsequent indictment for manslaughter or murder, as the charge would be based on a new fact, viz., the death of the person assaulted (*m*). Even an acquittal by a Court of

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(*f*) *R.* v. *Barron*, [1914] 2 K. B. 570; 83 L. J. K. B. 768; 10 Cr. App. R. 81; *R.* v. *Toms*, [1916] 1 K. B. 443; 85 L. J. K. B. 396; 114 L. T. 81; 80 J. P. 165; 60 S. J. 122; 32 T. L. R. 137.

(*g*) Larceny Act, 1916, s. 44, sub-ss. 2, 3.

(*h*) *R.* v. *Serné*, 107 Cent. Crim. Ct. Sess. Pap. 418.

(*i*) 34 & 35 Vict. c. 112.

(*k*) *R.* v. *Miles*, 3 Cr. App. R. 13.

(*l*) Archbold, 154.

(*m*) *R.* v. *Morris*, [1867] L. R. 1 C. C. R. 90. *R.* v. *Friel*, 17 Cox, 325.

competent jurisdiction abroad is a bar to an indictment for the same offence before any tribunal in this country (*n*).

The prisoner must satisfy the Court first, that the former indictment on which an acquittal took place was sufficient in point of law, so that he was in jeopardy upon it (*o*); an acquittal (or judgment for the defendant on demurrer) upon an insufficient indictment is therefore no bar to another indictment for the same offence (*oo*). To prove his acquittal he may obtain a certificate thereof from the officer or his deputy having custody of the records of the Court where the acquittal took place (*p*).

(b) *Autrefois convict.*—A former conviction may be pleaded in bar of a subsequent indictment for the same offence, and the same rules as in the plea of *autrefois acquit* generally apply (*q*).

This and the foregoing plea should be on paper or parchment and signed by counsel, but if it is pleaded verbally the Court will allow it to be reduced to writing afterwards (*r*).

The following is the form of the plea of *autrefois acquit* or *autrefois convict*:—

The King *v.* A.B.

Court of Trial.

A.B. says that the King ought not further to prosecute the indictment against him because he has been lawfully acquitted [or convicted] of the offence charged therein. [If the indictment be for treason or felony add also—And as to the offence of which the said A.B. now stands indicted he says that he is not guilty.]

(*n*) *R.* v. *Hutchinson*, [1784] 1 Leach, 135; *R.* v. *Aughet*, 13 Cr. App. R. 101.
(*o*) *R.* v. *Drury*, [1848] 3 C. & K. 190; 18 L. J. M. C. 189.
(*oo*) *R.* v. *Richmond*, 1 C. & K. 240.
(*p*) 14 & 15 Vict. c. 99, s. 13.
(*q*) See also pp. 173, 458, as to the effect of a certificate of dismissal, or proof of having submitted to punishment, in cases of assault and battery under 24 & 25 Vict. c. 100, ss. 44, 45. So also as to dismissal or conviction under the Summary Jurisdiction Act, v. 42 & 43 Vict. c. 49, s. 27; *R.* v. *Miles*, [1890] 24 Q. B. D. 423; 59 L. J. M. C. 56; v. *post*. p. 465.)
(*r*) Archbold, 155; *R.* v. *Chamberlain*, [1833] 6 C. & P. 93.

(c) *Pardon.*—A pardon by the Crown may be pleaded not only in bar to the indictment (as in the case of the three pleas just noticed), but also after verdict in arrest of judgment, or, after judgment, in bar of execution. But it must be pleaded as soon as the defendant has an opportunity of doing so; otherwise he will be considered to have waived the benefit of it. A pardon by statute need not, however, be pleaded at all. The subject will find a more convenient place hereafter (*s*).

iii. *The general issue of not guilty.*—When the prisoner on being charged with the offence answers *vivâ voce* at the bar "Not guilty," he is said to plead the general issue. The consequence is that he is to be tried by a jury, or, as it is frequently stated, he puts himself upon the country for trial. The plea is recorded by the proper officer of the Court, either by writing the words "*po. se.*" (*posuit se super patriam*), or at the Central Criminal Court by the word "*puts.*"

This is much the most common and advantageous course for the prisoner to take; unless, indeed, he pleads guilty, and thereby the Court is induced to take a more lenient view of his case. Pleading the general issue does not necessarily imply that the prisoner contends that he did not do the actual deed in question, inasmuch as it does not prevent him from urging matter in excuse or justification. Moreover, this is practically the only way in which he can urge matter in excuse or justification (*t*). Thus, on an indictment for murder, a man cannot plead that the killing was done in his own defence against a burglar; he must plead the general issue—not guilty—and give the special matter in evidence. The pleading of the general issue lays upon the prosecutor the task of proving every material fact alleged in the indictment or information (*u*); while the accused may give in evidence anything of a defensive character.

(*s*) v. p. 447.

(*t*) Except in case of libel, when justification must be specially pleaded, v. p. 92.

(*u*) See s. 8, sub-s. 1 of the Indictments Act, 1915, *ante*, p. 313

Issue.—When the prisoner has pleaded not guilty, the record is made up, both parties being brought to an issue, and both putting themselves upon their trial by jury. The general issue appears on the record: "*And the said John Styles forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith, that he is not guilty thereof.*" And on the part of the prosecution the *similiter* is then added: "*And John Brown* (the clerk of assize or clerk of the peace), *who prosecutes for our said Lord the King in this behalf, both the like. Therefore let a jury come,*" *&c.* (*w*).

(*w*) In actual practice the formal record is not made up unless it is required for a special purpose, although, of course, an abstract of the proceedings is always retained.

CHAPTER IX.

THE PETTY JURY.

THE only modes of trial which now remain are:—

A. Trial of Peers in the House of Lords or the Court of the Lord High Steward, of which enough has been said already.

B. Trial by jury (or by the country—*per patriam*). This is the ordinary mode of trial, and it is this with which we have now to deal, taking the various steps in their order.

When the prisoner has put himself upon the country the petty jurors are called by the clerk to answer to their names. The list which is thus called over is the panel returned by the sheriff.

The law as to the qualification of petty jurors is contained chiefly in two statutes, the Jury Act, 1826 (*a*), and the Juries Act, 1870 (*b*). The qualification of common jurors is the following: Every man between the ages of *twenty-one* and *sixty*, residing in any county in England, who has in his own name, or in trust for him, within the same county, £10 by the year above reprises (*i.e.*, deductions for annuities, rent-charges, &c.) in lands or tenements, or in rents therefrom, in fee simple, fee tail, or for life—or lands to the value of £20 a year held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives; or who, being a householder, is rated or assessed to the poor-rate or to the inhabited house duty, in Middlesex to the value of not less than £30, or in any other county not less than

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(*a*) 6 Geo. IV. c. 50. (*b*) 33 & 34 Vict. c. 77.

£20; or who occupies a house containing not less than fifteen windows—is qualified to serve on petty juries at the Royal Courts of Justice, Strand, and at the assizes, and also at both the grand and petty juries at the county sessions (*c*). Every burgess is qualified and liable to serve on the grand and petty juries at the borough Quarter Sessions (*d*).

Certain exemptions from serving on juries are enumerated by the Juries Act, 1870, and other Acts. The following are amongst those exempted: Peers, members of Parliament, Judges, clergymen and ministers of religion; those actually practising in the law as barristers, solicitors, managing clerks, &c.; officers of the Law Courts, and acting clerks of the peace or their deputies; coroners, gaolers and their subordinates, and keepers in public lunatic asylums; physicians, surgeons, apothecaries, pharmaceutical chemists actually practising; officers of the Navy, Army, militia, or yeomanry, if on full pay, and all soldiers in the regular Forces; masters of vessels employed in the buoy and light service of the corporations; the household servants of His Majesty; certain persons engaged in the Civil Service, such as officers of the Post Office, commissioners of customs, &c.: officers of the police; sheriff's officers; magistrates of the Metropolitan Police Courts, their clerks, &c.; burgesses as regards the sessions of the county in which their borough is situated; justices of the peace, so far as relates to any jury summoned to serve at any sessions of the peace, for the jurisdiction of which they are justices; officers of the Houses of Lords and Commons (*e*).

These exemptions should be claimed before the revision of the list by the justices (*f*). Aliens domiciled in England or Wales for ten years or upwards may be jurors, if otherwise qualified (*g*). Persons who have been convicted of

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(*c*) 6 Geo. IV. c. 50, s. 1.
(*d*) 45 & 46 Vict. c. 50, s. 186.
(*e*) 33 & 34 Vict. c. 77, s. 9.
(*f*) *Ibid.* s. 12.
(*g*) *Ibid.* s. 8.

any infamous crime, unless pardoned, and outlaws, are disqualified (*h*).

Jurors who have been summoned not attending, and not giving sufficient reason for their absence, may be fined. No person who was on the grand jury by which the bill was found should sit upon the petty jury by which it is tried.

The prisoner or prisoners, for usually a batch of them are brought up at the same time for this purpose, are apprised of their right to object to or *challenge* any of the jurors by the clerk of arraigns or other officer of the Court in the following or similar terms: "*Prisoners, these men that you shall now hear called are the jurors who are to pass between our sovereign lord the King and you upon your respective trials* (or, in a capital case, *upon your life and death*); *if, therefore, you, or any of you, will challenge them, or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard.*" The twelve jurors are then called by the proper officer. Challenges may be made not only on behalf of the prisoner, but also on behalf of the Crown. They are of two kinds: (a) For cause; (b) Peremptory. The former are either:—

i. To the *array*, when the exception is taken to the whole panel.

ii. To the *polls*, when particular individuals are objected to.

i. The *challenge to the array* is an objection to the whole body of jurors returned by the sheriff, not on account of their individual defects, but for some partiality or default in the sheriff or his under officer who arrayed the panel. It may be either (a) a *principal* challenge, founded on some manifest partiality, as if the sheriff be the prosecutor or person injured, or be closely connected with such person, or founded on some error on the part of the sheriff. If the cause of challenge is substantiated the Court will quash the array. (b) Challenge *for favour*, in cases where the ground of partiality is less

(*h*) *Ibid.* s. 10. As to special jurors, v. p. 356. As to the mode of preparing the jury lists and summoning the jurors, v. 6 Geo. IV. c. 50; 25 & 26 Vict. c. 107; 33 & 34 Vict. c. 77; and Archbold, 203.

apparent and direct, as when one of the parties is tenant to the sheriff, or when the sheriff has an action for debt depending against one of the parties (*i*).

The challenge to the array ought to be in writing, and must state specifically the ground of objection. The other side, prosecution or defence, may either plead to the challenge, traversing or denying its cause, or may demur to it as insufficient. If it is demurred to, the Court will decide the demurrer. If the other side pleads to the challenge, two triers are appointed by the Court to try whether the array is an impartial one. If they decide in favour of the challenge the coroner is ordered to return a fresh panel.

Though the challenge to the array be determined against the party, he may still have—

ii. A *challenge to the polls*—this is also either (a) principal; or (b) for favour.

Principal challenges may be subdivided into these—

Propter honoris respectum—where a peer or lord of Parliament is sworn on a jury for the trial of a commoner.

Propter defectum—that is, on account of some personal objection, as alienage, infancy, old age, or a want of the requisite qualification.

Propter affectum—where there is supposed to be a bias or prospect of partiality, as on account of the relationship of a juror; or where an actual partiality is manifested, or where a juror has expressed a desire or opinion as to the result of the trial.

Propter delictum—if a juror has been convicted of an infamous crime (*e.g.*, treason-felony, perjury, &c.) and has not been pardoned, or has been outlawed (*k*).

(*i*) As to challenges generally, see Archbold, 182; they are exceedingly rare in England.

(*k*) 33 & 34 Vict. c. 77, s. 10.

Challenges *for favour* are made when there is reasonable ground for suspicion (as if a fellow-servant be one party), but there is not sufficient ground for a principal challenge *propter affectum*.

The challenge to the polls is generally made orally, and must be made before the words of the oath are recited to the juror, though often the publicity of the matter is avoided by previous intimation of the objection being made to the proper officer, and in such case the juror objected to is generally not called. The validity of a principal challenge is determined by the Court itself; of a challenge for favour, by two jurors who have already been sworn. But if the challenge for favour is of one of the first two jurors, the Court appoints two indifferent "triers" to try the matter; but they are superseded as soon as two are sworn on the jury. Witnesses may be called to support or defeat the challenge, and the person objected to may also be examined, but not asked questions which tend to his discredit.

The Crown may order any number of persons called as jurors to stand by, and has not to show any cause for excluding them, until the panel has been gone through, and it appears that there will not be left enough jurors without those ordered to stand by (*l*).

So much for challenges for cause, to the number of which there is no limit, and the rules as to which are generally alike both in criminal and civil cases. But there is another kind of challenge known to the criminal law alone.

Peremptory challenge.—In *felonies* the prisoner is allowed to arbitrarily challenge, and so exclude, a certain number of jurors without showing any cause at all. He cannot claim this right in *misdemeanours;* but it is usual, on application to the proper officer, for him to abstain from calling any name objected to by the prosecution or defendant within reasonable limits; and this course has been sanctioned by the Court (*m*).

The defendant may peremptorily challenge to the number of thirty-five in treason, except in that treason which consists

(*l*) *Mansell* v. *R.*, [1857] 27 L. J. M. C. 4. (*m*) Archbold, 185.

of compassing the King's death by a direct attempt against his life or person (*n*). In such excepted case, in murder, and all other felonies, the number is limited to *twenty* (*o*). If challenges are made beyond the number allowed, those above the number are entirely void, and the trial proceeds as if no such extra challenge had been made (*p*).

The Court itself has power to amend or enlarge the panel, where such a course is necessary (*q*).

If a sufficient number of jurors do not appear, or if by means of challenges and exemptions a sufficient number of unexceptionable jurymen do not remain, the Court may order the sheriff to return a fresh panel immediately (*r*).

Except as stated below, when the jury have once been sworn they cannot leave the box without the leave of the Court, and then only in company with some officer of the Court. If, in consequence of being unable at once to come to a conclusion, they obtain leave to withdraw in order to consider their verdict, they are kept apart from every one, under the charge of an officer, who is sworn not to speak to them (except to ask them whether they have agreed), or suffer any one else to do so. By leave of the Court they may have the use of fire, when out of Court, and reasonable refreshment, procured at their own expense (*s*). Until recently, upon a trial for any felony, the jury were not allowed to separate until the trial was concluded, and if it was adjourned, they remained in the custody of the sheriff or his officer. This is still the law in cases of treason, treason-felony, or murder, but it is now provided that upon a trial for any other felony the Court may, if it see fit, at any time before the jury consider their verdict, permit them to separate in the same way as upon a trial for misdemeanour (*t*). If during the trial, before verdict is given, one of the jury dies, or is taken so ill

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(*n*) 39 & 40 Geo. III. c. 93, which provides that the offender shall be tried in the same manner as if charged with murder.
(*o*) 6 Geo. IV. c. 50, s. 29.
(*p*) 7 & 8 Geo. IV. c. 28, s. 3.
(*q*) 6 Geo. IV. c. 50, s. 20.
(*r*) Archbold, 191.
(*s*) v. 33 & 34 Vict. c. 77, s. 23.
(*t*) 60 & 61 Vict. c. 18.

that he is not able to proceed with the trial, or without permission leaves the box (*u*), the jury is discharged and a new one sworn to try the case. Of course, in such an event the remaining eleven may, and most frequently will, be in the new jury.

We have been hitherto referring to *common* juries. But as in civil, so in criminal cases, *special* juries are sometimes summoned. But this is only in misdemeanours, where the record is in the King's Bench Division, and only by permission of the Court on motion of either the prosecutor or the defendant; and there is no power in the Court to order a special jury for the trial of a person charged with felony (*w*). The party applying for a special jury must pay the extra fees and expenses, and he will not be allowed these fees on a taxation of costs unless the Court certifies that it was a proper case to be tried by a special jury. The property qualification of these jurors is higher than that of common jurors (*x*).

Another exceptional form of jury was formerly sometimes demanded: a jury *de medietate linguæ*. Formerly in cases of felony or misdemeanour, but not of treason, an alien might claim his right to be tried by a jury, half of whose number were aliens, or, at least, if not half, as many as the town or place could furnish. But this privilege was taken away by the Naturalization Act, 1870 (*y*); and now an alien is tried as if he were a natural-born subject.

(*u*) *R.* v. *Ward*, [1867] 10 Cox, 573.
(*w*) 6 Geo. IV. c. 50, s. 30.
(*x*) 33 & 34 Vict. c. 77, s. 6.
(*y*) 33 & 34 Vict. c. 14, s. 5.

CHAPTER X.

THE TRIAL.

THE full complement of jurors having been obtained, they are sworn; or, if any of them, either on conscientious grounds or as having no religious belief, object to the oath, they make the statutory declaration, or they may, if they please, take the oath with uplifted hand in the Scottish manner (*a*). The oath and mode of taking it differ slightly in felonies and in misdemeanours. In felonies, each juror takes the oath separately in the following terms: "*I swear by Almighty God that I will well and truly try, and true deliverance make, between our Sovereign lord the King and the prisoner at the bar, whom I shall have in charge, and a true verdict give according to the evidence.*" In misdemeanours, four take hold of the book at the same time, and four, or sometimes all, are sworn together. The oath is: "*I swear by Almighty God that I will well and truly try the issue joined between our Sovereign lord the King and the defendant, and a true verdict give according to the evidence.*"

After the jury are sworn, in cases of treason or felony, the crier at the assizes makes the following proclamation: "*If any one can inform my lords the King's justices, the King's attorney-general, or the King's serjeant, ere this inquest be taken between our Sovereign lord the King, and the prisoners at the bar, of any treason, murder, felony, or misdemeanour, committed or done by them, or any of them, let him come forth, and he shall be heard; for the prisoners stand at the bar upon their deliverance.*" The Clerk of the Court then having called the prisoner to the bar, says to the

(*a*) 51 & 52 Vict. c. 46.

jury: "*Gentlemen of the jury, the prisoner stands indicted by the name of John Styles, for that he on the* (reciting the substance of the indictment). *Upon this indictment he has been arraigned, and upon his arraignment he has pleaded that he is not guilty; your charge, therefore, is to enquire whether he be guilty or not guilty, and to hearken to the evidence.*" In misdemeanours the jury need not be thus charged. The counsel for the prosecution now opens the case to the jury, stating the principal facts which the prosecution intend to prove. He then calls his witnesses; who, having been sworn, are examined by him, and then subjected to cross-examination by the prisoner or his counsel. The counsel for the prosecution may re-examine on matters referred to in the cross-examination. The Court also may, at any time, interpose and ask questions of the witnesses. At the conclusion of the case for the prosecution the defendant's counsel may, if he thinks proper, submit to the Judge that there is no case for him to answer, and if the Judge is of that opinion he will direct the jury to acquit the defendant (*b*).

After the case for the prosecution is closed, it is ascertained whether the defence intend to call any witnesses. If it is intended to call for the defence the person accused as a witness but no other witness as to the facts, the defendant then gives his evidence (*c*), and then, or at the close of the evidence for the prosecution, if no evidence at all as to the facts is given for the defence, the counsel for the prosecution may, in case the prisoner is defended by counsel, but not otherwise, address the jury a second time in support of his case, for the purpose of summing up the evidence against the prisoner (*d*). He must, however, in this speech, and in his final reply if he has one, be careful to observe the rule that if the defendant has not given evidence on oath or has not called his wife as a witness, his failure to do so must

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(*b*) As to this, see further, p. 476.

(*c*) 61 & 62 Vict. c. 36, s. 2. As to the examination of the person accused and his wife, v. p. 365. Although the prisoner only gives evidence, counsel for the prosecution is permitted, in summing up his own evidence, to comment also upon that given by the prisoner, *R.* v. *Gardner*, [1899] 1 Q. B. 150; 68 L. J. Q. B. 42.

(*d*) 28 & 29 Vict. c. 18, s. 2.

not be made the subject of any comment by counsel for the prosecution (*e*). If the prisoner has witnesses whom he wishes to call, in addition to giving his own evidence, his counsel opens the case for the defence, and calls these witnesses in support thereof. They also are subject to cross-examination by the counsel for the prosecution, and re-examination by the counsel for the defence on this cross-examination. The Judge may in his discretion allow the prosecution to call witnesses to rebut or answer evidence given for the defence, but this will not usually be permitted where such witnesses could, and in fairness ought to, have been called by counsel for the prosecution before he closed his case (*f*). The counsel for the prisoner is entitled, at the close of the examination of the witnesses, to sum up his evidence (*g*).

After this address by the counsel for the defence, the counsel for the prosecution has the right of reply in cases where evidence, written or parol, has been adduced in defence. This does not, however, apply where the only witness called for the defence is the person who is upon his trial, as in such a case the prosecuting counsel has no right of reply after the prisoner's counsel has addressed the jury (*h*); moreover, where the only additional evidence called for the prisoner is as to his character, the right of reply is never exercised. If no evidence has been adduced for the prisoner other than his own evidence, the address of the counsel for the defence is the last. There is, however, one exception. In those Crown cases in which the Attorney-General or Solicitor-General is personally engaged, a reply, where no witnesses have been called for the defence, is allowed as of right to the counsel for the Crown (*i*). If two prisoners are jointly indicted for the same offence, and only one calls witnesses, the counsel for the prosecution has the

(*e*) 61 & 62 Vict. c. 36, s. 1 (b).
(*f*) *R.* v. *Crippen*, [1911] 1 K. B. 149.
(*g*) 28 & 29 Vict. c. 18, s. 2.
(*h*) 61 & 62 Vict. c. 36, s. 3.
(*i*) See the resolution of the Judges in Dec. 1884; 5 State Trials, New Series p. 3, note (*c*); Archbold, 200.

right to reply generally; but this is *summum jus*, and ought to be exercised with great forbearance, and if the offences are really separate, the prosecuting counsel can only reply on the case of the party who has called witnesses (*k*). If the prisoner is not defended by counsel, he may cross-examine the witnesses for the prosecution and examine his own witnesses; and, at the end of such examination, address the jury in his own defence, either upon oath or not, as he may prefer. And if one only of two prisoners jointly indicted is defended by counsel, the undefended one may cross-examine and examine as above, and make his statement to the jury before or after the address of the counsel for the other, as the Court thinks fit. If the prisoners jointly indicted are defended by different counsel, each counsel cross-examines, either in order of seniority at the bar, or in the order of the names of the prisoners on the indictment, the latter being the more usual course. If a prisoner defended by counsel wishes to address the jury and examine and cross-examine witnesses, he may do so; and his counsel may argue points of law, and suggest questions to him in cross-examination; but he cannot, as a matter of right, have counsel to examine and cross-examine witnesses, and reserve to himself the right of addressing the jury (*l*), otherwise than as a witness from the witness-box.

Nevertheless in some cases the prisoner, though represented by counsel, has been allowed to make a statement not upon oath (*m*), though whether he should do so before or after his counsel has addressed the jury does not appear to be well settled (*n*).

As to the practice of allowing counsel defending a prisoner to make, in his address to the jury, a statement of facts not intended to be proved, it formerly varied (*o*). But with a

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(*k*) *R.* v. *Jordan*, [1839] 9 C. & P. 118; v. also *R.* v. *Trevelli*, [1882] 15 Cox, 289; and Archbold, 223.

(*l*) *R.* v. *White*, [1811] 3 Camp. 97; 13 R. R. 765.

(*m*) *R.* v. *Manzano*, [1860] 2 F. & F. 64; *R.* v. *Doherty*, [1887] 16 Cox, 306.

(*n*) *R.* v. *Pope*, [1902] 18 T. L. R. 717; *R.* v. *Sherriff*, [1903] 20 Cox, 334; see Archbold, 196.

(*o*) *R.* v. *Weston*, [1879], 14 Cox, 346.

view to settle the practice on this point, a meeting of the Judges was held on November 26, 1881, and the following resolution was come to, viz., "That in the opinion of the Judges it is contrary to the administration and practice of the criminal law, as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence" (*p*). Whatever hardship this rule may have sometimes inflicted when prisoners were unable to give evidence on their own behalf, there can be none now that they may give such evidence in all cases.

It will simplify matters if we tabulate the steps in the various cases which may occur.

i. *The prisoner defended by counsel and adducing evidence in defence in addition to his own evidence.*

Counsel for prosecution opens his case.
Counsel for prosecution examines his witnesses, who may be then cross-examined and re-examined.
Counsel for defence opens his case.
Counsel for defence examines the prisoner (if he is called) and his other witnesses, who may be then cross-examined and re-examined.
Counsel for defence sums up his case.
Counsel for prosecution replies.

ii. *Prisoner defended by counsel, but not adducing evidence except his own evidence.*

Counsel for prosecution opens his case.
Counsel for prosecution examines his witnesses.
Prisoner (if he desires to do so) gives his evidence.
Counsel for prosecution sums up his case.
Counsel for defence addresses the jury.

(*p*) v. Archbold, 222.

iii. *Prisoner not defended by counsel, but calling witnesses.*

Counsel for prosecution opens his case.
Counsel for prosecution examines his witnesses.
Prisoner gives his own evidence (if he wishes to do so) and examines his witnesses.
Prisoner addresses the jury.
Counsel for prosecution replies.

iv. *Prisoner not defended by counsel, and not calling witnesses.*

Counsel for prosecution opens his case.
Counsel for prosecution examines his witnesses.
Prisoner gives his own evidence on oath (if he so desires) and addresses the jury.

The only other proceeding before the jury consider their verdict is the *summing-up* by the judge, or, at the sessions, by the chairman or recorder. The object of this is to explain the law as applicable to the case under trial, and to marshal the evidence so that it may be more readily understood and remembered by the jury. The Judge first states to them the substance of the charge against the prisoner; he then, if necessary, explains to them the law upon the subject; he next refers to the evidence which has been adduced in support of the charge, making occasionally such observations as may be necessary to connect the evidence, to apply it to the charge, and to render the whole plain and intelligible to the jury; he then states the defence, and the evidence given on the part of the defendant; and he usually concludes by telling the jury that, if upon considering the whole of the evidence they entertain a fair and reasonable doubt of the guilt of the prisoner, they should give the prisoner the benefit of that doubt and acquit him.

CHAPTER XI.

THE WITNESSES.

FORMERLY many classes of persons were excluded on various grounds as incompetent to give evidence, the principal objections being that the proposed witness had a personal interest in the result of the trial or was himself, by reason of his having been convicted of serious crime, unworthy of belief, or, as it was called, an "infamous" person. But these objections to the testimony of a witness now operate in another way. Instead of excluding it altogether, the objection may weaken the testimony and prevent the jury from placing ordinary credit in it; at the same time they have the opportunity of gathering therefrom as much truth as possible. Thus it has been provided by statute that no person offered as a witness shall be excluded, by reason of incapacity from *crime* or *interest*, from giving evidence (*a*). However, even now a person under sentence of death is incapable of giving evidence (*b*).

It is a general principle of English law (which must now, however, be taken with a considerable qualification) that no one is bound to criminate himself (*nemo tenetur prodere seipsum*). Upon this principle it was for a great many years and until very recently held that as a general rule an accused person and his or her wife or husband could not be examined as witnesses either for the prosecution or the defence. To this general rule a considerable number of exceptions were in recent years made by various statutes which it is now unnecessary to mention; but there were other exceptions (so

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(*a*) 6 & 7 Vict. c. 85, s. 1.
(*b*) *R.* v. *Webb*, [1867] 11 Cox, 133.

far as regarded the husband or wife) which existed at common law, and to these we shall afterwards have to refer. Although the law on this subject was revolutionised by the Criminal Evidence Act, 1898 (*c*), which enabled an accused person and his consort to give evidence, they were nevertheless not placed entirely upon the footing of ordinary witnesses, there being many special provisions with regard to their evidence and the mode in which it is to be taken which require the closest attention.

In one important respect the Criminal Evidence Act, 1898, effected no alteration in the pre-existing law. It does not (with the one exception referred to below) enable the prosecution in any criminal case to call the accused person himself as a witness. If he chooses to avail himself of his right to give evidence on his own behalf, to which we shall presently refer, he may do so, and he thereby exposes himself to be cross-examined by counsel for the prosecution, but unless he voluntarily tenders himself as a witness for the defence he cannot be put upon his oath, nor can the prosecuting counsel or the Court ask him any question whatever beyond calling upon him to plead guilty or not guilty to the indictment. The Act, indeed, expressly provides that he shall not be called as a witness except upon his own application (*d*). To this rule there is but one exception, which arises under the Evidence Act, 1877 (*e*), a statute which is not affected in any way by the Criminal Evidence Act, 1898 (*f*). The Evidence Act, 1877, provides that on the trial of any indictment or other proceeding for the non-repair of or nuisance to any public highway or bridge, or for a nuisance to a river, or of any indictment or proceeding instituted for the purpose of enforcing a civil right only, *the defendant* and the wife or husband of such defendant shall not only be admissible witnesses but shall be *compellable* to give evidence.

(*c*) 61 & 62 Vict. c. 36.
(*d*) *Ibid.* s. 1 (a).
(*e*) 40 & 41 Vict. c. 14.
(*f*) 61 & 62 Vict. c. 36, s. 6.

The provisions of the Criminal Evidence Act, 1898, are as follows:—

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence (*g*) at every stage of the proceedings (*h*), whether the person so charged is charged solely or jointly with any other person. Provided as follows:

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:

(b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution (*i*):

(c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged (*k*):

(d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged (*l*):

(*g*) *I.e.*, to give evidence on his own behalf or on behalf of a co-defendant tried jointly with him, *R.* v. *Macdonald*, 2 Cr. App. R. 322.

(*h*) Except before the grand jury, *R.* v. *Rhodes*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774.

(*i*) But the Judge may, in his discretion, comment upon such failure to give evidence, *R.* v. *Rhodes*, *supra*.

(*k*) *I.e.*, upon the application of the person charged, being the husband or wife of the witness. One of two co-defendants cannot call the husband or wife of the other, except upon the other's application. Archbold, 452.

(*l*) It should be noticed that this and the following provision are to a great extent the reverse of the rule with regard to the cross-examination of an ordinary witness, who cannot be required to answer a question the answer to which would tend to criminate him, but may be asked whether he has been convicted of any other offence; v. p. 374.

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless:—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged (*m*); or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character (*n*), or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution (*o*); or

(iii) he has given evidence against any other person charged with the same offence (*p*).

(g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness-box or other place from which the other witnesses gave their evidence:

(h) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or

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(*m*) As to cases in which evidence of other offences is admissible to show guilt of the offence charged, see pp. 219, 236.

(*n*) See p. 392.

(*o*) Where the defence is that one or more of the witnesses for the prosecution committed the offence with which the prisoner is charged, and questions are asked to show this, the nature and conduct of the defence necessarily involves imputations on the character of the witnesses for the prosecution (*R.* v. *Hudson*, [1912] 2 K. B. 465; 81 L. J. K. B. 861). In other cases the test is whether the suggestions alleged to amount to an imputation involve an attack upon the prosecutor or his witnesses upon the ground that his conduct, *outside and as distinct from the evidence given by him*, makes him an unreliable witness (*R.* v. *Preston*, [1909] 1 K. B. 568; 78 L. J. K. B. 335). Thus it is not an imputation on the character of a witness for the prosecution to say that his evidence is a lie and to call him a liar with respect to the evidence given, but it is an imputation on his character to say that he is such a horrible liar that even his brother will not believe him (*R.* v. *Rouse*, [1904] 1 K. B. 184; 73 L. J. K. B. 60; *R.* v. *Rappolt*, 6 Cr. App. R., 156).

(*p*) As to co-defendants giving evidence against each other, see p. 368.

any right of the person charged to make a statement without being sworn.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply (*q*).

4.—(1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called (*r*) as a witness either for the prosecution or defence and without the consent of the person charged.

(2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person (*s*).

(*q*) But counsel for the prosecution may sum up after the accused has given his evidence, and the accused or his counsel will then make the last address.

(*r*) That is to say, the wife or husband is a competent but not compellable witness (*R.* v. *Leach*, [1912] A. C. 305; 81 L. J. K. B. 616). The enactments mentioned in the Schedule and added thereto by subsequent statutes are :—

Vagrancy Act, 1824 (5 Geo. IV. c. 83), s. 3—neglecting to maintain or deserting wife or family.

Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), ss. 48—55, rape, indecent assault, and abduction of women or girls.

Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12 and 16—criminal proceedings against husband or wife.

Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69)—the whole Act.

Punishment of Incest Act, 1908 (8 Edw. VII. c. 45)—the whole Act.

The Children Act, 1908 (8 Edw. VII. c. 67)—Part II. of the Act and the first Schedule to the Act.

The Mental Deficiency Act, 1913 (3 & 4 Geo. V. c. 28), s. 56—unlawful connection with female defectives.

A similar provision to s. 4, sub-s. 1, is also contained (i) in the Criminal Law Amendment Act, 1912 (2 & 3 Geo. V. c. 20), s. 7, sub-s. 6, as to offences under the Vagrancy Act, 1898 (61 & 62 Vict. c. 39); (ii) in the Children (Employment Abroad) Act, 1913 (3 & 4 Geo. V. c. 7) s. 3, sub-s. 4, as to offences against the Act; and (iii) in the Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 28, sub-s. 3, as to bigamy.

(*s*) Such offences are (i) treason (perhaps); (ii) where the husband is indicted for personal injury to the wife; (iii) where the husband is indicted for forcible abduction and marriage. See Archbold, 451.

5.—(1) This Act shall apply to all criminal proceedings notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877 (*t*).

Defendants *jointly* indicted and given in charge to the jury, and being tried together, cannot be called by the prosecutor as witnesses against each other, though if one pleads guilty he may be called against the other (*u*). But, as we have seen (*w*), the course is sometimes adopted of abandoning the prosecution against one of the co-defendants, in order to make him a witness for the prosecution, and the other defendants cannot object to this (*x*). And a defendant jointly indicted with another can now give evidence on his own behalf (*y*), and if his evidence tells against his co-defendant the latter has a right to cross-examine him (*z*).

As to incompetency from want of understanding.

Generally the same rules which serve to render a person incapable of committing a crime apply to exclude a person from being a witness. Thus an idiot or a lunatic, unless in an interval of sanity, is incompetent, unless the Judge is of opinion that he is able to understand the nature and sanction of an oath, and is of sufficient intelligence to be able to give evidence (*a*). Persons deaf and dumb, or dumb only, may give evidence through an interpreter, or in writing if they are able to write (*b*).

As to children, the rule is different from that which prevails when the question is whether the child is responsible for its acts. An infant under the age of seven is incapable of committing a felony or probably any indictable offence, but at common law it is competent to give evidence at any age, if it has sufficient intelligence to understand the nature

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(*t*) v. p. 364.
(*u*) Archbold, 443, n.
(*w*) v. p. 341.
(*x*) *R.* v. *Rowland*, [1826] Ry. & M. 401.
(*y*) 61 & 62 Vict. c. 36, s. 1.
(*z*) *R. v. Hadwen*, [1902] 1 K. B. 882; 71 L. J. K. B. 581.
(*a*) *R.* v. *Hill*, [1851] 2 Den. 254; 20 L. J. M. C. 222.
(*b*) *Morrison* v. *Lennard*, [1827] 3 C. & P. 127; 2 Tayl. Ev. 985.

and obligation of an oath. It has also been provided by statute (*c*) that where in *any* proceeding against any person for an offence, any child of tender years who is tendered as a witness does not in the opinion of the Court understand the nature of an oath, the evidence of that child may be received, though not given upon oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. But such unsworn evidence must be corroborated by some other material evidence in support thereof implicating the accused (*d*). The Judge frequently, before allowing a child to be sworn, questions it as to its belief in God, knowledge of the consequences of telling a lie, &c. Juries are, however, often cautioned not to give too great weight to the evidence of young children.

As to incompetency on account of the relationship of legal adviser.

Counsel, solicitors, and their agents are not obliged, nor are they allowed without the consent of their clients, to give evidence of communications, written or parol, made to them by their clients in their professional capacity. And it is not material whether the communications were made in the case under trial or not, nor whether the client be a party to the cause. But they may be witnesses on points which do not come within the sphere of professional confidential communications—for example, to prove their client's handwriting or his identity. This privilege does not apply to a medical attendant, a conveyancer, a priest (*e*), nor indeed to any others than those mentioned above.

The privilege attaching to communications made by a person to a solicitor in his professional capacity does not

(*c*) 8 Edw. VII. c. 67, s. 30, as amended by 4 & 5 Geo. V. c. 58, s. 28, sub-s. 2.
(*d*) 8 Edw. VII. c. 67, s. 30 (a).
(*e*) But it is at least very doubtful whether a sacramental confession made to a priest is not privileged, and it is improbable that any Judge would now attempt to compel a priest to disclose statements so made to him. Best, C.J., expressly said that he would refuse to do so, though he would accept such evidence if the priest chose to make the disclosure, *Broad* v. *Pitt*, [1828] 3 C. & P. 519; see also an interesting note on this subject to *R.* v. *Hay*, [1859] 2 F. & F. 4.

extend to communications so made in furtherance of any criminal or fraudulent purpose. When upon the trial of such person the solicitor is called upon to disclose what passed between him and the accused person at the professional consultation, the Court must, upon the special facts of each particular case, judge of the admissibility of the proposed evidence. Although the fact that the consultation was held before the commission of the offence is not decisive, the Court must in each case determine, upon the facts given, or proposed to be given in evidence, whether it seems probable that the accused consulted the solicitor, not after the commission of the crime, for the legitimate purpose of being defended, but before the commission of the crime, for the purpose of being guided and helped in it (*f*).

In some cases the Court will not compel or allow the disclosure of a particular fact if such disclosure may be of detriment to the public service, and does not bear directly upon the matter in question; for example, evidence disclosing the channels through which information reaches the Government or the police (*g*).

As to a witness's want of religious belief.

Formerly a person who was wholly without religious belief could not be a witness. But now this incompetency has been done away with, and it is provided generally with regard to oaths taken for all purposes where an oath is required by law, that every person who objects to be sworn, and states as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation in the form prescribed by the Act instead of taking an oath (*h*). Nor, if an oath is taken, is the fact that the person taking it had no religious belief any objection to the validity of the

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(*f*) *R.* v. *Cox*, [1885] 14 Q. B. D., at p. 175; 54 L. J. M. C. 41.
(*g*) v. *Hardy's Case*, [1794] 24 How. St. Tr. 753; *Marks* v. *Beyfus*, [1890] 25 Q. B. D. 494.
(*h*) 51 & 52 Vict. c. 46, s. 1.

oath (*i*). Any person who, having made the affirmation provided by this statute, wilfully and corruptly gives false evidence, is liable to be indicted, and convicted as if he had taken an oath (*k*). But a witness cannot ask to affirm unless he states either that he has no religious belief, or that he has conscientious objections to take an oath as being against his religion, and if a witness objects to take the oath it is the duty of the presiding Judge to ascertain whether the form of his objection entitles him to do so (*l*).

The form of oath varies according to the creed of the witness. In an ordinary case, the witness holds the New Testament or, in the case of a Jew, the Old Testament in his uplifted hand and says or repeats after the officer of the Court, "*I swear by Almighty God that the evidence I shall give to the Court and jury sworn between our Sovereign lord the King and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth*" (*m*). Unless the witness voluntarily objects or is physically incapable of so taking the oath the officer of the Court must administer it in the above form without question (*n*). In the case of a person who is neither a Christian nor a Jew the oath is administered in any manner which is binding by his religion (*o*).

The objection to the competency of a witness should be made before he has been examined in chief, unless, of course, the incompetency appears only on examination.

If it is intended to call at the trial witnesses for the prosecution who were not examined before the magistrates, notice should always be given to the prisoner. Such evidence could not be rejected if the notice were not given, but the absence of notice is always a subject of strong comment (*p*).

(*i*) *Ibid.* s. 3.
(*k*) v. 1 & 2 Geo. V. c. 6, ss. 1, 15.
(*l*) *R.* v. *Moore*, [1892] 61 L. J. M. C. 80.
(*m*) 9 Edw. VII. c. 39.
(*n*) *Ibid.*
(*o*) *Ibid.* s. 2, sub-s. 2; v. Archbold, 460.
(*p*) *R.* v. *Greenslade*, [1870] 11 Cox, 412.

CREDIBILITY OF WITNESSES.

As we have already seen, instead of altogether excluding a witness on account of some supposed bias, the course generally adopted is to admit his evidence, allowing the circumstances causing suspicion to affect his credibility. It is for the jury to form their opinion of the credit due to a witness as on any other fact. "The credibility of a witness depends upon his knowledge of the fact he testifies, his disinterestedness, his integrity, his veracity, and his being bound to speak the truth by such an oath as he deems obligatory or by such affirmation or declaration as may by law be substituted for an oath. Proportioned to these is the degree of credit his testimony deserves from the Court and jury (*q*). It is chiefly to these points that cross-examination is directed.

As to *knowledge*.—It will be important to consider on what the witness bases his evidence; what opportunities and powers he had of observing the fact to which he testifies; what were the surrounding circumstances, whether they were such as to conduce to a correct observation; for example, whether it was light or dark and whether he was near or distant when the fact occurred, why and how his attention was directed to its occurrence.

As to *disinterestedness*.—Here should be considered the relationship of the prisoner and witness, natural or otherwise; the advantage or disadvantage that would accrue to the witness on the prisoner's conviction; prejudices, quarrels, or bias arising from any other cause (*r*).

As to *veracity*.—The chief mode in which the veracity of a witness is impeached is by showing that at some former time he has said or written, or, what is more damaging, sworn, something not agreeing with or opposed to that which he now swears. As to the manner in which he may thus be con-

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(*q*) Archbold, 457.
(*r*) As to the evidence of accomplices, v. p. 376.

fronted with his former allegations, it is provided by statute that if, on cross-examination, a witness does not admit having made an inconsistent former statement, proof may be given that he did make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement (*s*). If the statement has been in writing, or reduced into writing, as in the case of depositions, he may be cross-examined as to it without the writing being shown to him; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. But this does not prevent the Judge from inspecting and making such use of the writing as he thinks proper (*t*). It should be observed that when a witness is cross-examined as to contradictory statements made by him before the magistrates, the cross-examining party is bound by the witness's answer if he should deny having made such statements, unless the written deposition is actually put in evidence to contradict him (*u*).

As to *general character*.—It has been noticed above that a person is a competent witness although he has been convicted of a crime; but of course that fact will carry weight with the jury. To weaken the testimony of a witness, he may be cross-examined as to his delinquencies, or other witnesses may be called to prove his generally bad reputation and that they themselves would not believe him on his oath (*w*). A witness may be asked questions with regard to alleged crimes or other improper conduct; but he is not compelled to answer them if such answer would tend to expose the witness, or the husband or wife of the witness, to a criminal charge, or to a penalty or forfeiture of any kind (*x*). In

(*s*) 28 & 29 Vict. c. 18, s. 4.
(*t*) *Ibid.* s. 5.
(*u*) *R.* v. *Riley*, [1866] 4 F. & F. 964.
(*w*) *R.* v. *Brown*, [1867] L. R. 1 C. C. R. 70; 36 L. J. M. C. 59.
(*x*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 3.

order to entitle a witness to the privilege of not answering a question, as tending to criminate him, the Court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer; moreover, the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, and not a danger of an imaginary character, having reference to some barely possible contingency (*y*); but if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. But all other questions, if material to the issue, and even perhaps if they merely go to the credit of the witness, must be answered, however strongly they may reflect on the witness's character (*z*). A denial of improper conduct by the witness is conclusive, and he cannot be contradicted by calling other witnesses, unless the fact be relevant to the issue (*a*). A witness may, however, be questioned as to whether he has been *convicted* of a felony or misdemeanour, and, if he does not admit it, the cross-examining party may prove the conviction; and a certificate of the indictment and conviction for such offence, signed by the clerk of the Court, or other officer having the custody of the records of the Court where the offender was convicted, is, on proof of the identity of the person, sufficient evidence of such conviction (*b*). In order to show the general bad character of the witness, almost any question may be asked as to his past life. It is left to the discretion and good feeling of the bar not to exceed the limits required by the necessities of the case, by wantonly taking away a person's character. As has already been stated, witnesses may be called to show the general bad character of a witness. But they may not be examined as to any particular offences which are alleged

(*y*) *R.* v. *Boyes*, [1861] 30 L. J. Q. B. 301; 1 B. & S. 311.
(*z*) Archbold, 453, 458.
(*a*) *Harris* v. *Tippett*, [1811] 2 Camp. 637.
(*b*) 28 Vict. c. 18, s. 6.

against the witness. On the other hand, witnesses may be called to testify to the general good character of the witness, if that is questioned (*c*).

It must, however, be borne in mind that the observations in the above paragraph do not apply to a defendant giving evidence on his own behalf. He cannot refuse to answer any question on the ground that it would tend to criminate him as to the offence for which he is being tried, but on the other hand it is only under certain circumstances to which we have already referred (*d*) that he can be questioned as to his character or previous conviction.

NUMBER OF WITNESSES.

In all cases, both before the grand jury and at the trial, one witness for the prosecution is sufficient, with the following exceptions:—

1. In treason or misprision of treason (except in cases tried as murder) two witnesses are required, unless the prisoner confesses (*e*).

2. In perjury the accused cannot be convicted solely upon the uncorroborated evidence of one witness (*f*).

3. On a prosecution for blasphemy under 9 & 10 Wm. III. c. 35, two witnesses are necessary (*g*).

4. In offences against sections 2 & 3 of the Criminal Law Amendment Act, 1885, no person can be convicted upon the evidence of one witness, unless such evidence be corroborated in some material particular by evidence implicating the accused (*h*).

5. The same rule applies to the unsworn evidence of children, which must be similarly corroborated (*i*).

(*c*) Archbold, 458, 459.
(*d*) v. p. 366.
(*e*) v. p. 39.
(*f*) v. p. 67
(*g*) v. p. 56, and Archbold, 464.
(*h*) 48 & 49 Vict. c. 69, ss. 2, 3; v. p. 160. In rape also corroboration is required in practice, though not in law, Archbold, 464.
(*i*) v. p. 375.

It will be convenient here to notice the evidence of *accomplices*. Naturally it is viewed with suspicion, inasmuch as, on the one hand, the accomplice may hope to gain favour and leniency by assisting the prosecution; on the other hand, he will often be anxious to shield his companions. In practice, though not in strict law, it is deemed essential that the evidence of the accomplice should be corroborated in some material part by other evidence, so that the jury may be led to presume that he has spoken the truth generally (*k*). This confirmatory evidence must be unimpeachable; so that the evidence of another accomplice will not suffice (*l*). The confirmatory evidence required is some independent testimony which connects the accused with the crime—*i.e.*, which confirms not only the evidence by the accomplice that the crime was committed, but his evidence that the accused committed it (*m*). But it is not necessary that he should be corroborated in every particular provided there is a sufficient amount of confirmation to satisfy the jury (*n*). It is the duty of the Judge to warn the jury of the danger of convicting upon the uncorroborated evidence of an accomplice, though at the same time pointing out that they *may* do so if they choose (*o*). In the absence of such a warning the Court of Criminal Appeal will set aside the conviction (*p*). If there has been a proper caution the Court of Appeal will review all the facts of the case, bearing in mind that the jury heard and saw the witnesses, and will quash the conviction if the verdict is unreasonable and cannot be supported by the evidence (*q*).

How is the *attendance of witnesses* procured? In both felonies and misdemeanours the witnesses examined before the committing magistrates are usually bound over by

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(*k*) v. *R.* v. *Gallagher*, [1883] 15 Cox, at p. 318.
(*l*) *R.* v. *Noakes*, [1832] 5 C. & P. 326.
(*m*) *R.* v. *Baskerville*, [1916] 2 K. B. 658; 86 L. J. K. B. 28; 12 Cr. App. R. 81.
(*n*) *R.* v. *Gallagher*, [1883] 15 Cox, at p. 318.
(*o*) *R.* v. *Meunier*, [1894] 2 Q. B. at p. 418; *R.* v. *Stubbs*, Dears. C. C. 555; 25 L. J. M. C. 16.
(*p*) *R.* v. *Tate*, [1908] 2 K. B. 680; 77 L. J. K. B. 1043.
(*q*) *R.* v. *Baskerville*, *supra*.

recognisance by him to appear at the trial and give evidence. If they do not appear, the recognisances may be estreated and the penalty levied. All other witnesses may be compelled to attend by *subpœna*. This may be issued either at the Crown Office in London, or by the clerk of assize, or clerk of the peace at sessions. A copy of the writ is served upon the witness personally, the original writ being shown to him, and the subpœna may be served in any part of the United Kingdom (*r*).

The Merchant Shipping Act, 1894, contains a provision (*s*) by which, under certain circumstances, evidence taken abroad can be used upon a trial in England for a criminal offence. Whenever in the course of any legal proceeding the testimony of a witness is required, then, upon due proof that the witness cannot be found in the United Kingdom, any deposition that the witness may have previously made on oath relative to the same subject-matter before any magistrate in His Majesty's Dominions other than the United Kingdom, or any British Consular officer elsewhere, shall be admissible, provided that in criminal cases the deposition shall not be admissible unless it was made in the presence of the person accused, and the fact of it being made in his presence must be certified by the official before whom the deposition is made.

If a written instrument, required as evidence, is in the possession of some person, he is served with a *subpœna duces tecum*, ordering him to bring it with him to the trial. Unless he has some excuse, allowed to be valid by the Court, he must produce it at the trial. Such lawful excuses are the following: that the instrument will tend to criminate the person producing it, or, if he be a solicitor, his client, or that it is his title-deed.

In the event of the non-appearance of a witness in answer to a *subpœna*, he incurs certain penalties. If the writ has been sued out of the Crown Office, the King's Bench Division of the High Court will, upon application, grant an attachment for the contempt of Court. In other cases the

(*r*) 45 Geo. III. c. 92, ss. 3. 4.
(*s*) 57 & 58 Vict. c. 60, s. 691.

proceedings must be by way of indictment (*t*). But to render a witness subject to these penalties, he must have been served personally a reasonable time before the trial, and, if he is served in Scotland or Ireland, a sufficient sum to cover his expenses of coming and attending to give evidence and of returning must have been tendered to him at the time of service (*u*). And as regards a witness served in England, if his expenses have not been tendered, and he is so poor as not to be able to go to the place of trial, this will probably be allowed by the Court as a sufficient excuse.

If the witness is in custody, the proceedings are different. If in criminal custody, a Secretary of State, or any Judge of the King's Bench Division, may, on application by affidavit, issue a warrant or order under his hand for bringing up such person to be examined as a witness (*w*), or his attendance may be secured by a writ of *habeas corpus ad testificandum*. If in civil custody, a writ of *hab. corp. ad test.* is obtained upon application to a Judge in Chambers, founded upon an affidavit stating that the person to be brought up is a material witness. If the evidence of a person in Court is required, he is bound to give it, although he has not been subpœnaed.

A witness, whether subpœnaed or bound over by recognisance or even if attending voluntarily (*x*), either to prosecute or give evidence, is privileged from arrest whilst attending the trial on every day of the assizes or sessions until the case is tried, also for a reasonable time before and after trial whilst coming to or returning from the place of trial.

As we have seen, preventing a witness from attending or giving evidence is a contempt of Court; and intimidating a witness from giving or attempting to persuade him not to give evidence for the prosecution is a misdemeanour (*y*).

(*t*) Archbold, 468.
(*u*) 45 Geo. III. c. 92, s. 4.
(*w*) 16 & 17 Vict. c. 30, s. 9; Crown Office Rules, 1906, rr. 228, 229; 61 & 62 Vict. c. 41, s. 11.
(*x*) Archbold, 467; *Meekins* v. *Smith*, [1791] 1 H. Bl. 636.
(*y*) v. p. 82.

A Court of Assize or Quarter Sessions before which any indictable offence is prosecuted, and also a Court of summary jurisdiction by which an indictable offence is dealt with summarily, or justices before whom a charge of an indictable offence is made but is not dealt with summarily, may direct the payment of the costs of the prosecution, or the defence, or both, out of the funds of the county or county borough; these costs are, subject to the regulations of the Secretary of State (who may fix rates or scales of payment), such as appear to the Court to be reasonably sufficient to compensate the prosecutor for the expenses incurred by him in carrying on the prosecution, and to compensate any witness for the prosecution or defence (except witnesses to character only unless specially directed) for his expense, trouble, or loss of time in attending and giving evidence (*z*).

In addition to any other punishment the Court before which any person is convicted of an indictable offence may, if it think fit, order the person convicted to pay the whole or any part of the costs of the prosecution (*a*). And in certain cases—viz., where a person is *acquitted* on an indictment by a private prosecutor for the publication of a defamatory libel, or for any offence against the Corrupt Practices Prevention Act, 1854 (*b*), or for any corrupt practice under the Corrupt and Illegal Practices Prevention Act, 1883 (*c*), or on an indictment under the Merchandise Marks Acts, 1887 to 1894, or on an indictment under the Vexatious Indictments Act, 1859 (*d*), in a case where the defendant has not been committed for trial or bound by recognisance to answer the indictment—the Court before which he is acquitted may order the prosecutor to pay the whole or part of the costs of the defence (*e*). Moreover, where justices dismiss a charge of an indictable offence they may make a similar order against the prosecutor if they are of opinion that the charge was not made

(*z*) 8 Edw. VII. c. 15 (Costs in Criminal Cases Act, 1908), s. 1.
(*a*) *Ibid.* s. 6, sub-s. 1
(*b*) 17 & 18 Vict. c. 102.
(*c*) 46 & 47 Vict. c. 51.
(*d*) 22 & 23 Vict. c. 17.
(*e*) 8 Edw. VII. c. 15, s. 6, sub-s. 2.

in good faith, but if the amount of the costs so ordered to be paid exceeds £25 the prosecutor may appeal to Quarter Sessions against the order (*f*).

Similarly if a person is committed for trial and is not tried (which may be because no indictment is preferred against him or because the grand jury have refused to find a true bill), the prosecutor may be ordered to pay costs as if the defendant had been acquitted (*g*).

The Costs in Criminal Cases Act, 1908, does not apply to prosecutions for the non-repair or obstruction of any highway, public bridge, or navigable river. Costs in such cases may be allowed against the unsuccessful party as in civil proceedings (*h*).

(*f*) *Ibid.* s. 6, sub-s. 3.
(*g*) *Ibid.* s. 7.
(*h*) *Ibid.* s. 9, sub-s. 3.

CHAPTER XII.

THE EXAMINATION OF WITNESSES.

This is a subject on which, though a wide latitude is allowed to counsel, some rules may be laid down as directly authorised, others as developed in and sanctioned by practice.

We have already noticed the general course of the examination of witnesses (*a*); namely, that the witnesses for the prosecution are first examined in chief by the counsel for the prosecution, and then cross-examined by the counsel for the defence; and after the case for the prosecution has closed, then the witnesses for the defence are examined by the counsel for the defence, and cross-examined by the counsel for the prosecution; in each case the witness being re-examined by the party calling him, if it is thought desirable. It should also be remembered that the Court may at any time put such questions as it thinks fit to the witness, even after he has left the witness-box; and that if after the counsel has finished his examination or cross-examination, he thinks of some other question which ought to have been asked, that question can be put only through or by leave of the Court.

It is usual for counsel for the prosecution to call all the witnesses whose names are on the back of the indictment, even though he may not wish to ask them any question, the object being to afford the defence an opportunity to cross-examine if they so desire. In such a case the counsel for the prosecution may re-examine. Nevertheless a prosecutor is not in strictness bound to call every witness whose name is on the back of the indictment, although it

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(*a*) v. p. 361.

is usual to do so (*b*); nor can a prosecutor be compelled to give an accused person the additions and places of residence of witnesses named on the back of the indictment (*c*).

When any collusion is suspected among the witnesses, or it is thought that any of them will be influenced by what they hear from counsel and other witnesses, and indeed as a matter of course in many Courts, those witnesses who have not yet been examined are ordered to leave the Court until they are wanted, and after examination they are required to remain in Court. The Judge will do this either at his own instance or on the application of the opposite party. If the order be disobeyed, the witness may be punished as for his contempt; but, though the disobedience will be matter of remark for the jury, the Judge has no right to reject his testimony (*d*).

At the outset it will be well to ascertain the position of the counsel for the prosecution and for the defence respectively, their functions and conduct, their respective duties, and the spirit in which they should conduct them. It is needless to observe that it is not the object of the counsel for the prosecution to get a conviction at any price. It is his duty to see that the case against the prisoner is brought out in all its strength; but it is not his duty to conceal, or in any way diminish the importance of, its weak points, his function being to put forward, but with all possible candour and temperance, that part of the case which is unfavourable to the prisoner (*e*).

On the other hand, the counsel for the prisoner has before him, as his object, the acquittal of the prisoner. His duty is to act as an advocate, and not to any extent as a Judge. He has to put himself in the place of the accused, and so is not under any obligations which the accused would not be

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(*b*) *R.* v. *Simmonds*, [1823] 1 C. & P. 84; *R.* v. *Whitbread*, *ibid.* (*n.*); *R.* v. *Taylor*, *ibid.* (*n.*).

(*c*) *R.* v. *Gordon*, [1843] 12 L. J. M. C. 84; v. also Rosc. 119.

(*d*) *R.* v. *Colley*, [1829] Moo. & M. 329.

(*e*) Prosecuting counsel should regard themselves rather as ministers of justice assisting in its administration than as advocates; *R.* v. *Puddick*, 4 F. & F., at p. 499, approved in *R.* v. *Banks*, [1916] 2 K. B. 621; 12 Cr. App. R. 74.

under. Thus he is not obliged to divulge facts with which he may be acquainted which are unfavourable to the prisoner (*f*). Nevertheless he is not entitled to browbeat a witness, nor otherwise to treat him unfairly, nor to misstate the evidence to the jury.

The rules as to examination-in-chief and cross-examination respectively are *generally* the same, whether the witness be for the prosecution or the defence. They are based upon the supposition that the witness called and presented by the party examining him is favourable to his side, and therefore unfavourable to his opponent.

Examination-in-chief.—What questions may be put to a witness? In the first place, only such as are *relevant* to the matter in issue, the answers to which will tend to prove the offence or defence. Of course, if circumstantial evidence is resorted to, greater latitude will be allowed, inasmuch as it is not so easy to estimate the relevancy of the question.

The second great rule is that *leading questions* may not be asked in examination-in-chief. A leading question is one which in any way suggests to the witness the answer which the person asking requires. Thus, to ask a witness, "Had the prisoner a white hat on?" would be a leading question; but the question, "What sort of a hat had the prisoner on?" would not be, unless, indeed, the point to be proved was whether he had or had not a hat on. It is often given as a test whether a question be leading or not whether it might be answered by "Yes" or "No." But this test is by no means decisive; all questions which may be thus answered not being leading, whereas other questions than those which may be so answered may be leading. Thus the question,

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(*f*) "The counsel for the Crown may not use arguments to prove the guilt of the prisoner which he does not himself believe to be just, and he is bound to warn the jury of objections which may diminish the weight of his arguments. In short, as far as regards his own evidence, his speech should as much as possible resemble the summing-up of the Judge. The counsel for the prisoner may use arguments which he does not believe to be just. It is the business of the jury, after hearing the Judge, to say whether or not they are just."—St. Dig. Cr. Law 168 (1st edition).

"Could the prisoner hear what he said?" is not leading. Though the rule is that leading questions may not be put in examination-in-chief, there are certain exceptions, some allowed as of right, others for the sake of convenience.

(i) For the purpose of identifying persons or things which have already been described, the attention of the witness may be directly pointed to them (*g*).

(ii) When a witness is called to contradict another, who has sworn to a certain fact, he may be asked in direct terms whether that fact ever took place.

(iii) When a witness is, in the opinion of the Judge, hostile to the party calling him.

Leading questions are also not objected to—

(iv) When merely introductory, so as to save time.

(v) When the particular matter is not disputed. Thus, where a witness having deposed to a fact has not been cross-examined on it, questions may be put which assume that fact.

A third general rule is, that the evidence of the witness must relate to what is immediately *within his knowledge and recollection*. But there is one exception to this rule. In matters of science, skill, travel, &c., the evidence of experts is allowed; that is, persons who have a special knowledge of the subject in question may be called to give their opinion as to the consequences, &c., of facts already proved. For example, if the wounds of a murdered person are described, a surgeon may be asked his opinion as to whether they caused the death; but, of course, it will be for the jury to determine how far they will adopt this opinion (*h*). A witness is not allowed to read his evidence. But he is allowed to *refresh* his memory by referring to any writing made or examined by himself soon after the event to which it refers (*i*), and a skilled witness called to give evidence on some scientific question may refresh his memory by referring to professional treatises, tables, or the like.

(*g*) *R.* v. *Watson*, [1817]; Archbold, 472.
(*h*) *R.* v. *Wright*, [1821] R. & R. 456.
(*i*) Archbold, 473.

A fourth general rule is, that the *contents of a written document* cannot be proved orally if the document is capable of being produced, but must be proved by the document itself. If, however, it be shown that it is lost, destroyed, or in the possession of the prisoner, who has had notice to produce it, other evidence may be given of its contents (*k*).

Another matter to be noticed is the possible *hostility* of one's own witness. It is a rule that a counsel cannot discredit his own witness, although he may, if he can, make out his case by other and contradictory evidence; it is also, as we have seen, a rule that leading questions may not be put in examination-in-chief. But it is provided by statute (*l*) that although a party producing a witness is not allowed to impeach his credit by general evidence of bad character, he may, in case the witness, in the opinion of the Judge, proves adverse (*i.e.*, *hostile* (*m*)), contradict him by other evidence, or, by leave of the Judge, prove that at other times he has made a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

It will be remembered that a witness is not compelled to answer questions which tend to criminate himself. By several statutes, though they are obliged to answer the questions, the evidence given by witnesses is expressly declared not available against them on a criminal charge—for example, under the Corrupt Practices Prevention Act (*n*).

Cross-examination.—Inasmuch as a witness is supposed to be inclined to favour the party calling him, greater powers are given to the cross-examining counsel. He may ask leading questions (*o*), and in this way remind the witness of anything

(*k*) v. p. 405.
(*l*) 28 & 29 Vict. c. 18, s. 3.
(*m*) *Greenough* v. *Eccles*, 5 C. B. (N.S.) 786; 28 L. J. C. P. 160.
(*n*) 46 & 47 Vict. c. 51, s. 59.
(*o*) *Parkin* v. *Moon*, 7 C. & P. 408.

which may tend to help the cause of the opposite party. But if the witness proves anything favourable to the cross-examiner, the fact that the evidence was procured by leading questions may, of course, diminish its value. The counsel will not, however, be allowed to put into the witness's mouth the very words he is to echo back again (*p*). In cross-examination the questions will be of three classes: (i) those which tend directly to refute or explain what has been given in evidence in the examination-in-chief; (ii) those whose object is to affect the credit of the witness; (iii) questions put for the purpose of eliciting some fact which the cross-examining counsel wishes to be before the Court. Again, if the witness has given an account of an interview or conversation and the counsel cross-examining him intends to challenge the accuracy of what the witness has said by calling evidence to the contrary, he is always expected to put his client's detailed account of the occurrence to the witness and thus to give him an opportunity of admitting or denying it. It is not usual to cross-examine witnesses to character unless the counsel cross-examining has some distinct charge on which to cross-examine them (*q*). It is needless to add that a cross-examining counsel should avoid asking a question the answer to which, if unfavourable, would be conclusive against him. And he should remember that the story of the witness, if true, will often be confirmed the more he is questioned about it; and this although there may be slight discrepancies on immaterial points.

Re-examination.—The object of the re-examination, if it be judged expedient to have recourse to it, is to inquire into and explain what has transpired on cross-examination. But it must be strictly confined to such matter; the re-examiner may not without the leave of the Judge ask questions which he might and ought to have put on examination-in-chief.

Any further questions after re-examination must be put through the Judge, or by counsel with his permission.

(*p*) *R.* v. *Hardy*, [1794] 24 How. St. Tr. 659. 755.
(*q*) *R.* v. *Hodgkiss*, [1836] 7 C. & P. 298.

If any improper, *e.g.*, an irrelevant or leading, question be put in examination-in-chief, the counsel on the other side should immediately interpose and object to it before the witness has time to answer it, though in the case of a leading question this will often be ineffectual, inasmuch as the mischief has been done by the suggestion being made. Counsel in the same way should interpose if parol evidence is proposed to be given when a document should be produced.

CHAPTER XIII.

EVIDENCE.

"EVIDENCE, in law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any fact the truth of which is submitted to judicial investigation" (*a*).

In ascertaining the law on the subject of evidence in general, three heads present themselves under which may be ranged the chief principles which it is necessary to consider:—

1. On whom the burden of proof lies.
2. What must be proved, and what may not be proved.
3. How it must be proved.

1. The *burden of proof* is on the prosecution as a rule. The prosecution must prove their case before the prisoner is called upon for his defence; and this although the offence alleged consists of an act of omission and not of commission, and therefore the prosecution have to resort to negative evidence (*b*). The law considers a man innocent until he is shown to be guilty. But the principle under discussion must not be understood with unlimited signification. Though the burden of proof of the charge is in general on the prosecution, yet on particular points it is on the prisoner. This is markedly the case in some offences. Thus, by various Acts of Parliament, it is declared penal to do certain things, or possess certain articles, without lawful excuse or authority; such excuse or authority must be proved by the accused. For example, to possess public stores marked with the broad

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(*a*) 1 Tayl. Ev. 1.

(*b*) There is an exception to this rule when the accused pleads specially, *e.g.*, *autrefois acquit*.

arrow (*c*); to possess coining tools (*d*). Again it lies on the defendant to prove that signals to smuggling vessels were not made for the purpose of giving illegal notice (*e*), also to show some justification for sending an unseaworthy ship to sea (*f*). So where a person is charged with making or having in his possession any explosive substance, under suspicious circumstances, the onus lies on him to show that he made it or had it in his lawful possession for a lawful object (*g*). Again the onus lies on a defendant, who is accused of forging, &c., a trade mark, trade description, &c., to prove that he acted without intent to defraud (*h*); or if he be accused of selling, &c., goods, with any forged trade mark, description, &c., to prove that he took reasonable precautions and had no reason to suspect the genuineness of the mark, &c., gave the prosecutor all information in his power with respect to the persons from whom he obtained such goods, &c., or otherwise acted innocently (*i*). But it will be noticed that in all these cases there is something to be proved in the first instance by the prosecution—*e.g.*, the possession of the goods or the unseaworthiness of the ship.

And not only in the particular cases of which we have given examples, but in most cases of circumstantial evidence "there is a point (though it is impossible to determine exactly where it lies) at which the prosecutor has done all that he can reasonably be expected to do, and at which it is reasonable to ask for evidence from the prisoner in explanation, and to draw inferences unfavourable to him from its absence" (*k*). Thus in a case of murder by poisoning, the Court will naturally expect from the prisoner an explanation of the object for which poison was purchased if it is traced to his possession; so also in the case of the possession of recently stolen goods. Killing is presumed to be murder until otherwise accounted for.

(*c*) 38 & 39 Vict. c. 25.
(*d*) 24 & 25 Vict. c. 99, s. 24.
(*e*) 39 & 40 Vict. c. 36, s. 190.
(*f*) 57 & 58 Vict. c. 60, s. 457.
(*g*) 46 & 47 Vict. c. 3, s. 4 (1).
(*h*) 50 & 51 Vict. c. 28, s. 2 (1).
(*i*) *Ibid.* s. 2 (2).
(*k*) St. Dig. Cr. L. 303 (1st ed.).

2. *What must be proved?* All facts and circumstances stated in the indictment which cannot be rejected as surplusage; in other words, all the constituents of the offence. Though, as we shall see hereafter, if a more serious crime contains, as it were, a less serious one, the prisoner indicted for the former may sometimes be convicted of the latter, if the more serious circumstances cannot be established; thus on an indictment for murder if malice be not proved, the prisoner may be convicted of manslaughter. In any case, however, the offence must be proved to have been committed within the extent of the Court's jurisdiction.

Closely connected with the question "What must be proved?" is the question "What may *not* be given in evidence?" As a rule, nothing must be given in evidence which does not directly tend to prove or disprove the matter in issue. The previous or subsequent bad character of the prisoner may not be proved, unless to rebut evidence of good character (*l*). Nor may evidence be adduced to show that the prisoner has been guilty of criminal acts other than those covered by the indictment, *for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried* (*m*). But such evidence may be admissible if it is relevant to an issue before the jury, and it may be relevant to prove guilty knowledge, design, or system, or to rebut a defence set up by the prisoner (*n*), or where it relates to facts which form part of the same transaction as, and so *explain*, the facts upon which the prisoner is charged (*o*). Accordingly

(i) When it is necessary to prove the *guilty knowledge* of the defendant, evidence may sometimes be given of his having committed the same offence on other occasions. Thus, on an indictment for uttering forged banknotes, or for uttering counterfeit coin, evidence may be given of the

(*l*) v. *R.* v. *Rowton*, [1865] 34 L. J. M. C. 57; 11 L. T. (N.S.) 745.
(*m*) *Makin* v. *Att.-Gen. for New South Wales*, [1894] A. C., at p. 65; 63 L. J. P. C. 41.
(*n*) *Ibid.* and see other cases cited Archbold 342, 344. As to when such evidence may be given to rebut a defence, see in particular *R.* v. *Bond*, [1906] 2 K. B. 389.
(*o*) See Archbold, 344.

defendant having at other times uttered or had in his possession other forged banknotes or counterfeit coin (*p*). So the guilty knowledge of the falsehood of a pretence may be shown by evidence of a previous or even sometimes of a subsequent obtaining, or attempting to obtain, by similar false pretences (*q*). So also, as we have seen (*r*) the guilty knowledge of a receiver of stolen property may be proved by evidence of his possession of other stolen property or of his previous convictions.

(ii) When it is necessary to prove *malice, or intent,* on the part of the defendant, or to rebut a possible suggestion of mistake or accident, evidence of other similar acts may be given. Thus in a trial for murder, evidence of former unsuccessful attempts or threats to murder the same person, and even of the actual murder of other persons by the same means, has been admitted as being relevant to the question whether the prisoner's actions proved in the case under inquiry have been wilful or accidental (*s*). And upon this principle it is permissible to prove by other acts committed by the prisoner similar to that with which he is charged that the latter offence was part of a *systematic scheme* or course of conduct which he designedly adopted, as such evidence raises a presumption that he was not acting under a mistake or undesignedly (*t*). Evidence of this kind has been admitted in cases of obtaining by false pretences (*u*), embezzlement and falsification of accounts by servants (*w*), forgery (*x*), larceny (*y*), procuring

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(*p*) For a number of authorities as to these and similar cases, v. Archbold, 345.

(*q*) *R.* v. *Francis*, [1874] L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; v. p. 236, *ante*.

(*r*) *Ante*, p. 219.

(*s*) *R.* v. *Geering*, [1849] 18 L. J. M. C. 215; *Makin* v. *Att.-Gen. for New South Wales*, [1894] App. Cas. 57; 63 L. J. P. C. 41; *R.* v. *Bond*, [1906] 2 K. B. 389; 75 L. J. K. B. 693.

(*t*) *R.* v. *Francis*, [1874] L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; and see the cases cited above.

(*u*) v. pp. 235, 236.

(*w*) *R.* v. *Richardson*, [1860] 2 F. & F. 343; 8 Cox, C. C. 448; *R.* v. *Stephens*, [1888] 16 Cox, C. C. 387.

(*x*) *R.* v. *Millard*, [1813] R. & R. 245; *R.* v. *Salt*, [1862] 3 F. & F. 834.

(*y*) *R.* v. *Bleasdale*, [1848] 2 C. & K. 765; *R.* v. *Firth*, [1869] L. R. 1 C. C. R. 173; 38 L. J. M. C. 54.

abortion (*z*), uttering counterfeit coin (*a*), arson (*b*), and libel (*c*).

As to evidence of *good character*.—Witnesses may be called to speak generally to the good character of the prisoner, but may not give evidence of particular facts as showing such good character, unless such evidence tends directly to the disproving of some of the facts in issue. The evidence must be to the general reputation for good character, and not to the witness's own opinion. The way in which the information is elicited is by such questions as: "How long have you known the prisoner?" "During that time, what has been his general character for sobriety, honesty, and industry?"

General evidence of good character, if adduced by the defence, may be disproved by general evidence of bad character; but not by particular cases of misconduct, although if he sets up his good character, the prisoner and his witnesses may be cross-examined on the subject (*d*), and previous convictions may, as a rule, be proved in cases where the prisoner calls witnesses to prove his good character, or tries to establish a good character for himself by cross-examining the witnesses for the prosecution (*e*).

3. The *best evidence must always be given*—that is, if it is possible to be had; if not, then inferior evidence will be admitted. But before this inferior (or *secondary*) evidence is let in, the absence of the better evidence must be accounted for. By this is meant that merely substitutionary evidence—that is, such as indicates that more original sources of information exist—must not be received so long as the original evidence is obtainable.

The most common and perhaps the only application of this rule is in the case of written instruments. It is plain

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(*z*) *R.* v. *Bond*, [1906] 2 K. B. 389; 75 L. J. K. B. 693.
(*a*) *R.* v. *Wylie*, [1804] 1 B. & P. N. R. 92, 95; *R.* v. *Johnson*, [1909] 3 Cr. App. R. 168.
(*b*) *R.* v. *Gray*, [1866] A. F. & F. 1102.
(*c*) *R.* v. *Pearce*, [1791] 1 Peake, 106.
(*d*) v. p. 366.
(*e*) Archbold, 353; 6 & 7 Will. IV. c. 111; 24 & 25 Vict. c. 96, s. 116; c. 99, s. 37.

that the best evidence of the contents of a written document is the writing itself, and therefore before a copy, or parol evidence of its contents, can be received, the absence of the original instrument must be accounted for by proving that it is lost or destroyed, or that it is in the possession of the opposite party, and that he has had reasonable notice to produce it and does not do so (*f*). If once secondary evidence is admitted, any proof may be given, as there are no degrees of secondary evidence; thus, if an original deed cannot be produced, parol evidence of its contents may be given although there is an attested copy in existence (*g*). But for the sake of convenience, duly certified or examined copies may be given in evidence of all records, other than those of the Court requiring proof of them, of journals of either House of Parliament, and generally of the official documents of other Courts, and parish registers, entries in corporation books and books of public companies relating to things public and general (*h*).

To avoid the inconvenience of the production in Court of bankers' books, it has been provided that an examined copy of any entry in such a book shall be received as *prima facie* evidence of the entry and of the transaction therein recorded; but it must first be proved by a partner or officer of the bank, orally or by affidavit, that the book is one of the ordinary books of the bank and is still in its custody, that the entry was made in the usual course of business, and that the copy is a correct copy of the entry. The bank cannot be compelled to produce the original book without an order of a Judge (*i*).

Hearsay is no evidence.

This is a rule with which it is difficult to deal satisfactorily because of the different definitions which have been given of the word "hearsay" and the various views which have been taken as to the scope of the rule and the principles

(*f*) Archbold, 356.

(*g*) *Sugden* v. *Lord St. Leonards*, [1876] L. R. 1 P. D. 154; 45 L. J. P. 1; 34 L. T. 369; 24 W. R. 479.

(*h*) Archbold, 356.

(*i*) 42 & 43 Vict. c. 11. An order may be obtained under this Act for the inspection of a banking account, ss. 7, 10.

upon which exceptions to it have been admitted. Strictly speaking, hearsay is any statement made by a person, not being a witness, which is sought to be proved *as evidence of the truth of the matters stated.* The mere making of a statement is a fact, and, like other facts, may be proved as original and not hearsay evidence if it is in issue, as in a prosecution for libel or false pretences, or is relevant to the issue as being a threat or an expression of hostility. But a witness may not prove a statement, whether oral or written, and whether made by himself or by some other person, if the truth of the matters therein stated, as distinct from the mere making of the statement, is material. Apart from the cases as above mentioned, in which the making of a statement is directly in issue or relevant to the issue, it may be proved as original evidence in a number of cases, of which the following are the most important:—

(i) Where a witness has been heard at another time to say something different from his testimony in the case. Here his previous contrary statement may be proved, not as evidence of its truth, but as evidence that he has made inconsistent statements and is therefore unreliable (*k*).

(ii) In cases of rape and similar offences against women and girls, evidence that a complaint was made by the prosecutrix and *the particulars of such complaint* may, so far as they relate to the charge against the prisoner, be given in evidence by the prosecutor, not as being evidence of the fact complained of (which must first be proved) but as evidence of the consistency of the prosecutrix with the story told by her in the witness-box and as negativing consent (*l*). Such complaints, however, to be admissible, must have been made at the first opportunity after the offence which reasonably offered itself, and must have been voluntary and not elicited by questions of a leading or suggestive character. A mere question put by the mother or some other person, such as "What is the matter?" will not render the statement

(*k*) Archbold, 359. As to when such evidence may be given by the party producing the witness, v. p. 385.

(*l*) Archbold, 360; *R.* v. *Lillyman*, [1896] 2 Q. B. 167; 65 L. J. M. C. 195; but see *R.* v. *Christie*, [1914] A. C., at 553.

inadmissible, but if the question asked were "Did So-and-so" (naming the prisoner) "assault you?" "Did he do this and that to you?" then the statement ought to be rejected (*m*).

(iii) Where it accompanies and explains an act which is relevant (*n*).

(iv) Where it is part of the *res gestæ*, *i.e.*, where it is one of the facts which actually constitute the transaction which is in issue. Thus, on a charge of murder or manslaughter, a statement made by the deceased immediately after he was knocked down, as to the cause of the accident, has been held admissible (*o*). So also statements made during a quarrel in the course of which the deceased was killed are admissible. But in order to be admissible as part of the *res gestæ*, the statement must not be separated by time or circumstances from the commission of the crime in such a way as to make it a narrative of past events. So where, on a charge of murder, the deceased coming out of the house after a quarrel and after the wound had been inflicted, said "See what Harry has done for me," it was held that this was a narrative of past events and was not admissible (*p*).

(v) Where the statement is made in the presence of the person against whom it is offered as evidence (*q*).

In addition to the above there are, however, certain cases in which hearsay in the strict sense is admissible, *i.e.*, in which a statement may be proved as evidence of the truth of the matters stated. The chief of these are:—

(i) Statements as to matters of pedigree (*r*).

(ii) Statements relating to the existence of any public or general right or custom, or any matter of public or general interest (*s*).

(iii) Declarations or statements made by persons under the sensible conviction of their impending death, and who,

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(*m*) *R.* v. *Osborne*, [1905] 1 K. B. 551; 74 L. J. K. B. 311.
(*n*) *See R.* v. *Christie*, [1914] A. C. 545; 10 Cr. App. R. 141; Stephen Dig. Ev. art. 8.
(*o*) *R.* v. *Foster*, 6 C. & P. 325.
(*p*) *R.* v. *Bedingfield*, 14 Cox, 341; see also *R.* v. *Christie*, *supra*.
(*q*) See *post*, p. 400.
(*r*) Stephen Dig. Ev. art. 31.
(*s*) Stephen Dig. Ev. art. 30; Archbold, 358.

at the time, are in actual danger of death (*t*). Such declarations are admitted only when the death of the deceased is the subject of the charge (that is, in cases of murder or manslaughter), and only if the declaration refers to the injury which is the cause of death (*u*). Moreover, if the deceased has expressed at the time of making the declaration any hope of recovery, however baseless that hope may have been, the declaration is inadmissible. There must be on the part of the person making the declaration an unqualified belief in the certainty of death and the abandonment of all hope of living, or, as it has been expressed, "a settled hopeless expectation of death," and before the evidence can be admitted, this belief must be shown by the prosecution to have existed (*w*). The question whether the deceased had such a belief so as to make the declaration admissible in evidence is for the Judge and not for the jury (*x*).

(iv) Statements made by deceased persons, if against their pecuniary or proprietary interest (*y*).

(v) Statements or entries, made in the ordinary course of their duty or employment, by deceased persons, provided such statements or entries were made from their own personal knowledge, and at, or very shortly after, the time when the act occurred which is sought to be proved (*z*).

(vi) When the bodily or mental feelings of a person are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible; for example, what was said to a surgeon by a person assaulted, immediately after the assault (*a*). But such expressions are admissible only so far as they relate to the nature and effect of such

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(*t*) Archbold, 381. A declaration of this kind is admissible in a prisoner's favour, as well as against him. *R.* v. *Scaife*, [1836] 1 M. & Rob. 551.

(*u*) *R.* v. *Mead*, [1824] 2 B. & C. 605.

(*w*) *R.* v. *Jenkins*, [1869] L. R. 1 C. C. R. 187; 38 L. J. M. C. 82; *R.* v. *Mitchell*, [1892] 17 Cox, 503; *R.* v. *Perry*, [1909] 2 K. B. 697; 78 L. J. K. B. 1034.

(*x*) *R.* v. *Whitmarsh*, [1898] 62 J. P. 711.

(*y*) Archbold, 362.

(*z*) Archbold, 362.

(*a*) *Aveson* v. *Lord Kinnaird*, [1805] 6 East. 198.

feelings; they cannot be given in evidence to show how or by whom the condition was caused (*b*).

(vii) If a witness is dead or too ill to travel (or kept out of the way by the prisoner (*c*)), his deposition taken before the committing magistrate may be read, provided that such deposition was taken in the presence of the accused, and that he had an opportunity of cross-examining the witness (*d*). The death or illness of the witness whose deposition it is proposed to read, and the fact that the deposition was regularly taken in the presence of the accused person must be proved to the satisfaction of the Judge at the trial (*e*). In the same way and under the same circumstances a deposition taken before a coroner may be read at the trial of a person for murder or manslaughter (*f*).

(viii) To perpetuate the testimony which can be given by a person whose death is apprehended it is also provided that —if it appear to some justice of the peace that any person dangerously ill, and in the opinion of a registered medical practitioner not likely to recover, is able to give material information relating to an indictable offence, and it is not practicable to take his deposition in the ordinary way—the justice may take in writing the statement on oath or affirmation of the person who is ill. Having observed the formalities prescribed by the statute, such depositions are transmitted to the proper quarter.

With regard to offences against children and young persons punishable under the Children Act, 1908, and the statutes referred to in the first schedule to that Act (*g*), including all offences involving bodily injury to a child or young person, there are special provisions for enabling a justice to take

(*b*) *R.* v. *Nicholas*, 2 C. & K. 246; *R.* v. *Thomson*, [1912] 3 K. B. 19; 81 L. J. K. B. 892.

(*c*) *R.* v. *Scaife*, [1851] 2 Den. 281; 20 L. J. M. C. 229.

(*d*) 11 & 12 Vict. c. 42, s. 17. So, also, as to depositions on behalf of the accused, 30 & 31 Vict. c. 35, s. 3.

(*e*) *R.* v. *Stephenson*, [1862] 31 L. J. M. C. 147; L. & C. 165.

(*f*) *R.* v. *Cowle*, [1907] 71 J. P. 152. If the deposition contains any statement which would not be evidence if given orally, that part of the deposition must not be read to the jury.

(*g*) *I.e.*, offences under ss. 5, 42, 43, 52, 55, 56, and 62 of the Offences against the Person Act, 1861, or under the Criminal Law Amendment Act, 1885, or the Dangerous Performances Act, 1879 and 1897.

the deposition of a child or young person whose attendance in Court would involve serious danger to its life or health.

And if on the trial of the offender it is proved that the deponent is dead, or will not in all probability ever be able to travel or give evidence, or, in case of a child or young person, that its attendance at the trial would involve serious danger to its life or health, the statement may be read in evidence without further proof if it purports to be signed by the justice before whom it was taken (*i*). But it is a condition precedent to the admission in evidence of such a statement that reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused) against whom it is proposed to be read, and that such person had full opportunity (*k*), if he so wished, of cross-examining the deponent (*l*).

(ix) *Confessions*, in certain circumstances, are admitted as evidence, but when they are admissible they are received with great caution, not only from the consideration that, owing to insanity or other reason, they may be false, but also there is the danger of their not having been correctly reported. To be admissible a confession must be free and voluntary; and that it was so must be proved affirmatively by the prosecution, and if any doubt exists as to this the evidence ought to be rejected (*m*). If an objection is raised to the admissibility of such evidence on the ground that the confession was not free and voluntary, it is usual to allow the defendant's counsel to cross-examine on this point before the effect of the confession is stated. Whether a particular confession is free and voluntary is sometimes a difficult question to decide, because, although the rules to be applied are well settled, it is not easy to reconcile all their applications in the various cases upon this subject. To make a confession free and voluntary it must not have been induced by any

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(*i*) 30 & 31 Vict. c. 35, s. 6; 8 Edw. VII. c. 67, ss. 28. 29.

(*k*) *R.* v. *Mitchell*, [1892] 17 Cox, 503, where the witness became so much worse during the cross-examination that the magistrate stopped the cross-examination; the evidence was held to be inadmissible.

(*l*) *R.* v. *Shurmer*, [1886] 55 L. J. M. C. 153.

(*m*) *R.* v. *Thompson*, [1893] 2 Q. B. 12; 62 L. J. M. C. 93.

threat or promise of a temporal character, having reference to the charge against the accused person, and proceeding from a person in authority (*n*). If the inducement is merely of a moral or religious character it will not exclude the confession, and the chief difficulty is to determine whether in any particular case such words as "You had better tell the truth" were a mere moral exhortation or amounted to a promise of temporal benefit (*o*). But an inducement will not render the confession inadmissible unless it proceeds from a person in authority; the prosecutor, officers of justice, magistrates, and other persons in similar positions, are persons in authority (*p*); but not the prisoner's master, unless the crime or offence be committed against him (*q*). Again, if a confession be made after the impression produced by any inducement has been completely removed, it is admissible (*r*). A confession or admission made to a police-constable in answer to questions put by him to the prisoner before, or even after, his arrest and without any threat or inducement, is admissible (*s*). Though a confession may be inadmissible, the fact that a discovery was made in consequence of it is not (*t*).

(*n*) Archbold, 373.

(*o*) Compare, for example, *R.* v. *Jarvis*, [1867] L. R. 1 C. C. R. 96; 37 L. J. M. C. 1; *R.* v. *Rose*, [1898] 67 L. J. Q. B. 289; 118 Cox, 717; *R.* v. *Fennell*, [1881] 7 Q. B. D. 147; 50 L. J. M. C. 126; *R.* v. *Reeve*, L. R. 1 C. C. R. 362; 37 L. J. M. C. 92; *R.* v. *Thompson*, *supra*, and see Archbold, 373, 376.

(*p*) Archbold, 375.

(*q*) *R.* v. *Moore*, [1852] 2 Den. 522; 21 L. J. M. C. 199.

(*r*) *R.* v. *Clewes*, [1830] 4 C. & P. 221.

(*s*) *Rogers* v. *Hawkin*, [1898] 67 L. J. Q. B. 526; *R.* v. *Best*, [1909] 1 K. B. 692; 78 L. J. K. B. 658. Where there is evidence of an offence a police officer is justified in questioning any person, whether suspected or not, from whom he thinks that information can be obtained. But after a police officer has made up his mind to charge a person he should not question him without cautioning him that his answers may be given in evidence. But the fact that no caution has been given does not appear to render a confession inadmissible (Archbold, 379). When a person is in custody a police officer ought not to question him. Whether or not a statement obtained from a person in custody by a police officer is admissible is a question which is not yet settled as a matter of law. Logically the objection goes to the weight, not the admissibility, of the evidence. As a matter of practice a Judge may in his discretion refuse to allow the statement to be given in evidence, but if he allows proof of the statement the conviction will not be quashed unless there has been a substantial miscarriage of justice; see *Ibrahim* v. *R.*, [1914] A. C. 599; 83 L. J. P. C. 185, in which all the authorities on this point are discussed.

(*t*) *R.* v. *Gould*, [1840] 9 C. & P. 364.

Subject to exceptions made by certain statutes (*u*) any statement made by a person on oath, when being examined as a witness, may be afterwards used against him on his trial on a criminal charge, unless at the time of his examination he objected to answer the questions on the ground that the answers would tend to criminate him and yet was improperly compelled to answer them (*w*).

A confession is admissible only against the person who makes it, though of course, if the jury hear anything in it against accomplices, it will be apt to prejudice them against such co-defendants.

A statement made in the presence of the prisoner, accusing him of crime, is admissible in evidence. But it is not in itself any evidence of the facts stated; the only evidence for or against the prisoner is his behaviour in answer to the charge. It therefore creates evidence against him only (i) if it is made upon an occasion when he might reasonably be expected to make some explanation or denial, and (ii) if by his words or conduct he acknowledges the truth of all or part of the charge (*x*). The mere fact that the prisoner denies the charge does not render the statement inadmissible because his denial may be made in such a manner that the jury may nevertheless from his conduct and demeanour infer an acknowledgment, or again his denial may be inconsistent with the defence set up at the trial. The jury should, however, be told that in the absence of anything from which an acknowledgment can be inferred, they should disregard such a statement; and the Judge may in most cases rightly use his influence to prevent evidence of such statements being given when the eventual value of the prisoner's conduct is very small, either for or against him (*y*).

(*u*) v. pp. 195, 229.

(*w*) Archbold, 372. As to confessions before the committing magistrate, v. p. 299.

(*x*) *R.* v. *Norton*, [1910] 2 K. B. 496; 79 L. J. K. B. 756.

(*y*) *R.* v. *Christie*, [1914] A. C. 545; 10 Cr. App. R. 141. See also *R.* v. *Thompson*, [1910] 1 K. B. 640; 79 L. J. K. B. 321; 102 L. T. 257; 74 J. P. 176, where a statement made by one of two prisoners jointly charged, and read over to the other in the presence of both, was held admissible although the other denied its truth.

Strictly speaking, the rule against hearsay evidence applies to cross-examination as well as to examination-in-chief, though it is not so strictly applied in the former case. Moreover, questions which in examination-in-chief would be inadmissible to prove the issue may in cross-examination be admissible to test the credibility of a witness.

CIRCUMSTANTIAL AND PRESUMPTIVE EVIDENCE.

It is usual to distinguish two kinds of evidence, *Direct or Circumstantial*. By the former is meant the attestation *directly* by witnesses, things, or documents of the principal fact to be proved, or *factum probandum*, as, *e.g.*, the evidence of a person who testifies to having actually seen the commission of the act constituting the alleged crime. All other evidence is termed indirect, presumptive, or circumstantial; being evidence of facts, from which the fact of the crime may be inferred as a natural or very probable conclusion. Thus, if a witness proves that he saw the prisoner cut A.'s throat, or put his hand into B.'s pocket, draw out his purse, and run away, the evidence is direct. But if the witness proves that the prisoner was seen going to B.'s house at four o'clock, that there was no other person in the house at the time, that at 4.15 B.'s throat was found cut, and that a blood-stained knife was found concealed in the prisoner's locked box, the evidence is circumstantial.

It is sometimes difficult to compare the effect of direct and circumstantial evidence, and there is little advantage in attempting to do so. It would certainly be incorrect to say that direct is always stronger than circumstantial evidence. It may be that in the former there is not the danger involved in drawing the inferences which are incidental to the latter; but, on the other hand, in the latter more facts are generally put in evidence by a greater number of witnesses, and thereby any mistake is more likely to be exposed.

Circumstantial evidence may be either *conclusive*, when the connection between the principal and evidentiary facts is a necessary consequence of the laws of nature; as in an

alibi; or *presumptive*, when it only rests on a greater or less degree of probability. Such evidence is termed "presumptive," inasmuch as the fact to be proved is to be presumed from certain other facts.

Presumptions of fact (*facti* or *hominis*), which are inferences of fact, drawn from the existence of other facts, must be distinguished from presumptions of law, which are rules of law. The latter are:—

i. *Juris et de jure.*—Presumptions of this character are by law absolute, conclusive, and irrebuttable. No evidence is allowed to be given to the contrary; for example, that an infant under the age of seven is incapable of committing a felony; that a male under fourteen years of age is incapable of having carnal connection.

ii. *Juris.*—Presumptions which are conditional, inconclusive, and rebuttable. They only hold good until the contrary is proved. For example, a child between the ages of seven and fourteen is presumed to be incapable of committing a felony but only till it is proved that he had a mischievous discretion. Malice is presumed from the act of killing, unless its absence be shown.

So, also, there is a *prima facie* presumption that a person is innocent until he is proved to be guilty, and sane until he is proved to be insane.

WRITTEN EVIDENCE.

Written documents may be divided into three classes, differing as to the manner in which they must be given in evidence and proved:—

i. Records.
ii. Matters *quasi* of record.
iii. Written documents of a private nature.

i. *Records.*—First, as to Acts of Parliament. Public statutes do not need any proof; the Court is bound judicially

to take notice of them. And all Acts passed since February 4, 1851, are to be taken as public Acts unless the contrary be expressly provided (*z*). Private Acts must be proved by an examined copy of the Parliament roll, or by a copy purporting to be printed by the King's printers. As regards proof, general customs of the realm are on the footing of public Acts; particular customs must be proved (*a*).

As to *other Records*.—Inasmuch as the records of the various Courts are frequently required to be given in evidence, perhaps in two places at the same time, and thus inconvenience would arise, as well as the danger of destruction or loss, the production of the originals is not required. Their place is supplied by an exemplification of the record under the Great Seal (now seldom used) or an office copy, under the seal of the Court, or by an examined copy, *i.e.*, a copy sworn to be true by a person who has compared it with the original. But such last-mentioned copy will not suffice if the matter of the record forms the gist of the pleading, *e.g.*, on a plea of *autrefois acquit*. A copy of a copy will never suffice. Previous conviction may be proved in any legal proceeding by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract in the case of an indictable offence must consist of a certificate containing the substance and effect only (omitting the formal facts) of the indictment and conviction, and purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court by which such conviction was made, or by his deputy, and in case of a summary conviction consists of a copy of the conviction, purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the Court by which such conviction was made, or by the

(*z*) 13 & 14 Vict. c. 21, ss. 7, 8.
(*a*) Archbold, 391.

clerk or other officer of any Court to which such conviction has been returned. And there is no need to prove the signature or official character of the person whose signature appears (*b*). By section 28 (1) of the Criminal Justice Administration Act, 1914 (*c*), the record or extract may in case of a summary conviction consist of a copy of the minute or memorandum of the conviction entered in the register required to be kept under section 22 of the Summary Jurisdiction Act, 1879, purporting to be signed by the clerk of the Court by whom the register is kept.

ii. *Matters* quasi *of record.*—Without going into detail, it may be said generally that the proceedings, not being records, of any of the Divisions of the High Court may be proved by office or examined copies; but upon a prosecution for perjury in an affidavit, the original affidavit, if it exists, must always be produced; if it does not exist, proof of its loss and secondary evidence of its contents may be given (*d*). Proceedings in County Courts are proved by a copy of the entry in the Court book, bearing the seal of the Court, and purporting to be signed and certified as a true copy by the registrar of the Court (*e*). In the case of proceedings in other inferior Courts the proof is by producing the books in which the entry has been made, or by an examined copy. As to bankruptcy proceedings, a copy of the London *Gazette*, containing any notice of a receiving order, or of an adjudication in bankruptcy, is conclusive evidence of the order or adjudication (*f*).

iii. *Written documents of a private nature.* As to *deeds.*—As a general rule, if they are to be given in evidence, they must be produced themselves at the trial. But in case of loss or destruction, the contents may be proved by copies

(*b*) 34 & 35 Vict. c. 112, s. 18.
(*c*) 4 & 5 Geo. V. c. 58.
(*d*) *R.* v. *Milnes*, [1860] 2 F. & F. 10.
(*e*) 51 & 52 Vict. c. 43, s. 28.
(*f*) 4 & 5 Geo. V. c. 59, s. 137. See also ss. 138—144 as to the proof of other proceedings in bankruptcy.

or other secondary evidence. And so also if other written documents are lost, secondary evidence may be received, if the genuineness of the original instrument is proved at the same time, but if the document is in the possession of the opposite party he must be served with notice to produce it or evidence of its contents cannot be given (*g*). The notice to produce must be given a reasonable time before the trial, and it should be in writing.

The manner of the proof of the execution of deeds and other written instruments is the same. If the instrument is one to the validity of which attestation is requisite (*h*), it must be proved by a subscribing witness. But to this rule there are several exceptions; for example, if the witness be dead, insane, or cannot be found (*i*). But if the instrument is not one which requires attestation, even though it be actually attested, it need not be proved by the attesting witness (*k*), but may be proved by simple evidence of the party's handwriting; and a deed or will which is thirty years old is said to prove itself; that is to say, the execution of it need not be proved at all provided that it is produced from custody which affords a reasonable presumption in favour of its genuineness, and that the deed does not on the face of it appear suspicious, as, for example, by containing interlineations or erasures (*l*).

Handwriting may be proved directly by calling the writer or some person who saw him write the document in question. It may also be proved indirectly in several ways (*m*).

i. By one who has seen the party write.

ii. By one who has carried on a correspondence with the person whose writing it is desired to prove, or had other opportunities of getting acquainted with his writing.

(*g*) *R.* v. *Elworthy*, [1867] L. R. 1 C. C. R. 103; and see also, as to notice to produce, *ante*, p. 393.

(*h*) A list of these documents will be found in Tayl. Ev. (10th ed.), ss. 1110, *et seq.*

(*i*) v. Archbold, 43.

(*k*) 28 & 29 Vict. c. 18, s. 7.

(*l*) Archbold, 430.

(*m*) Archbold, 432.

iii. By comparison with documents known and admitted to be in the handwriting of the party. It is provided by statute that comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute (*n*). The witness need not be a professional expert in handwriting (*o*).

It may be useful to notice the chief points in which differences exist between the application of the rules of evidence in civil and criminal cases.

1. In the latter in some cases more than one witness is required (*p*).

2. Confessions and admissions—in criminal cases, with great caution, and only when they are free and voluntary; in civil cases unreservedly (*q*).

3. A party to a civil cause gives his evidence just as an ordinary witness, and can even be called as a witness for his opponent. A prisoner, on the other hand, cannot be called as a witness for the prosecution; and although he can now in all cases give evidence on his own behalf, there are certain special provisions which affect him as a witness (*r*).

4. The wife (or husband) of a prisoner cannot in all cases be called as a witness against him (*s*); whereas in a civil action she may always give evidence for his opponent.

5. The use in criminal cases of the depositions of witnesses prevented from attending in person (*t*); and their use to contradict the witness at the trial itself (*u*). In civil actions there is, however, the somewhat analogous process of examining aged and infirm witnesses upon commission.

(*n*) 28 & 29 Vict. c. 18, s. 8.
(*o*) *R.* v. *Silverlock*, [1894] 2 Q. B. 765; 63 L. J. M C. 233.
(*p*) v. p. 375.
(*q*) v. p. 398.
(*r*) v. pp. 365, 366.
(*s*) v. p. 365.
(*t*) v. p. 397.
(*u*) v. p. 373.

6. In cases of homicide, the dying declaration of the deceased is admitted in evidence as to the cause of death (*w*).

7. Witnesses to good character are allowed in all criminal cases, whereas in civil actions this is only permitted to contradict evidence of bad character offered by the opposite party, which evidence can only be given where the general character of the party is one of the facts in issue in the action.

The above refers only to the *admissibility* of evidence (*x*). But it must always be borne in mind that, while in civil litigation evidence may be nicely balanced, and the jury have to decide to which side the balance inclines, the evidence to be offered in support of a criminal charge must be of a much more cogent nature, and, to justify a conviction, must satisfy the jury beyond any reasonable doubt that the accused is guilty of the offence charged.

(*w*) v. p. 395.

(*x*) "The principles of the law of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials and which have acquired their force by the constant and invariable practice of Judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the criminal law as almost to have acquired the force of law." *R.* v. *Christie*, [1914] A. C., at p. 564.

CHAPTER XIV.

VERDICT AND JUDGMENT.

VERDICT.

We have already considered the province of the jury and the opportunities afforded to them for considering their verdict. In order to clear up any difficulties, they may ask the opinion of the Judge on any point which is not exclusively for their determination; or may have read over to them by the Judge any part of the evidence; or through the Judge in Court may ask any additional question of any witness. If they cannot after a reasonable time agree upon their verdict, they are discharged (*a*); the prisoner, of course, being liable to be tried again. Before finding the prisoner guilty, they must be unanimous in believing that there is no reasonable doubt of his guilt, not necessarily that there is no other possible explanation. If they do all agree on coming into Court again, if they have retired, they answer to their names. The clerk of assize, clerk of the peace, or other officer, thus addresses them: "Gentlemen, have you agreed upon your verdict? How say you, do you find John Styles guilty or not guilty?" They deliver their verdict through the foreman. In treason or felony the prisoner must be present when this is done; but not necessarily in misdemeanour.

Verdicts in criminal cases must be distinguished into:—

General—i.e., "guilty" or "not guilty" on the whole charge.

Partial—as when the jury convict on one or more counts of the indictment and acquit on the rest.

(*a*) v. p. 355 as to discharge on account of death, &c., of juror.

Special—when the facts of the case as found by the jury are stated by them, but the Court is desired to draw the legal inference from the facts—for example, whether they amount to murder or manslaughter. But in such a case, before the Judge can direct a verdict of guilty to be entered, the jury must have found all the facts necessary to constitute the offence. Where, for instance, a jury unable to agree upon a verdict of guilty or not guilty in a case of larceny stated in answer to the Judge that they believed all the evidence for the prosecution, and the Judge thereupon directed a verdict of guilty to be entered, the conviction was quashed as the jury had not found expressly that the prisoner had any *animus furandi* (*b*).

In every case the jury have a right to return either a general or a special verdict, as they may think fit (*c*). If, however, the verdict is so imperfect that no judgment can be given upon it, a new trial may be ordered (*d*).

The jury may acquit one of several defendants who are joined in the same indictment and convict the others, and *vice versa;* even though charged with jointly receiving (*e*). But in cases where to constitute the crime it is necessary that a certain number should joint in it, if so many are acquitted that less than the requisite number are left, these also must be acquitted—thus, three at least are necessary for a riot, two for a conspiracy.

Verdict of lesser offence than charged in the indictment.—At common law the prisoner may not be convicted of an offence of a different character from that charged in the indictment; he may not, *e.g.*, be convicted of felony on an indictment for misdemeanour, or *vice versa.* But he may at common law be convicted of a less aggravated felony or misdemeanour than is charged, provided that the indictment contains words apt to include both offences. Thus on an indictment for murder he may be convicted of manslaughter,

(*b*) *R.* v. *Farnborough*, [1895] 2 Q. B. 484; 64 L. J. M. C. 270.
(*c*) Archbold, 209.
(*d*) *Ibid.*; *Campbell* v. *R.*, [1848] 11 Q. B. 799; 17 L. J. M. C. 89.
(*e*) 6 & 7 Geo. V. c. 50, s. 44.

on an indictment for robbery he may be convicted of larceny, and upon an indictment for unlawful wounding he may be convicted of a common assault (*f*). The chief statutory exceptions to the common law rule are as follows:—

A person charged with felony or misdemeanour may be found guilty of an *attempt* to commit the same offence (*g*), the same consequences following as if he had been in the first instance charged with the attempt only.

Upon an indictment for a misdemeanour, if the facts given in evidence amount to a felony, the prisoner is not on that account to be acquitted of the misdemeanour, and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts unless the Court thinks fit to discharge the jury and to order the defendant to be indicted for the felony (*h*).

Upon an indictment for *robbery*, the prisoner may be found guilty of an *assault with intent* to rob (*i*).

Upon an indictment for *larceny*, the prisoner may be found guilty of *embezzlement*, and *vice versa* (*k*).

Upon an indictment for obtaining by *false pretences*, if the offence turns out to amount to *larceny* the defendant may be convicted of obtaining by false pretences, and upon an indictment for larceny he may be convicted of obtaining by false pretences (*l*).

Upon an indictment for felony (except in the cases of murder and manslaughter) alleging that the prisoner *cut, stabbed, or wounded* any person, a verdict of guilty of *unlawful wounding* may be found (*m*).

Upon an indictment charging any person with the *murder of a child*, the jury may, if they acquit of the murder, convict the prisoner of *concealment of birth* (*n*).

(*f*) Archbold, 204.
(*g*) 14 & 15 Vict. c. 100, s. 9.
(*h*) 14 & 15 Vict. c. 100, s. 12.
(*i*) 6 & 7 Geo. V. c. 50, s. 44, sub-s. 1.
(*k*) Ibid. s. 44, sub-s. 2.
(*l*) Ibid. s. 44, sub-ss. 3, 4.
(*m*) 14 & 15 Vict. c. 19, s. 5.
(*n*) 24 & 25 Vict. c. 100, s. 60.

Upon an indictment for *rape* or for any offence made felony by section 4 of the Criminal Law Amendment Act, 1885 (as to which v. p. 157), the prisoner may be convicted of the misdemeanours mentioned in sections 3, 4, or 5 of that Act, or of an indecent assault (*o*).

Upon an indictment for *rape*, the jury may acquit of rape but convict of *incest*, or attempted incest (*p*).

Upon an indictment for *incest* or attempted incest, the jury may acquit of that offence and convict the defendant of an offence against section 4 or section 5 of the Criminal Law Amendment Act, 1885 (*q*).

Upon an indictment of any person over the age of sixteen for the *manslaughter* of a child or young person under sixteen of which he has had the custody or care, the jury may find the accused guilty of one of the numerous forms of cruelty to such person (*r*).

And, as we have seen (*s*), the prisoner may always plead not guilty of the offence charged, but guilty of any other offence of which he can be convicted upon the indictment.

If the Judge is dissatisfied with the verdict he may direct the jury to reconsider it, and their subsequent verdict will stand as a true one. If, however, the jury insist upon having the first recorded it must be recorded (*t*).

When an indictment contains several counts it is often advisable to take a separate verdict on each count, in case objection should be taken to any particular count.

If a verdict of *acquittal* is returned, the prisoner is for ever free from the present accusation; and he is discharged in due course, unless there is some other charge against him. If, however, he is acquitted merely on account of some defect in the proceedings, so that the acquittal could not be pleaded in bar of another indictment for the same offence (*u*), he may be detained and indicted afresh. If the jury find that

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(*o*) 48 & 49 Vict. c. 69, s. 9.
(*p*) 8 Edw. VII. c. 45, s. 4.
(*q*) 8 Edw. c. 45, s. 4.
(*r*) 8 Edw. VII. c. 67, s. 12, sub-s. 4. v. p. 180 *et seq.*
(*s*) v. p. 341.
(*t*) Archbold, 212.
(*u*) v. p. 346.

he was insane at the time he committed the offence, whether such offence was a felony or misdemeanour (*w*), he must be kept in custody until the King's pleasure be known; and the King may order his confinement during his pleasure (*x*).

If a verdict of guilty is brought in, the accused is said to be *convicted* (*y*). The jury may annex to such a verdict a recommendation to mercy on any grounds they think proper—which recommendation will usually be taken into consideration by the Judge.

If there is a second indictment against a prisoner who has been found guilty, it is frequently not proceeded with if the charge is similar to that on which he has just been convicted. If the prisoner is acquitted, the second indictment is then proceeded with, unless it is obvious that there is no more evidence than in the first case.

If a prisoner indicted for any *crime*, *i.e.*, any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or of obtaining goods or money by false pretences, or of conspiracy to defraud, or of any misdemeanour under section 28 of the Larceny Act, 1916 (*z*), has been found guilty, then, if he has been previously convicted of any of the above crimes, he is asked whether he has been so previously convicted, the previous conviction being also alleged in the indictment. If he admits it, the Court proceeds to sentence him. But if he denies it, or will not answer, the jury are then, without being again sworn, charged to enquire concerning such previous conviction; the point to be established being the identification of the accused with the person so convicted (*a*). It must be noted that where the crime is complete in itself and a previous conviction is charged merely in order to increase the power of punishment it is charged in the indictment in a separate

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(*w*) 46 & 47 Vict. c. 38, ss. 1, 2.

(*x*) v. p. 339, as to insanity at time of trial and not of commission of offence.

(*y*) The word "conviction" is, however, not of very precise meaning, and is sometimes applied to the sentence of the Court, as well as to the verdict of the jury; see the judgment in *R.* v. *Ireland*, [1910] 1 K. B. 654, 660; 79 L. J. K. B. 338.

(*z*) v. p. 246.

(*a*) 24 & 25 Vict. c. 96, s. 116; 34 & 35 Vict. c. 112, ss. 9, 20.

count (*b*), the prisoner is in the first instance arraigned only upon the count charging the subsequent crime, and the first conviction must not be mentioned to the jury until the prisoner has pleaded guilty or been found guilty of the subsequent crime (*c*). If, however, the prisoner gives evidence of good character, the previous conviction may be proved during his trial, and in this case the jury enquire into the previous conviction and the subsequent offence at the same time (*d*). And if the prisoner is charged under s. 7 of the Prevention of Crimes Act, 1871, in which case he can be found guilty of the "offence" charged only if he has been twice previously convicted, the previous convictions are an element of the complete offence, and must be given in evidence to the jury on the trial for the subsequent offence (*e*).

After the verdict has been given it is usual for a responsible police officer to give the Court on oath the result of his enquiries as to the prisoner's antecedents, with a view to assist the Court in fixing the proper punishment (*f*).

JUDGMENT.

Before judgment, in cases of treason and felony, the prisoner is asked whether he has anything to say why the Court should not proceed to pass sentence upon him. This is called the *allocutus* and affords him an opportunity of moving the Court in *arrest of judgment*. This motion can only be grounded on some defect apparent on the face of the

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(*b*) v. p. 315.

(*c*) The same rules apply where the prisoner is charged with being a habitual criminal (8 Edw. VII. c. 59, s. 10) or a habitual drunkard (61 & 62 Vict. c. 60, s. 10); v. p. 315.

(*d*) 6 & 7 Will. IV. c. 111; see also p. 219 as to the evidence of certain previous convictions which may be proved on the trial of an indictment for receiving.

(*e*) *R.* v. *Penfold*, [1902] 1 K. B. 547; 71 L. J. K. B. 306; for form of indictment in such cases see Appendix A.

(*f*) For this purpose hearsay evidence is, in the first instance, admissible, but if the prisoner disputes the truth of the officer's statement the Judge will either disregard such statement or require it to be strictly proved, *R.* v. *Campbell*, 75 J. P. 216; 55 S. J. 273.

record, and not on any irregularity in the proceedings or on the insufficiency of the evidence. The objection must be a substantial one, such as want of sufficient certainty in the indictment as to the statement of facts, or circumstances constituting the offence. But judgment will not be arrested if the defect has been amended during the trial or is such a one as is aided by verdict. The Court itself will arrest judgment if it is satisfied that the defendant has not been found guilty of an offence in law. If judgment is arrested, the proceedings are set aside, and the prisoner is discharged. But, unlike an ordinary acquittal, the defendant may be indicted again on the same facts (*g*).

Judgment may be postponed if the Court wishes to reserve any point of law for the consideration of the Court of Criminal Appeal.

If the defendant has been found guilty of a misdemeanour in his absence (in felonies he must be present), process issues to bring him up to receive judgment; and on non-appearance he may be prosecuted to outlawry (*h*). If he has been allowed to leave the Court on entering into recognisances to come up for judgment when called upon, and he fails to come up, his recognisances will be forfeited and a warrant issued for his apprehension.

Judgment or sentence is given by the Court, the Judge adding such remarks as he thinks proper. Formerly, in all capital felonies, when the Court thought that the person convicted was a fit subject for royal mercy, it was lawful, instead of publicly giving sentence of death, to enter it on the record, the effect being the same (*i*). But now sentence of death must be *pronounced* on conviction for murder (*k*).

(*g*) Archbold, 217.
(*h*) v. p. 333.
(*i*) v. 4 Geo. IV. c. 48, s. 1.
(*k*) 24 & 25 Vict. c. 100, s. 2.

CHAPTER XV.

INCIDENTS OF TRIAL.

Some miscellaneous points connected with a criminal trial remain to be noticed, now that we have viewed the general order of proceedings.

Defence of Poor Prisoners.—It is provided by the Poor Prisoners' Defence Act, 1903 (*a*), that where it appears, having regard to the nature of the defence set up by any poor prisoner, as disclosed in the evidence given or statement made by him before the committing justices (*b*), that it is desirable in the interests of justice that he should have legal aid in his defence, and that his means are insufficient to enable him to obtain it, the committing justices or the Judge at the trial may certify that the prisoner ought to have such legal aid, and he shall thereupon have a solicitor and counsel assigned to him. In such cases the expenses of the defence and the fees of the solicitor and counsel are to be paid in the same manner as the expenses of a prosecution (*c*).

View of locus in quo *by the jury.*—The Judge may allow the jury to view the scene of the crime or other occurrence under investigation, at any time during the trial, even after the summing-up. But care should be taken that no improper communications are made at the view; and that no evidence

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(*a*) 3 Edw. VII. c. 38.

(*b*) This has been held to prevent the application of the Act unless it appears upon the depositions that the prisoner has pleaded himself to some definite line of defence when before the committing justices, v. Archbold, 171.

(*c*) 8 Edw. VII. c. 15, s. 1 (3).

is received by the jury in the absence of the Judge and the prisoner (*d*).

Withdrawal from prosecution.—Sometimes the prosecution is desirous of withdrawing from the prosecution, and if the offence is a misdemeanour more immediately affecting the individual, *e.g.*, a battery, the Court may allow the prosecution to be withdrawn; but this will probably not be the case if the offence is a felony or a misdemeanour of a more public nature (*e*).

The Attorney-General, as representing the Crown, has always the right at any time before judgment to enter a *nolle prosequi*, whether the prosecution is being carried on at the instance of a private person or not (*f*). In that case the whole of the proceedings are at an end, although the defendant is liable to be again indicted.

Restitution of goods.—In certain cases the Court has power to order goods which have been stolen or fraudulently obtained to be given up to the original owner. This power now depends upon section 45 of the Larceny Act, 1916 (*g*).

By this section it is provided that if any person guilty of a felony or misdemeanour mentioned in that Act in stealing, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property is prosecuted to conviction by or on behalf of the owner of the property and convicted thereof (*h*), the property shall be restored to the owner and the Court before whom the offender is tried shall have power to order the restitution of the property in a summary manner. But when goods as defined in the Sale of

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(*d*) *R.* v. *Martin*, [1872] L. R. 1 C. C. R. 378; 41 L. J. M. C. 113.

(*e*) *Rawlings* v. *Coal Consumers' Association*, [1873] 43 L. J. M. C. 111; *Windhill Local Board* v. *Vint*, [1890] 45 Ch. D. 351; 59 L. J. Ch. 608; and see *ante*, p. 78.

(*f*) *R.* v. *Allen*, [1862] 1 B. & S. 850; 31 L. J. M. C. 129.

(*g*) 6 & 7 Geo V. c. 50.

(*h*) This includes a summary conviction for an indictable offence (42 & 43 Vict. c. 49, s. 27). Also where a probation order is made by a Court of summary jurisdiction (*post*, p. 465) the order for the purposes of revesting stolen property and making restitution has the same effect as a conviction (7 Edw. VII. c. 17, s. 1 (4)).

Goods Act, 1893, have been obtained by fraud or other wrongful means *not amounting to larceny*, the property in such goods shall not revest in the person who was the owner of the goods or his personal representative by reason only of the conviction of the offender. And nothing in the section shall apply to any valuable security which has been in good faith paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been in good faith taken or received by transfer or delivery by some person, &c., for a just and valuable consideration without any notice or reasonable cause to suspect that the same had been stolen. On the restitution of any stolen property, if it appears to the Court by the evidence that the offender has sold the stolen property to any person who had no knowledge that it was stolen and that any money was taken from the offender on his apprehension, the Court may, on the application of the purchaser, order him to be paid out of such money a sum not exceeding the proceeds of the sale.

It is desirable to point out shortly what are the rights of an owner of goods which have been stolen from him, or obtained from him by false pretences. If they have been *stolen*, he may retake them wherever he finds them (*i*), as the goods are still his; with this exception, that, if the goods have since the theft been sold in *market overt* to a *bona fide* purchaser, the person from whom they were stolen cannot recover them from the purchaser (*k*), unless he first prosecutes the thief and obtains his conviction. If he does so obtain a conviction, the property in the goods is, by force of section 45 of the Larceny Act, 1916, revested in him and he can either apply for an order of restitution under that section or bring an action to recover possession of the

(*i*) *Blades* v. *Higgs*, [1861] 10 C. B. N. S. 713; 30 L. J. C. P. 347.

(*k*) 56 & 57 Vict. c. 71, s. 22. *Market overt* includes all markets established by grant or prescription, though probably not a market established by a local Act. Moreover, all shops in the City of London are market overt for the sale of goods usually sold in such shops. 2 Bl. 449; *Hargreaves* v. *Spink*, [1892] 1 Q. B. 25; 61 L. J. Q. B. 318; *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031; 81 L. J. K. B. 49.

goods (*l*). This, which has for many years been the law on the subject, was also previously enacted by the Larceny Act, 1861, and by the Sale of Goods Act, 1893 (*m*), which provides that where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, notwithstanding any intermediate dealing with them by sale in *market overt* or otherwise.

When, however, goods *are obtained by false pretences* the right to the goods depends upon different considerations. The original owner is still entitled, as in the case of larceny, to retake them from the person who fraudulently obtained them, or from any person who holds them on his behalf (*n*). Moreover, before the Sale of Goods Act, 1893 (*o*), if he obtained a conviction of the fraudulent person, he could have recovered them from a *bona fide* purchaser, who had bought them from him, as it was held that the effect of the provisions of the Larceny Act, 1861, was that, upon and by reason of the conviction, the property in the goods revested in the prosecutor. But this hardship upon an innocent purchaser was remedied by section 24 (2) of the Sale of Goods Act, 1893, now re-enacted by section 45 of the Larceny Act, 1916, which provided, that notwithstanding any enactment to the contrary (*p*), where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods *by reason only* of the conviction. This section, however, will not apply to cases where there never has been any contract between the prosecutor and the fraudulent person passing the property, as where the fraud consists in a representation by the latter that he is some other person to whom the prosecutor really intended to sell his goods (*q*); nor to cases where the goods have been obtained by some trick amounting to larceny. In such cases the owner

(*l*) *Scattergood* v. *Sylvester*, [1850] 15 Q. B. 506; 19 L. J. Q. B. 447.
(*m*) 56 & 57 Vict. c. 71, s. 24 (1).
(*n*) *In re Eastgate*, [1905] 1 K. B. 465; 74 L. J. K. B. 324.
(*o*) 56 & 57 Vict. c. 71, s. 24 (1).
(*p*) *i.e.*, s. 100 of the Larceny Act, 1861.
(*q*) As in *Cundy* v. *Lindsay*, [1878] L. R. 3 A. C. 459; 47 L. J. Q. B. 481.

never, in fact, parts with his property in the goods, as he does in the case of a sale even if it be brought about by fraud; he claims them, therefore, by his original title as owner and not "by reason only" of a revesting upon the conviction (*r*). It must, however, always be borne in mind that if once a real contract of sale actually existed, although it might have been induced by fraud and therefore be *voidable* at the option of the party defrauded, yet the contract was not originally *void;* and if possession of the goods is obtained under such a contract by the fraudulent person, and they are then sold or pledged with an innocent person before the contract is avoided, the original seller cannot recover them (*s*), and the fact of a conviction following will not now affect the *bona fide* purchaser's or pledgee's rights.

In cases in which there is power to order restitution, such an order can only be made against a person actually in possession of the goods at the time of the conviction. It cannot be made against a purchaser who has sold them again before the conviction, even with notice of the theft (*t*). The Court may have power in such a case to order restitution of the *proceeds* of the goods, but that power ought not to be exercised unless such proceeds are in the hands of the convicted person or his agent (*u*).

By the terms of section 45 of the Larceny Act, an order of restitution cannot be made for the delivery up of *negotiable securities* (bills, cheques, &c.) in the hands of an innocent third party. With regard to *money*, if it is found on the thief an order for restitution can be made, but if it has been paid away by the thief to an innocent person for valuable consideration *as currency*, it cannot be followed by

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(*r*) v. *R.* v. *Walker*, [1901] 65 J. P. 729.

(*s*) 56 & 57 Vict. c. 71, ss. 23, 25; v. *Payne* v. *Wilson*, [1895] 1 Q. B. 653; 64 L. J. Q. B. 328; the judgment in this case was, by consent, reversed on appeal ([1895] 2 Q. B. 537), but only on the ground that there was in law no agreement to buy. The conviction in that case was for *larceny* as a bailee, but the Court held that even a conviction for larceny would not defeat the title acquired by an innocent purchaser, under s. 9 of the Factors Act, 1889, which is in the same terms as s. 25, sub-s. 2 of the Sale of Goods Act, 1893.

(*t*) *Horwood* v. *Smith*, [1788] 2 T. R. 750.

(*u*) *R.* v. *Justices of the Central Criminal Court*, [1886] 17 Q. B. D. 598; 56 L. J. M. C. 25.

an order of restitution even if the coins can be identified. But if the coins have really been sold as curiosities (as, *e.g.*, a £5 piece) and have not been paid away as currency, the Court has jurisdiction to make an order of restitution (*w*).

It is entirely in the discretion of the Court whether it will make an order of restitution or not (*x*), and if the order be refused the prosecutor still has his remedy by action if the legal property in the goods is still vested in him (*y*). If there is a question of law as to the rights of the parties, the Court usually declines to interfere, and leaves the prosecutor to bring an action.

The Court before which a prisoner is tried has no power, as a rule, to order property not forming or connected with the subject of the indictment, although found on the prisoner, to be disposed of in a particular manner (*z*). But an exception to this is made by section 45 of the Larceny Act, 1916 (re-enacting an earlier statute (*a*)), which provides for the repayment of an innocent purchaser out of money found on the prisoner (*b*).

Where any property has come into the possession of the police in connection with any criminal charge, or has been stopped by a pawnbroker or other person under section 103 of the Larceny Act (*c*) or section 34 of the Pawnbrokers Act, 1872, a Court of summary jurisdiction may, on application by an officer of police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrates to be the owner, or, if the owner cannot be ascertained, make such order as to the property as to the Court shall seem meet (*d*).

(*w*) *Ibid.*

(*x*) *Vilmont* v. *Bentley*, [1886] 18 Q. B. D., at p. 327.

(*y*) *Scattergood* v. *Sylvester*, [1850] 15 Q. B. 506; 19 L. J. Q. B. 447.

(*z*) *R.* v. *Corporation of London*, [1858] 27 L. J. M. C. 231; E. B. & E. 509. As to the power of a Court of summary jurisdiction to order property taken from a person charged before such Court to be returned to him, v. 42 & 43 Vict. c. 49, s. 44.

(*a*) 30 & 31 Vict. c. 35, s. 9.

(*b*) *Ante*, p. 417.

(*c*) See also 6 & 7 Geo. V. c. 50, s. 41.

(*d*) 60 & 61 Vict. c. 30, s. 1.

If the stolen property has been *pawned* for not more than £10 the Court may order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment of any part thereof, as the Court, according to the conduct of the owner and the other circumstances of the case, thinks just and fit (*e*).

A Metropolitan police magistrate has also power to order delivery up of goods, under the value of £15, unlawfully detained within the limits of the Metropolitan Police District (*f*).

(*e*) 35 & 36 Vict. c. 93, s. 30. As to the Metropolis, v. 2 & 3 Vict. c. 71, ss. 27, 28. See also p. 443 as to compelling a convicted felon to make compensation to a person who has lost his property by reason of the felony; and p. 423 as to compensation under the Probation of Offenders Act, 1907.

(*f*) 2 & 3 Vict. c. 71, s. 40.

CHAPTER XVI.

PUNISHMENT.

THE object of the sentence is to prescribe the punishment. In almost every case the law, whether common law or statute law, which assigns the punishment, gives the Judge a certain latitude as to its amount. Though he is restricted as to the maximum, in almost every case he can give as little as he pleases, the minimum punishments, which were formerly provided for many felonies, having been abolished by statute (*a*). On conviction for treason or murder, however, sentence of death must be passed (*b*).

We may notice here that if the prisoner is found guilty of several distinct offences on different counts or indictments, he may be sentenced to several terms of imprisonment; which terms may be either ordered to be concurrent, as is more usually the case, or the second to commence at the expiration of the first (*c*). When a sentence for felony is passed on a person already suffering imprisonment for another crime, the Court may order the imprisonment for the subsequent offence to commence at the expiration of the former term (*d*).

It not infrequently happens that after a person has been convicted on indictment the Court is informed that there are other charges pending against him in respect of which he has not yet been indicted. If the prisoner admits these other charges, and the authorities responsible for prosecuting them consent, the Judge will usually (if the prisoner so desires)

(*a*) 9 & 10 Vict. c. 24; v. also 54 & 55 Vict. c. 69, s. 1.
(*b*) v. p. 261 for two other offences which remain capital
(*c*) *R.* v. *Castro*, [1880] 5 Q. B. D. 490.
(*d*) 7 & 8 Geo. IV. c. 28, s. 10; but v. p. 450.

take them into consideration in sentencing the prisoner for the crime for which he has been convicted (*e*), in order that upon his release from prison he may not be subject to further prosecutions.

It is provided by the Probation of Offenders Act, 1907 (*f*), that where any person is *convicted on indictment* of any offence punishable with imprisonment, the Court may, having regard to his character, antecedents, age, health, or mental condition, or to the trivial nature of the offence, or the extenuating circumstances under which it was committed, instead of sentencing him to imprisonment, make an order discharging him conditionally on his entering into a recognisance, with or without sureties, to come up for sentence if called upon within any time not exceeding three years, and to be of good behaviour.

The Court may also in such a case direct the offender to pay damages for injury or compensation for loss (not exceeding in the case of a Court of summary jurisdiction £10, unless a higher limit is fixed by any enactment relating to the offence) and reasonable costs. Payment of such damages or costs may, however, be ordered to be made by the parent or guardian of the offender (*g*).

A Court of summary jurisdiction is given similar powers by the Act and may, *without proceeding to conviction*, either (i) dismiss the information or charge *or* (ii) discharge the offender conditionally upon his entering into a recognisance as above stated (*h*).

Probation orders.—A recognisance order made under the Act may contain a condition that the offender shall be for a specified period under the supervision of some person named in the order, and may also contain such additional conditions as to residence, abstention from intoxicants, and any other matters as the Court may, having regard to the circumstances

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(*e*) See *R.* v. *McLean*, [1911] 1 K. B. 332.
(*f*) 7 Edw. VII. c. 17, s. 1, sub-s. 2.
(*g*) 8 Edw. VII. c. 67, s. 99, sub-s. 1; v. p. 428.
(*h*) *Ibid.* s. 1, sub-s. 1.

of the case, consider necessary for preventing the repetition of the offence or the commission of other offences (*i*).

Moreover, in order that some control may be maintained over persons who have entered into such recognisances, probation officers may be appointed in any petty sessional division whose duty will be to visit or receive reports from a person bound by recognisance, to see that he observes its conditions, to report to the Court as to his behaviour, and to assist him and endeavour to find him suitable employment (*k*). If he fails to observe the conditions of his recognisance he may be arrested on warrant and sentenced for his original offence (*l*).

The *punishments* which the law prescribes are the following:—

Death; Penal Servitude; Imprisonment; Fine.

Incidental to the imprisonment are sometimes

Hard Labour; Whipping.

In addition to other punishment there is power in certain cases to order that the person convicted be under police supervision for a certain time; and a person who is convicted of being an habitual criminal may be sentenced to "preventive detention."

Again, in some cases the ends of justice are attained by requiring the prisoner to enter into recognisances to come up for judgment if called upon; which generally means that if he conducts himself with propriety he will hear nothing more of the matter.

The prisoner may also be required to find sureties to keep the peace, and be of good behaviour.

Youthful offenders, under certain circumstances, may be sent to reformatories or industrial schools.

Criminal habitual drunkards may under certain circumstances be ordered to be detained in inebriate reformatories.

(*i*) 7 Edw. VII. c. 17, s. 2; 4 & 5 Geo. V. c. 58, s. 8.

(*k*) 7 Edw. VII. c. 17; an officer of an approved society whose object is the care of youthful offenders on probation may be appointed as probation officer. *Ibid.* s. 9.

(*l*) *Ibid.* s. 6.

Special provision has also been made for the expulsion from the country of aliens who have been convicted of crime.

Each of the above-named sanctions of the law will in turn receive a brief notice.

Death.—This is the only punishment which can be awarded in treason and murder. And it cannot be awarded in any other case (*m*) except piracy with violence, or the crimes of setting fire to His Majesty's vessels of war, or military or naval stores, or to ships, &c., in the Port of London (*n*).

Sentence of death cannot be pronounced or recorded against any person under sixteen years of age, but in lieu of such a sentence the Court must sentence such person to be detained during His Majesty's pleasure, and he will then be liable to be detained in such place and under such conditions as a Secretary of State may direct (*o*).

An execution for murder must take place within the walls of the prison in which the offender is confined at the time (*p*). The criminal is usually executed about three weeks after his sentence. The sentence cannot in any case be executed until after the expiration of the time, viz., ten days, within which notice of appeal, or of an application for leave to appeal, may be given; if such notice be given, the appeal or application must be heard with as much expedition as is practicable, and the sentence will not be executed until after the appeal has been heard and finally refused (*q*).

Execution is carried out by the sheriff or his deputy, thus giving effect to the sentence of the Judge. It is the usage for the Judge, at the end of the assizes, to sign the calendar containing the prisoners' names and sentences. This is left to the sheriff as his warrant and authority, and, if he receive no special order to the contrary, he executes the judgment therein contained.

(*m*) *i.e.*, by an ordinary Court of criminal jurisdiction, but as to the power of courts-martial to pronounce sentence of death in certain cases of mutiny and desertion, v. p. 48.

(*n*) As to these offences, v. p. 261. As to recording sentence, v. p. 414.

(*o*) 8 Edw. VII. c. 67, s. 103.

(*p*) 31 & 32 Vict. c. 24, s. 2.

(*q*) 7 Edw. VII. c. 23, s. 7, sub-s. 2.

Penal Servitude.—This mode of punishment was introduced in substitution for transportation beyond the seas in certain cases by 16 & 17 Vict. c. 99, and totally superseded the sentence of transportation by 20 & 21 Vict. c. 3. It was placed generally on the same footing as the latter punishment: thus, any person who might formerly have been sentenced to transportation is now liable to be kept in penal servitude for the same period; and any person who might have been sentenced either to transportation or imprisonment may now be sentenced either to penal servitude or imprisonment, but in cases where before the Act sentence of seven years' transportation might have been passed, the Court may now pass sentence of not less than three years' penal servitude (*r*).

Persons sentenced to penal servitude may, however, still be confined in any prison in the United Kingdom, or in His Majesty's Dominions beyond the seas, as a Secretary of State may direct (*s*).

Penal servitude cannot be imposed except by statute. Where no term is fixed by a particular statute the following rules apply (*t*):—

(i) Where under any enactment in force on August 5, 1891, an offence is merely declared to be felony and no punishment is specially provided, the maximum sentence is seven years' penal servitude.

(ii) Where under any such enactment an offence is declared to be punishable with penal servitude, the maximum sentence is five years' penal servitude, unless a greater period is authorised by the enactment.

(iii) The minimum sentence of penal servitude is three years.

Penal servitude for life may be awarded whenever a person is convicted of *any felony* (not punishable with death and

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(*r*) 20 & 21 Vict. c. 3, s. 2; 54 & 55 Vict. c. 69, s. 1.

(*s*) 16 & 17 Vict. c. 99, s. 6; 20 & 21 Vict. c. 3, s. 3; the powers given by these sections are not, however, exercised.

(*t*) 7 & 8 Geo. IV. c. 28, ss. 8, 11; 20 & 21 Vict. c. 3, s. 2; 54 & 55 Vict. c. 69, s. 1, sub-s. 1. The provisions of the last-named Act must be read into any provisions of the Criminal Law Consolidation Acts, 1861. See also Archbold, 230.

not being simple larceny) after a previous conviction for felony (*u*).

A child or young person under sixteen cannot be sent to penal servitude for any offence (*w*).

Imprisonment.—Imprisonment or fine or both was the common law punishment for misdemeanours. At common law there was no limit to the term which might be inflicted. With regard to statutory offences, the usual term is two years, and *wherever penal servitude may be awarded*, the Court may, unless some Act passed after 1891 otherwise provides, instead of penal servitude award punishment for any term not exceeding two years, *with or without hard labour* (*x*).

Imprisonment *without hard labour* may be awarded for any common law misdemeanour or for any statutory misdemeanour for which no specific punishment is prescribed.

A child under fourteen cannot be sentenced to imprisonment for any offence or committed to prison in default of payment of a fine, damages, or costs (*y*), nor can a young person between the ages of fourteen and sixteen unless the Court certifies that he is of so unruly a character that he cannot be detained in a place of detention provided under the Children Act, 1908, or that he is of so depraved a character that he is not a fit person to be so detained (*z*).

Imprisonment *with hard labour* can be imposed only by statutory authority, *e.g.*, under 54 & 55 Vict. c. 69, s. 1 (2) or the statute dealing with the offence. But whenever a person convicted by any Court of an offence is sentenced to imprisonment without the option of a fine, the imprisonment

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(*u*) As to penal servitude for life for coinage offences after previous convictions, v. *ante*, p. 51. As to the amount of penal servitude for larceny after previous convictions, v. *ante*, p. 210.

(*w*) 8 Edw. VII. c. 67, s. 102. As to the punishment of children, v. p. 435.

(*x*) 54 & 55 Vict. c. 69, s. 1, sub-s. 1. This section does not as a matter of law apply to offences for which penal servitude could *not* be awarded and for which a longer imprisonment is authorised by statute. There are, however, very few of such offences, and in practice two years is the maximum term of imprisonment.

(*y*) 8 Edw. VII. c. 67, s. 102.

(*z*) 8 Edw. VII. c. 67, s. 102. As to punishment of young persons, see *post*, p. 435.

may be either with or without hard labour, notwithstanding that the offence is an offence at common law or that the statute under which the sentence is passed does not authorise the imposition of hard labour or requires the imposition of hard labour. The only exception to this is where the imprisonment is for non-payment of a sum of money adjudged to be paid, when it must be *without* hard labour (*a*).

Fines.—A fine is never inflicted for a felony without statutory authority (*b*). But at common law it may be inflicted as the whole or part of the punishment for a misdemeanour, and there is no limit to its amount except the provisions of Magna Charta and the Bill of Rights against excessive fines. A discretionary power to fine in addition to or in lieu of other punishment is given in each of the Criminal Law Consolidation Acts and in the Forgery Act, 1913 (*c*) and the Larceny Act, 1916 (*d*).

Where a child or young person under sixteen years of age is charged before any Court with an offence which the Court thinks may best be met by the imposition of a fine, damages, or costs, the Court may in any case, and must if the defendant is a child under *fourteen*, order that the fine, damages, or costs be paid by the parent or guardian of the child unless it is satisfied that the parent or guardian cannot be found or that he did not conduce to the commission of the offence by neglecting to exercise due care of the child, and such an order may even be made without convicting the defendant if the Court thinks that the charge is proved. The parent or guardian may also be ordered to give security for the good behaviour of the offender (*e*).

Whipping.—No person can be whipped otherwise than under a statutory enactment and no person can be whipped

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(*a*) 4 & 5 Geo. V. c. 58, s. 16.

(*b*) As, *e.g.*, for manslaughter (24 & 25 Vict. c. 100, s. 5, and under the Probation of Offenders Act, 1907 (v. p. 423).

(*c*) 3 & 4 Geo. V. c. 27, s. 12, sub-s. 2 (a).

(*d*) 6 & 7 Geo. V. c. 50, s. 37, sub-s. 5 (a).

(*e*) 8 Edw. VII. c. 67, s. 99. The parent or guardian has a right of appeal to the Court of Criminal Appeal or to Quarter Sessions as the case may be, *ibid.*

more than once for the same offence (*f*). Two classes of cases in which whipping is allowed must be distinguished: (i) of males below the age of sixteen; (ii) of males of any age. A female can now in no case be whipped, though at one time such a sentence was a common one.

i. Males under sixteen may be whipped under several sections of the Larceny Act, 1916, the Malicious Damage Act, 1861, the Offences Against the Person Act, 1861, and section 4 of the Criminal Law Amendment Act, 1885. The number of strokes and the instrument with which they are to be inflicted must be specified by the Court in the sentence (*g*).

ii. Males of any age may be whipped under a number of statutory provisions, of which the most important are those contained in

Section 23 (1) of the Larceny Act, 1916—Robbery, Assault with intent to rob, &c. (v. p. 227).

Section 21 of the Offences against the Person Act, 1861—Attempting to choke, suffocate, &c., with intent to commit an indictable offence (v. p. 175). In this and the preceding case the number of strokes, &c., must be specified: if the offender is not over sixteen the number of strokes must not exceed 25 and the instrument must be a birch rod; in other cases the number of strokes must not exceed 50.

Section 3 of the Criminal Law Amendment Act, 1912—providing that whipping may be awarded for offences against section 2 of the Criminal Law Amendment Act, 1885—Procuration (v. p. 159).

Section 7 (5) of the Criminal Law Amendment Act, 1912—Offences against the Vagrancy Act, 1898 (v. p. 129). In this and the preceding case there are similar provisions as to specifying the number of strokes, &c.

Police Supervision.—When any person is convicted on an indictment of a *crime* (*h*), and a previous conviction of a

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(*f*) 4 & 5 Geo. V. c. 58, s. 36.

(*g*) 6 & 7 Geo. V. c. 50, s. 37, sub-s. 6; 24 & 25 Vict. c. 97, s. 75; c. 100, s. 70; 48 & 49 Vict. c. 69, s. 4. As to the whipping of children by the sentence of a Court of summary jurisdiction, v. *post*, p. 454.

(*h*) v. p. 412.

crime is proved against him, the Court may, in addition to any punishment, direct that he is to be subject to the supervision of the police for a period of seven years or less (*i*).

The consequence of such sentence is that the person to be supervised must notify from time to time the place of his residence and any change of residence to the police. If a male he must report himself to the police personally or by letter, as required, once a month. If he offends against these regulations, he is subject to imprisonment with or without hard labour for a term not exceeding one year, unless he can show that he did his best to act in conformity with the law (*k*). He may be arrested without warrant by a constable who reasonably suspects him of having committed any offence (*l*).

Persons twice convicted of crime.—When any person is convicted on indictment of a *crime* and a previous conviction of a crime is proved against him he is, at any time within seven years after the expiration of the sentence passed on him for the last of such crimes, or if the sentence is one of penal servitude, then also whilst at large on licence under that sentence, liable to imprisonment, with or without hard labour, for a term not exceeding one year.

(i) If, on being charged by a constable with getting his livelihood by dishonest means and being brought before a Court of summary jurisdiction, it appears that there are reasonable grounds for believing that he is getting his living by dishonest means; *or*

(ii) If, on being charged with any offence punishable on indictment or summary conviction, and, on being required by a Court of summary jurisdiction to give his name and address, he refuses to do so, or gives a false name or address; *or*

(*i*) 34 & 35 Vict. c. 112, s. 8.

(*k*) 34 & 35 Vict. c. 112, s. 8; 42 & 43 Vict. c. 55, s. 2; 54 & 55 Vict. c. 69, s. 4. The same regulations, with the same punishment on their breach, apply to convicts at large on licence, *post*, p. 449

(*l*) 54 & 55 Vict. c. 69, s. 2.

(iii) If he is found in any place, public or private, under circumstances which satisfy the Court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction or was waiting for an opportunity to commit, &c., such an offence; *or*

(iv) If he is found on any premises without being able to account to the satisfaction of the Court before whom he is brought for being found on such premises.

In cases (i), (iii), and (iv), he may be arrested by a constable without warrant, provided in case (i) that the constable has authority from the chief police officer of the district. In case (iv) he may also be arrested without warrant by the owner of the property on which he is found (*m*).

Habitual Criminals.—Where a person is convicted on indictment of a *crime* (*n*), and the jury find that he is a habitual criminal, and the Court passes sentence of *penal servitude*, the Court may also, if it is of opinion that by reason of the prisoner's criminal habits and modes of life it is expedient for the protection of the public that he should be kept in detention for a lengthened period, pass a further sentence of preventive detention not exceeding ten nor less than five years, to commence on the determination of his sentence of penal servitude (*o*). A prisoner cannot, however, be found by the jury to be a habitual criminal unless it is proved: (1) That since he was sixteen years of age he has at least on *three* previous occasions been convicted of a "Crime" (defined as above stated) *and* that he is leading persistently a dishonest or criminal life, or (2) that he has been previously convicted of being a habitual criminal and sentenced to preventive detention (*p*). He must be charged

(*m*) 34 & 35 Vict. c. 112, s. 7; 54 & 55 Vict. c. 69, s. 6. If brought before a Court of summary jurisdiction the accused may elect to be tried on indictment, 42 & 43 Vict. c. 49, s. 17. See *post*, p. 453.

(*n*) v. p. 412.

(*o*) 8 Edw. VII. c. 59, s. 10 (the Prevention of Crimes Act, 1908).

(*p*) *Ibid.* The three convictions, which must be proved strictly, may themselves in a proper case be sufficient to entitle the jury to find that the prisoner is leading persistently a dishonest or criminal life (*R.* v. *Waller*, [1910] 1 K. B. 364; 74 J. P. 81; 3 Cr. App. R. 213); but where a substantial period

in the indictment with being a habitual criminal, and after he has been convicted of the principal offence he must be separately tried on that count; a count of this kind cannot be added without the consent of the Director or Assistant Director of Public Prosecutions, and not less than seven clear days' notice must be given to the offender and to the officer of the Court that it is intended to add such a charge, and the notice must state the previous convictions and the grounds upon which it is intended to found the charge (*q*). A prisoner may, without leave, appeal from a sentence of preventive detention (*r*).

While undergoing preventive detention prisoners are to be subjected to such disciplinary and reformative influences and are to be employed on such work as may be best fitted to make them able and willing to earn an honest livelihood on their discharge, and wide powers are given to the Secretary of State to discharge persons so sentenced on licence if he is satisfied that there is a reasonable probability that they will abstain from crime and lead a useful and industrious life (*s*). And where any person has been sentenced to penal servitude for five years or upwards, of which he has served not less than three years, the Secretary of State may, if it appears to him that the offender is a habitual criminal, commute the whole or part of the residue of the sentence to preventive detention (*t*).

Recognisances and Sureties.—Under each of the Criminal Consolidation Acts, 1861, and the Forgery Act, 1913, and Larceny Act, 1916, in case of conviction for an indictable *misdemeanour* punishable under those Acts, the Court may require the offender to enter into a recognisance, with or

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has elapsed between his last discharge from prison and the commission of the offence of which he is convicted, and there is no evidence showing that he has not been leading an honest life in the interval, the attention of the jury should be strongly drawn to those facts by the Judge (*R.* v. *Turner*, [1910] 1 K. B. 346; 79 L. J. K. B. 176; 3 Cr. App. R. 103; *R.* v. *Kelly*, [1909], 3 Cr. App. R. 248; *R.* v. *Wells*, [1910] 5 Cr. App. R. 33).

(*q*) 8 Edw. VII. c. 59, s. 10. *R.* v. *Turner*, *supra*.

(*r*) 8 Edw. VII. c. 59, s. 11.

(*s*) *Ibid.* ss. 13-16.

(*t*) *Ibid.* s. 12.

without sureties, to keep the peace and be of good behaviour, in addition to or in lieu of any other punishment. In case of a *felony*, except murder, punishable under those Acts, the Court may make a similar order, in addition to any other punishment. And under these clauses the offender may be imprisoned for not more than one year in default of finding sureties (*u*). But, independently of statute, upon *any* conviction for an indictable misdemeanour the Court may in addition to or substitution for any other punishment, require the defendant to enter into a recognisance, with or without sureties, to keep the peace and be of good behaviour for a reasonable time, and in default may commit him to prison (*w*).

A recognisance is a contract of record whereby the person bound acknowledges himself to be indicted to the King in a certain sum, to be levied on his goods and chattels, lands and tenements, if he fail in the condition specified in the recognisance. If the condition is performed the recognisance becomes void; if it is broken the recognisance may by order of the Court be forfeited and estreated (*x*), the person bound, and his sureties (if any) become absolute debtors to the Crown for the sum named, which will then be levied by the sheriff.

Recognisances must as a rule be taken before a Court, justice, or Court official, but there are some exceptions, as, *e.g.*, in the case of bail (*y*).

The condition of a recognisance varies according to the purpose for which it is taken; it may be required in a number of cases in addition to those stated in the preceding paragraph, as for example:

(i) From the prosecutor and witnesses for the prosecution or defence upon committal of a person for trial upon an

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(*u*) 24 & 25 Vict. c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; c. 100, s. 71; 3 & 4 Geo. V. c. 27, s. 12, sub-s. 2 (b) (c) (d); 6 & 7 Geo. V. c. 50, s. 37, sub-s. 5 (b).

(*w*) *R.* v. *Dunn*, [1847] 12 Q. B., at p. 1041.

(*x*) Estreat (extraction) means an extract or copy of some record of a Court. It was formerly the duty of the clerks of all the King's Courts to make up an estreat roll showing all fines, &c., imposed by the Court and to return it to the Exchequer. For the modern practice as to the estreat of recognisances, see Archbold, 94 & 97.

(*y*) *Ante*, p 304.

indictable offence (*z*), or where under the Vexatious Indictments Act, the prosecutor has been bound over to prosecute (*a*).

(ii) Under the Probation of Offenders Act, 1907 (*b*).

(iii) From the appellant on appeals to Quarter Sessions or where a Court of summary jurisdiction states a special case (*c*).

(iv) From a person admitted to bail (*d*).

(v) From a person who appeals to the Court of Criminal Appeal where a fine only has been inflicted (*e*).

(vi) By a Court of summary jurisdiction as a preventive measure. By section 25 of the Summary Jurisdiction Act, 1879, (*f*) a Court of summary jurisdiction may upon complaint by any person order any one to enter into a recognisance and find sureties to keep the peace or be of good behaviour towards the complainant. The procedure in such cases is the same as in any other proceedings under the Summary Jurisdiction Acts (*g*), and will be described in a later chapter.

Security for the peace may be demanded by a complainant who has just cause to fear that another will do him some bodily harm, or will procure others to do so (*h*). Security for good behaviour is under the security for the peace. It may be demanded from all persons who are disturbers of the peace, whether or not anyone is put in fear of actual bodily harm (*i*). Thus it may be demanded from a person who uses or threatens to use in public places words likely to cause a breach of the peace, *e.g.*, from a Protestant lecturer who uses language insulting to the Roman Catholic religion (*k*). So also security for the peace and for good behaviour may be

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(*z*) *Ante*, p. 305.
(*a*) *Ante*, p. 330.
(*b*) *Ante*, p. 423.
(*c*) *Post*, pp. 469, 470.
(*d*) *Ante*, p. 301, *et seq.*
(*e*) Criminal Appeal Rules, 1908, rule 7.
(*f*) 42 & 43 Vict. c. 49.
(*g*) *Ibid.*
(*h*) 1 Hawk. c. 60, s. 6.
(*i*) *Lansbury* v. *Riley*, [1914] 3 K. B. 229.
(*k*) *Wise* v. *Dunning*, [1902] 1 K. B. 167.

demanded from persons intending to hold a prize fight. If the party is already before the Court on another charge security for the peace or for good behaviour may be ordered without any formal complaint having been made (*l*).

In default of compliance with the order the defendant may be imprisoned for a period not exceeding six months, if the Court be a petty sessional Court, and if the Court is a Court of summary jurisdiction other than a petty sessional Court, for a period not exceeding fourteen days (*m*).

Quite apart from the above statutory provisions, the High Court, or a Court of assize, or Quarter Sessions, or a Court of summary jurisdiction has at common law jurisdiction to require sureties for the peace and must do so if satisfied that the complainant has reasonable grounds of fear. This jurisdiction is now rarely exercised in view of the provisions of the Summary Jurisdiction Act, 1879, but it is said that only the High Court (including Courts of Assize) has jurisdiction to bind a peer or peeress (*n*).

Punishment of Children and Young Persons.—We have already stated that some of the punishments inflicted on adults cannot be imposed upon a child or a young person, by the former being meant a child under fourteen years of age, and by the latter a person between the ages of fourteen and sixteen (*o*). The various modes of dealing with children are specified in the Children Act, 1908 (*p*), which provides that where a child or young person is tried by any Court and the Court is satisfied of his guilt, it may deal with the case in any of the following ways:—

(a) By dismissing the charge (although the Court may be satisfied that he is guilty) (v.p. 423).

(b) By discharging the offender on his entering into a recognisance (v.p. 423).

(*l*) *Ex parte Davis*, 35 J. P. 551.
(*m*) 42 & 43 Vict. c. 49, s. 45.
(*n*) See Encyclopedia of English Law, vol. 1, title "Articles of the Peace."
(*o*) 8 Edw. VII. c. 67, s. 131.
(*p*) *Ibid.* s. 107.

(c) By so discharging him and placing him under the supervision of a probation officer (v. p. 424).
(d) By committing him to the care of a relative or other fit person (v. p. 423).
(e) By sending him to an industrial school (v. p. 437).
(f) By sending him to a reformatory school (v. p. 437).
(g) By ordering him to be whipped (v. p. 429).
(h) By ordering him to pay a fine, damages, or costs (v. pp. 423-428).
(i) By ordering his parent or guardian to pay a fine, damages, or costs (*Ibid.*).
(j) By ordering his parent or guardian to give security for his good behaviour (*Ibid.*).
(k) By committing him to custody in a place of detention provided under the Act (*infra*).
(l) If he is a young person by sentencing him to imprisonment (but v. p. 427).
(m) By dealing with the case in any other manner in which it may be legally dealt with (see ss. 104-106, *infra*).

The Children Act requires (*q*) that a place of detention shall be provided for each petty sessional division, the registered occupier of which must be a fit person to have and be responsible for the custody and care of children committed for detention; the premises are to be registered by the police authority, and no child or young person is to be detained in custody in any place which is not so registered.

Where a child or young person is convicted of an offence punishable in the case of an adult with penal servitude or imprisonment, or who would if he were an adult be liable to be imprisoned in default of payment of any fine, damages, or costs, and the Court considers that none of the other methods in which the case might be dealt with is suitable, it may, instead of sending him to prison, order that he be committed in custody to one of the above-mentioned places of detention for a term not exceeding that for which he might otherwise have been committed to prison, nor in any case exceeding *one month* (*r*).

(*q*) 8 Edw. VII. c. 67, s. 108.
(*r*) *Ibid.* s. 106.

But upon a conviction on indictment of a child or young person of an attempt to murder, or of manslaughter, or of wounding with intent to do grievous bodily harm, if the Court is of opinion that no punishment which under the provisions of the Act it is authorised to inflict is sufficient the Court may order the offender to be detained for such period as may be specified in the sentence, and he is then liable to be detained in such place and on such conditions as a Secretary of State may direct (*s*).

Where an offender who in the opinion of the Court is twelve years of age, but less than sixteen, is convicted either on indictment or by a petty sessional Court of an offence punishable in the case of an adult with imprisonment the Court may in addition to or in lieu of sentencing him to any other punishment (except imprisonment) order him to be sent to a *certified reformatory* (*t*), or, if he be apparently under twelve years of age and has not been previously convicted, to a *certified industrial school* if the Court should think that under the circumstances he should be sent there rather than to a reformatory (*u*). Any person may bring before a petty sessional Court a child apparently under the age of *fourteen* begging or receiving alms, or being in a street or public place for the purpose of begging or receiving alms; or found wandering, not having any home or settled place of abode or visible means of subsistence; or who frequents the company of reputed thieves or prostitutes; or is found destitute, either having no parent or guardian, or one who does not exercise proper guardianship or is of criminal or drunken habits, or having a surviving parent in penal servitude or imprisonment; or is lodging in a house used by prostitutes for the purpose of prostitution, or is otherwise living in circumstances calculated to encourage the seduction or prostitution of the child (*w*). The Court may order any such child to be sent to an industrial school, and the same order may be made

(*s*) *Ibid.* s. 104.
(*t*) 8 Edw. VII. c. 67, s. 57.
(*u*) *Ibid.* s 58, sub-s. 3.
(*w*) *Ibid.* s. 58. But if the only prostitute whose company the child frequents is its mother, and she exercises proper guardianship, the section will not apply.

by any Court before which a child apparently under the age of *twelve* is charged with an offence punishable in the case of an adult by penal servitude or less punishment (*x*).

A youthful offender sent to a reformatory school must be ordered to be detained there for not less than three or more than five years, and not in any case after he attains the age of nineteen years. If sent to an industrial school a child may be ordered to be detained for such time as the Court thinks proper for his teaching and training, but not after he attains the age of sixteen (*y*). But a child sent to a reformatory school if discharged before he is nineteen years of age until he reaches that age, and a child sent to an industrial school until he reaches the age of eighteen, remain under the supervision of the managers of those schools, and they may recall him to the school if they are of opinion that this is necessary for his protection (*z*). The managers may also bind the child or young person, with his consent, as an apprentice to any trade or assist him to emigrate (*a*).

Instead of sending the child to an industrial school the magistrates may, if they think fit, make an order, under the Prevention of Cruelty to Children Act, 1904, committing him to the custody of a relation or some other person and providing for his maintenance by such relation, &c. (*b*), and may, in addition to such order, make an order under the Probation of Offenders Act, 1907, placing him under the supervision of a probation officer (*c*).

A person who is convicted on indictment of an offence for which he is liable to penal servitude or imprisonment may, instead of being punished in that way, be sentenced by the Court to detention under penal discipline in a *Borstal Institution* for not less than two years nor more than three years, provided that (a) he is not less than sixteen nor more than twenty-one years of age, and (b) by reason of his

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(*x*) *Ibid.*
(*y*) 8 Edw. VII. c. 67, s. 65.
(*z*) *Ibid.* s. 68.
(*a*) *Ibid.* s. 70.
(*b*) *Ibid.* s. 22, sub-s. 2; s. 58, sub-s. 7, s. 60.
(*c*) *Ibid.* s. 58, sub-s. 4, s. 60.

criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the suppression of crime (*d*).

A person sent to one of these institutions may be discharged on licence to the supervision of any society or person before the expiration of his term of detention (*e*).

After the term of his detention has expired he will still be subject for one year to the supervision of the Prison Commissioners (*f*), and if during his period of detention he is found to be incorrigible he may be sent by the Secretary of State to prison (*g*).

Conviction of Defectives.—On the conviction (or even without a conviction if the case is before a Court of summary jurisdiction and is one with which the Court may deal summarily if it finds the charge proved) of any person of any criminal offence punishable in the case of an adult with penal servitude or imprisonment; or on a child, when brought before a Court under section 58 of the Children Act, 1908 (*h*), being found liable to be sent to an industrial school, the Court if satisfied on medical evidence that he is a defective may either (i) postpone sentence and direct that a petition be presented to a judicial authority under the Act, with a view to obtain an order that he should be sent to an institution or placed under guardianship, or (ii) the Court may itself make such an order as if such a petition had been presented. The order will expire in a year from its date, but may be

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(*d*) 8 Edw. VII. c. 59 (Prevention of Crime Act, 1908), s. 1; 4 & 5 Geo. V. c. 58, s. 11, sub-s. 1. Before passing such a sentence the Court must consider any report by the Prison Commissioners as to the suitability of the case for treatment at such an institution, 8 Edw. VII. c. 59, s. 1. A Borstal institution is a place in which young offenders may be given such industrial training and other instruction, and be subject to such disciplinary and other influences, as will conduce to their reformation and the prevention of crime (*Ibid.* s. 4).

(*e*) *Ibid.* s. 5.

(*f*) 8 Edw. VII. c. 59, s. 6; 4 & 5 Geo. V. c. 58, s. 11, sub-s. 2.

(*g*) 8 Edw. VII. c. 59, s. 7.

(*h*) 8 Edw. VII. c. 67, v. p. 437.

continued for successive periods of five years by the Board of Control instituted under the Act (*i*).

Criminal Habitual Drunkards.—Where a person is convicted on indictment of an offence punishable with imprisonment, if the Court is satisfied that the offence was committed under the influence of, or was contributed to by, drink, and the offender admits that he is, or is found by the jury to be, a habitual drunkard, the Court may in addition to or substitution for any other sentence, order him to be detained for a term not exceeding three years in an inebriate reformatory. And if he is sixty years of age or upwards the Court may order him to be disqualified from receiving an old age pension for any period not exceeding ten years. The indictment should allege, after charging the offence, that the accused is a habitual drunkard, and, if he is found guilty of the offence, the jury are then charged to inquire whether he is a habitual drunkard. But unless evidence of the habitual drunkenness has been given before the committing magistrate, seven days' notice must be given to the accused and to the officer of the Court that habitual drunkenness will be charged in the indictment. There is a somewhat similar provision as to persons who are repeatedly convicted *summarily* of drunkenness (*k*), and also in the case of a parent who is a habitual drunkard and is convicted of the ill-treatment of his or her child (*l*).

It having been found that the criminal classes in this country were largely recruited from abroad, it has been enacted (*m*) that the Secretary of State may make an expulsion order requiring an alien to leave the kingdom, and not to return, if it is certified to him by any Court that the alien has been convicted by that Court of any felony or misdemeanour, or other offence for which the Court has power

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(*i*) 3 & 4 Geo. V. c. 28, ss. 8, 11.
(*k*) 61 & 62 Vict. c. 60, s. 1; 8 Edw. VII. c. 40, s. 3, sub-s. 3.
(*l*) v. p. 181.
(*m*) 5 Edw. VII. c. 13, s. 3. The Act also contains provisions intended to prevent the landing in this country of undesirable immigrants.

to impose imprisonment without the option of a fine, and that the Court recommends that an expulsion order should be made in his case either in addition to or in lieu of his sentence; and with a view to the prevention of crime a similar order may be made in the case of an alien with regard to whom a Court of summary jurisdiction may certify that he has entered the kingdom within the preceding twelve months, and has been sentenced in a foreign country for an extradition crime within the meaning of the Extradition Act, 1870.

If the alien disobeys such an expulsion order he is to be deemed a rogue and vagabond, and may be imprisoned for three months (*n*).

Other Consequences of Conviction.—Formerly certain forfeitures and other consequences followed on conviction for treason or felony (*o*). But by statute (*p*) it was provided that from and after the passing of the Act (July 4, 1870) no conviction for any treason, felony, or *felo de se* should cause any *attainder*, or *corruption of blood*, or any *forfeiture* or *escheat;* provided that nothing in the Act should affect the forfeiture consequent upon outlawry (*q*).

But a conviction for treason or felony for which the sentence is death, penal servitude, or imprisonment either with hard labour or exceeding twelve months, determines the tenure of any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or any office or emolument in any university or other corporation, or any pension or superannuation allowance payable by the public, or out of any public fund, unless a pardon is received within two months after the conviction, or before the filling up of the office, place, &c., if given at a later period. It also disqualifies the felon for the future, until the punishment has been

(*n*) 5 Edw. VII. c. 13, s. 3, sub-s. 2, s. 7.
(*o*) As to forfeiture on misprision of treason, v. p. 39.
(*p*) 33 & 34 Vict. c. 23, s. 1.
(*q*) *Ibid.* s. 5.

suffered or pardon received, from holding any military or naval office, or any civil office under the Crown, or other public employment, or any ecclesiastical benefice, or being elected, or sitting, or voting as a member of either House of Parliament, or from exercising any right of suffrage or other parliamentary or municipal franchise (*r*).

A conviction for any offence, if the sentence is imprisonment for more than six weeks without the option of a fine, disqualifies a person from receiving an old age pension for ten years from the date of his release from prison. If the imprisonment is for not more than six weeks the period of disqualification is two years (*s*).

The conviction of a child or young person under sixteen years of age is not regarded as a conviction of felony for the purpose of any disqualification attaching to felony (*t*).

As to the *property* of the felon.—The property of a person convicted of *felony* may be committed by the Crown to the custody and management of an administrator; or in default of such appointment, to the management of an *interim* curator, who may be appointed by the magistrates on an application made in the interest of the felon or his family. The administrator or curator must pay his debts and liabilities, and support his family, and preserve the residue of the property for the felon himself or his representatives on the completion of his punishment, his pardon, or his death (*u*). The administrator has an absolute power of sale of all the felon's property, and a *bona fide* sale by him cannot be impeached by the convict at any time (*w*).

(*r*) 33 & 34 Vict. c. 23, s. 2.

(*s*) 8 Edw. VII. c. 40, s. 3, sub-s. 2; 1 & 2 Geo. V. c. 16, s. 4. A person in receipt of an old age pension who is convicted of any of the offences as to drunkenness mentioned in Schedule 1 of 61 & 62 Vict. c. 60, is disqualified from receiving his pension for six months from the date of his conviction, unless the Court otherwise directs: 1 & 2 Geo. V. c. 16, s. 4, sub-s. 3. As to criminal habitual drunkards, v. p. 440.

(*t*) 8 Edw. VII. c. 67, s. 100.

(*u*) 33 & 34 Vict. c. 23, ss. 9, 18, 21. This does not apply to property vested in the convict as trustee or mortgagee, 56 & 57 Vict. c. 53, s. 48.

(*w*) *Carr* v. *Anderson*, [1903] 2 Ch. 279; 72 L. J. Ch. 534; 88 L. T. 503; 51 W. R. 465.

Persons convicted of felony may be ordered to pay a sum of money not exceeding £100, as compensation for any loss of property suffered by any person through or by means of the felony (*x*). The power of the Court to order the defendant to pay the costs of the prosecution has already been referred to (*y*).

Objects of Punishment.—It seems desirable to add a few words as to the objects which the law has in view in inflicting punishment upon a person convicted of crime.

It is indisputable that the main object of punishment is to prevent the commission of crime, but there are some differences of opinion as to the methods by which this can best be effected. Broadly speaking, however, there are three ways in which punishment can act, viz., as a deterrent, or by way of reformation, or prevention.

There is one class of criminals, comprising the habitual and the professional criminal, upon whom punishment has very little deterrent effect and who are practically incapable of reformation. It is now almost universally recognised that the only satisfactory way of dealing with this class is by the adoption of purely preventive methods, such as police supervision and preventive detention. At the other end of the scale we find a large class of offenders, principally juvenile, who are capable of education and reformation. For this type of offender the proper method of punishment is that of the Borstal system, namely, "Detention . . . under such instruction and discipline as appears most conducive to his reformation and the repression of crime" (*z*). And though instruction and discipline cannot prevent crime, yet with this class of offenders they are a powerful factor in diminishing it, and in a very large number of cases a permanent reformation is effected.

Between these two extreme types we get a large body of criminals of various kinds whom, in a work of this kind, it is impossible to attempt to classify, so diverse are their crimes

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(*x*) 33 & 34 Vict. c. 23, s. 4. (*y*) v. p. 379.

and the causes for their commission. With these, at the present time, it seems possible to deal only by such a system of punishment as will in most cases act as a deterrent. There are, of course, many crimes and many offenders whom no punishment will deter—crimes of sudden passion, crimes committed under overwhelming temptation, offenders who commit crime under the belief that detection is impossible, and offenders who from a scientific though not from a legal point of view are not responsible for their actions. But under ordinary circumstances and for the mass of mankind there is no doubt that the fear of punishment is the most efficacious deterrent from crime. The influence of education in diminishing some kinds of crime must not be overlooked, but the chief effect of what ordinarily passes for education is merely to give a wider knowledge of the existence and nature of punishment.

It remains, therefore, to consider what, as a general rule, should be the nature of punishment so that it may act as a sufficient deterrent. This may be summed up by saying that it must be adequate and it must be certain.

Punishment must in the first place present to the offender sufficient inconvenience and disgrace to outweigh any advantages which he may gain from the commission of the crime. And though punishment by the State is the antithesis of the primitive individual vengeance, yet it must be graded so that its strictly punitive effect may vary according to the nature of the offence. Hence in some classes of cases, as, *e.g.*, in bigamy, the punishment varies with the moral gravity of the offence in the circumstances of the particular case. On the other hand, it is important that punishment should be moderate; probably the alleviation of the severe punishments of former times is to some extent due to the fact that the probability of their infliction caused the sympathy of the jury to be with the offender and often contributed largely to his acquittal. Even of more importance, however, is the *certainty* of punishment, including certainty as to its amount. It is perhaps one of the most regrettable features of the criminal law that it is almost impossible to predict in any

particular case what amount of punishment is likely to be inflicted. This cannot altogether be avoided, but very much might be done towards making punishment less dependent upon judicial discretion, especially in inferior Courts.

Lastly, it should be noticed that the certainty and adequacy of punishment affect not only the offender but the community generally. Where punishment is uncertain and inadequate there is always the risk that further breach of law will be caused through the persons injured or even the public taking the law into their own hands.

CHAPTER XVII.

APPEAL.

Until 1907 it could not be said that there was any appeal on the merits, by a person convicted, from the verdict of the jury; nor even an appeal from an erroneous decision of the Judge upon a matter of law unless the Judge stated a case for the opinion of a superior Court (*a*), or the case was one of a very limited class in which relief could be obtained by writ of error or motion for a new trial. This grave defect in the practice of the criminal law was remedied by the Criminal Appeal Act, 1907. Under this Act a person convicted on indictment, inquisition, or information, or sentenced at Quarter Sessions as an incorrigible rogue has the following rights of appeal to the Court of Criminal Appeal:—

1. A right, without any leave, to appeal against his conviction on any question of law:

2. A right, with leave of the Judge who tried him or of the Court of Criminal Appeal, to appeal against his conviction on any question of fact or mixed law and fact:

3. A right, with leave of the Court of Criminal Appeal, to appeal against his sentence unless it is one fixed by law. No leave is, however, required for an appeal against a sentence of preventive detention.

The Act is set out fully with notes in Book V.

(*a*) By the Crown Cases Reserved Act, 1848, any Court of oyer and terminer or gaol delivery, and any Court of Quarter Sessions could reserve any question of law for the consideration of the Court for Crown Cases Reserved (consisting of the Judges of the High Court or any five of them), which could reverse, affirm, or amend the judgment below or "mete such other order as justice may require."

CHAPTER XVIII.

REPRIEVE AND PARDON.

A REPRIEVE (*reprendre*) is the withdrawing of a sentence for an interval of time, whereby the execution of a criminal is suspended (*a*).

Reprieves may be granted either:—

i. By the *Crown* (*ex mandato regis*) at its discretion, its pleasure being signified to the Court by which execution is to be awarded.

ii. By the *Court* empowered to award execution either before or after verdict (*ex arbitrio judicis*). Generally it must be guided by its own discretion as to whether substantial justice requires it. But in two cases the Court is bound to grant a reprieve. (i) When a woman sentenced to death is ascertained to be pregnant. To discover whether she is *quick* with child a jury of twelve matrons is empanelled. If so found, she is reprieved until either she is delivered or proved by the course of nature not to have been with child at all. But after she has been once delivered she cannot be reprieved on this ground a second time. (ii) When the prisoner becomes insane after judgment (*b*). We have already seen that the occurrence of insanity in the prisoner is a stay to proceedings at any stage.

Pardon.—The exercise of the prerogative of pardoning is at the absolute discretion of the Sovereign. If, either from the opinion of the Judge, or for any other reason, the Home Secretary thinks the case a fit one for the interposition of royal mercy, he recommends the same to the King, who acts on the recommendation.

(*a*) Archbold, 220. (*b*) Archbold, 221.

The Criminal Appeal Act, 1907, does not in any way affect the royal prerogative to pardon an offender, but on considering any petition for mercy having reference to a conviction on indictment, or to the sentence (other than sentence of death), the Home Secretary may refer the whole case to the Court of Criminal Appeal to be heard and determined by them, or ask their opinion upon any point arising in the case (*c*).

The Sovereign cannot pardon where private interests are principally concerned in the prosecution of offenders: "*non potest rex gratiam facere cum injuria et damno aliorum*" —for example, a common nuisance cannot be pardoned while it remains unredressed. But in certain cases there is statutory power to remit penalties, although they may be wholly or in part payable to some other than the Crown (*d*). There is another case in which the offender cannot be pardoned, namely, when he is guilty of the offence of committing a man to prison out of the realm (*e*). It should also be noticed that a pardon cannot be pleaded to an impeachment so as to stifle the enquiry (*f*). But after a person has been impeached and sentenced he may then be pardoned.

A pardon must be by warrant under the Great Seal, or under the sign manual (*g*). As a rule, it is to be construed most beneficially *for* the subject and *against* the King.

A pardon may be *conditional*—the most frequent example of which is when a person sentenced to death is pardoned on the condition that he submit to punishment either of penal servitude or imprisonment (*h*).

The effect of a pardon (subject to any conditions upon which it may be granted) is to absolve the person pardoned from all punishment due to the offence, and from all dis-

(*c*) 7 Edw. VII. c. 23, s. 19.
(*d*) See 22 Vict. c. 32.
(*e*) 31 Car. II. c. 2.
(*f*) 12 & 13 Will. III. c. 2, s. 12.
(*g*) 7 & 8 Geo. IV. c. 28. s. 13
(*h*) v. 5 Geo. IV. c. 84; 20 & 21 Vict. c. 3.

qualifications and forfeitures which he may have incurred in consequence of the conviction (*i*).

Ticket of leave.—In connection with the subject of pardon, it will be convenient to notice the case of those who are allowed to be at large before the expiration of their term of confinement.

When any person is sentenced to penal servitude or imprisonment, the King, by order in writing under the hand and seal of the Secretary of State, may grant him a *licence to be at large* in the United Kingdom and the Channel Islands, or in such part thereof respectively as in such licence shall be expressed, during such portion of the term of penal servitude or imprisonment, and upon such conditions, as His Majesty thinks fit. But the licence may be revoked or altered at the King's pleasure (*k*). It will be forfeited in the event of a subsequent conviction for an indictable offence (*l*). If he fails to comply with the regulations as to notifying his residence or (if a male) reporting to the police, he may either be imprisoned for one year *or* the Court may forfeit his licence (*m*). His licence may also be revoked if he is summarily convicted of any offence (*n*). He may be summarily convicted under the Penal Servitude Acts (i) if on being brought before a Court of summary jurisdiction it appears that he is earning his living by dishonest means (in such a case he may be arrested without warrant by a constable, if authorised in writing by the chief police officer of the district) (*o*), (ii) if he breaks any conditions of his licence (*p*), (iii) if he fails without reasonable excuse to produce his licence to a Judge, magistrate, or constable (*q*). In the last two cases he is also liable to imprisonment for three months

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(*i*) *Hay* v. *Justices of Tower Division*, [1890] 24 Q. B. D. 561; 59 L. J M. C. 79.
(*k*) 16 & 17 Vict. c. 99, ss. 9-11.
(*l*) 27 & 28 Vict. c. 47, s. 4.
(*m*) 34 & 35 Vict. c. 112, s. 5; 54 & 55 Vict. c. 69, s. 4.
(*n*) 27 & 28 Vict. c. 47, s. 9.
(*o*) 34 & 35 Vict. c. 112, s. 3.
(*p*) *Ibid.* s. 4.
(*q*) 27 & 28 Vict. c. 47, s. 5; 34 & 35 Vict. c. 112, s. 4.

with or without hard labour. He may be arrested without warrant by a constable if he is suspected of any offence (*r*) or if his licence has been revoked (*s*). On a subsequent conviction the offender will first suffer the punishment attached to such offence, and then finish his original term, the Judge having no power to direct otherwise (*t*). If the licence is revoked, the convict may be apprehended and sent back to prison (*u*).

In the case of those sentenced to penal servitude or imprisonment, the remission of a part of the term, proportioned to the length of the sentence, follows as a matter of course if the convict conduct himself well. But if the sentence is penal servitude for life, the special order of one of the Secretaries of State is required.

(*r*) 54 & 55 Vict. c. 69, s. 2.
(*s*) 4 & 5 Geo. V. c. 58, s. 27.
(*t*) 27 & 28 Vict. c. 47, s. 9; 54 & 55 Vict. c. 69, s. 3; *R.* v. *Hamilton*, [1908] 1 Cr. App. R. 87; *R.* v. *Wilson*, [1909] 2 K. B. 756; 79 L. J. K. B. 4.
(*u*) 16 & 17 Vict. c. 99, s. 11; 20 & 21 Vict. c. 3, s. 5.

BOOK IV.

SUMMARY CONVICTIONS.

CONVICTIONS of a certain class are described as "summary" to distinguish them from such as follow after a regular trial on an indictment or information. The essence of summary proceedings is the absence of the intervention of a jury, the person accused being acquitted or condemned by the decision of the person who is instituted Judge.

The only class of summary proceedings which is to be dealt with in this chapter is by far the most extensive and important—*Summary convictions before magistrates out of Quarter Sessions* (*a*).

The original functions of justices of the peace, when not in General or Quarter Sessions, were chiefly to prevent breaches of the peace and to cause offenders to be apprehended. But their jurisdiction has been gradually extended. A great number of minor offences can be dealt with satisfactorily without the expense and delay of bringing them before the ordinary Courts. Accordingly from time to time authority has been conferred by statute (*b*) on the magistrates to examine into such offences and punish the offenders. It is only in virtue of legislative enactments that they act in this capacity. In some cases the offenders are punished merely by

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(*a*) We have already noticed a form of summary proceeding in the event of contempt of Court (v. p. 81). Another class comprises proceedings before the Commissioners of Inland Revenue; v. 15 & 16 Vict. c. 61.

(*b*) The statutes regulating Courts of summary jurisdiction are: The Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), amended by the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35); the Summary Jurisdiction Acts, 1848 (11 & 12 Vict. c. 43), 1879 (42 & 43 Vict. c. 49), 1884 (47 & 48 Vict. c. 43), 1899 (62 & 63 Vict. c. 22), and the Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58).

the infliction of a pecuniary penalty. In others the magistrates are empowered to punish by a penalty or imprisonment with hard labour not exceeding six months; or, if there has been a previous conviction, twelve months (*c*).

When the Court deals with an indictable offence summarily and dismisses the information or convicts, the effect of such dismissal or conviction is the same as if the person charged had been acquitted or convicted respectively on indictment. And the conviction or certificate of dismissal is a bar to further proceedings for the same offence (*d*).

The jurisdiction of a magistrate is local, and not personal; that is, he can exercise it only in his own county, borough, or other district. And as a general rule, the jurisdiction is further limited to offences committed within such county, borough, or district. But in some cases the jurisdiction is extended. Thus offences committed on the boundary of the jurisdiction of two Courts, or begun within the jurisdiction of one Court and completed within the jurisdiction of another Court, may be tried by either Court, and offences against property in transit may be tried by any Court through which the property passed in the course of transit (*e*).

In some cases one justice may act by himself, in others the presence of more is required. But Metropolitan police magistrates, City of London magistrates, and stipendiary magistrates have, within their jurisdiction, power in most cases to do alone whatever is authorised to be done by one or more justices (*f*).

The magistrates have no jurisdiction to hear and determine cases in a summary manner where the title to property is in question, though, if it had not been for such question, they would have had cognisance thereof; and where the act complained of was done by the defendant in the exercise of a *bona fide* claim or assertion of right, such claim of right

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(*c*) As, *e.g.*, under 24 & 25 Vict. c. 96, s. 33 (v. p. 193), or in case of persons already twice convicted of "crime" (v. p. 430) or under police supervision (v. p. 429), or convicts at large under licence (v. p. 449).

(*d*) 42 & 43 Vict. c. 49, s. 27.

(*e*) 42 & 43 Vict. c. 49, s. 46. See also 57 & 58 Vict. c. 60, s. 684.

(*f*) 42 & 43 Vict. c. 49, s. 20, sub-s. 10; 11 & 12 Vict. c. 43, s. 33.

being not on the face of it obviously absurd or unreasonable, the jurisdiction of the magistrates is ousted (*g*).

When a person is charged with any offence (except assault) for which he is liable on summary conviction to imprisonment for *more than three months*, he may, before the charge is gone into (but not afterwards), claim to be tried by a jury; and thereupon the case will be treated as an indictable offence. Before the charge is gone into, he must be informed of his right of trial by jury, and asked if he desires such a trial. And in the case of a child similar information must be given to the child's parent or guardian, if present; and such parent or guardian has the right of claiming trial by jury (*h*).

The information that he has a right to be tried by jury must be given to the person charged before the charge is gone into, and if it is not so given and he is convicted by the magistrates, even upon his own confession, the conviction will be quashed (*i*). If the prisoner elects to be tried by a jury it is not, however, necessary that the indictment should allege that he did so elect (*k*).

If a defendant does elect to be tried by a jury, and not summarily, he may (subject to the provisions of the Vexatious Indictments Act) be committed for trial and indicted for any offence disclosed by the depositions, although those offences were not charged in the summons (*l*).

We shall first notice some of the chief offences which have been made the subjects of summary proceedings, and then enquire into the nature of such proceedings.

As in some cases the limit of jurisdiction, and the extent of punishment which can be inflicted by Courts of summary jurisdiction, differ according to the age of the person accused, and in some cases jurisdiction exists only when the accused is under a certain age, it will be convenient to classify offences

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(*g*) Stone's Justices' Manual, p. 1042; *Scott* v. *Baring*, [1895] 64 L. J. M. C. 200.
(*h*) 42 & 43 Vict. c. 49, s. 17.
(*i*) *R.* v. *Cockshott*, [1898] 1 Q. B. 582; 67 L. J. Q. B. 467.
(*k*) *R.* v. *Chambers*, [1896] 65 L. J. M. C. 214.
(*l*) *R.* v. *Brown*, [1895] 1 Q. B. 119; 64 L. J. M. C. 1.

in accordance with these distinctions, and to treat of them in the following order:—

1. Offences by children.
2. Offences by young persons as distinguished from children and adults.
3. Offences by adults as distinguished from young persons.
4. Common assaults.
5. Larcenies not indictable.
6. Small wilful injuries to property.
7. Offences relating to game.

It should be observed that the first three of these classes of offences comprise certain indictable offences which can be dealt with summarily on admission of guilt, or by consent of the accused, or in the case of children by consent of their parents or guardians. The remainder chiefly consist of offences which are punishable on summary conviction without the option of trial by jury.

For the purposes of the Summary Jurisdiction Act, 1879, a *child* is defined to be a person who, in the opinion of the Court before whom he is brought, is above the age of seven years and under the age of fourteen years. A *young person* is one who, in the opinion of the Court, is over fourteen and under sixteen years of age. And an *adult* is one who, in the opinion of the Court, is over sixteen years of age (*m*).

1. *Offences by Children.*

When a child is charged with *any* indictable offence, other than homicide, before a Court of summary jurisdiction, such Court may, if they think it expedient, and if the parent or guardian of the child on being informed of the right of trial by jury does not object, deal summarily with the offence, and inflict the same description of punishment as might have been inflicted had the case been tried on indictment; except that no fine shall, in the case of a child, exceed forty shillings; and that whipping (with not more than six strokes of a birch) may be inflicted on a male child either in addition to, or in

(*m*) 42 & 43 Vict. c. 49, s. 10, sub-s. 5, s. 49; 8 Edw. VII. c. 67, s. 128.

substitution for, any other punishment (*n*). By the Criminal Justice Administration Act, 1914, it has been also provided that whenever a child is charged before a Court of summary jurisdiction with a *felony*, and the Court deals with the case summarily, it may inflict a fine not exceeding forty shillings as a punishment (*o*).

2. *Offences by Young Persons.*

When a young person between the ages of fourteen and sixteen is charged with any indictable offence other than homicide, such young person may, if he or she consent, and the Court think it expedient, be dealt with summarily, and if found guilty, may be adjudged either to pay a fine not exceeding £10 or to be imprisoned, with or without hard labour, for any term not exceeding three months (*p*).

3. *Offences by Adults.*

A. *Value not exceeding* £20. *Trial by consent.*—Where an adult is charged before a Court of summary jurisdiction with certain indictable offences, the Court, if they think it expedient to do so, and if the person charged consents, may deal summarily with the offence and may adjudge such person, if found guilty of the offence, to be imprisoned, with or without hard labour, for any term not exceeding three months, or to pay a fine not exceeding £20; *or if the value of the property which was the subject of the offence exceeds* 40s., to be imprisoned, with or without hard labour, for not more than six months, or to pay a fine not exceeding £50 (*r*). This applies only to the following offences, and, in cases Nos. 1—7, 9 and 10, only where the value of the whole of the property which is the subject of the offence does not exceed £20:—

(*n*) 42 & 43 Vict. c. 49, ss. 10, 15. As to the punishment of children and young persons, see *ante*, p. 435.

(*o*) 4 & 5 Geo. V. c. 58, s. 15, sub-s. 3.

(*p*) 42 & 43 Vict. c. 49, s. 11; 62 & 63 Vict. c. 22, s. 2; 8 Edw. VII. c. 67, s. 134, Third Schedule. As to the restriction of the imprisonment of young persons, see 8 Edw. VII. c. 67, s. 102, *ante*, p. 427.

(*r*) 42 & 43 Vict. c. 49, s. 12; 62 & 63 Vict. c. 22, s. 1; 4 & 5 Geo. V. c. 58, s. 15, sub-s. 1.

1. Simple larceny.
2. Offences punishable by statute as simple larceny (*s*).
3. Larceny from or stealing from the person.
4. Larceny as a clerk or servant.
5. Embezzlement by a clerk or servant.
6. Receiving stolen goods (including any offence specified in section 33 (1) of the Larceny Act, 1916. v. p. 218).
7. Aiding, abetting, counselling or procuring the commission of any of the offences numbered 1, 2, 3, 4.
8. Attempting to commit any of the offences numbered 1, 2, 3, 4, whatever the value of the property.
9. Obtaining or attempting to obtain money, goods, or valuable securities by false pretences (*t*).
10. Maliciously setting fire to woods, &c., under section 16 of the Malicious Damage Act, 1861 (v. p. 261).
11. Certain offences committed by habitual drunkards (Inebriates Act, 1898, section 2).
12. Indecent assault upon a male or female under the age of sixteen years (Children Act, 1908, section 128 (2)). For this offence the maximum imprisonment is six months.

B. *Value exceeding* £20. *Plea Guilty.*—When an adult is charged with any of the offences named in the last paragraph, and the value of the property which is the subject of the alleged offence exceeds £20, and as the Court at any time during the hearing of the case become satisfied that there is sufficient evidence to put the person charged on his trial, they may, if they deem it expedient to deal with the case summarily, call on the person to plead, after having first had the charge reduced into writing, and having explained the effect of pleading. If he plead guilty, they shall adjudge the prisoner to be imprisoned, with or without

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(*s*) These are (i) destruction, &c., of valuable securities other than documents of title to land (v. p. 194); (ii) stealing, &c., material of buildings and fixtures, trees and plants (v. pp. 193, 194); (iii.) stealing by a partner or joint owner (v. p. 202); (iv.) stealing, &c., electricity (v. p. 196).

(*t*) Where a Court of summary jurisdiction deals summarily with this offence under 42 & 43 Vict. c. 49, ss. 11, 12, 13 (v. pp. 455, 457), it must explain to the person charged the nature of a false pretence (62 & 63 Vict. c. 22, s. 3).

hard labour, for any term not exceeding six months. If he plead not guilty, the prisoner is committed for trial (*u*).

4. *Common Assaults and Batteries.*

When any person unlawfully assaults or beats another, two magistrates may hear and determine the charge, and may inflict a fine of £5, or may sentence to imprisonment not exceeding two months with or without hard labour. If the person assaulted, &c., is a male child under the age of fourteen, or is a female of any age, and the assault is of an aggravated nature, the offender may be fined £20, or imprisoned for six months. He may also be bound over to keep the peace for a further period of six months (*w*). The words of the enactment when referring to a common assault are "upon complaint by or on behalf of the party aggrieved." Unless, therefore, the party aggrieved or some one on his behalf (and an unauthorised police officer is not such a person) complains of the assault, a Court of summary jurisdiction has no power to convict of a common assault (*x*). But this is not the case with regard to an aggravated assault upon a woman or child, as the complaint may then be by any one; and even in the case of a common assault, if the person assaulted is so aged or infirm or is so under the control of the assailant as to be unable to take proceedings another person may do so on his behalf (*y*).

An assault upon a police officer while in the execution of his duty is also punishable on summary conviction by six months' imprisonment with hard labour or a fine of £20 (*z*).

When a husband has been convicted of an aggravated assault upon his wife, the Court has power to make an order having the effect of a judicial separation (*a*).

(*u*) 42 & 43 Vict. c. 49, s. 13; 62 & 63 Vict. c. 22, s. 1; 4 & 5 Geo. V. c. 58, s. 15, sub-s. 1. By pleading guilty he loses his right of appeal to Quarter Sessions, 4 & 5 Geo. V. c. 58, s. 37.

(*w*) 24 & 25 Vict. c. 100, ss. 42, 43.

(*x*) *Nicholson* v. *Booth*, [1888] 57 L. J. M. C. 43.

(*y*) *Pickering* v. *Willoughby*, [1907] 2 K. B. 296; 76 L. J. K. B. 709.

(*z*) 34 & 35 Vict. c. 112, s. 12.

(*a*) As to these orders, v. p. 172.

If the magistrates deem the offence not proved, or find the assault to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the complaint, they must, if required, make out and deliver to the party charged a certificate stating the fact of such dismissal. This certificate, or the conviction (if the punishment has been suffered), is a bar to any other proceedings, civil or criminal, for the same cause. The certificate is, however, only to be given in cases where the complaint has been made by the person assaulted (*b*). But neither the acquittal nor the conviction will afford a defence to an action for the assault if the prosecution was by *indictment*.

If the magistrates find that the assault was accompanied by an attempt to commit a felony, or think, from any other circumstance, that it is a fit subject for prosecution by indictment, they must abstain from adjudication, and send the case for trial. Also they may not determine any case of assault in which a question arises as to the title to any lands or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy, or any execution under the process of a Court of justice (*c*).

5. *Larcenies not indictable.*

We have already, under the headings of Offences by Children, Offences by Young Persons, and Offences by Adults, dealt with the case of larcenies which are the subject of indictment, but which, in the circumstances above mentioned, can be dealt with summarily. It now remains to mention that almost every possible injury in the nature of an illegal taking of personal property or of things annexed to the realty, when not indictable, is punishable before one or more justices under the Larceny Act, 1861 (*d*), subject in some cases to the right of the person charged to elect to be tried

(*b*) 24 & 25 Vict. c. 100, ss. 44, 45.
(*c*) *Ibid.* s. 46.
(*d*) 24 & 25 Vict. c. 96, ss. 18, 19 (dogs, *ante*, p. 199); ss. 12, 14, 15 (deer, *ante*, p. 198; s. 17 (rabbits, *ibid.*); ss. 21-24 (beasts or birds ordinarily kept in confinement but not subjects of larceny, and fish, *ibid.*); ss. 30-37 (trees, fences, vegetable productions, &c., *ante*, pp. 193, 194.

on indictment. In some cases after one summary conviction, in other cases after two summary convictions for the offence, such offence amounts to a felony, and is indictable as larceny (*e*).

6. *Small wilful Injuries to Property.*

Most of such injuries to property when not indictable are punishable on summary conviction under the Malicious Injuries to Property Act, 1861. In some cases a second or third offence amounts to a felony or misdemeanour.

Also by section 14 of the Criminal Justice Administration Act, 1914, it is provided that if any person wilfully or maliciously commits any damage to any real or personal property whatever and the amount of the damage does not exceed £20, he shall be liable on summary conviction (a) if the damage exceeds £5 to imprisonment for not more than three months or to a fine not exceeding £5; (b) if the damage is £5 or less to imprisonment for not more than two months or a fine not exceeding £5; and in either case to the payment to the party aggrieved of such further amount as appears to the Court reasonable compensation for the injury.

But it is a good defence that the alleged offender acted under a fair and reasonable supposition that he had a right to do the act complained of. The same section also provides that a Court of summary jurisdiction shall not commit a person for trial for an offence under section 51 of the Malicious Damage Act, 1861, unless the damage exceeds £5 (*f*). If the damage is between £5 and £20, the offence may be dealt with either summarily or on indictment, if over £20 on indictment only.

7. *Offences relating to Game.*

Some of these have already been considered (*g*), the following may also be added: Power is given to the police to search

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(*e*) 24 & 25 Vict. c. 97, ss. 22—24 (trees, vegetable productions, &c., *ante*, p. 269); s. 25 (fences, *ante*, p. 267); ss. 37, 38 (telegraphs, *ibid.*; animals not cattle, *ante*, p. 268).

(*f*) *Ante*, p 270.

(*g*) *Ante*, p. 133, *et seq.*

in public places persons suspected on reasonable grounds of coming from lands where they have been unlawfully in pursuit of game, and to seize any game or guns in their possession. And any person who has obtained game by unlawfully going on land for that purpose or has used any gun, &c., for unlawfully taking game and any accessory is liable on summary conviction to a fine of £5 and forfeiture of the game and guns (*h*).

PROCEEDINGS UPON SUMMARY CONVICTIONS.

The following is an outline of the proceedings: An *information* is laid before a justice of the peace that a person has committed, or is suspected to have committed within the jurisdiction of such justice, an offence for which he is liable to be punished on summary conviction. This information gives the justice jurisdiction and limits his enquiry to the matter contained therein. It must be laid (unless a particular period is fixed by the statute on which it is founded) within six months from the time when the matter arose (*i*). It must be laid before a magistrate by the informant in person, or by his counsel or attorney, or other person authorised in that behalf, and must be for one offence only (*k*). It need not be in writing, unless it is so directed to be by the statute dealing with the offence, though it usually is in writing, and 11 & 12 Vict. c. 43 appears to assume this. Nor, as a rule, need it be on oath, unless required by some particular statute or a warrant to apprehend the person charged is issued in the first instance instead of a summons, in which case the matter of the information must be substantiated by the oath or affirmation of the informant, or of some witness on his behalf, before the warrant is issued (*l*).

The next step is the issue of the *summons* directed to the accused, stating shortly the matter of the information, and requiring him to appear at a certain time and place to answer

(*h*) 25 & 26 Vict. c. 114, s. 2.
(*i*) 11 & 12 Vict. c. 43, s. 11.
(*k*) *Ibid.* s. 10.
(*l*) *Ibid.* See also s. 2.

the information, and to be dealt with according to law. And here it may be observed that if a justice of the peace refuses to do any act relating to the duties of his office as such justice, *e.g.*, refusing to issue a summons, the party requiring such act to be done may apply to the King's Bench Division of the High Court, upon an affidavit of the facts, for a rule calling upon such justice, and also the party to be affected by such act, to show cause why such act should not be done, and if after due service of such rule good cause be not shown against it, the King's Bench Division may make the same absolute, with or without costs, as it thinks proper; and the justice upon being served with such rule absolute must obey it and do the act required, and no proceedings are to be taken against a justice for obeying such rule and doing the act required (*m*). But if a magistrate has *bona fide* exercised his discretion and brought his mind to bear upon the question whether he ought to act or not, the High Court has no jurisdiction to review his decision (*n*); unless he has taken into consideration matters which are outside the ambit of his jurisdiction and absolutely apart from the matters which by law ought to be taken into consideration (*o*).

The summons is served by the proper officer on the party charged personally, or at his last or usual abode (*p*). If the person so served does not appear at the time and place specified, provided a reasonable time has intervened between the summons and the day appointed, the justice or justices may, upon the matter of the information being to their satisfaction substantiated by oath or affirmation, issue a *warrant* to apprehend the accused. Authority is given to them to issue a warrant in the first instance instead of issuing a summons, if they think fit, on the information being to

(*m*) 11 & 12 Vict. c. 44, s. 5. This provision is really intended for the protection of the magistrate in cases where he might otherwise incur personal liability by taking the course desired. But in all cases where a justice, whether from a mistaken view of his power or otherwise, declines to perform his duty or to proceed in a matter where he has jurisdiction, the High Court has an inherent jurisdiction to compel him by *mandamus* to do his duty.

(*n*) *Ex parte Lewis*, [1888] 21 Q. B. D. 191; 57 L. J. M. C. 108; *R.* v. *Bros*, [1901] 20 Cox, C. C. 89.

(*o*) *R.* v. *Cotham*, [1898] 1 Q. B., at p. 806; 67 L. J. Q. B. 632.

(*p*) 11 & 12 Vict. c. 43, s. 1.

their satisfaction substantiated by oath or affirmation (*q*). This warrant must state shortly the matter of the information, must be under the hand and seal of the justices issuing it, and be directed to the constable in whose hands it remains in force until executed. It may be executed by apprehending the accused at any place within the jurisdiction of the issuing justice, or out of such jurisdiction on being indorsed or backed by a magistrate of the jurisdiction in which the defendant is (*r*).

A second course may be pursued if the summons, having been duly served, is not obeyed. The justices may proceed *ex parte* to the hearing of the information, and may adjudicate thereon, as fully and effectually as if the party had personally appeared in obedience to the summons (*s*).

To secure the attendance of witnesses for the prosecution and for the accused they may be served with a summons to attend and give evidence or to produce any documents or articles likely to be material evidence on the hearing, and, if this is disobeyed, they may be arrested on a warrant. Or, if the justice is satisfied on oath or affirmation that the witness will not attend to give evidence unless compelled, a warrant to secure such attendance may be issued in the first instance. If the witness attends but refuses to be sworn, or, without just excuse, to answer questions, he may be committed to prison for seven days (*t*).

The *hearing* must take place before two or more justices, unless any statute expressly authorises hearing before one justice (*u*).

No case can be heard, tried, determined, or adjudged by a Court of summary jurisdiction except when sitting in open Court. "Open Court" means either a petty sessional Court-house, that is, a place where Special or Petty Sessions are usually held, or an occasional Court-house, that is, a police

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(*q*) *Ibid.* s 2.
(*r*) *Ibid.* s. 3.
(*s*) *Ibid.* s. 2.
(*t*) *Ibid.* s. 7; 42 & 43 Vict. c. 49, s. 36; 4 & 5 Geo. V. c. 58, s. 29.
(*u*) 42 & 43 Vict. c. 49, s. 20, sub-s. 9; by 4 & 5 Geo. V. c. 58, s. 38, one justice may deal with certain charges of drunkenness.

station or other place appointed by the petty sessions as a place to be used as an occasional Court-house (*w*).

Petty Sessional Court.—Two or more justices sitting in a petty sessional Court-house, or the Lord Mayor, or any of the Aldermen of the City of London, or any police or stipendiary magistrate, sitting in a Court-house where he has the usual power of two justices, constitute "a petty sessional Court," and no fine of more than twenty shillings, and no imprisonment for more than fourteen days, can be given by a Court of summary jurisdiction other than a petty sessional Court (*x*). Indictable offences can be dealt with summarily under the Summary Jurisdiction Act, 1879, only by a petty sessional Court sitting on a day publicly appointed for hearing indictable offences. A case may be adjourned by a Court of summary jurisdiction which is not a petty sessional Court to the next practicable sitting of a petty sessional Court (*y*).

The accused may make full defence, give evidence himself, and call witnesses, and either party may be represented by counsel or attorney or may in person conduct his own case (*z*). A policeman is not allowed to be an advocate in the proceedings of which he has charge (*a*). But if he is named in the summons as informant in a case under the summary jurisdiction of the Court he will be entitled, although a police officer, to conduct the case as prosecutor, though the practice is not one which is encouraged (*b*).

If the defendant fails to appear, the justices may either proceed to hear and determine or may adjourn. If the defendant appears and the prosecutor does not, the magistrates will generally dismiss the complaint or they may adjourn the hearing (*c*).

(*w*) 42 & 43 Vict. c. 49, s. 20, sub-ss. 1, 2, 4, 5; Interpretation Act, 1889, s. 13.
(*x*) 42 & 43 Vict. c. 49, s. 20, sub-s. 7.
(*y*) 42 & 43 Vict. c. 49, s. 20, sub-ss. 8, 11.
(*z*) 11 & 12 Vict. c. 43, s. 12. In an *indictable* case the prosecutor has no right to conduct the prosecution in person.
(*a*) *Webb* v. *Catchlove*, [1886] 50 J. P. 795; 82 L. T. 103.
(*b*) *Duncan* v. *Toms*, [1887] 56 L. J. M. C. 81.
(*c*) 11 & 12 Vict. c. 43, s. 13.

Juvenile Courts.—A Court of summary jurisdiction, when hearing charges against children or young persons under the age of sixteen, must, unless the defendant is charged jointly with an adult, sit in a different building or room from that in which the ordinary sittings of the Court are held, or on different days or at different times from those of the ordinary sittings, and the Court is then styled a juvenile Court. In such a Court no persons other than the members and officers of the Court, the parties, their solicitors and counsel, other persons directly concerned in the case and representatives of a newspaper or news agency are, without the leave of the Court, allowed to be present (*d*). And no child may be present during the trial of *any* person charged with an offence (*e*).

If both the parties appear, the following are the proceedings. The substance of the information is read to the defendant, and he is asked if he has any cause to show why he should not be convicted. If he admits the truth of the information, the justices proceed to convict and pass judgment (*f*). If he does not admit the truth of the charge, the magistrates hear the prosecutor, and such witnesses as he may examine, and afterwards the defendant (who may in every case give evidence on oath (*g*)) and his witnesses. The prosecutor will then be allowed to call evidence in reply, if the defendant has examined any witnesses or given any evidence other than to his general character; but the prosecutor is not entitled to make any observations in reply upon the evidence given by the defendant, nor the defendant to make any observations in reply upon the evidence given by the prosecutor in reply (*h*). The magistrates then consider the whole matter, and determine the same by convicting the defendant or dismissing the information. If there are more

(*d*) 8 Edw. VII. c. 67, s. 111.
(*e*) *Ibid.* s. 115.
(*f*) 11 & 12 Vict. c. 43, s. 14.
(*g*) 61 & 62 Vict. c. 36, s. 1; v. p. 365.
(*h*) 11 & 12 Vict. c. 43, s. 15. By leave of the Court the defendant or his representative may postpone his speech until after his witnesses have been called. If the only witness for the defence is the person charged he must be called immediately after the close of the evidence for the prosecution and before his representative addresses the Court (61 & 62 Vict. c. 36, s. 2; v. p. 367).

magistrates than one, the result is determined by the opinion of the majority; if they are equally divided, and come to no decision, there may be an adjournment for a re-hearing before a re-constituted Court (*i*), or they may dismiss the information, in which case the dismissal is a bar to a second information on the same subject-matter (*k*). If they convict, they make a memorandum thereof, and the conviction being drawn up in the proper form is lodged with the clerk of the peace, to be filed among the records of the General Quarter Sessions. If the information is dismissed, the magistrates must, if required, give a certificate of the order of dismissal to the defendant, and this will be a bar to a subsequent information or complaint for the same matter against the same person (*l*).

The *judgment* consists of two parts, namely, the adjudication of conviction and the sentence or award of punishment. This punishment may be either fine or imprisonment, or both, according to the direction of the statute under which the offence falls, which statute also defines the limits of the punishment (*m*). Sometimes satisfaction by the wrongdoer to the person injured may be ordered without the infliction of any other punishment (*n*).

Again, as we have seen (*o*), the Court, although the offence is proved, may exercise the powers given by the Probation of Offenders Act, 1907, and may either dismiss the information or discharge the offender, conditionally upon his entering into a recognisance as provided by the Act, and subject in either case to any order as to payment of damages or compensation not exceeding £10.

Again, where a person is summarily convicted of any offence for which the Court has power to impose imprisonment for

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(*i*) *Bagg* v. *Colquhoun*, [1904] 1 K. B. 554.
(*k*) See *Kinnis* v. *Graves*, [1898] 67 L. J. Q. B. 583.
(*l*) 11 & 12 Vict. c. 43, s. 14.
(*m*) Whenever a Court of summary jurisdiction has power under any Act other than the Summary Jurisdiction Act, 1879, to impose imprisonment for an offence punishable on summary conviction, it may, although not given authority by the particular Act, impose a fine not exceeding £20 instead of imprisonment (42 & 43 Vict. c. 49, s. 4).
(*n*) 24 & 25 Vict. c. 96, s. 108; c. 97, s. 66.
(*o*) v. p. 423.

one month or more without the option of a fine, and (a) the offender is not less than sixteen nor more than twenty-one years of age; and (b) has been previously convicted or, having been previously discharged, has failed to observe a condition of his recognisance; and (c) by reason of his criminal tendencies or association with persons of bad character it is expedient that he should be subject to detention under instruction and discipline, the Court, instead of passing sentence, may commit him to prison until the next Quarter Sessions and the Court of Quarter Sessions may pass a sentence of detention in a Borstal institution (*p*).

Imprisonment.—No person can be sentenced by a Court of summary jurisdiction for less than five days. But a person may be ordered to be detained in police custody for not more than four days (*q*); and the Court, instead of passing a sentence of imprisonment, may direct that the offender be detained within the precincts of the Court or at any police-station until any hour not later than eight in the evening on the day on which he is convicted (*r*).

Where imprisonment without the option of a fine is imposed it may in any case be with or without hard labour; but when imprisonment is imposed in respect of the non-payment of a sum ordered to be paid it must be without hard labour (*s*).

Enforcement of fines.—The payment of fines may be enforced by distress (and in default of sufficient distress by imprisonment (*t*)) or by imprisonment in the first instance (*u*).

(*p*) 4 & 5 Geo. V. c 58, s. 10.
(*q*) 4 & 5 Geo. V. c. 58, s. 13.
(*r*) *Ibid.* s. 12.
(*s*) *Ibid.* s. 16.
(*t*) 11 & 12 Vict. c. 43, ss. 21, 22. The procedure on distress is regulated by 42 & 43 Vict. c. 49, s. 43. The wearing apparel and bedding of the person convicted and his family and the tools and implements of his trade to the value of £5 are privileged from distress, *ibid.* s. 21, sub-s. 2.
(*u*) 11 & 12 Vict. c. 43, s. 19; 42 & 43 Vict. c. 49, s. 21; 4 & 5 Geo. V. c. 58, s. 25. The periods of imprisonment authorised in default of payment of a fine, or in default of distress, are as follows: Where the fine does not exceed 10s., not more than seven days; where it is between 10s. and £1, not more than fourteen days; where between £1 and £5, not more than one month; where between £5 and £20, not more than two months; where it exceeds £20, not

The Court may allow time for the payment of a fine or may direct payment to be made by instalments (*w*), or may postpone the issue of a warrant of distress or commitment (*x*). A warrant of commitment cannot be issued in the first instance unless the Court is satisfied that the person convicted has sufficient means to pay the sum forthwith, or unless, upon being asked, he does not desire time to pay, or unless he has no fixed abode within the jurisdiction of the Court, or unless the Court for any other special reason directs that no time shall be allowed: In the absence of any of these reasons he must be allowed not less than seven days to pay (*y*). If time is not allowed for payment a warrant of commitment may not be issued in the first instance unless it appears to the Court that the offender has no goods or insufficient goods to satisfy the money payable or that the distress will be more injurious to him or his family than imprisonment (*z*).

Costs.—On conviction, the magistrate may order the defendant to pay the prosecutor's costs. On dismissal, the magistrate may order the prosecutor to pay to the defendant such costs as seem reasonable. The amount is to be specified in the conviction or order of dismissal and recovered as penalties are (*a*), but imprisonment cannot, in default of distress, be inflicted for non-payment of costs by an unsuccessful prosecutor without proof that he has, or has had, means to pay (*b*).

When a fine is imposed not exceeding five shillings, no costs are payable by the defendant to the informant without an express order; and the fine, or part thereof, may be ordered to be paid to the informant towards his costs; and all fees

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more than three months (42 & 43 Vict. c. 49, s. 5; 4 & 5 Geo. V. c. 58, s. 44). Where part of the sum has been paid the period must be reduced by a number of days bearing the same proportion to the number of days in the period as the sum paid bears to the whole sum (4 & 5 Geo. V. c. 58, s. 3, sub-s. 1).

(*w*) 42 & 43 Vict. c. 49, s. 7.

(*x*) *Ibid.* s. 21, sub-s. 1.

(*y*) 4 & 5 Geo. V. c. 58, s. 1, sub-s. 1.

(*z*) *Ibid.* s. 25, sub-s. 1.

(*a*) 11 & 12 Vict. c. 43, ss. 18, 26; see also s. 24.

(*b*) 42 & 43 Vict. c. 49, ss. 35, 47; *R.* v. *Lord Mayor of London, Ex parte Boaler*, [1893] 2 Q. B. 146; 63 L. J. M. C. 29.

payable or paid by the informant shall be remitted, or returned, unless otherwise expressly ordered (*c*).

The justices may direct the payment out of local funds of the costs of proceedings for indictable offences which are dealt with summarily, in the same way that the costs of trials at the sessions or assizes are dealt with (*d*).

Where a child or young person under sixteen years of age is ordered to pay a fine and costs, the costs can in no case exceed the amount of the fine (*e*).

Proceedings against Magistrates.—It will not be necessary to do more than mention that certain proceedings (in some cases civil, in some criminal) may be taken against justices for any irregularity or excess in their measures. As to criminal steps, it may be stated generally that "wherever the powers vested in justices for summary execution of penal laws are exerted from corrupt or personal motives," the delinquent may be proceeded against by criminal information, and punished accordingly; but "an information is never granted for an irregularity merely from ignorance or mistake" (*f*).

No application can be made for a criminal information against a magistrate for misconduct as such, unless a notice specifying the grievances complained of is served upon him six days before the application is made. The appellant must also state on affidavit his belief that the magistrate was actuated by corrupt motives, and also, if he complains of an unjust conviction, that he himself is innocent of the charge made against him (*g*).

In conclusion, we may again draw attention to the fact that the examination and punishment of offences in a summary manner by justices of the peace, without the intervention of a jury, is founded entirely upon a special authority conferred and regulated by statute in the case of

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(*c*) 42 & 43 Vict. c. 49, s. 8.
(*d*) 8 Edw. VII. c. 15, s. 1; v. p. 379.
(*e*) 8 Edw. VII. c. 67, s. 100.
(*f*) Paley, Sum. Con. 511.
(*g*) Crown Office Rules, 1906, rr. 36, 37.

each offence. No new offence is cognisable in this manner unless expressly made so by statute; if some statute does not authorise the summary proceeding, the offence must be dealt with in the ordinary way by indictment or information (*h*).

(*h*) Paley, Sum. Con. 16, 17.

BOOK V.

APPEALS.—PART I.

APPEALS FROM SUMMARY CONVICTIONS.

Two kinds of appeal exist: (i) the ordinary appeal to the Quarter Sessions; (ii) the appeal to the High Court on a case stated by the justices out of sessions.

(i) *Appeal to Quarter Sessions.*—Any person aggrieved by a conviction of a Court of summary jurisdiction in respect of any offence who did not plead guilty or admit the truth of the information may appeal from the conviction in manner provided by the Summary Jurisdiction Acts to a Court of Quarter Sessions (*a*).

Under the Summary Jurisdiction Act, 1879, by which the proceedings upon all appeals are now regulated, such appeals are subject to the following conditions and regulations (*b*):—

(i) The appeal shall be to the *next* practicable Court of General or Quarter Sessions holden not less than *fifteen* days after the day on which the decision was given.

(ii) The appellant must give notice in writing of his intention to appeal, within seven days after the decision, to the other party (*c*) and to the clerk of the Court of summary jurisdiction, and the notice must state the general grounds of the appeal.

(iii) The appellant must, within three days after his notice of appeal (*d*), enter into recognisances before a Court of summary jurisdiction (*e*), with such sureties as that Court may direct, to prosecute the appeal and abide the result and

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(*a*) 4 & 5 Geo. V. c. 58, s. 37, sub-s. 1. Note that this is a very great extension of the pre-existing right to appeal.

(*b*) 42 & 43 Vict. c. 49, s. 31.

(*c*) Notice to the solicitor is not sufficient, *R.* v. *Justices of Oxfordshire*, [1893] 2 Q. B. 149; 62 L. J. M. C. 156.

(*d*) The appeal cannot be heard if the recognisance is entered into *before* the notice of appeal is given. *R.* v. *Justices of Cheshire*, [1896] 60 J. P. 585.

(*e*) Not necessarily before the justices whose order is appealed from, or even before justices for the same county. *R.* v. *Justices of Durham*, [1895] 1 Q. B. 801; 64 L. J. M. C. 187.

pay such costs as may be awarded. Instead of finding sureties money may be deposited with the clerk of the Court as security.

(iv) If the appellant is in custody, he may be released if the Court think fit, on entering into recognisances or giving security.

(v) Notice must be signed by the appellant or his agent, and may be sent by registered letter.

Large discretionary powers are given to the Court hearing the appeal in relation to costs, adjournments, and modifying, confirming, or reversing the decisions of the Court of summary jurisdiction.

Fresh evidence may be given on the hearing of the appeal. The respondent begins, and supports the order of the Court below; if he does not attend the conviction should be quashed (*f*). The decisions of the Quarter Sessions are by a majority of votes, and are pronounced by the chairman. Such a decision is conclusive, unless a case is reserved for the consideration of the King's Bench Division.

(ii) *Case for opinion of High Court.*—Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction, on the ground that it is *erroneous in point of law, or is in excess of jurisdiction*, may apply to that Court to state a special case setting forth the facts of the case, and the grounds on which the proceeding is questioned. And if the Court declines to state the case, he may apply to a Divisional Court of the King's Bench Division of the High Court of Justice for an order requiring the case to be stated (*g*). This resort to a superior Court operates as an abandonment of the right to appeal to the Quarter Sessions (*h*). Certain conditions have also to be complied with, and a recognisance must be entered into to prosecute the appeal, and to pay the costs of the respondent, if the Court allows them. The application must

(*f*) *R.* v. *Justices of Surrey*, [1892] 2 Q. B. 719; 61 L. J. M. C. 200.

(*g*) 42 & 43 Vict. c. 49, s. 33, extending 20 & 21 Vict. c. 43, s. 2. The provisions of these two Acts must be read together; *Stokes* v. *Mitcheson*, [1902] 1 K. B. 857; 66 J. P. 615. The application is by motion for an order *nisi*, or in vacation to a Judge in chambers, Crown Office Rules, 1906, No. 49.

(*h*) 20 & 21 Vict. c. 43, s. 14.

be made as directed from time to time by rules (*i*). By one of these rules an application to a Court of summary jurisdiction, under section 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be in writing and shall be left with the clerk of the Court within seven clear days from the date of the proceeding questioned, and there shall also be left with him a copy of such application for each of the justices constituting such Court, which shall be duly forwarded by him to each of the said justices. The case shall be stated within three calendar months after the date of the application and after the recognisance has been entered into (*k*).

Where the charge is of a purely criminal character and the justices refuse to commit the defendant for trial, they have no power to state a case for the opinion of the High Court. They can, however, do so if the charge which is dismissed is one of a *quasi*-criminal nature only, *e.g.*, a prosecution for a breach of by-laws, and this course is often taken. Whether a case can be stated where a charge is purely of a criminal nature and is dealt with by the justices *summarily* and dismissed appears to be doubtful (*l*).

Where no notice of application for the case in writing had been given to the justices making the order, though notice of application in writing had been served on their clerk, it was held that there was no power to state a case (*m*). The case when stated should be signed by all the justices, whether they agreed with the decision or dissented from it (*n*).

When the case has been stated by the justices, the appellant must give notice of the appeal to the other party, and supply him with a copy of the case (*o*), transmitting the original to the King's Bench Division of the High Court, whose decision in a "criminal cause or matter" is final (*p*).

(*i*) 20 & 21 Vict. c. 43, s. 3.
(*k*) Rule 52 of the Summary Jurisdiction Rules, 1915.
(*l*) *Foss* v. *Best*, [1906] 2 K. B. 105; 75 L. J. K. B. 575.
(*m*) *Lockhart* v. *The Mayor of St. Albans*, [1888] 21 Q. B. D. 188; 57 L. J. Q. B. D. 118; v. also *Westmore* v. *Paine*, [1891] 1 Q. B. 482; 60 L. J. M. C. 89.
(*n*) *Barker* v. *Hodgson*, [1904] 68 J. P. 310. [1896] 60 J. P. 312.
(*o*) Service upon the solicitor of the other party is insufficient. *Hill* v. *Wright*,
(*p*) 36 & 37 Vict. c. 66 (Jud. Act, 1873), s. 47.

When there is any fault or illegality in the commitment alone, the proper remedy is for the defendant to sue out a writ of *habeas corpus*, which will be directed to the gaoler in whose custody the defendant is.

Certiorari.—The proceedings may also be removed by writ of *certiorari* from the justices to the King's Bench Division for the purpose of being examined by that Court, and, if necessary, quashed. Unlike the qualified right of appeal, this right exists in every case as a matter of common law, unless expressly taken away by statute.

A writ of *certiorari* will in general lie for (1) a defect or informality on the face of the proceedings before the magistrates; (2) where there has been a want of jurisdiction on their part, or any of the magistrates have had an interest in the subject-matter of the proceedings, or the proper jurisdiction of the magistrates has been exceeded; and (3) where a conviction has been obtained fraudulently. The issuing of the writ is, except when it is applied for by the Attorney-General, in the discretion of the Court, and the application must be made within six months from the date of the proceedings complained of. The application is in the first instance by motion to a Divisional Court for an order *nisi* (or in vacation to a Judge in chambers) to show cause why the writ should not be issued, and if the rule *nisi* (or summons) is granted it must be served upon the justices six days before the return day when it is to be argued, in order that they, or the other party interested, may show cause against it. The rule *nisi* will then either be discharged or made absolute (*q*).

If the case is one in which the applicant has a right of appeal to Quarter Sessions no writ of *certiorari* will be granted before the time for appealing has expired, or, if he has appealed, before his appeal has been heard (*r*). The applicant must enter into a recognisance to pay costs if his application to set aside the order should be unsuccessful (*s*).

(*q*) For fuller details as to the practice, see Crown Office Rules, 1906, and Short and Mellor's Crown Office Practice, p. 37.
(*r*) Crown Office Rules, 1906, r. 29.
(*s*) *Ibid.* r. 24.

PART II.

APPEAL TO THE COURT OF CRIMINAL APPEAL.

1. *Constitution of Court.*—(1) There shall be a Court of Criminal Appeal, and the Lord Chief Justice of England and eight Judges of the King's Bench Division of the High Court, appointed for the purpose by the Lord Chief Justice with the consent of the Lord Chancellor for such period as he thinks desirable in each case, shall be Judges of that Court.

All the Judges of the King's Bench Division are now Judges of the Court of Criminal Appeal, 8 Edw. VII. c. 46, s. 1.

(2) For the purpose of hearing and determining appeals under this Act, and for the purpose of any other proceedings under this Act, the Court of Criminal Appeal shall be summoned in accordance with directions given by the Lord Chief Justice of England with the consent of the Lord Chancellor, and the Court shall be duly constituted if it consists of not less than three Judges and of an uneven number of Judges.

See, however, s. 17 as to matters which can be dealt with by one Judge.

If the Lord Chief Justice so directs, the Court may sit in two or more divisions.

The Court shall sit in London except in cases where the Lord Chief Justice gives special directions that it shall sit at some other place.

(3) The Lord Chief Justice, if present, and in his absence the senior member of the Court, shall be president of the Court.

(4) The determination of any question before the Court of Criminal Appeal shall be according to the opinion of the majority of the members of the Court hearing the case.

(5) Unless the Court direct to the contrary in cases where, in the opinion of the Court, the question is a question of law

on which it would be convenient that separate judgments should be pronounced by the members of the Court, the judgment of the Court shall be pronounced by the president of the Court or such other member of the Court hearing the case as the president of the Court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the Court.

(6) If in any case the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that Court to any other Court.

(7) The Court of Criminal Appeal shall be a superior Court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the Court.

(8) Rules of Court shall provide for securing sittings of the Court of Criminal Appeal, if necessary, during vacation.

(9) Any direction which may be given by the Lord Chief Justice under this section may, in the event of any vacancy in that office, or in the event of the incapacity of the Lord Chief Justice to act from any reason, be given by the senior Judge of the Court of Criminal Appeal.

2. *Registrar of the Court.*—There shall be a Registrar of the Court of Criminal Appeal (in this Act referred to as the Registrar) who [shall be appointed by the Lord Chief Justice from among the Masters of the Supreme Court acting in the King's Bench Division and shall] be entitled to such additional salary (if any), and be provided with such additional staff (if any), in respect of the office of Registrar

as the Lord Chancellor, with the concurrence of the Treasury, may determine.

The senior Master of the Supreme Court shall be the first Registrar.

The Master of the Crown Office is now the Registrar of the Court of Criminal Appeal (8 Edw. VII. c. 46, s. 2, practically repealing the words in square brackets).

RIGHT OF APPEAL AND DETERMINATION OF APPEALS.

3. A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal:—

"*Convicted on indictment.*"—Notice that by s. 20, sub-s. 2, the Act applies also to convictions on *criminal* information and coroners' inquisitions and in cases where a person is dealt with by a Court of Quarter Sessions as an incorrigible rogue.

Also by s. 9, sub-s. 5 of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), a person sentenced by a Court of Quarter Sessions under that section to detention in a Borstal institution (v. p. 466) may appeal against the sentence to the Court of Criminal Appeal and the provisions of the Criminal Appeal Act shall apply accordingly.

(*a*) against his conviction on any ground of appeal which involves a question of *law* alone; and

"*Conviction.*"—Note that a *prosecutor* cannot appeal to the Court of Criminal Appeal, though with the certificate of the Attorney-General he can appeal to the House of Lords, s. 1, sub-s. 6.

The word "conviction" includes a conviction upon a plea of guilty (*R.* v. *Alexander*, 7 Cr. App. R. 110; *R.* v. *Ingleson*, [1915] 1 K. B. 512; 11 Cr. App. R. 21). It does *not* include the finding of a jury that a person arraigned was unfit to plead (*R.* v. *Larkins*, 6 Cr. App. R. 194) *nor* a finding that he was insane at the time he committed the act (*Felstead* v. *R.*, [1914] A. C. 534; 83 L. J. K. B. 1132; 10 Cr. App. R. 129; *R.* v. *Taylor*, 11 Cr. App. R. 198).

Where the indictment is bad in law an appeal lies as of right, but unless the defect is one of substance the Court may dismiss the appeal on the ground that no substantial miscarriage of justice has occurred (s. 4, sub-s. 1) or may substitute a verdict of guilty for some other offence (s. 5, sub-s. 2); *R.* v. *Garland*, [1910] 1 K. B. 154; 3 Cr. App. R. 199. See Archbold, 321-322:

Where evidence has been wrongly admitted the conviction will be quashed unless such evidence could not reasonably be said to have affected the minds of the jury; in considering this question the nature of the evidence so admitted and the direction with regard to it in the summing-up of the Judge are the most material matters. (See Archbold, 322, and authorities cited.)

If evidence has been wrongly excluded the question for consideration again is its probable effect upon the minds of the jury, and unless the verdict would in all probability have been the same the conviction will be quashed. (*Ibid.*)

If at the close of the case for the prosecution there is in the opinion of the Judge no evidence to go to the jury he should, upon a submission to that effect being made to him, direct the jury to find a verdict of not guilty, and it has been held that if he fails to do so the Court of Criminal Appeal may not have regard to any evidence for the defence which supplies the defect in

the evidence for the Crown. This has, however, been doubted. (Archbold, 322.)

But if there is no such submission at the close of the prosecution, the Court, in considering the question of miscarriage of justice, may dismiss the appeal if the evidence for the defence supplements deficiencies in the evidence for the prosecution. (Archbold, 323, and authorities cited.)

If the evidence does not prove the offence charged the conviction will be quashed apart from any considerations as to submissions. (*Ibid.*) If there has been misdirection as to the *law* the conviction will be quashed unless the prosecution can show that on a right direction the jury would have come to the same conclusion. (Archbold, 324, and authorities cited.)

(*b*) *with the leave of the Court of Criminal Appeal or upon the certificate of the Judge who tried him* that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of *fact alone*, or a question of *mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal*; and

Misdirection as to the evidence is a question of fact and must be such that it is reasonably probable that the jury would not have returned their verdict but for the misdirection. (Archbold, 324, and authorities cited.)

See Archbold, 325.

(*c*) *with the leave of the Court of Criminal Appeal* against the *sentence* passed on his conviction, unless the sentence is one fixed by law.

Sentence.—This includes an order made on a parent or guardian under the Children Act, 1908 (see pp. 423, 428).

A person sentenced to preventive detention may *without leave* appeal against his sentence, including the sentence of penal servitude which must precede the sentence of detention, Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), s. 11; *R.* v. *Weston*, [1910] 1 K. B. 17, 21; 79 L. J. K. B. 1.

4.—(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

To succeed on this ground it must be shown that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not sufficient that the case for the prosecution was weak nor that the members of the Court of Criminal Appeal have some doubt as to the correctness of the verdict. (Archbold, 325, and authorities cited.)

As, *e.g.*, where the trial was conducted unfairly, or that the identification of the prisoner was not conducted properly, or that the jury have taken into consideration matters which they ought not to have done. (Archbold, 326.)

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

The Court is not bound to pass another sentence and may simply quash the sentence passed at the trial (*R.* v. *Johnson*, [1909] 1 K. B. 439; 2 Cr. App. R. 13; *R.* v. *Bradford*, 22 Cox, 627).

5. *Powers of Court in special cases.*—(1) If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the Court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the Court consider that the appellant has been properly convicted.

(2) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied with the facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass

such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.

(3) Where on the conviction of the appellant the jury have found a special verdict, and the Court of Criminal Appeal consider that a wrong conclusion has been arrived at by the Court before which the appellant has been convicted on the effect of that verdict, the Court of Criminal Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.

(4) If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made, so as not to be responsible according to law for his actions, the Court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act.

6. *Re-vesting and restitution of property on conviction.*— The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the operation, in case of any such conviction, of the provisions of sub-section (1) of section twenty-four of the Sale of Goods Act, 1893, as to the re-vesting of the property in stolen goods on conviction, shall (unless the Court before whom the conviction takes place direct to the contrary in any case in which, in their opinion, the title to the property is not in dispute) be suspended:—

(a) in any case until the expiration of ten days after the date of the conviction; and

(b) in cases where notice of appeal or leave to appeal is given within ten days after the date of conviction, until the determination of the appeal;

and in cases where the operation of any such order, or the operation of the said provisions, is suspended until the

determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal. Provision may be made by rules of Court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.

See rules 9—13, Archbold, 303.

(2) The Court of Criminal Appeal may by order annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

PROCEDURE.

7. *Time for appealing.*—(1) Where a person convicted desires to appeal under this Act to the Court of Criminal Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of Court within ten days of the date of conviction: Such rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires. Any case or argument so presented shall be considered by the Court.

See rules 17—25, Archbold, 305.

Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given may be extended at any time by the Court of Criminal Appeal.

(2) In the case of a conviction involving sentence of death or corporal punishment:—

(a) The sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and

(b) if notice is so given, the appeal or application shall be heard and determined with as much expedition as

practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused, of the application.

8. *Judge's notes and report to be furnished on appeal.*—The Judge or chairman of any Court before whom a person is convicted shall, in the case of an appeal under this Act against the conviction or against the sentence, or in the case of an application for leave to appeal under this Act, furnish to the Registrar, in accordance with rules of Court, his notes of the trial, and shall also furnish to the Registrar in accordance with rules of Court a report giving his opinion upon the case or upon any point arising in the case.

9. *Supplemental powers of Court.*—For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice:—

(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and

(b) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court before any Judge of the Court or before any officer of the Court or justice of the peace or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and

For cases in which this has been done, see Archbold, 295.

(c) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant in cases where the evidence of the

husband or wife could not have been given at the trial except on such an application; and

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by rules of Court for enquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

(e) appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Court: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

10. *Legal assistance to appellant.*—The Court of Criminal Appeal may at any time assign to an appellant a solicitor and counsel, or counsel only, in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.

See also s. 15, sub-s. 5.

11. *Right of appellant to be present.*—(1) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where

rules of Court provide that he shall have the right to be present, or where the Court gives him leave to be present.

(2) The power of the Court to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present.

12. *Duty of Director of Public Prosecutions.*—It shall be the duty of the Director of Public Prosecutions to appear for the Crown on every appeal to the Court of Criminal Appeal under this Act, except so far as the solicitor of a Government department, or a private prosecutor in the case of a private prosecution, undertakes the defence of the appeal, and the Prosecution of Offences Act, 1879, shall apply as though the duty of the Director of Public Prosecutions under this section were a duty under section two of that Act, and provision shall be made by rules of Court for the transmission to the Director of Public Prosecutions of all such documents, exhibits, and other things connected with the proceedings as he may require for the purpose of his duties under this section.

13. *Costs of appeal.*—(1) On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto under this Act no costs shall be allowed on either side.

(2) The expenses of any solicitor or counsel assigned to an appellant under this Act, and the expenses of any witnesses attending on the order of the Court or examined in any proceedings incidental to the appeal, and of the appearance of an appellant on the hearing of his appeal or on any proceedings preliminary or incidental to the appeal, and all expenses of and incidental to any examination of witnesses conducted by any person appointed by the Court for the purpose, or any reference of a question to a special commissioner appointed by the Court, or of any person appointed as assessor to the Court, shall be defrayed, up to an amount allowed by the Court, but subject to any regulations as to rates and scales of payment made by the Secretary of State,

in the same manner as the expenses of a prosecution in cases of felony.

By s. 9, sub-s. 6 of the Costs in Criminal Cases Act, 1908 (8 Edw. VII. c. 15), "a reference to the payment of costs out of local funds under this Act shall be substituted for any reference to the payment of expenses in the case of an indictment for felony, or any like reference . . . in s. 13 of the Criminal Appeal Act, 1907." There is no provision in the Act for the expenses of a private prosecutor in opposing an appeal.

14.—(1) An appellant who is not admitted to bail shall, pending the determination of his appeal, be treated in such manner as may be directed by prison rules within the meaning of the Prison Act, 1898.

(2) The Court of Criminal Appeal may, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

(3) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and, subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court of Criminal Appeal, shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

(4) Where a case is stated under the Crown Cases Act, 1848, this section shall apply to the person in relation to whose conviction the case is stated as it applies to an appellant.

(5) Provision shall be made by prison rules within the meaning of the Prison Act, 1898, for the manner in which an appellant, when in custody, is to be brought to any place at which he is entitled to be present for the purposes of this Act, or to any place to which the Court of Criminal Appeal

or any Judge thereof may order him to be taken for the purpose of any proceedings of that Court, and for the manner in which he is to be kept in custody while absent from prison for the purpose; and an appellant whilst in custody in accordance with those rules shall be deemed to be in legal custody.

15. *Duties of Registrar with respect to notices of appeal, &c.*—(1) The Registrar shall take all necessary steps for obtaining a hearing under this Act of any appeals or applications, notice of which is given to him under this Act, and shall obtain and lay before the Court in proper form all documents, exhibits, and other things relating to the proceedings in the Court before which the appellant or applicant was tried which appear necessary for the proper determination of the appeal or application.

(2) If it appears to the Registrar that any notice of an appeal against a conviction purporting to be on a ground of appeal which involves a question of law alone does not show any substantial ground of appeal, the Registrar may refer the appeal to the Court for summary determination, and, where the case is so referred, the Court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily, without calling on any persons to attend the hearing or to appear for the Crown thereon.

(3) Any documents, exhibits, or other things connected with the proceedings on the trial of any person on indictment, who, if convicted, is entitled or may be authorised to appeal under this Act, shall be kept in the custody of the Court of trial in accordance with rules of Court made for the purpose, for such time as may be provided by the rules and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits, or things from that custody.

(4) The Registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this Act to any person who demands the same, and to officers of Courts, governors of prisons, and such

other officers or persons as he thinks fit, and the governor of a prison shall cause those forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this Act, and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the Registrar.

(5) The Registrar shall report to the Court or some Judge thereof any case in which it appears to him that, although no application has been given for the purpose, a solicitor and counsel or counsel only ought to be assigned to an appellant under the powers given to the Court by this Act.

16. *Shorthand notes of trial.*—(1) Shorthand notes shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the Registrar so directs, and furnished to the Registrar for the use of the Court of Criminal Appeal or any Judge thereof: Provided that a transcript shall be furnished to any party interested upon the payment of such charges as the Treasury may fix.

If there is no shorthand note or the note taken is inadequate, the Court of Criminal Appeal can proceed upon the material available. (Archbold, 298.)

(2) The Secretary of State may also, if he thinks fit in any case, direct a transcript of the shorthand notes to be made and furnished to him for his use.

(3) The cost of taking any such shorthand notes, and of any transcript where a transcript is directed to be made by the Registrar or by the Secretary of State, shall be defrayed in accordance with scales of payment fixed for the time being by the Treasury, out of moneys provided by Parliament, and rules of Court may make such provision as is necessary for securing the accuracy of the notes to be taken and for the verification of the transcript.

17. *Powers which may be exercised by a Judge of the Court.*—The powers of the Court of Criminal Appeal under this Act to give leave to appeal, to extend the time within

which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any Judge of the Court of Criminal Appeal in the same manner as they may be exercised by the Court, and subject to the same provisions; but, if the Judge refuses an application on the part of an appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court of Criminal Appeal as duly constituted for the hearing and determining of appeals under this Act.

18. *Rules of Court.*—(1) Rules of Court for the purposes of this Act shall be made, subject to the approval of the Lord Chancellor, and so far as the rules affect the governor or any other officer of a prison, or any officer having the custody of an appellant, subject to the approval also of the Secretary of State, by the Lord Chief Justice and the Judges of the Court of Criminal Appeal, or any three of such Judges, with the advice and assistance of the Committee hereinafter mentioned. Rules so made may make provision with respect to any matter for which provision is to be made under this Act by rules of Court, and may regulate generally the practice and procedure under this Act, and the officers of any Court before whom an appellant has been convicted, and the governor or other officers of any prison or other officer having the custody of an appellant and any other officers or persons, shall comply with any requirements of those rules so far as they affect those officers or persons, and compliance with those rules may be enforced by order of the Court of Criminal Appeal.

(2) The Committee hereinafter referred to shall consist of a chairman of Quarter Sessions appointed by a Secretary of State, the Permanent Under-Secretary of State for the time being for the Home Department, the Director of Public Prosecutions for the time being, the Registrar of the Court of Criminal Appeal, and a clerk of assize, and a clerk of the

peace appointed by the Lord Chief Justice, and a solicitor appointed by the President of the Law Society for the time being, and a barrister appointed by the General Council of the Bar. The term of office of any person who is a member of the Committee by virtue of appointment shall be such as may be specified in the appointment.

(3) Every rule under this Act shall be laid before each House of Parliament forthwith, and, if an address is presented to His Majesty by either House of Parliament within the next subsequent thirty days on which the House has sat next after any such rule is laid before it, praying that the rule may be annulled, His Majesty in council may annul the rule, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.

SUPPLEMENTAL.

19. *Prerogative of mercy.*—Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either:—

(a) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or

(b) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly.

20. *Criminal informations, procedure in the High Court, &c.*—(1) Writs of error, and the powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, are hereby abolished.

Note that the Act gives no power to order a new trial.

(2) This Act shall apply in the case of convictions on *criminal* informations and coroners' inquisitions and in cases where a person is dealt with by a Court of Quarter Sessions as an incorrigible rogue under the Vagrancy Act, 1824, as it applies in the case of convictions on indictments, but shall not apply in the case of convictions on indictments or inquisitions charging any peer or peeress or other person claiming the privilege of peerage, with any offence not now lawfully triable by a Court of assize.

An appeal of an incorrigible rogue can be only from his sentence at Quarter Sessions, not from his conviction at Petty Sessions. (*R.* v. *Johnson*, [1909] 1 K. B. 439; 78 L. J. K. B. 290; 2 Cr. App. R. 13.)

(3) Notwithstanding anything in any other Act, an appeal shall lie from a conviction on indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river, in whatever Court the indictment is tried, in all respects as though the conviction were a verdict in a civil action tried at assizes, and shall not lie under this Act.

(4) All jurisdiction and authority under the Crown Cases Act, 1848, in relation to questions of law arising in criminal trials which is transferred to the Judges of the High Court by section forty-seven of the Supreme Court of Judicature Act, 1873, shall be vested in the Court of Criminal Appeal under this Act, and in any case where a person convicted appeals under this Act against his conviction on any ground of appeal which involves a question of law alone, the Court of Criminal Appeal may, if they think fit, decide that the procedure under the Crown Cases Act, 1848, as to the statement of a case should be followed, and require a case to be

stated accordingly under that Act in the same manner as if a question of law had been reserved.

This power has not yet been exercised.

21. *Definitions.*—In this Act, unless the context otherwise requires:—

The expression "appellant" includes a person who has been convicted and desires to appeal under this Act; and

The expression "sentence" includes any order of the Court made on conviction with reference to the person convicted or his wife or children, and any recommendation of the Court as to the making of an expulsion order in the case of a person convicted, and the power of the Court of Criminal Appeal to pass a sentence includes a power to make any such order of the Court or recommendation, and a recommendation so made by the Court of Criminal Appeal shall have the same effect for the purposes of section three of the Aliens Act, 1905, as the certificate and recommendation of the convicting Court.

This includes an order for payment of costs by the person convicted. (*R.* v. *Howard*, 6 Cr. App. R. 17.)

22. *Repeal.*—The Acts specified in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

23.—(1) This Act may be cited as the Criminal Appeal Act, 1907.

(2) This Act shall not extend to Scotland or Ireland.

(3) This Act shall apply to all persons convicted after the eighteenth day of April nineteen hundred and eight, but shall not affect the rights, as respects appeal, of any persons convicted on or before that date.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
7 & 8 Will. III. c. 3	The Treason Act, 1695.	In section nine, from "but neverthelesse" to the end of the section.
11 & 12 Vict. c. 78	The Crown Cases Act, 1848.	Sections three and five.
38 & 39 Vict. c. 77	The Supreme Court of Judicature Act, 1875.	In section nineteen, the words "including the practice and procedure with respect to Crown cases reserved."
44 & 45 Vict. c. 68	The Supreme Court of Judicature Act, 1881.	Section fifteen.

TABLE OF PRINCIPAL OFFENCES.

THEIR PUNISHMENTS, STATUTES, &c.

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THEIR PUNISHMENTS, STATUTES, &c.

NOTE.—The maximum length of penal servitude is stated. The minimum is in every case *three* years. v. 54 & 55 Vict. c. 69, s. 1.

OFFENCE.	FELONY OR MISDEMEANOUR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Offences against the Law of Nations:						
Piracy	Fel.	Life.	2 yrs.	No.	11 & 12 Wm. III. c. 7.	31
,, with violence	Fel.	Death.	...	No.	8 Geo. I. c. 24. ...	
					18 Geo. II. c. 30 ...	
Slaves, conveying, &c.	Fel.	Life.	2 yrs.	No.	7 Wm. IV. & 1 Vict. c. 88	
,, other offences as to	Fel. or Misd.	...	...	No.	5 Geo. IV. c. 113 ...	33
					36 & 37 Vict. c. 88	
Offences against the Government and Sovereign:						
Treason	Fel.	Death.	...	No.	25 Ed. III. st. 5, c. 2	34
					7 & 8 Wm. III. c. 3...	
					1 Anne, st. 2, c. 17, s. 3	
					6 Anne, c. 7	
					7 Anne, c. 21, s. 11 ...	
					36 Geo. III. c. 7 ...	
					39 & 40 Geo. III. c. 93	
					54 Geo. III. c. 146 ...	
					57 Geo. III. c. 6 ...	
					11 & 12 Vict. c. 12 ...	
Attempt to alarm the King	Misd.	7 yrs.	2 yrs. (Whipping).	No.	5 & 6 Vict. c. 51 ...	40
Treason-Felony	Fel.	Life.	2 yrs.	No.	11 & 12 Vict. c. 12 ...	40
Seditious libel	Misd.	...	F. and (or) imp.	No.	6 & 7 Vict. c. 96, s. 6	41
Unlawful oaths against Government ...	Fel.	7 yrs.	2 yrs.	No.	37 Geo. III. c. 123 ...	42
,, ,, to commit crimes	Fel.	Life.	2 yrs.	No.	52 Geo. III. c. 104 ...	43

Unlawful societies	Misd.	7 yrs.	2 yrs.	No.	39 Geo. III. c. 79 ... / 57 Geo. III. c. 19 ...	44
Offences against Foreign Enlistment Act ...	Misd.	...	F. and (or) im. for 2 yrs.	Yes.	33 & 34 Vict. c. 90 ...	44
Desertion, Mutiny, &c.	Fel.	Life.	2 yrs.	No.	37 Geo. III. c. 70 ...	46
Illegal training and drilling	Misd.	7 yrs.	2 yrs.	No.	60 Geo. III. & 1 Geo. IV. c. 1	47
Public stores, unlawful dealings with ...	Misd.	...	2 yrs.	Yes.	38 & 39 Vict. c. 25 ...	47
Public stores, obliterating marks	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.*	
Coinage Offences	...	...	...	...	24 & 25 Vict. c. 99 ...	
Counterfeiting gold or silver of realm ...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 2 ...	
,, copper of realm or foreign gold or silver	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* ss. 14, 18 ...	49
,, foreign copper	Misd.	...	1 yr.	Yes.	*Ibid.* s. 22 ...	
,, (second offence)	Misd.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 22 ...	
Colouring, &c., to represent gold or silver...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 3 ...	
Impairing, &c., gold or silver	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 4 ...	
Having clippings, &c.	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 5 ...	50
Defacing coin	Misd.	...	1 yr.	Yes.	*Ibid.* s. 16 ...	
Buying or selling counterfeit gold or silver	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 6 ...	
,, ,, copper ...	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 14 ...	
Importing, &c., counterfeit gold or silver ...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 7 ...	
,, foreign gold or silver ...	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 19 ...	
Exporting counterfeit coin	Misd.	...	2 yrs.	Yes.	*Ibid.* s. 8 ...	
Uttering—						
counterfeit gold or silver or copper ...	Misd.	...	1 yr.	Yes.	*Ibid.* ss. 9, 15 ...	
if other counterfeit in possession, or other uttering within ten days ...	Misd.	...	2 yrs.	Yes.	*Ibid.* s. 10 ...	51
after certain previous convictions ...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 12 ...	
counterfeit foreign coin	Misd.	...	6 months.	Yes.	*Ibid.* s. 20 ...	
second offence	Misd.	...	2 yrs.	Yes.	*Ibid.* s. 21 ...	
third offence	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 21 ...	
spurious coin resembling coin of realm ...	Misd.	...	1 yr.	Yes.	*Ibid.* s. 13 ...	

OFFENCE.	FELONY OR MISDEMEANOUR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Offences against Government & Sovereign—*cont.*						
Having in possession—						
three or more pieces of counterfeit g. or s.	Misd.	5 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 99, s. 11	
,, ,, after certain previous convictions	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 12 ...	
,, ,, of counterfeit copper	Misd.	...	1 yr.	Yes.	*Ibid.* s. 15 ...	
more than five pieces of counterfeit foreign coin		(Summary conviction.)			*Ibid.* s. 23 ...	52
Making, &c., coining tools	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 24 ...	
Making, &c., coining tools for copper ...	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 14 ...	
Conveying out of Mint tools, bullion, &c. ...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 25 ...	
Concealment of treasure trove	Misd.	...	F. and (or) imp., or both	Yes.	...	53
Entering prohibited place, making sketches, &c.	Fel.	7 yrs.	2 yrs.	No.	1 & 2 Geo V. c. 28, s. 1	53
Communicating such sketch, &c., to unauthorised person	Misd.	...	2 yrs. and (or) F.	No.	*Ibid.* s. 2 ...	54
Harbouring such person and refusing information	Misd.	...	1 yr. and (or) F.	No.	*Ibid.* s. 7 ...	
Offences against Religion:						
Apostasy (second offence)	Misd.	...	3 yrs.	No.	9 & 10 Wm. III. c. 32	56
Blasphemy	Misd.	...	F. and (or) im.	No.	...	
Disturbing public worship	Misd.	...	F. of £40.	Yes.	52 Geo. III. c. 155, s. 12	57
Riotous conduct in public worship		(Summary conviction.)			23 & 24 Vict. c. 32 ...	
Disturbing burial	Misd.	...	F. or im.	Yes.	43 & 44 Vict. c. 41 s. 7	
Swearing and profanation of Sabbath ...		(Summary conviction.)			19 Geo. II. c. 21. ...	58
Palmistry, &c.		(Summary conviction.)			29 Car. II. c. 7 ...	
					5 Geo. IV. c. 83 ...	
Offences against Public Justice:						
Escape	Fel. or Misd.	(v. p. 60.)				

Escape, aiding	Fel.	...	2 yrs.	Yes.	16 Geo. II. c. 31 ...	
,, aiding while prisoner being conveyed to prison	Fel.	7 yrs.	...	Yes.	28 & 29 Vict. c. 126, s. 37	61
,, aiding prisoner of war	Fel.	Life.	...	No.	52 Geo. III. c. 156 ...	
Breach of prison: if for felony	Fel.	7 yrs.	2 yrs.	Yes.	1 Edw. II. st. 2, c. 1...	61
,, ,, otherwise	Misd.	...	F. and (or) im.	Yes.	...	
Being at large during a term of penal servitude	Fel.	Life.	2 yrs.	No.	5 Geo. IV. c. 84, s. 22...	62
Rescue, if person rescued convicted of felony	Fel.	7 yrs.	2 yrs.	Yes.	1 & 2 Geo. IV. c. 88...	
Rescue, if not so convicted, or of misdemeanor	Misd.	...	F. or im., or both.	Yes.	...	62, 63
Rescue in case of murder	Fel.	Life.	2 yrs.	No.	25 Geo. II. c. 37, s. 9	
Poundbreach	Misd.	...	F. or im., or both.	Yes.	5 Geo. IV. c. 84, s. 22	
Obstructing arrest			(v. p. 63.)			
Perjury and subornation	Misd.	7 yrs.	F. and (or) im., 2 yrs.	No.	1 & 2 Geo. V. c. 6 ...	64
Attempted subornation	Misd.	...	1 yr.	No.	*Ibid.*	69
Voluntary oaths	Misd.	...	F. or im., or both.	No.	5 & 6 Wm. IV. c. 62, s. 13	69
False declarations, v. p. 68						
Bribery, of those in office	Misd.	...	F. and im.	No.	...	70
Sale, &c., of offices	Misd.	...	F. and im.	Yes.	49 Geo. III. c. 126 ...	71
Corrupt practices at elections—bribery—treating—undue influence	Misd	...	F. of £200 or im. 1 yr.	No.	17 & 18 Vict. c. 102 ... 21 & 22 Vict. c. 87 ... 26 & 27 Vict. c. 29 ... 30 & 31 Vict. c. 102, s. 49 31 & 32 Vict. c. 125, ss. 43–47. 35 & 36 Vict. c. 60, s. 3 46 & 47 Vict. c. 51, s. 6	71
Personation	Fel.	...	2 yrs.	No.	46 & 47 Vict. c. 51, s. 6	73
Illegal practice	Misd.	...	F. £100.	No (*a*).	46 & 47 Vict. c. 51, s. 10	73
Bribery of agents or servants	Misd.	...	F. of £500 and im. 2 yrs.	No.	6 Edw. VII. c. 34 ... 6 & 7 Geo. V. c. 64 ...	74

(*a*) The offences of unlawfully withdrawing an election petition, of an elector employed by a candidate voting, and of a returning officer, his clerk, or partner acting as agent for a candidate, are triable at Quarter Sessions.

TABLE OF PRINCIPAL OFFENCES—THEIR PUNISHMENTS, STATUTES, &c.—*continued.*

OFFENCE.	FELONY OR MISDEMEANOUR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Offences against Public Justice—*continued.*						
Embracery	Misd.	...	F. or im., or both.	Yes.	6 Geo. IV. c. 50, s. 61	75
Common Barratry	Misd.	...	F. or im., or both.	Yes.	12 Geo. I. c. 29, s. 4...	75
Maintenance	Misd.	...	F. or im., or both.	Yes.	8 Eliz. c. 2	76
Champerty	Misd.	...	F. or im., or both.	Yes.	...	
Compounding felony...	Misd.	...	F. and im.	Yes.	...	77
Taking reward to recover stolen property ...	Fel.	7 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 96, ss. 101, 102.	78
Compounding informations on penal statutes without leave	Misd.	...	F. and im.	Yes.	18 Eliz. c. 5 ... ... 56 Geo. III. c. 138, s. 2	78
Misprision of felony	Misd.	...	F. or im., or both.	Yes.	...	79
Extortion, and other misconduct of officers of justice	Misd.	...	F. or im., or both.	Yes.	...	79
Contempt of court of justice	...	...	F. or im., or both.	Yes.	...	81
Offences against the Public Peace:						
Riot, rout, or unlawful assembly	Misd.	...	F. or im., or both.	Yes (*a*).	v. 24 & 25 Vict. c. 97, ss. 11, 12.	83
,, under Riot Act, after proclamation ...	Fel.	Life.	2 yrs.	No.	1 Geo. I. st. 2, c. 5. ...	85
Affray	Misd.	...	F. or im., or both.	Yes.	...	86
Challenge to fight	Misd.	...	F. or im., or both.	Yes.	...	86
Sending letter threatening to burn or destroy houses, &c., or to kill, &c., cattle ...	Fel.	10 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 97, s. 50	87
Sending letter threatening to kill	Fel.	10 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 100, s. 16	87
Sending letter demanding money, &c., with menaces	Fel.	Life.	2 yrs.	No.	6 & 7 Geo. V. c. 50, s. 29	87
Menaces other than by letter, with intent to steal	Fel.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 30 ...	88

Threats to publish with intent to extort, &c.	Misd.	...	2 yrs.	Yes.	*Ibid.* s. 31 ...	88
Libel, defamatory	Misd.	...	F. and (or) im., 1 yr.	No.	32 Geo. III. c. 60 ... 6 & 7 Vict. c 96, ss. 3–10	94
,, if falsity known	Misd.	...	F. and (or) im., 2 yrs.	No.	51 & 52 Vict. c. 64 ...	
Forcible entry or detainer	Misd.	...	F. or im., or both.	Yes.	5 Rich. II. c. 8 ... 21 Jac. I. c. 15 ...	95
Offences against Trade:						
Smuggling—taking goods from warehouse without paying duty ...	Misd.	...	F. or im.	Yes.	39 & 40 Vict. c. 36, s. 85	96, 97
,, shooting at vessels, wounding officers, &c.	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 193 ...	
,, procuring persons to assemble for	Misd.	...	1 yr.	Yes.	*Ibid.* s. 189 ...	
,, if persons armed or disguised	Misd.	...	3 yrs.			
,, making signals, &c.	Misd.	...	£100 or 1 yr.	Yes.	*Ibid.* s. 190 ...	
Bankruptcy Laws, offences against... ...	Misd. Fel. s. 159	...	2 yrs.	Yes.	4 & 5 Geo. V. c. 59 ...	97
Debtors Act, 1869, offences against ...	Misd.	...	1 yr.	Yes.	32 & 33 Vict. c. 62 ...	101
Counterfeiting trade-marks	Misd.	...	F. and (or) im., 2 yrs.	Yes.	50 & 51 Vict. c. 28 ...	102
Unlawful interference with trade	Misd. or Sum. Conv.	...	3 mos. or £20.	Yes.	24 & 25 Vict. c. 100, ss. 39, 40. 34 & 35 Vict. c. 31, s. 2 38 & 39 Vict. c. 86 ... 6 Edw. VII. c. 47 ...	104
Conspiracy:						
in ordinary cases	Misd.	...	F. and (or) im., or both.	Yes (*b*).	14 & 15 Vict. c. 100, s. 12	106
to murder	Misd.	10 yrs.	2 yrs.	No.	24 & 25 Vict. c. 100, s. 4	107

(*a*) Except the riotous demolition of houses, machinery, &c., which must be tried at the Assizes, the punishment extending to penal servitude for life—v. p. 265
(*b*) Except conspiracies to commit crimes which there is no jurisdiction to try at Quarter Sessions.

TABLE OF PRINCIPAL OFFENCES—THEIR PUNISHMENTS, STATUTES, &c.—*continued.*

OFFENCE.	FELONY OR MISDEMEANOUR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Offences against Public Morals, Health, &c.:						
Bigamy	Fel.	7 yrs.	2 yrs.	No.	24 & 25 Vict. c. 100, s. 57	110
Indecent conduct, or publication	Misd.	...	F. or im., or both.	Yes.	14 & 15 Vict. c. 100, ss. 25–29. 20 & 21 Vict. c. 83 ...	112
Gaming, cheating at	Misd.	5 yrs.	2 yrs.	Yes.	8 & 9 Vict. c. 109 s. 17	114
,, in public places and street betting			(v. Vagrancy.)		36 & 37 Vict. c. 38, s. 3 6 Edw. VII. c. 43 ...	114
Gambling on marine perils	...	...	£100 or 6 mos.	Summary conviction.	9 Edw. VII. c. 12.	114
Gaming-house or betting-house, keeping ...	Misd.	...	F. or im., or both.	Yes.	8 & 9 Vict. c. 109 ... 17 & 18 Vict. c. 38 ...	115
Sending circulars, &c., to infants, soliciting to bet or borrow	Misd.	...	£100 or 3 mos.	Yes.	55 Vict. c. 4	118
Nuisance, common or public	Misd.	...	F. or im., or both.	Yes.	...	118
Adulteration of provisions (2nd offence) ...	Misd.	...	6 mos.	Yes.	38 & 39 Vict. c. 63 ...	124
Furious driving	Misd.	...	2 yrs. or f., or both.	Yes.	24 & 25 Vict. c. 100, s. 35	126
Vagrancy, idle and disorderly persons ...	...	...	1 mo.	Summary conviction.	5 Geo. IV. c. 83 ...	127
,, rogues and vagabonds	...	...	3 mos.		1 & 2 Vict. c. 38 ...	128
,, incorrigible rogues	...	...	1 yr.			129
Drunkenness, v. p. 130	...	(Summary conviction.)				
Unseaworthy ship, sending to sea	Misd.	...	F. or im., or both.	Yes.	57 & 58 Vict. c. 60, s. 457	130
Neglect of duty by master, &c., of ship ...	Misd.	...	F. or im., or both.	Yes.	*Ibid.* ss. 419, 422; 2 & 3 Geo. V. c. 31, ss. 46–48	131
Offences relating to Game:						
Taking, &c., by night after two summary convictions	Misd.	7 yrs.	2 yrs.	Yes.	9 Geo. IV. c. 69 ...	
Assaulting officers, when committing, &c.	Misd.	7 yrs.	2 yrs.	Yes.	7 & 8 Vict. c. 29 ...	134
Three or more armed entering, &c. ...	Misd.	14 yrs.	2 yrs.	No.	25 & 26 Vict. c. 114 ...	

Spring guns, &c., setting	Misd.	5 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 100, s. 31	135
Day-poaching...		(Summary conviction.)			1 & 2 Vict. c. 32 ...	135
Homicide: p. 138						
Murder	Fel.	Death.	...	No.	24 & 25 Vict. c. 100, s. 1	148
,, accessory after the fact	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 67 ...	148
Manslaughter...	Fel.	Life.	F. and (or) im., 2 yrs.	No.	*Ibid.* s. 5 ...	152
Attempt to murder	Fel.	Life.	2 yrs.	No.	*Ibid.* ss. 11–15 ...	154
Attempt to commit suicide	Misd.	...	F. or im.	Yes.	...	144
Rape, &c.:						
Rape	Fel.	Life.	2 yrs.	No.	*Ibid.* ss. 48, 63 ...	157
Carnally abusing children under thirteen ...	Fel.	Life.	2 yrs.	No.	48 & 49 Vict. c. 69, ss. 4, 5, 6.	157, 158
,, ,, ,, attempt ...	Misd.	...	2 yrs.	No.		
,, ,, ,, ,, sixteen or attempt	Misd.	...	2 yrs.	No.		
Carnally abusing female idiot or imbecile...	Misd.	...	2 yrs.	No.		
Allowing girl under 13 to resort to premises for unlawful carnal knowledge	Fel.	Life.	2 yrs.	No.		
The same, if the girl is under 16	Misd.	...	2 yrs.	No.		
Causing or encouraging seduction, &c., of girl under 16	Misd.	...	2 yrs.	Yes.	8 Edw. VII. c. 67, s. 17 10 Edw. VII. & 1 Geo. V. c. 25.	158
Procuration, &c.	Misd.	...	2 yrs.	No.	...	159
Carnally knowing female lunatic patient ...	Misd.	...	2 yrs.	Yes.	53 Vict. c. 5, s. 324 ...	61
Indecent assault	Misd.	...	2 yrs.	Yes.	24 & 25 Vict. c. 100 s. 52	
Carnally knowing female defective, attempt, procuration, &c.	Misd.	...	2 yrs.	No.	3 & 4 Geo. V. c. 28, s. 56	161
Unnatural crime	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 61 ...	162
,, attempt, &c....	Misd.	10 yrs.	2 yrs.	Yes.	*Ibid.* s. 62 ...	
Indecent conduct with another male person	Misd.	...	2 yrs.	No.	48 & 49 Vict. c. 69 ...	
Incest	Misd.	7 yrs.	2 yrs.	No.	8 Edw. VII. c. 45 ...	163
Abortion, attempt to procure	Fel.	Life.	2 yrs.	No.	24 & 25 Vict. c. 100, s. 58	164
,, supplying poison, &c., for ...	Misd.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 59 ...	165
Concealment of birth	Misd.	...	2 yrs.	No.	*Ibid.* s. 60 ...	165

TABLE OF PRINCIPAL OFFENCES—THEIR PUNISHMENTS, STATUTES, &c.—*continued.*

OFFENCE.	FELONY OR MISDEMEANOUR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Rape, &c.—*continued.*						
Abduction for fortune; or by force with intent, &c.	Fel.	14 yrs.	2 yrs.	No.	*Ibid.* ss. 53, 54 ...	166
Abducting girls under eighteen and sixteen	Misd.	...	2 yrs.	No.	48 & 49 Vict. c. 69, s. 7	167
Child stealing...	Fel.	7 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 100, s. 56	168,
,, exposing	Misd.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 27 ... / 4 Edw. VII. c. 15, s. 1	169
v. also other offences under Criminal Law Amendment Act, pp. 157–160.						
Assaults, &c.:						
Common assault	Misd.	(Usually sum. con., v. p. 457.)	1 yr.	Yes.	24 & 25 Vict. c. 100, ss. 42, 47	171
Actual bodily harm	Misd.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 47 ...	174
Grievous bodily harm	Misd.	5 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 100, s. 20	174
,, ,, with intent to maim, resist apprehension, &c. ...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 18 ...	
Assault with intent to commit felony ...	Misd.	...	2 yrs.	Yes.	24 & 25 Vict. c. 100, s. 38	
Attempt to choke, &c., with intent, &c. ...	Fel.	Life.	2 yrs. (Whipping).	No.	*Ibid.* s. 21 ... / 26 & 27 Vict. c. 44 ...	175
Administering chloroform, &c., with intent, &c.	Fel.	Life.	2 yrs.	No.	24 & 25 Vict. c. 100, s. 22	
Administering poison, so as to endanger, &c.	Fel.	10 yrs.	2 yrs.	Yes.	*Ibid.* ss. 23, 25 ...	
Administering poison, with intent to annoy, &c.	Misd.	5 yrs.	2 yrs.	Yes.	*Ibid.* ss. 24, 25 ...	
By explosion, &c., doing grievous bodily harm	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 28 ...	176
Causing explosion with intent to do grievous bodily harm	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 29 ...	
Placing gunpowder, &c., near buildings, ships, &c., with intent	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 30 ...	

Endangering safety of railway passengers by certain acts	Fel.	Life.	2 yrs.	No.	*Ibid.* ss. 32, 33 ...	177
Endangering safety of railway passengers otherwise	Misd.	...	2 yrs.	Yes.	*Ibid.* s. 34 ...	
Assault on officer, &c., preserving wreck ...	Misd.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 37 ...	178
Impeding escape from wreck	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 17 ...	178
Forcing or leaving seamen on shore ...	Misd. or Sum. Conv.	...	F. or im., or both.	Yes.	6 Edw. VII. c. 48, ss. 30, 36, 43, 680.	178
Assault on peace officer, &c.	Misd.	...	2 yrs.	Yes.	24 & 25 Vict. c. 100, s. 38	179
,, clergyman on duty	Misd.	...	2 yrs.	Yes.	*Ibid.* s. 36 ...	179
,, apprentices and servants ...	Misd.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 26 ...	179
,, lunatic	Misd. or Sum. Conv.	...	F. or im., or both.	Yes.	53 Vict. c. 5	185
,, children, ill-treating, neglecting, &c.	Misd. or Sum. Conv.	v. 8 Edw. VII. c. 67.		Yes.	...	180
,, mental defectives	Misd. also Sum. Conv.	...	F. or im., 2 yrs.	Yes.	3 & 4 Geo. V. c. 28 ...	186
,, with intent to rob, v. *infra*						
,, indecent, v. *supra*						
,, in trade disputes, v. *supra*						
,, on gamekeepers, v. *supra*						
False imprisonment	Misd.	...	F. or im., or both.	Yes.	...	197
Larceny:						
Simple larceny	Fel.	5 yrs.	2 yrs.	Yes.	6 & 7 Geo. V. c. 50, s. 2	210
,, ,, after previous conviction for felony	Fel.	10 yrs.	2 yrs.	Yes.	*Ibid.* s. 37 (1) ...	211
,, ,, after previous conviction for indictable misdemeanour under Larceny Act or after two summary convictions	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 37 (2) ...	

TABLE OF PRINCIPAL OFFENCES—THEIR PUNISHMENTS, STATUTES, &c.—*continued.*

OFFENCE.	FELONY OR MISDEMEANOUR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Larceny—*continued.*						
Larceny by husband or wife of the other's goods		(v. p. 203.)				
,, by tenants or lodgers, of fixtures, &c.	Fel.	7 yrs. if value above £5.	2 yrs.	Yes.	*Ibid.* s. 16 ...	210
,, by clerks or servants	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 17 (1) ...	210
,, by public officers	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 17 (2) ...	212
Stealing, &c., materials of buildings or fixtures	Fel.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 8 (1) ...	193
Stealing, &c., from mines	Fel.	...	2 yrs.	Yes.	*Ibid.* s. 11 ...	193
,, trees, &c., in garden, &c., to value of £1, or elsewhere to value of £5	Fel.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 8 (2) ...	193, 194
,, trees, &c., to value of £1 after two summary convictions ...	Fel.	5 yrs.	2 yrs.	Yes.		
,, plants, &c., in garden, &c., after summary conviction	Fel.	5 yrs.	2 yrs.	Yes.		
,, deeds, &c.	Fel.	5 yrs.	2 yrs.	No.	*Ibid.* s. 7 (1) ... 24 & 25 Vict. c. 96, s. 20	194
,, &c., bonds, bills, notes, and other valuable securities	Fel.	(v. p. 192.)		Yes.	6 & 7 Geo. V. c. 50, s. 2 24 & 25 Vict. c. 96, s. 27	194, 195
,, wills	Fel.	Life.	2 yrs.	No.	6 & 7 Geo. V. c. 50, s. 6 24 & 25 Vict. c. 96, s. 29	195
,, records	Fel.	5 yrs.	2 yrs.	No.	6 & 7 Geo. V. c. 50, s. 7 24 & 25 Vict. c. 96, s. 20	196
,, electricity	Fel.	5 yrs.	2 yrs.	Yes.	6 & 7 Geo. V. c. 50, s. 10	196
,, deer in enclosed place, or after previous conviction in unenclosed	Fel.	...	2 yrs.	Yes.	24 & 25 Vict. c. 96, s. 12	198

,, hares, &c., in warren at night	Misd.	...	F. or im., or both.	Yes.	*Ibid.* s. 17 ...	198
,, fish in certain waters	Misd.	...	F. or im., or both.	Yes.	*Ibid.* s. 24 ...	198
,, oysters from fishery	Fel.	5 yrs.	2 yrs.	Yes.	6 & 7 Geo. V. c. 50, s. 2	199
,, dogs, after previous summary conviction	Misd.	...	18 mos.	Yes.	*Ibid.* s. 5 ...	199
	(Same consequences attend having possession of dog, or taking money to restore, &c.)					
,, horse, cow, sheep, &c., or killing with intent to steal skin, &c....	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* ss. 3 & 4 ...	200
,, certain goods in process of manufacture	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 9 ...	211
,, from vessels, docks, wrecks, &c.	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 15 ...	212
Robbery	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 23 (2) ...	214
,, with violence or by person armed or by two or more	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 23 (1) ...	214
Assault with intent to rob	Fel.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 23 (3) ...	215
Stealing from the person	Fel.	14 yrs.	2 yrs.	Yes.	6 & 7 Geo. V. c. 50, s. 14	215
Post Office larceny, &c.			(v. p. 216.)			
Receiving stolen goods, where principal offence a felony, &c.... ...	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 33 ...	218
,, where a misdemeanour... ...	Misd.	7 yrs.	7 yrs.	Yes.		
,, where punishable on summary conviction		(Summary conviction.)			24 & 25 Vict. c. 96, s. 97	218
Extortion by threats, &c., v. *supra*						
Embezzlement:						
Embezzlement	Fel.	14 yrs.	2 yrs.	Yes (*a*).	6 & 7 Geo. V. c. 50, s. 17	222
By persons entrusted with property or power of attorney	Misd.	7 yrs.	2 yrs.	No.	*Ibid.* s. 20 ...	226
By factors	Misd.	7 yrs.	2 yrs.	No.	*Ibid.* s. 22 ...	226
By trustees	Misd.	7 yrs.	2 yrs.	No.	*Ibid.* s. 21 ...	227
By directors, &c.	Misd.	7 yrs.	2 yrs.	No.	*Ibid.* s. 20, 24 & 25 Vict. c. 96, ss. 82–84	228
Falsification of accounts	Misd.	7 yrs.	2 yrs.	Yes.	38 & 39 Vict. c. 24, s. 1	225

(*a*) Except in the case of a clerk or servant of the Bank of England or Bank of Ireland, who may be sentenced to penal servitude for life. 6 & 7 Geo. V. c. 50, s. 19.

TABLE OF PRINCIPAL OFFENCES—THEIR PUNISHMENTS, STATUTES, &c.—*continued.*

OFFENCE.	FELONY OR MISDEMEANOUR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
False Pretences, &c.:						
Obtaining by false pretences	Misd.	5 yrs.	2 yrs.	Yes.	6 & 7 Geo. V. c. 50, s. 32	230
Inducing by fraud, execution, &c., of valuable securities...	Misd.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 32 ...	237
Money-lender fraudulently inducing person to borrow	Misd.	...	2 yrs. and £500 fine.	Yes.	63 & 64 Vict. c. 51, s. 4	237
False personation to obtain property ...	Fel.	Life.	2 yrs.	No.	37 & 38 Vict. c. 36 ...	239
,, of seamen...	Misd.	5 yrs.	2 yrs.	Yes.	28 & 29 Vict. c. 124 ...	238
,, of soldiers	Fel.	Life.	2 yrs.	No.	2 & 3 Wm. IV. c. 53, s. 49	238
,, of owners of stock ...	Fel.	Life.	2 yrs.	No.	24 & 25 Vict. c. 98, s. 3	239
,, bail	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 34 ...	239
Cheating (at common law)	Misd.	...	F. or im., or both.	Yes.	...	239
Burglary, &c.:						
Burglary	Fel.	Life.	2 yrs.	Yes.	6 & 7 Geo. V. c. 50, s. 25	241
Entering house at night with intent to commit felony or breaking and entering dwelling-house, place of worship, &c. ...	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 27 ...	246
Being found at night armed, with intent, &c.	Misd.	5 yrs. (After prev. conv., v. p. 24 .	2 yrs.	Yes.	6 & 7 Geo. V. c. 50, s. 28	246
,, ,, disguised or with house-breaking implement, &c.						
,, ,, in building with intent, &c. ...						
Housebreaking	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 26 ...	246
Sacrilege	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 24 ...	247
Larceny in dwelling-house to amount of £5 or to any amount if bodily fear, &c. ...	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 13 ...	247

Forgery:						
According to the nature of the instrument forged	Fel. or Misd. (*a*)	(v. pp.	251–254.)	No.	3 & 4 Geo. V. c. 27 ...	248
At common law (*i.e.*, of instruments not provided for by statute)	Misd.	...	F. and (or) im., 2 yrs.	No.	*Ibid.* s. 4 ...	248, 254
Possession of forged documents, seals and dies	Fel.	14 yrs. (*b*)	2 yrs.	No.	*Ibid.* s. 8 ...	257
Possession of implements of forgery ...	Fel.	7 yrs.	2 yrs.	No.	*Ibid.* s. 9 ...	257
Demanding money under forged instrument	Fel.	14 yrs.	2 yrs.	No.	*Ibid.* s. 7 ...	258
Injuries to Property:						
Arson, in cases of certain specified buildings	Fel.	Life.	2 yrs.	No.	24 & 25 Vict. c. 97, ss. 1–5	259
,, ,, other buildings	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 6 ...	260
Setting fire to things in, &c., buildings, &c.	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 7 ...	
Attempt to set fire to buildings, &c. ...	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 8 ...	
Setting fire to crops, trees, &c.	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 16 ...	
,, ,, stacks of corn, &c. ...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 17 ...	261
Attempt to set fire to crops, stacks, &c.	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 18 ...	
Setting fire to mines of coal, &c. ...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 26 ...	
Attempt ,, ,, ...	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 27 ...	
Setting fire to or casting away ships ...	Fel.	Life.	2 yrs.	No.	*Ibid.* ss. 42, 43 ...	
Attempt ,, ,, ,, ...	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 44 ...	
Setting fire to ships of war, or military stores	Fel.	Death.	...	No.	12 Geo. III. c. 24, s. 1	262
,, ,, vessels in docks of London	Fel.	Death.	...	No.	39 Geo. III. c. 69, s. 104	
Malicious injury to—						
Houses, by explosion, so as to endanger, &c., life...	Fel.	Life.	2 yrs.	No.	24 & 25 Vict. c. 97, s. 9 46 & 47 Vict. c. 3, ss. 2–4	264
,, throwing gunpowder, &c., on, with intent, &c.	Fel.	14 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 97, s. 10	
,, by demolishing, &c. (riotously)...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 11 ...	
,, by damaging, &c. (riotously) ...	Misd.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 12	

(*a*) The forgery of all documents specified in the Forgery Act, 1913, is felony, but under some previous statutes still unrepealed it is a misdemeanour or punishable on summary conviction, v. p, 254. (*b*) Or seven years where a seal, &c., used under the Local Stamp Act, 1869, is forged.

OFFENCE.	FELONY OR MISDEMEANOUR.	MAXIMUM PENAL SERVITUDE.	MAXIMUM IMPRISONMENT OR FINE.	WHETHER TRIABLE AT QUARTER SESSIONS OR NOT.	PRINCIPAL STATUTES.	PAGE.
Injuries to Property—*continued.*						
Houses, tenant demolishing, &c. ...	Misd.	...	F. or im., or both.	Yes.	*Ibid.* s. 13 ...	265
Manufactures, certain goods in process of, or the machinery	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 14 ...	
Machines of other kinds	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 15 ...	
Mines and their engines, &c.	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* ss. 28, 29 ...	
Vessels, by explosion	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 45 ...	
,, otherwise	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 46 ...	
,, altering signals, or otherwise endangering	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 47 ...	
,, interfering with buoys	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 48 ...	266
,, wrecked, &c.	Fel.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 49 ...	
Sea and river banks, quays and wharves, &c.	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 30 ...	
Cutting piles, opening sluices, &c. ...	Fel.	7 yrs.	2 yrs.	Yes.	*Ibid.* s. 31 ...	
Bridges, viaducts, aqueducts, &c.	Fel.	Life.	2 yrs.	No.	24 & 25 Vict. c. 97, s. 33	266
Turnpikes, &c.	Misd.	...	F. or im., or both.	Yes.	*Ibid.* s. 34 ...	267
Walls, gates, &c.		(Summary conviction.)			*Ibid.* s. 25. ...	
Railways, with intent to upset, &c. ...	Fel.	Life.	2 yrs.	No.	*Ibid.* s. 35 ...	
,, obstructing by unlawful act or neglect...	Misd.	...	2 yrs.	Yes.	*Ibid.* s. 36 ...	
Telegraphs	Misd. or Sum. Conv.	...	...	Yes.	*Ibid.* s. 37 ...	
Electric line or work...	Fel.	5 yrs.	2 yrs.	Yes.	45 & 46 Vict. c. 56, s. 22	
Ponds, fish, &c.	Misd.	7 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 97, s. 32 36 & 37 Vict. c. 71, s. 13	
Animals, kill, maim, &c., cattle	Fel.	14 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 97, s 40.	268
,, ,, ,, others		(Summary conviction.)				
,, ill-treat, torture, &c.		(Summary conviction.)			1 & 2 Geo. V. c. 27 ...	

Trees, &c., in parks, to value of £1; elsewhere to value of £5	Fel.	5 yrs.	2 yrs.	Yes.	24 & 25 Vict. c. 97, ss. 20, 21.	269
,, to value of 1s. (third offence) ...	Misd.	...	2 yrs.	Yes.	24 & 25 Vict. c. 97, s. 22	
Plants, &c., in garden, &c. (second offence)	Fel.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 24 ...	
Malicious injury to—						
Hopbines	Misd.	14 yrs.	2 yrs.	Yes.	*Ibid.* s. 19 ...	270
Works of art, &c.	Misd.	...	6 mos.	Yes.	*Ibid.* s. 39 ...	
Other injuries	Misd.	...	2 yrs.	Yes.	*Ibid.* s. 51 ...	
,, at night	Misd.	5 yrs.	2 yrs.	Yes.	*Ibid.* s. 51 ...	
,, below that amount		(Summary conviction.)			*Ibid.* s. 52 ...	
Making, or having in possession, dangerous thing or instrument, with intent to commit a felony under the Act	Misd.	...	2 yrs.	Yes.	*Ibid.* s. 54 ...	271

INDICTMENTS ACT, 1915.

APPENDIX TO RULES.

FORMS OF INDICTMENT (*a*).

1.

STATEMENT OF OFFENCE.

Murder.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, murdered J. S.

2.

STATEMENT OF OFFENCE.

Accessory after the fact to murder.

PARTICULARS OF OFFENCE.

A. B., well knowing that one, H. C., did on the —— day of ——, in the county of ——, murder C. C., did on the —— day of ——, in the county of ——, and on other days thereafter receive, comfort, harbour, assist and maintain the said H. C.

3.

STATEMENT OF OFFENCE.

Manslaughter.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, unlawfully killed J. S.

(*a*) It will be noticed that these forms in some cases relate to offences under sections of statutes which have been repealed since the Act.

4.

STATEMENT OF OFFENCE.

Rape.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, had carnal knowledge of E. F. without her consent.

5.

STATEMENT OF OFFENCE.

First Count.

Wounding with intent, contrary to section 18 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, wounded C. D., with intent to do him grievous bodily harm, or to maim, disfigure, or disable him, or to resist the lawful apprehension of him the said A. B

STATEMENT OF OFFENCE.

Second Count.

Wounding, contrary to section 20 of the Offences against the Person Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously wounded C. D.

6.

STATEMENT OF OFFENCE.

Cruelty to a child, contrary to section 12 of the Children Act, 1908.

PARTICULARS OF OFFENCE.

A. B., between the —— day of —— and the —— day of ——, in the county of ——, being a person over the age of sixteen years having the custody, charge, or care of C. D., a child, ill-treated or neglected the said child, or caused or procured the said child to be ill-treated or neglected in a manner likely to cause the said child unnecessary suffering or injury to its health.

7.

STATEMENT OF OFFENCE.

Larceny, contrary to section 67 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, being clerk or servant to M. N., stole from the said M. N. ten yards of cloth.

8.

STATEMENT OF OFFENCE.

Robbery with violence, contrary to section 42 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, robbed C. D. of a watch, and at the time of or immediately before or immediately after such robbery did use personal violence to the said C. D.

9.

STATEMENT OF OFFENCE.

First Count.

Larceny, after a previous conviction.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, stole a bag, the property of C. D.

A. B. has been previously convicted of burglary on the —— day of ——, at the assizes held at Reading.

STATEMENT OF OFFENCE.

Second Count.

Receiving stolen goods, contrary to section 91 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, did receive a bag, the property of C. D., knowing the same to have been stolen.

10.

STATEMENT OF OFFENCE.

Burglary and Larceny, contrary to section 60 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., in the night of the —— day of ——, in the county of ——, did break and enter the dwelling-house of C. D. with intent to steal therein, and did steal therein one watch, the property of S. T., the said watch being of the value of ten pounds.

11.

STATEMENT OF OFFENCE.

Sending threatening letter, contrary to section 46 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, sent, delivered or uttered to or caused to be received by C. D., a letter accusing or threatening to accuse the said C. D. of an infamous crime with intent to extort money from the said C. D.

12.

STATEMENT OF OFFENCE.

Obtaining goods by false pretences, contrary to section 88 of the Larceny Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with intent to defraud, obtained from S. P. five yards of cloth by falsely pretending that he, the said A. B., was a servant to J. S., and that he, the said A. B., had then been sent by the said J. S. to S. P. for the said cloth, and that he, the said A. B., was then authorised by the said J. S. to receive the said cloth on behalf of the said J. S.

13.

STATEMENT OF OFFENCE.

Conspiracy to defraud.

PARTICULARS OF OFFENCE.

A. B. and C. D., on the —— day of ——, and on divers days between that day and the —— day of ——, in the county of ——, conspired

together with intent to defraud by means of an advertisement inserted by them, the said A. B. and C. D., in the A. S. newspaper, falsely representing that A. B. and C. D. were then carrying on a genuine business as jewellers at ——, in the county of ——, and that they were then able to supply certain articles of jewellery to whomsoever would remit to them the sum of two pounds.

14.

STATEMENT OF OFFENCE.

First Count.

Arson, contrary to section 2 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously set fire to a dwelling-house, one E. G. being therein.

STATEMENT OF OFFENCE.

Second Count.

Arson, contrary to section 3 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously set fire to a house with intent to injure or defraud.

15.

STATEMENT OF OFFENCES.

A. B., *arson*, contrary to section 3 of the Malicious Damage Act, 1861.
C. D., accessory before the fact to same offence.

PARTICULARS OF OFFENCES.

A. B., on the —— day of ——, in the county of ——, set fire to a house with intent to injure or defraud.

C. D., on the same day, in the county of ——, did counsel, procure, and command the said A. B. to commit the said offence.

16.

STATEMENT OF OFFENCE.

First Count.

Offence under section 35 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, displaced a sleeper belonging to the Great Western Railway with intent to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage or truck using the said railway.

STATEMENT OF OFFENCE.

Second Count.

Obstructing railway, contrary to section 36 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, by unlawfully displacing a sleeper belonging to the Great Western Railway did obstruct or cause to be obstructed an engine or carriage using the said railway.

17.

STATEMENT OF OFFENCE.

Damaging trees, contrary to section 22 of the Malicious Damage Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, maliciously damaged an oak tree there growing.

A. B. has been twice previously convicted of an offence under section 22 of the Malicious Damage Act, 1861, namely, at ——, on the —— day of ——, and at ——, on the —— day of ——.

18.

STATEMENT OF OFFENCE.

First Count.

Forgery, contrary to section 2 (1) (*a*) of the Forgery Act, 1913.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, with intent to defraud, forged a certain will purporting to be the will of C. D.

STATEMENT OF OFFENCE.

Second Count.

Uttering forged document, contrary to section 6 (1) (2) of the Forgery Act, 1913.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, uttered a certain forged will purporting to be the will of C. D., knowing the same to be forged and with intent to defraud.

19.

STATEMENT OF OFFENCE.

Uttering counterfeit coin, contrary to section 9 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, at the public-house called "The Red Lion," in the county of ——, uttered a counterfeit half-crown, knowing the same to be counterfeit.

20.

STATEMENT OF OFFENCE.

Uttering counterfeit coin, contrary to section 12 of the Coinage Offences Act, 1861.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, at a public-house called "The Red Lion," in the county of ——, uttered a counterfeit sovereign, knowing the same to be counterfeit.

A B. has been previously convicted of a misdemeanour under section 9 of the Coinage Offences Act, 1861, on the —— day of ——, at ——.

21.

STATEMENT OF OFFENCE.

Perjury, contrary to section 1 (*i*) of the Perjury Act, 1911.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, being a witness upon the trial of an action in the Chancery Division of the High Court of Justice in England, in which one, ——, was plaintiff, and one, ——, was defendant, knowingly falsely swore that he saw one, M. N., in the street called the Strand, London, on the —— day of ——.

22.

STATEMENT OF OFFENCE.

Libel.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, published a defamatory libel concerning E. F., in the form of a letter [book, pamphlet, picture, or as the case may be].

[Innuendo should be stated where necessary.]

23.

STATEMENT OF OFFENCE.

First Count.

Publishing obscene libel.

PARTICULARS OF OFFENCE.

E. M., on the —— day of ——, in the county of ——, sold, uttered, and published and caused or procured to be sold, uttered, and published an obscene libel the particulars of which are deposited with this indictment.

[Particulars to specify pages and lines complained of where necessary, as in a book.]

STATEMENT OF OFFENCE.

Second Count.

Procuring obscene libel [or thing] with intent to sell or publish.

PARTICULARS OF OFFENCE.

E. M., on the —— day of ——, in the county of ——, procured an obscene libel [or thing] the particulars of which are deposited with this indictment, with intent to sell, utter, or publish such obscene libel [or thing].

24.

STATEMENT OF OFFENCES.

A. B., undischarged bankrupt obtaining credit contrary to section 155(*a*) of the Bankruptcy Act, 1914.

C. D., being accessory to same offence.

PARTICULARS OF OFFENCES.

A. B., on the —— day of ——, in the county of ——, being an undischarged bankrupt, obtained credit to the extent of twelve pounds from

H. S. without informing the said H. S. that he then was an undischarged bankrupt.

C. D. at the same time and place did aid, abet, counsel, and procure A. B. to commit the said offence.

25.

STATEMENT OF OFFENCE.

First Count.

Falsification of accounts, contrary to section 1 of the Falsification of Accounts Act, 1875.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, being clerk or servant to C. D., with intent to defraud, made or concurred in making a false entry in a cash book belonging to the said C. D., his employer, purporting to show that on the said day £100 had been paid to L. M.

STATEMENT OF OFFENCE.

Second Count.

Same as first count.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, being clerk or servant to C. D., with intent to defraud, omitted or concurred in omitting from or in a cash book belonging to the said C. D., his employer, a material particular, that is to say, the receipt on the said day of £50 from H. S.

26.

STATEMENT OF OFFENCE.

First Count.

Fraudulent conversion of property, contrary to section 1 (1) (*a*) of Larceny Act, 1901.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, fraudulently converted to his own use and benefit certain property, that is to say, £100 entrusted to him by H. S., in order that he, the said A. B., might retain the same in safe custody.

STATEMENT OF OFFENCE.

Second Count.

Fraudulent conversion of property, contrary to section 1 (1) (*b*) of Larceny Act, 1901.

PARTICULARS OF OFFENCE.

A. B., on the —— day of ——, in the county of ——, fraudulently converted to his own use and benefit certain property, that is to say, the sum of £200 received by him for and on account of L. M.

GENERAL INDEX.

NOTE.—Where an asterisk is prefixed to a title in this Index further details will be found in the Table of Offences. Thus, for example, all the various coinage offences are set out only in the Table of Offences and not also in the General Index.

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