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A SELECTION OF LEADING CASES IN THE CRIMINAL LAW.

With Notes.

BY

HENRY WARBURTON,

BARRISTER-AT-LAW, OF THE INNER TEMPLE, AND OF THE SOUTH-EASTERN CIRCUIT, AND CENTRAL CRIMINAL COURT.

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PREFACE.

In this edition three new leading cases have been added, namely, on the subjects of (1) Offences against Public Justice, (2) Carnal Knowledge of Children, (3) Previous Convictions. A large number of other cases have also been embodied, and the facts of the cases generally set out more fully than in the three preceding editions. More quotations are given from the decisions of Judges, especially in cases decided by the Court of Crown Cases Reserved. On every occasion when quoting from a judgment, the *ipsissima verba* of the Judge have been used; and these judgments, grave and lucid as they are, cannot be too carefully studied by those who wish to understand the deep-seated principles upon which the Criminal Law of England is founded.

With certain branches of the law, such as Public Gaming, Adulteration of Food and Drugs, and Offences against the Licensing Laws, I have not attempted to deal, as I consider that these special matters scarcely come within the scope of this book,

and also because they are treated with great minuteness in works devoted exclusively to each particular subject.

The cases are arranged in the following order :—

(1) General Principles of Criminal Law.

(2) Offences more particularly against the State, and Offences against the Person.

(3) Offences against Property.

(4) Criminal Procedure.

I venture to express a hope that, so far as it goes, this work may be found of some assistance to those who are engaged in

> "Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances."

H. W.

3, Elm Court, Temple.

June, 1908.

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LEADING CASES IN THE CRIMINAL LAW.

Intention.

SHERRAS *v.* DE RUTZEN. (1895) [1]

[[1895] 1 Q. B. 918; 64 L. J. M. C. 218; 59 J. P. 440; 18 Cox, C. C. 157.]

In this case the appellant was the licensee of a public-house, and was convicted before a metropolitan police magistrate under sect. 16, sub-sect. 2, of the Licensing Act, 1872, for having unlawfully supplied liquor to a police constable on duty without the authority of a superior officer of such constable for so doing. It appeared that the appellant's public-house was situated nearly opposite a police-station, and was much frequented by the police when off duty, and that on July 16, 1894, at about 4.40, the police constable in question, being then on duty, entered the appellant's house and was served with liquor by the appellant's daughter in his presence. Prior to entering the house the police constable had removed his armlet; and it was admitted that if a police constable is not wearing his armlet, that is an indication that he is off duty. The armlet is removed at the police-station when a constable is dismissed, and a publican seeing the armlet off would naturally think the police constable off

duty. The police constable was in the habit of using the appellant's house, and was well known as a customer to the appellant and his daughter. Neither the appellant nor his daughter made any inquiry of the police constable as to whether he was or was not on duty, but they took it for granted that he was off duty in consequence of his armlet being off, and served him with liquor under that belief. The appellant and his daughter were in the habit of serving a number of police constables in uniform with their armlets off, each day, and the question whether they were or were not on duty was never asked when the armlet was seen to be off.

The appellant appealed to quarter sessions against the conviction, contending that in order to constitute an offence under sect. 16, sub-sect. 2, of the Licensing Act, 1872, there must be shown to be either knowledge that the police constable was on duty, or an intentional abstention from ascertaining whether he was on duty or not. The court of quarter sessions, however, upheld the conviction, considering that knowledge that the police constable, when served with liquor, was on duty was not an essential ingredient of the offence; but stated this case for the opinion of the Court.

Day, J., said: "I am clearly of opinion that this conviction ought to be quashed. The police constable comes into the appellant's house without his armlet, and with every appearance of being off duty. The house was in the immediate neighbourhood of the police-station, and the appellant believed, and he had very natural grounds for believing, that the constable was off duty. In that belief he accordingly served him with liquor. As a matter of fact the constable was on duty; but does that fact make the innocent act of the appellant an offence? I do not think it does. He had no intention to do a wrongful act; he acted in the *bonâ fide* belief that the constable was off duty. It seems to me that the

contention that he committed an offence is utterly erroneous. An argument has been based on the appearance of the word 'knowingly' in sub-sect. 1 of sect. 16, and its omission in sub-sect. 2. In my opinion, the only effect of this is to shift the burden of proof. In cases under sub-sect. 1 it is for the prosecution to prove the knowledge, while in cases under sub-sect. 2 the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word 'knowingly' in the one sub-section and its omission in the other. It appears to me that it would be straining the law to say that this publican, acting as he did in the *bonâ fide* belief that the constable was off duty, and having reasonable grounds for that belief, was nevertheless guilty of an offence against the section, for which he was liable both to a penalty and to have his licence indorsed."

Wright, J., said: "I am of the same opinion. There are many cases on the subject, and it is not very easy to reconcile them. There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered. (Nichols *v.* Hall, L. R. 8 C. P. 322.) One of the most remarkable exceptions was in the case of bigamy. It was held by all the judges, on the statute 1 Jac. I. c. 11, that a man was rightly convicted of bigamy who had married after an invalid Scotch divorce, which had been obtained in good faith, and the validity of which he had no reason to doubt. (Lolley's case, R. & R. 237.) Another exception, apparently grounded on the language of a statute, is Prince's case (L. R. 2 C. C. R. 154), where it was held, by fifteen judges against one, that a man was guilty of abduction of a girl under sixteen, although he believed, in good faith and on reasonable grounds, that she was over that age. Apart from isolated and extreme

cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush, J., in Davies *v.* Harvey (L. R. 9 Q. B. 433), are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on the Revenue Statutes, *e.g.* Attorney-General *v.* Lockwood (9 M. & W. 378), where the innocent possession of liquorice by a beer retailer was held an offence. So, under the Adulteration Acts, Reg. *v.* Woodrow (15 M. & W. 404), as to innocent possession of adulterated tobacco; Fitzpatrick *v.* Kelly (L. R. 8 Q. B. 337) and Roberts *v.* Egerton (L. R. 9 Q. B. 494), as to the sale of adulterated food. So, under the Game Acts, as to the innocent possession of game by a carrier: Rex *v.* Marsh (2 B. & C. 717). So, as to the liability of a guardian of the poor whose partner, unknown to him, supplied goods for the poor: Davies *v.* Harvey (L. R. 9 Q. B. 433). To the same head may be referred Reg. *v.* Bishop (5 Q. B. D. 259), where a person was held rightly convicted of receiving lunatics in an unlicensed house, although the jury found that she honestly and on reasonable grounds believed that they were not lunatics. Another class comprehends some, and perhaps all, public nuisances: R. *v.* Stevens (L. R. 1 Q. B. 702), where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and so in Rex *v.* Medley (6 C. & P. 292) and Barnes *v.* Akroyd (L. R. 7 Q. B. 474). Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right: see per Williams and Willes, JJ., in Morden *v.* Porter (7 C. B (N. S.) 641), as to unintentional trespass in pursuit of game; Lee *v.* Simpson (3 C. B. 871), as to unconscious dramatic piracy; and Hargreaves *v.* Diddams (L. R. 10 Q. B. 582), as to a *bonâ fide* belief in a legally impossible right to fish. But, except in such cases as these,

there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him generally, or in the particular matter, in order to constitute an offence. It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under sect. 16, sub-sect. 2, since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public-house. I am therefore of opinion that this conviction ought to be quashed."

[Poland, Q.C., and Paul Taylor for the appellant; Macmorran for the respondent.]

Intention has been defined as the fixing the mind upon the act, and thinking of it as of one which will be performed when the time comes, and such intention must be a state of mind forbidden by the law. The guilty state of mind, or criminal intention, is generally known by the term *mens rea*, and is thus necessary to the legal conception of crime.

Speaking generally, an act cannot amount to a crime when it is not accompanied by the *mens rea;* but when an act is done of which the probable consequences may be highly injurious, the *mens rea*, or criminal intention, is an inference of law resulting from the doing of the act; thus the publication of obscene matter is a punishable offence, although the defendants had no thought of depraving the public morals. An example of this was the publishing and selling of a work entitled "The Fruits of Philosophy," for which some years back a prosecution was instituted against Mr. Bradlaugh and Mrs. Besant. The book in question, although described in the indictment as "indecent, lewd, and filthy," was in fact a work written from the Malthusian point of view with the object of checking over-population, but containing certain crude and unpleasant details. A verdict in the prosecution of the Rabelais Gallery was to the same effect. Moreover, when the statute law expressly declares that a thing shall not be done, it becomes *ipso facto* illegal to do it. Malice, in its legal sense, only imports the

existence of the criminal intention, and has no reference to the motives.

As a general rule no penal consequences are incurred where there has been no personal neglect or default, and a *mens rea* is essential to an offence under a penal enactment, unless a contrary intention appears by express language or necessary inference. (Dickinson *v.* Fletcher, 69 L. J. M. C. 25.)

By a railway Act it was enacted "that if any person shall do any act, matter, or thing to obstruct the free passage of the railway or any part thereof," he shall be liable to a penalty. The Court held, that to render a party liable, he must have intended to have committed the obstruction complained of. (Butting *v.* Bristol and Exeter Railway, 3 L. T. 665.)

Sect. 2, sub-sect. 2, of the Merchandise Marks Act, 1867, provides that a person selling goods to which a forged trade mark is applied is guilty of an offence against the Act unless he proves that, having taken all reasonable precautions, he had no reason to suspect the genuineness of the trade mark "or that otherwise he had acted innocently." On a case stated by a metropolitan magistrate, the Court held that a person who had reason to suspect the genuineness of the trade mark might nevertheless have acted innocently in selling goods to which the trade mark was applied, and might therefore be exonerated under this sub-section. (Christie *v.* Cooper, [1900] 2 Q. B. 522.)

In R. *v.* Twose (14 Cox, C. C. 327) the prisoner was indicted for having set fire to some furze growing on a common, and it appeared from the evidence that persons living near the common had occasionally burnt the furze to improve the growth of the grass, although the existence of any right to do this was denied. The prisoner denied having set the furze on fire at all. It was contended on the prisoner's behalf that, even if it were proved that she set the furze on fire, she could not be found guilty if it appeared that she *bonâ fide* believed that she had a right to do so, whether the right were a good one or not.

Lopes, J., said: "If she set fire to the furze thinking she had a right to do so, it would not be a criminal offence. I shall leave two questions to the jury—1. Did she set fire to the furze? 2. If yes, Did she do it wilfully and maliciously?"

In the case of R. *v.* Dart (14 Cox, C. C. 143) the prisoner was

charged with having thrown her child into the water with intent to drown, &c., under 24 & 25 Vict. c. 100, s. 14, and it was held necessary to prove that the prisoner had the will and intention at the time to kill the child.

In a colliery certain horses were worked while suffering from raw wounds. T. was an owner and S. was the certificated manager, but neither was proved to be present or to have any notice or knowledge of the state of the horses: Held, that the justices were wrong in convicting S. of ill-treating the horses under 12 & 13 Vict. c. 92, s. 2, merely because he was certificated manager, and that some knowledge of the matter was an essential ingredient of that offence. (Small *v.* Warr, 47 J. P. 20; *vide* also R. *v.* Bishop, 14 Cox, C. C. 404, *post*, p. 165, in which the defendant was convicted under 8 & 9 Vict. c. 100, s. 44, of receiving two or more lunatics into her house, not being a registered asylum or hospital or a house duly licensed under the Act.)

In Cundy *v.* Lecocq (13 Q. B. D. 207) Stephen, J., said: "We have had quoted the maxim that in every criminal offence there must be a guilty mind; but I do not think that maxim has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of R. *v.* Prince (L. R. 2 C. C. R. 154, *vide post*, p. 221) and R. *v.* Bishop (5 Q. B. D. 259, *vide post*, p. 165), to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether, and how far, knowledge is of the essence of the offence created."

In Chisholm *v.* Doulton (22 Q. B. D. 736 and 16 Cox, C. C. 675), which was a case of negligently using a furnace so as to emit smoke, contrary to the Smoke Nuisance (Metropolis) Act, 1853, Field, J., said: "The general rule of law is that a person cannot be convicted and punished in a proceeding of a criminal nature unless it can be shown that he had a guilty mind. And though the legislature undoubtedly may enact, as in the case of certain of the offences under this very Act it has enacted, that persons shall be criminally responsible for the doing of particular acts,

even though they have no guilty mind in doing them, yet it is for the prosecution in each case to make out clearly that the legislature has in fact so enacted."

In the same case Cave, J., said: "It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge; but as a general rule there must be something of that kind which is designated by the expression *mens rea*." In R. *v.* Bond ([1906] 2 K. B. 389 and 21 Cox, C. C. 252), the prisoner, a medical man, was indicted for feloniously using certain instruments on a certain woman with intent to procure her miscarriage. At the trial evidence was tendered on behalf of the prosecution to show that some nine months previously the prisoner had used similar instruments upon another woman with the avowed intention of bringing about her miscarriage, and that he had then used expressions tending to show that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted, and the Court of Crown Cases Reserved upheld the conviction, two judges dissenting from the judgments of the other five.

In R. *v.* Hicklin (L. R. 3 Q. B. 360 and 11 Cox, C. C. 19) a number of copies of a pamphlet entitled "The Confessional Unmasked" were seized in the appellant's house and ordered by justices of a borough to be destroyed as obscene books within sect. 1 of 20 & 21 Vict. c. 83. The Court of Queen's Bench held that the order of the justices was right, for that the publication of such an obscene pamphlet was a misdemeanour, and was not justified or excused by the appellant's innocent motives or object; he must be taken to have intended the natural consequences of his act.

Other cases on the question of intention are:—R. *v.* Tolson, 23 Q. B. D. 168, *vide post*, p. 140; Dyke *v.* Gower, 65 L. T. 760; R. *v.* Farnborough, [1895] 2 Q. B. 484; Hearne *v.* Garton, 28 L. J. M. C. 216; Bank of New South Wales *v.* Piper, [1897] A. C. 383; Derbyshire *v.* Houliston, [1897] 1 Q. B. 772; R. *v.* Almon, 5 Bur. 2686; R. *v.* Jones, 12 Cox, C. C. 628; R. *v.* James, 8 C. & P. 131.

Principals.

R. *v.* JORDAN AND OTHERS. (1836) [2]

[7 C. & P. 432.]

In this case a room door was latched, and one person lifted the latch and entered the room and concealed himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch, for the purpose of assisting him to enter, and screened him from observation by opening an umbrella. It was held that the two were in law parties to the breaking and entering, and were answerable for the robbery which took place afterwards, though they were not near the spot at the time when it was perpetrated. It was also held that where the breaking is in one night, and the entry the night after, a person present at the breaking, though not present at the entering, is in law guilty of the whole offence of burglary.

[Campbell, A.-G., Adolphus, Barlow, Bodkin and Chambers for the prosecution; Andrews, Serjt., C. Phillips, Clarkson, Payne, and Jones for the prisoners.]

A principal may be in the first degree, or he may be in the second degree. A principal in the first degree is one who actually takes part in the commission of the crime; but it is not necessary that he should be present at the place where the crime is consummated, or he might accomplish his purpose by means of an innocent agent, as where a man tells a child to bring him money belonging to a third person. (*Vide* R. *v.* Dowey, 11 Cox, C. C. 115.)

A principal in the second degree is where one aids and abets the commission of a crime, as where one of a party of robbers keeps watch at a distance from the scene of the robbery. These distinctions, however, are of no practical importance.

In treasons and misdemeanours all are principals. (R. *v.* Burton, 13 Cox, C. C. 71.)

Where two persons go out to fight a deliberate duel, and death ensues, all persons who are present encouraging and promoting that duel will be guilty of murder; but mere presence at a duel is not sufficient to make spectators principals in the combat. If, however, they sustain the principals, either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet, if they are present assisting and encouraging by their presence at the moment when the fatal shot is fired, they are, in law, guilty of murder. If a man encourages another to commit suicide, and is present abetting him while he does so, such person is guilty of murder as a principal; and if two persons agree to commit suicide together, and only one of them actually dies, the survivor is guilty of the murder of the other. (R. *v.* Alison, 8 C. & P. 418; R. *v.* Jessop, 16 Cox, C. C. 204; R. *v.* Stormonth, 61 J. P. 729; R. *v.* Dyson, R. & R. 523; R. *v.* Abbott, 67 J. P. 151. *Vide post*, pp. 184—189).

If each of two persons is driving and inciting the other to drive a cart at a dangerous rate, and one of the carts runs over a man and kills him, each of the two is guilty of manslaughter. (R. *v.* Swindall, 2 C. & K. 230.)

If A. and B. are riding fast along a highway as if racing, and A. rides by without doing any mischief, but B. rides against the horse of C., whereby C. is thrown and killed, this is not manslaughter in A. (R. *v.* Mastin, 6 C. & P. 396.)

It certainly appears difficult to reconcile these two rulings. (*Vide* also R. *v.* Harrington, 5 Cox, C. C. 231; R. *v.* Collison, 4 C. & P. 565; and R. *v.* White, R. & R. C. C. 99.)

By 24 & 25 Vict. c. 94, s. 8, whosoever shall aid, abet, counsel, or procure the commission of any misdemeanour, whether the same be a misdemeanour at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

A person who has counselled the commission of an offence punishable on summary conviction may under sect. 5 of the Summary Jurisdiction Act, 1848, be convicted upon an information which charges him with having committed such offence as a

principal offender. A defendant was therefore held liable to conviction upon an information which charged him with having cruelly ill-treated a horse by causing it to be worked in an unfit state contrary to sect. 2 of 12 & 13 Vict. c. 92, although the offence proved was that he had knowingly counselled the owner of the horse to cause the act of cruelty to be done. (Benford *v.* Sims, [1898] 2 Q. B. 641.)

A person who has aided and abetted the commission of an offence punishable on summary conviction may, under sect. 5 of the Summary Jurisdiction Act, 1848, be convicted upon an information which charges him with having committed the offence as a principal offender. The appellant appealed to quarter sessions against a conviction for unlawfully driving his motor car at a speed dangerous to the public. At the hearing of the appeal there was a conflict of evidence as to whether the car was being driven by the appellant or by a lady seated by his side in the car. The quarter sessions, without deciding whether the appellant was himself driving the car, dismissed the appeal, finding as facts that if the lady was driving she was doing so with the consent and approval of the appellant, who must have known that the speed was dangerous, and who, being in control of the car, could, and ought to, have prevented it. The King's Bench Division held, affirming the decision of quarter sessions, that there was evidence on which the appellant could be convicted of aiding and abetting the commission of the offence. (Du Cros *v.* Lambourne, [1907] 1 K. B. 40 and 21 Cox, C. C. 311.)

Agents.

R. *v.* MICHAEL. (1840) [3]

[9 C. & P. 356; 2 M. C. C. 120.]

The prisoner, Catherine Michael, was indicted for the murder of her infant child, George Michael, by poison. It appeared that the deceased was a child between nine and ten months old,

and that the prisoner was its mother, and was a single woman living in service as wet nurse at Mrs. Kelly's, in Hunter Street, Brunswick Square. The child was taken care of by a woman named Stevens, living at Paddington, who received five shillings a week from the prisoner for its support. A few days before its death, the prisoner told Mrs. Stevens that she had an old frock for the child, and a bottle of medicine, which she gave her, telling her it would do the baby's bowels good. Mrs. Stevens said the baby was very well, and did not want medicine; but the prisoner said it had done her mistress's baby good, and it would do her baby good, and desired Mrs. Stevens to give it one teaspoonful every night. Mrs. Stevens did not open the bottle or give the child any of its contents, but put the bottle on the mantel-piece, where it remained till Tuesday, the 31st of March, on which day, about half-past four in the afternoon, Mrs. Stevens went out, leaving the prisoner's child playing on the floor with her children, one of whom, about five years of age, during the absence for about ten minutes of his elder sister, gave the prisoner's child about half the contents of the bottle, which made it extremely ill, and in the course of a few hours it died. The bottle was found to contain laudanum. The prisoner said that a young man, an assistant of Dr. Reid's, had given the bottle by mistake. This was proved to be untrue; and Dr. Reid stated that in the course of a conversation he had with the prisoner she used these remarkable words, speaking of the death of the child, and the probability of an inquest being held upon the body: "If I am hanged for it, I could not support the child on my wages." It was also proved that the prisoner purchased the laudanum at a chemist's in Tavistock Place, Russell Square, saying it was for her mistress, Mrs. Kelly, who was in the habit of taking it, being a bad sleeper. One of the medical men examined at the trial said that a teaspoonful administered to a child of the age of the deceased

would be sure to destroy life. The jury found the prisoner guilty. The judgment was respited that the opinion of the judges might be taken whether the facts above stated constituted an administering of the poison by the prisoner to the deceased child. At a subsequent session, Mr. Baron Alderson, in passing sentence upon the prisoner, said that the judges were of opinion that the administering of the poison by the child of Mrs. Stevens was, under the circumstances of the case, as much, in point of law, an administering by the prisoner as if the prisoner had actually administered it with her own hand. They therefore held that she was rightly convicted.

[Ryland for the prosecution; Ballantine for the prisoner.]

If a man does, by means of an innocent agent, an act which amounts to a felony, the employer, and not the agent, is accountable for the act. (R. *v.* Bleasdale, 2 C. & K. 765.)

If A. by letter desires B., an innocent agent, to write the name of S. to a receipt on a post-office order, and the innocent agent does it, believing that he is authorised so to do, A. is a principal in this forgery; and it makes no difference that, by the letter, A. says to B. that he is at liberty to sign the name of S., and does not in express words direct him to do so. (R. *v.* Clifford, 2 C. & K. 202.)

The prisoner employed a die sinker to make, for a pretended innocent purpose, a die calculated to make shillings. The die sinker, suspecting fraud, informed the Commissioners of the Mint, and under their directions made the die for the purpose of detecting the prisoner:—Held, that the die sinker was an innocent agent, and the prisoner rightly convicted as a principal under 2 & 3 Will 4, c. 34, s. 10. (R. *v.* Bannen, 1 C. & K. 295.)

Where a prisoner, charged with uttering a forged note to A., knowing it to be forged, gave forged notes to a boy who was ignorant of that fact, and directed him to pay away the note mentioned in the indictment at A.'s for the purchase of goods, and the boy did so, and brought back the goods and the change to the prisoner:—Held, that it was an uttering by the prisoner to A. (R. *v.* Giles, 1 M. C. C. 166.)

B. was one of many persons employed whose wages were paid

weekly at a pay-table. On one occasion, when B.'s wages were due, the prisoner said to a little boy, "I will give you a penny if you will go and get B.'s money." The boy went innocently to the pay-table, and said to the treasurer, "I am come for B.'s money"; and B.'s wages were given to him :—Held, that the prisoner might be convicted of obtaining the money by false pretences. (R. *v.* Butcher, 8 Cox, C. C. 77.)

The prisoner, knowing that some old country bank notes were valueless, gave them to a man to pass, telling him to say, if asked about them, that he had taken them from a man he did not know. It was held that the prisoner was guilty of obtaining money by false pretences. (R. *v.* Dowey, 11 Cox, C. C. 115.)

Accessory before the Fact.

[4] **R. *v.* MANNING.** (1852)

[Dears. C. C. 21; 6 Cox, C. C. 86; 22 L. J. (M. C.) 21; 17 Jur. 28.]

Michael Manning and John Smith were tried at the Manchester Borough Sessions on the 5th of August, 1852, for stealing, on the 17th of July, twenty-four bags, the property of John Sheridan. The prosecutor was a potato dealer, and used bags in that trade; and he also dealt largely in bags which he bought and sold. The prisoner Manning had been for several years in the prosecutor's service, and had the care of his warehouse, in which the bags were kept. The prisoner Smith had for five years regularly supplied the prosecutor with bags, which he made, and from time to time, when he had finished a lot, his custom was to take them and put them down at the warehouse door of the prosecutor, outside the warehouse, and very shortly after any bags had been so left, either he or his wife, but generally his wife, used to come to receive payment for them

from the prosecutor. On the night of the 16th July the prosecutor had a quantity of marked bags in his warehouse. On the morning of the 17th July, the prisoner Manning went into his master's warehouse and brought out twenty-four of the bags which had been so marked by his master on the previous night, and put them down outside the warehouse, by the door, at the place where Smith used to deposit the bags he brought for the prosecutor, and for which he had to be paid. Shortly after Manning had brought the prosecutor's bags out of his warehouse, and so placed them at the door, Smith's wife came and asked for payment for them, as for bags that her husband had brought that morning. Upon this Smith was sent for, and was told what his wife had said, and the bags, which were then lying where Manning had placed them, were pointed out to him, and he was asked whether he had brought those bags there; he said yes, he had brought them there an hour before, and that his wife had been working at them till twelve o'clock the night before, in order to finish them. "Nay," said the prosecutor, "those bags are mine." "Yes," replied Smith, "they will be yours when you have paid for them." Upon this the prosecutor pointed out to the two prisoners, Manning being then also present, the mark that had been put upon the bags the night before. The prisoners were then given into custody.

The Recorder told the jury that, if they were satisfied that Manning brought his master's bags out of the warehouse, and placed them outside by the door in the manner stated, for the purpose of enabling Smith to receive payment for them from his master, and with the intent that he should do so as if they had been new bags just then finished by Smith, and for which he would be entitled to be paid, that that would be larceny; and that if they were satisfied that this had been so done by Manning, in pursuance of previous concert and arrangement between him and Smith, that Smith, though absent when the

bags were so removed out of the warehouse, would be accessory before the fact to the felony.

The jury said that they were satisfied that the bags had been so removed out of the warehouse by Manning, for the purpose and with the intention aforesaid, and that the same had been done in pursuance of a previous arrangement between him and Smith, and they found both the prisoners guilty. The question reserved for the opinion of the Court of Crown Cases Reserved was whether these facts amounted to larceny.

The Court held that the finding of the jury was right, and that Smith was an accessory before the fact.

[Cross for the Crown.]

An accessory before the fact is he who, being absent at the time the offence was committed, procures, counsels, commands, or abets another to commit a felony.

By 24 & 25 Vict. c. 94, s. 1, whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects the same as if he were a principal felon.

By sect. 2, whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.

In R. *v.* Manley (1 Cox, C. C. 104) the prisoner was indicted for larceny. The facts as proved by the prosecution were that the prisoner was an apprentice of the prosecutor; that he had

induced the son of the prosecutor, a child of the age of nine years, to take money from his father's till and give it to him. In cross-examination, it further appeared that the child had done the like for other boys. Wightman, J., said: "Apart from the consideration of the guilt or innocence of the prisoner generally, if you believe the story told by the child, you will have to determine whether that child was an innocent agent in this transaction; that is, whether he knew that he was doing wrong, or was acting altogether unconsciously of guilt and entirely at the dictation of the prisoner; for if you should be of opinion that he was not an innocent agent, you cannot find the prisoner guilty as a principal under this indictment."

In R. *v.* James (24 Q. B. D. 439), the Court of Crown Cases Reserved held that a person who induces a servant of the Post Office to intercept and hand over a letter, which is in course of transmission by the post, is either guilty of larceny as a principal felon, or is accessory before the fact to the larceny committed by the servant of the Post Office, and in either view can be convicted on an indictment charging him with larceny of the letter.

Cases on this subject are:—R. *v.* Quail, 4 F. & F. 1076; R. *v.* Tuckwell, Car. & M. 215; R. *v.* Morris, 2 Leach, C. C. 1096; R. *v.* Soares, R. & R. C. C. 25; R. *v.* Fretwell, 9 Cox, C. C. 152; R *v.* Hollis, 28 L. T. 455; R. *v.* Manning, 2 C. & K. 903; R. *v.* Cooper, 5 C. & P. 535; R. *v.* Russell, 1 M. C. C. 356; R *v.* Taylor, L. R. 2 C. C. R. 147; R. *v.* Saunders, Foster's Crown Law, 371.

Accessory after the Fact.

R. *v.* LEE AND SCOTT. (1834) [5]

[6 C & P. 536.]

The prisoner Lee was indicted for stealing eleven 10*l.* promissory notes and eleven pieces of paper in the dwelling-house of Messrs. Stephens & Co., and the prisoner Scott was charged

as an accessory after the fact. It appeared that the prisoner Lee, who was a lad of seventeen years of age, and whose family lived in Reading, was a clerk in the banking-house of Messrs. Stephens at that place, and that the prisoner Scott was aged twenty-three, and that his family had gone to reside in America. It was proved that, for some time before the 21st of June, 1834, when the felony was committed, the prisoner Lee was in the daily habit of coming to the room of the prisoner Scott, and that he did so on the evening of the 21st of June, after the banking-house had closed, and consequently after stealing the notes, and stayed twenty minutes. It further appeared that, on that evening, the two prisoners proceeded together in the stage coach to Bristol, and after that by mail to Liverpool, where both the prisoners were apprehended, each of them having a number of Spanish dollars in his possession. It appeared that the places in the coaches for both prisoners were paid for by the prisoner Lee. The prisoner Lee had made a confession in writing; and it was also proved that the prisoner Scott said that they were going to America. Williams, J., in summing up, said: "In considering the question, whether the prisoner Scott is guilty of receiving, harbouring and maintaining the prisoner Lee, you ought to look at the relative situations of the parties. You find that Lee is a boy who is connected with Reading in the most intimate manner, and that he, being a clerk in a banking-house, is frequently going to the room of Scott, who is a man whose friends are in America. You next find that the banking-house is robbed, and that the two prisoners go off together, evidently on their way to America. It is for you to say whether the elder prisoner did not suggest to the younger that he would not only aid his escape to America, but go off with him; and is it not manifest that the boy was encouraged by the man?"

The jury found both prisoners guilty.

[Talbot and Cripps for the prosecution; Curwood and Carrington for the prisoners.]

An accessory after the fact is one who, knowing that a felony has been committed, helps or harbours the felon. A wife, however, may, under such circumstances, screen her husband.

By 24 & 25 Vict. c. 94, s. 3, whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.

By sect. 4, every accessory after the fact to any felony (except where it is otherwise specially enacted), whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable, at the discretion of the Court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour, and it shall be lawful for the Court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to such punishment; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

To substantiate the charge of harbouring a felon, it must be shown that the party charged did some act to assist the felon personally (R. *v.* Chapple, 9 C. & P. 355); but in R. *v.* Jarvis (2 M. & Rob. 40) it was held that one who employed another person to harbour the principal felons may be convicted as an accessory after the fact, though he himself did no act of relieving.

In R. *v.* Richards (2 Q. B. D. 311; and 13 Cox, C. C. 611), several persons were tried upon one indictment, some as principals in murder, others as accessories after the fact. The principals were convicted of manslaughter, and the Court of Crown Cases

Reserved held that those charged as accessories might rightly be convicted as accessories to manslaughter.

In R. *v.* Bubb (70 J. P. 143), on an indictment charging two persons—a man and a woman—with an indecent assault upon a child, the jury found the male prisoner guilty of an indecent assault and returned against the female prisoner a verdict of being an accessory after the fact. The Court of Crown Cases Reserved held that the conviction of the female prisoner must be quashed. Alverstone, C. J., said:—"The woman was properly indicted as a principal, and there was, in my opinion, abundant evidence on which she might have been convicted as a principal in the second degree. She was convicted as being an 'accessory after the fact,' and it is somewhat unfortunate that the chairman left the matter there. We cannot make the verdict good unless we find that the jury meant that she was a principal in the second degree or an accessory at the time the misdemeanour was committed. Looking at the authorities, I should have thought that the statement of the law shows that a person cannot be held guilty as a principal when all that she or he has done shows that she or he was guilty of something after the commission of the act. The statute 24 & 25 Vict. c. 94, s. 8, supports this view. The words in that section are not apt to include an accessory after the fact. It would be impossible to construe this verdict as rendering the woman liable on this indictment." Darling, J., said:—"It has been argued that there is no such thing as an accessory after the fact to misdemeanour; it is not necessary to decide that point for the purposes of to-day. It is true that an accessory after the fact cannot be indicted as a principal under s. 8 of 24 & 25 Vict. c. 94, but I think whenever that point comes up for consideration it will be necessary to look more carefully into the question. That section does not say that an accessory after the fact to misdemeanour cannot be indicted at all."

Other cases are:—R. *v.* King, R. & R. C. C. 332; R. *v.* Greenacre, 8 C. & P. 35; R. *v.* Butterfield, 1 Cox, C. C. 39; R. *v.* Fallon, 9 Cox, C. C. 242.

Accomplices.

R. *v.* STUBBS AND OTHERS. (1855) [6]

[Dears. C. C. 555; 25 L. J. (M. C.) 16; 1 Jur. N. S. 1115.]

The prisoner and three others were indicted at Quarter Sessions with stealing some copper. Three accomplices swore that Stubbs assisted in taking some of the copper and selling it to a marine store dealer. The latter, being called, stated that the three other prisoners were the parties who brought the copper and sold it to him. No other evidence was adduced against Stubbs, but the accomplices were corroborated in other particulars with regard to the three other prisoners. The chairman directed the jury that it was not necessary that the accomplices should be confirmed as to each individual prisoner being connected with the crime charged, that their being corroborated as to material facts, tending to show that two of the other prisoners were connected with the larceny, was sufficient as to the whole case, but that the jury should look with more suspicion at the evidence in Stubbs' case, where there was no corroboration, than to the cases of the others, where there was corroboration, but that it was a question for the jury. The jury found all the prisoners guilty. The question for the opinion of the Court of Crown Cases Reserved was, whether the direction of the chairman was right.

The Court held that if the jury chose to act on such evidence only, the conviction could not be quashed as bad in law.

"We cannot interfere," said Jervis, C. J., "though we may regret the result that has been arrived at, for it is contrary to the ordinary practice. It is not a rule of law that accomplices must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may

act on the unconfirmed testimony of an accomplice; but it is usual in practice to advise the jury not to convict on such testimony alone, and juries generally attend to the judge's direction, and require confirmation. But it is only a rule of practice."

[Gray for the Crown.]

The evidence of an accomplice, although admissible, is naturally regarded with very great suspicion, as the witness is necessarily a person of damaged character, and presumably anxious to save himself and please the authorities.

The evidence of other accomplices is not corroboration. (R. *v.* Noakes, 5 C. & P. 326.) Nor will the evidence of the wife of an accomplice carry the case any further, for husband and wife must be taken as one for this purpose. A judge is not entitled to direct an acquittal as a matter of course in a case where there is no sufficient confirmation of an accomplice's evidence. He cannot do more than give the jury his advice, and tell them how important it is, for the protection of innocence, that no one should be convicted except on the testimony of at least one reliable witness.

Where an accomplice in giving evidence against two prisoners is confirmed only as to his statement against one of them, it ought not, although admissible, to operate as a confirmation of his statement against the other. (R. *v.* Jenkins, 1 Cox, C. C. 177.)

Other cases on this subject are :—R. *v.* Andrews, 1 Cox, C. C. 183 : R. *v.* Arundel, 4 Cox, C. C. 260 ; R. *v.* Payne, L. R. 1 C. C. R. 340; R. *v.* Thompson, L. R. 1 C. C. R. 377 ; Margaret Tinckler's case, 1 East, P. C. 354 ; *Re* Meunier, 18 Cox, C. C. 15; R. *v.* Waudby, [1895] 2 Q. B. 482 : R. *v.* Atwood & Robins, 1 Leach, 464 : R. *v.* Wilkes & Edwards, 7 C. & P. 272 ; R. *v.* Pratt, 4 F. & F. 315.

Incitement.

R. *v.* GREGORY. (1867) [7]

[L. R. 1 C. C. R. 77; 36 L. J. (M. C.) 60; 16 L. T. 388; 15 W. R. 774; 10 Cox, C. C. 459.]

The prisoner was indicted at the Borough Sessions at Leeds for inciting a person named John White, a servant of one James Kirk, to steal a bushel of hay, the property of James Kirk his master. The second count of the indictment merely varied the date, and in a third count the prisoner was charged with inciting John White and two other servants of the said James Kirk to steal barley, the property of their master. The indictment charging a misdemeanour, the jury were sworn accordingly. There was evidence upon all the counts of the indictment in proof of the offence charged, but no one of the three servants named stole any barley in compliance with the defendant's solicitations or otherwise. Counsel for the defence submitted that the incitement to commit a felony was not a misdemeanour but a felony; and that the indictment, therefore, not charging the incitement and solicitation to have been done "feloniously," was bad; he cited R. *v.* Higgins, 2 East, 5, and R. *v.* Gray, Leigh & Cave, C. C. 365. The prisoner was convicted, and the question reserved for the consideration of the Court of Crown Cases Reserved was, whether, since the passing of the 24 & 25 Vict. c. 94, it is a misdemeanour to solicit and incite a servant to steal his master's goods, though no other act be done except the soliciting and inciting; and the Court held that the offence of soliciting and inciting a man to commit a felony is, where no such felony is actually committed, a misdemeanour only, and not a felony under the 24 & 25 Vict. c. 94, s. 2, which only applies to cases where a felony is committed as the result of the

counselling and procuring therein mentioned. Kelly, C. B., said: "The first question is, whether a soliciting and inciting is equivalent to a counselling and procuring, so that an allegation of the former would sustain a conviction upon a statute making the latter an offence. It is not necessary to decide that point now; but we must not be taken to hold that an indictment founded upon a statute could be sustained, if, instead of the words of the statute, it used other words which might have a different signification. The second question is, whether the soliciting and inciting, or, indeed, the counselling and procuring (if we may supply those words), a man to commit a felony, are within the 24 & 25 Vict. c. 94, so as to make the soliciting and inciting a felony, although no principal felony be committed. Looking at the structure of the section, and construing it by the ordinary rules of grammar, it is impossible to put that construction upon it. There can be no accessory to a felony, unless a felony has been committed. Here there was no principal felony; and, therefore, the prisoner's offence was a misdemeanour only, and he has been properly convicted."

[Waddy for the prosecution; C. Foster for the prisoner.]

The case shows that the inciting a man to the commission of a crime is a misdemeanour, although such incitement may not result in the actual commission of the crime. An attempt to incite is also a misdemeanour.

A count in an indictment charged that the prisoner unlawfully, wickedly and indecently, did write and send to H. a letter, with intent thereby to move and incite H. to attempt and endeavour feloniously and wickedly to commit an unnatural offence, and by the means aforesaid did unlawfully attempt and endeavour to incite H. to attempt to commit the crime aforesaid:—Held, that the count charged an indictable misdemeanour. The evidence was that H. was a boy at school, and that he had received two letters from the prisoner, which he read, but that when he received the one mentioned in the above count he did not read it, nor was he in any way aware of its contents, but handed it over to the school

authorities:—Held, that the sending of the letter proved the attempt to incite, although it might be doubted whether it could be said to amount to inciting and soliciting, inasmuch as H. was not aware of the contents. (R. *v.* Ransford, 13 Cox, C. C. 9.)

A servant who, in order to make a profit for himself, sells his master's goods at less than their proper market value, thereby defrauds his master of the sum which represents the difference between the value of the goods and the price at which the servant has sold them. Where, therefore, a person was indicted for soliciting a servant to conspire to cheat and defraud his master, and it was proved that such person had offered a bribe to the servant as an inducement to him to sell certain goods of his master at less than their value, the Court of Crown Cases Reserved held that he might properly be convicted of such conspiracy. (R. *v.* De Kromme, 17 Cox, C. C. 492.)

In R. *v.* Krause (66 J. P. 121), it was held that the offence created by sect. 4 of the Offences against the Person Act, 1861 (which makes it a misdemeanour for a person to solicit, encourage, persuade, or endeavour to persuade, or propose to another to commit a murder), is not complete unless it can be shown that there has been some communication by the accused to the person whom he is alleged to have solicited or endeavoured to persuade, although it is not necessary to show that the mind of such person would be affected by such communication. Lord Alverstone, C. J., who tried the case, said: "In my opinion the objection raised with regard to the counts founded on the statute is an important objection and must prevail. The case must therefore go to the jury on the other counts. I think that the words 'endeavour to persuade' in the statute are descriptive of the character of the offence which involves direction to a particular person, and in my opinion the words have the same meaning as the words 'encourage,' 'solicit,' 'persuade,' and 'propose to.' Therefore I think there must be some communication to the person in order to constitute the statutory offence. I am clearly of opinion that it is not necessary to show that the mind of a man has been affected. So to hold would be contrary to R. *v.* Most (14 Cox, C. C. 583) [*vide post*, p. 79]; but I think there must be some evidence of communication." The case then proceeded upon the remaining

counts, which charged the common law offence of attempting to commit the statutory offence.

In R. *v.* Higgins (2 East, 5), the defendant was indicted for "falsely, wickedly, and unlawfully" soliciting and inciting a servant "to take, embezzle, and steal a quantity of twist, of the goods and chattels of his masters." It was argued in defence that this contained no charge of any matter indictable at common law. On the part of the Crown it was contended that every attempt to commit a crime, whether felony or misdemeanour, is itself a misdemeanour, and indictable. And if an act be necessary, the incitement or solicitation is an act; it is an attempt to procure the commission of a felony by the agency of another person. By the incitement the party does all that is left for him to do to constitute the misdemeanour; for if the felony be actually committed, he is guilty of felony as accessory before the fact. The Court upheld the conviction.

Le Blanc, J., said: "It is contended that the offence charged in the second count, of which the defendant has been convicted, is no misdemeanour, because it amounts only to a bare wish or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done; namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so."

Attempt.

[8] **R. *v.* RING.** (1892)

[17 Cox, C. C. 491; 61 L. J. (M. C.) 116; 66 L. T. 300; 56 J. P. 552.]

The prisoners, Henry Ring, Thomas Atkins, and William Jackson, were tried on an indictment, which charged them with an attempt to steal from the person of a person unknown and with assaulting a person unknown with intent to commit a felony.

At the trial it was proved that the three prisoners were seen to hurry on to the platform at King's Cross Station of the Metropolitan Railway just as a train, which was going to Edgware Road, was about to start; they did not go by that train, and separated on reaching the platform. On the arrival of the succeeding train, the prisoners crowded round and hustled a woman who was entering a compartment, and Atkins was seen endeavouring to find the pocket of her dress. The prisoners entered the train, got out of it at Gower Street Station, and there again crowded round and hustled a woman who was entering the train, Atkins again endeavouring to find her pocket. They re-entered the train, got out at Portland Road Station, entered the next train, and travelled in it to Baker Street Station, where they got out and were arrested. They were found to be in possession of tickets from King's Cross to Edgware Road. At the trial it was argued on behalf of the prisoners, on the authority of R. *v.* Collins (9 Cox, C. C. 497), that there was no case against them to go to the jury. The counsel for the prosecution argued that R. *v.* Collins had been overruled by R. *v.* Brown (16 Cox, C. C. 715, and 24 Q. B. D. 357). The case was left to the jury, and the prisoners were convicted.

The Court of Crown Cases Reserved affirmed the conviction.

[Forrest Fulton for the prosecution.]

In R. *v.* Brown (24 Q. B. D. 357) the prisoner was indicted, at the Essex Assizes, with attempting to commit unnatural offences with domestic fowls, and pleaded guilty. He was sentenced to twelve months' imprisonment with hard labour, but after sentence, Lord Coleridge, C. J., who tried the case, having been informed that it had been held that a duck was not an animal within 24 & 25 Vict. c. 100, s. 61, reserved the question.

The Court of Crown Cases Reserved affirmed the conviction, and Lord Coleridge, C. J., in delivering the judgment of the Court, said: "My attention having been called to R. *v.* Dodd after I had left the assize town, I thought it was my duty to make inquiry

with regard to it. It turned out to be a case decided by this Court in 1877, and it is unreported. The question reserved for the consideration of the Court was whether a duck was an animal within 24 & 25 Vict. c. 100, s. 61. The Court quashed the conviction, and it was not unreasonable to suppose that they had quashed it upon the ground that a duck was not an animal within the statute. It is fortunate, however, that several of the judges who composed the Court are still amongst us, and having made inquiry we understand that the conviction was quashed, not upon the ground that a duck was not an animal within the statute, but upon another ground. In R. *v.* Collins (9 Cox, C. C. 497; and L. & C. 471), the Court held that where a man put his hand into another's pocket and there was nothing in the pocket which he could steal, he could not be convicted of an attempt to steal. That is a decision with which we are not satisfied. R. *v.* Dodd proceeded upon the same view, that a person could not be convicted of an attempt to commit an offence which he could not actually commit. Some of the judges, I know, yielded with great reluctance to the authority of R. *v.* Collins, and thought that decision was wrong. In this case it would seem, on the question of fact, that the ground of the decision in R. *v.* Dodd fails, because I should suppose it is obvious that as a fact the offence could be committed by the boy. We are all therefore of opinion that R. *v.* Dodd is no longer law. It was decided on the authority of R. *v.* Collins, and that case, in our opinion, is no longer law."

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if not interrupted.

Any attempt to commit a crime is a misdemeanour unless otherwise provided for by statute. 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 express this in their verdict. The prisoner is then dealt with as if he had been convicted on an indictment for the attempt. It has been held that procuring a die for coining was an act in furtherance of the criminal purpose sufficiently proximate to the offence to constitute an attempt; but not so the buying a box of matches for setting a stack of corn on fire.

In R. *v.* Cheeseman (L. & C. 140), the prisoner, Edwin Cheeseman, was servant to Alfred Cheeseman, a contractor for the supply of meat to a regiment at Shorncliffe Camp. It was the prisoner's duty to return the surplus meat to his master after weighing out a certain allowance to each mess. By using a short weight, the prisoner set aside, as surplus, sixty pounds instead of fifteen pounds, intending to steal the forty-five pounds and return the fifteen pounds to his master. The prisoner's fraud was discovered before he carried the meat away. The prisoner was convicted, and the Court of Crown Cases Reserved affirmed the conviction. Erle, C. J., said: "The prisoner, having charge of the meat, went through the form of delivering it, but kept back part of which he ought to have delivered. Now, if he had actually moved away with any part of the meat, the crime of larceny would have been complete. It is said, however, that the evidence here does not show any such proximate overt act as is sufficient to support the conviction for an attempt to steal the meat. In my opinion, there were several overt acts which brought the attempt close to completion. These were, the preparation of the false weight, the placing it in the scale, and the keeping back the surplus meat. It is almost the same as if the prisoner had been sent with two articles and had delivered one of them as if it had been two. To complete the crime of larceny there only needed one thing, the beginning to move away with the property. The meat was in the prisoner's custody and under his control. He had almost the manual comprehension of it and had all but begun the asportation."

Blackburn, J., said: "There is, no doubt, a difference between the preparation antecedent to an offence and the actual attempt. But if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

In R. *v.* Eagleton (Dearsly, C. C. 515), the prisoner, by false pretence as to the number of loaves he had delivered under a contract, obtained credit in account for the loaves, and would have been paid for them but for the discovery of the fraud. The Court of Criminal Appeal held that the defendant was properly convicted of attempting to obtain money by false pretences, as the fraudulent representation made was of an antecedent fact; and that although

the defendant had only obtained credit in account, and could not have been convicted of obtaining money by false pretences, he was nevertheless properly convicted of the attempt, his obtaining the credit in account being the last act depending on himself towards obtaining the money.

In R. *v.* Ball (Car. & M. 249), the prisoner went to a pawnbroker's shop and laid down eleven thimbles on the counter, saying, "I want five shillings on them." The pawnbroker's assistant asked the prisoner if they were silver, and he said they were. The assistant tested them and found they were not silver, and in consequence did not give the prisoner any money but sent for a policeman and gave him into custody. The Court held that the conduct of the prisoner amounted to an attempt to commit the offence of obtaining money by false pretences.

In R. *v.* Hensler (11 Cox, C. C. 570), the prisoner was indicted for attempting to obtain money by false pretences in a begging letter. In reply to the letter the prosecutor sent the prisoner five shillings, but he stated in his evidence at the trial that he knew that the statements contained in the letter were untrue. The Court of Criminal Appeal held that the prisoner might be convicted on this evidence of attempting to obtain money by false pretences.

In R. *v.* Linneker ([1906] 2 K. B. 99; and 21 Cox, C. C. 196), the prisoner was indicted under sect. 18 of the Offences against the Person Act, 1861, with attempting to discharge a loaded revolver at the prosecutor with intent to do him grievous bodily harm. Evidence was given at the trial that during an interview between the prisoner and the prosecutor the prisoner drew a loaded revolver from his coat pocket. The prosecutor immediately seized the prisoner and prevented him from raising his arm; a struggle ensued, in the course of which the prisoner nearly succeeded in getting his arm free, but after a few minutes the prosecutor wrested the revolver from him, and he was taken into custody. During the struggle the prisoner several times said to the prosecutor "You've got to die." The Court of Crown Cases Reserved held that there was evidence upon which the prisoner could properly be convicted of an attempt to discharge the revolver within the meaning of sect. 18.

In R. *v.* Duckworth ([1892] 2 Q. B. 83, and 17 Cox, C. C. 495),

the prisoner was indicted under 24 & 25 Vict. c. 100, s. 18, which enacts that whosoever shall unlawfully and maliciously, "by drawing a trigger or in any other manner," attempt to discharge any kind of loaded arms at any person with intent to do grievous bodily harm, shall be guilty of felony. It was proved on the trial that the prisoner drew from his pocket a loaded revolver and pointed it towards his mother. His wrists were seized by bystanders as he was raising the pistol, and after a struggle it was taken from him. During the struggle his finger and thumb were seen fumbling about the revolver, which cocked automatically when the trigger was pulled. The Court of Crown Cases Reserved held that there was evidence upon which the prisoner could properly be convicted of an attempt to discharge the revolver within the meaning of the statute.

The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.

Cases on the question of attempt are :—R. *v.* Brown, 10 Q. B. D. 381 ; R. *v.* Watts, Sessions Paper, C. C. C. Vol. 71, p. 50; R. *v.* Bain, 9 Cox, C. C. 98; R. *v.* Roderick, 7 C. & P. 795 ; R. *v.* Nicholls, 2 Cox, C. C. 182 ; R. *v.* Ransford, 13 Cox, C. C. 9 ; Roberts' Case, Dears. C. C. 539 ; R. *v.* Phillips, 6 East, 464 ; R. *v.* Jackson, 17 Cox, C. C. 104 ; R. *v.* Brown, 62 J. P. 790 ; R. *v.* Taylor and Smith, 25 L. T. 75 ; R. *v.* Hapgood and Wyatt, 1 C. C. R. 221 ; R. *v.* Chapman, 2 C. & K. 846 ; R. *v.* Martin, 9 C. & P. 215 ; R. *v.* Taylor, 1 F. & F. 511.

Statutes on the subject are : 14 & 15 Vict. c. 100, s. 9 ; 24 & 25 Vict. c. 100, ss 11—15.

Infancy as an Excuse for Crime.

R. *v.* OWEN. (1830) [9]

[4 C. & P. 236.]

The prisoner, Elizabeth Owen, a girl of ten years of age, was indicted for stealing coals. It was proved that she was

standing by a large heap of coals belonging to Messrs. Harford & Brothers, and that she put a basket upon her head. The basket was found to contain a few knobs of coal, which, in answer to a question put to her by the witness for the prosecution, she said she had taken from the heap. Notwithstanding that the facts were undisputed, the jury acquitted her, saying, "We do not think that the prisoner had any guilty knowledge."

"In this case," said Littledale, J., "there are two questions: first, did the prisoner take these coals? and secondly, if she did, had she at the time a guilty knowledge that she was doing wrong? The prisoner, as we have heard, is only ten years of age: and unless you are satisfied by the evidence that, in committing this offence, she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know that it is wrong; and such person ought not to be convicted, unless there be evidence to satisfy the jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong."

[Lumley for the Crown.]

A child under seven cannot be guilty of a crime, for it is conclusively presumed to be *doli incapax* Between seven and fourteen the presumption in favour of innocence still continues but may be rebutted by strong and pregnant evidence of a mischievous discretion; for then *malitia supplet ætatem.* This *capacitas doli* ought to be affirmatively proved, as in the case of R. *v.* Clark, tried before Mr. Justice Denman at Winchester Assizes in 1880, where a little boy of eleven was charged with manslaughter, and his schoolmaster was put into the witness-box against him to show the amount of his intelligence. If it were merely proved against a boy of ten or eleven that he killed a person intentionally, or picked his pocket, he would be entitled to his acquittal; but, of course, the surrounding circumstances may, in any particular

case, furnish the proof of the "mischievous discretion" required. Thus at Abingdon Assizes, in 1629, before Mr. Justice Whitlock, a boy named Dean, about eight or nine years of age, was found guilty of burning some barns at Windsor, and sentenced to death, and hanged, it appearing upon examination that he had malice, revenge, craft, and cunning. So in a case where a boy of nine killed a playmate and then hid the blood and body, the attempt at concealment was considered to prove the *capacitas doli*. The case of R. *v.* York, where a boy of ten murdered a little girl of five is very similar. A girl of the age of thirteen was burnt in 1338 for killing her mistress; and about the time of Edward I. a boy under fourteen killed his comrade and afterwards hid himself, and he was hanged, as it was held that the hiding showed knowledge of right and wrong.

A boy under fourteen is conclusively presumed to be incapable of committing a rape; but he may be a principal in the second degree as aiding and assisting another, or he may be convicted of a common assault, although he cannot be convicted of an assault with intent to commit a rape, and if he is under that age no evidence is admissible to show that, in point of fact, he could commit the offence; nor can a boy under fourteen years of age be convicted of feloniously carnally knowing and abusing a girl under thirteen years old, under sect. 4 of the Criminal Law Amendment Act, 1885, even though the offence is fully proved (R. *v.* Waite, [1892] 2 Q. B. 600; 17 Cox, C. C. 554); but he may be convicted of an indecent assault under sect. 9 of the Criminal Law Amendment Act, 1885. (R. *v.* Williams, [1893] 1 Q. B. 320, *vide post*, p. 275.)

A child under fourteen, indicted for murder, must be proved conscious of the nature of the act (R. *v.* Vamplew, 3 F. & F. 520); and in a case where coining implements were found in the house occupied by a man, his wife, and a child ten years of age, the jury were directed to acquit the child of a felonious possession. (R. *v.* Boober, 4 Cox, C. C. 272.) Infants between the ages of fourteen and twenty-one are privileged in a few cases where the offence charged is a mere nonfeasance, on the ground that, till the latter age, they have not command of their purses.

On an indictment against a defendant for obtaining goods by falsely pretending that he was of full age, a plea of infancy in an

action brought against him is not admissible for the purpose of proving that he was a minor. (R. *v.* Simmonds, 4 Cox, C. C. 277; and R. *v.* Walker, 1 Cox, C. C. 99.)

Vide also R. *v.* Smith, 1 Cox, C. C. 260.

Insanity as an Excuse for Crime.

[10] **R. *v.* McNAUGHTEN.** (1843)

[10 Cl. & Fin. 200.]

The prisoner had been indicted at the Central Criminal Court for the murder of Edward Drummond. Evidence having been given of the fact of the shooting of Mr. Drummond, and of his death in consequence thereof, witnesses were called on the part of the prisoner, to prove that he was not, at the time of committing the act, in a sound state of mind. The medical evidence was in substance this: That persons of otherwise sound mind might be affected by morbid delusions; that the prisoner was in that condition; that a person so labouring under a morbid delusion might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception, and that he was not capable of exercising any control over acts which had connection with his delusion; that it was of the nature of the disease with which the prisoner was affected, to go on gradually until it had reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms. Some of the witnesses

who gave this evidence had previously examined the prisoner: others had never seen him till he appeared in Court, and they formed their opinions on hearing the evidence given by the other witnesses.

Tindal, C. J., told the jury that the question to be determined was whether, at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act.

The verdict of the jury was Not Guilty, on the ground of insanity. This verdict, and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a felony of this sort, having been made the subject of debate in the House of Lords, it was determined to take the opinion of the judges on the law governing such cases. Accordingly, on June 19, 1843, all the judges attended the House of Lords, when (no argument having been had) certain questions of law were propounded to them.

Tindal, C. J., delivered the opinion of the judges (Maule, J., dissenting) to the following effect:—

(1) 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 according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to the law.

(2) Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the commission 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.

(3) The accused 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 him in revenge for such supposed injury, he would be liable to punishment.

(4) A medical man who never saw the prisoner previously to the trial, but who was present during the whole trial, cannot, in strictness, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; but where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

[No counsel appeared.]

In R. *v.* Oxford (9 C. & P. 525) the prisoner discharged the contents of two pistols at the Queen, and the defence of insanity was set up for him. Denman, C. J., who tried the case, in summing up to the jury said: "Persons *primâ facie* must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act, and yet not be responsible. If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you

are to be governed. Many cases have been referred to upon the subject. But it is a sort of matter in which you cannot expect any precedent to be found. It is the duty of the Court to lay down the rule of the English law on the subject, and even that is difficult, because the Court would not wish to lay down more than is necessary in the particular case. . . . The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime."

Every person is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his acts until the contrary be proved. To establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong. Everything depends on the attitude of the prisoner's mind with regard to the particular act charged against him. If it was a guilty mind with regard to that act, its general derangement will not be an excuse. Thus in the case of Lord Ferrers (19 St. Trials, 947), who was tried before the House of Lords for the murder of his steward, it was shown that he was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. Many witnesses stated that they considered him insane, and it appeared that several of his relations had been confined as lunatics. But as it appeared that the murder of his steward was deliberate, and that the earl knew quite well in that particular instance what he was doing, he was found guilty and executed.

"A person," said Stephen, J., in R. *v.* Davis (14 Cox, C. C. 563), "may be both insane and responsible for his actions, and the great test laid down in McNaughten's case (10 Cl. & Fin. 200) was whether he did or did not know at the time that the act he was committing was wrong. If he did, even though he were mad, he must be responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which

so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason—may be fairly said to prevent a man from knowing that what he did was wrong."

Notwithstanding that a party accused did an act which was in itself criminal, under the influence of an insane delusion, with a view of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time that he was acting contrary to law. If the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to law, he is punishable. A party labouring under a partial delusion must be considered in the same situation as to responsibility as if the facts in respect of which the delusion exists were real.

Where, upon a trial for murder, the plea of insanity is set up, the question for the jury is, did the prisoner do the act under a delusion, believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he is guilty of murder.

Sir James Fitzjames Stephen says :—

"No act is a crime if the person who does it is, at the time when it is done, prevented either by any defective mental power or by any disease affecting his mind—

"(a) From knowing the nature and quality of his act, or

"(b) From knowing that the act is wrong, [or

"(c) From controlling his own conduct, unless the absence of the powers of control has been produced by his own default."]

In R. *v.* Burton (3 F. & F. 772), the prisoner, a youth of eighteen, was indicted for the murder of a boy. It appeared that the deceased boy had been playing on the Lines, a public place at Chatham, where the prisoner saw him and was seen near him. Some hours afterwards the child's dead body was found on the Lines. The throat was cut and there were marks of a violent struggle. The prisoner gave himself up and admitted the act. He said he was

tired of life, and had made up his mind to murder somebody. The prisoner was often absent-minded, and had been known to eat soap, &c. His mother had twice been to a lunatic asylum, and his brothers were of weak intellect. At the trial the prisoner's counsel proposed to ask a doctor, who was a witness, whether, having heard the evidence, he was of opinion that the prisoner was sane or insane at the time of the doing of the act; but the learned judge would not allow the question to be put, as it was the very question the jury had to determine. The prisoner was convicted and executed. Wightman, J., said: "It was urged that the prisoner did the act to be hanged, and so was under an insane delusion; but what delusion was he under? So far from it, it showed that he was quite conscious of the nature of the act and of its consequences. He was supposed to desire to be hanged, and, in order to attain the object, committed murder. That might show a morbid state of mind, but not delusion. Homicidal mania, again, as described by the witnesses for the defence, showed no delusion; it merely showed a morbid desire for blood. Delusion meant the belief in what did not exist. The question for the jury was whether the prisoner, at the time he committed the act, was labouring under such a species of insanity as to be unaware of the nature, the character, or the consequences of the act he committed; in other words, whether he was incapable of knowing that what he did was wrong. If so, they should acquit him; if otherwise, they should find a verdict of guilty."

In R. *v.* Haynes (1 F. & F. 666), the prisoner murdered a woman with whom he had been on the most friendly terms up to the moment of the commission of the offence. No motive was assigned for the perpetration of the act.

Bramwell, B., said: "As to the defence of insanity, it has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence or homicidal tendency. But I must remark as to that, that the circumstances of an act being apparently motiveless is no ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to

such a deed for his own relief." The prisoner was convicted, but reprieved.

Cases on this subject are:—R. *v.* Barton, 3 Cox, C. C. 275; R. *v.* Davies, 1 F. & F. 69; R. *v.* Richards, 1 F. & F. 87; R. *v.* Wright, R. & R. C. C. 456; R. *v.* Searle, 1 M. & Rob. 75; R. *v.* Frances, 4 Cox, C. C. 57; R. *v.* Layton, 4 Cox, C. C. 149; R. *v.* Stokes, 3 C. & K. 185; R. *v.* Law, 2 F. & F. 836; R. *v.* Vyse, 3 F. & F. 247; R. *v.* Dixon, 11 Cox, C. C. 341; R. *v.* Leigh, 4 F. & F. 915; R. *v.* Hodges, 8 C. & P. 195; R. *v.* Dwerryhouse, 2 Cox, C. C. 446; R. *v.* Southey, 4 F. & F. 864; R. *v.* Pearce, 9 C. & P. 667; R. *v.* Goode, 7 A. & E. 536: R. *v.* Davies, 6 Cox, C. C. 326; R. *v.* Turton, 6 Cox, C. C. 385.

Drunkenness as an Excuse for Crime.

[11] **R. *v.* CRUSE.** (1838)

[8 C. & P. 541; 2 Moo. C. C. 53.]

The prisoner Thomas Cruse, and his wife Mary Cruse, were indicted under 1 Vict. c. 85, s. 2, for the offence, at that time capital, of inflicting an injury dangerous to life with intent to murder; the prisoners were found guilty of an assault.

The evidence showed that the child Charlotte Heath, upon whom the assault was committed, was seven years old, and was a natural daughter of the female prisoner. Between six and seven in the evening of the 5th of June, Thomas Cruse asked his wife for more money; she said he should have no more that night; he shut the door, he and his wife being then in the house. Both prisoners were very drunk, and a neighbour heard the husband call the child, and the child say, "Father, do not beat me." The female prisoner said he might beat the child when he liked, and if he killed the child

she would not come near him. Blows were heard, and after that the child ran out of the house; the female prisoner ran after the child and gave her a blow on the head, and drove her back again. A noise was then heard of something falling, and Mary Cruse cried "Murder." The medical evidence showed that two hours after these injuries were inflicted the child was suffering from concussion of the brain, which is an injury dangerous to life. Patteson, J., in summing up the case to the jury, said: "Before you can find the prisoner, Thomas Cruse, guilty of this felony, you must be satisfied that when he inflicted this violence on the child he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that will not be sufficient, unless he actually intended to commit murder. With respect to the wife, it is essential not only that she should have assisted her husband in the commission of the offence, but also that she should have known that it was her husband's intention to commit murder. It appears that both these persons were drunk; and although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in questions where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering this child, you may still find them guilty of an assault."

[J. J. Williams for the prosecution; Carrington for the prisoners.]

Voluntary drunkenness affords no excuse for crime, as men must be taken to drown their faculties at their peril. (*Vide* Pearson's Case, 2 Lewin, C. C. 144.) But in the later case of R. *v.* Monkhouse (4 Cox, C. C. 55), where the prisoner was indicted for discharging a loaded pistol at the prosecutor with intent to murder

him, Mr. Justice Coleridge expressed substantial agreement with the view of Mr. Justice Patteson in the leading case. "Drunkenness," he said, "is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may, no doubt, exist. To ascertain whether or not it did exist in this instance, you must take into consideration the quantity of spirit he had taken, as well as his previous conduct." So, also, in the case of R. *v.* Doherty (16 Cox, C. C. 306), which was a trial for murder, Mr. Justice Stephen said: "Although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime."

Although drunkenness is no excuse for crime, *delirium tremens* caused by excessive drinking is different. If it produces such a degree of madness as to render the person incapable of distinguishing right from wrong at the time the offence is committed, he is relieved from criminal responsibility. (R. *v.* Davis, 14 Cox, C. C. 563.)

It is said that drunkenness, even though contracted voluntarily, may sometimes be taken into consideration as tending to rebut the existence of a specific intention. And clearly, whenever the question is whether the prisoner committed the act charged against him intentionally or by accident, it is important to ascertain whether he was drunk or sober.

In a case of stabbing, where the prisoner had used a deadly weapon, the fact that he was drunk does not at all alter the nature of the case; but if he had intemperately used an instrument not in its nature a deadly weapon, at a time when he was drunk, the fact of his being drunk might induce the jury to less strongly infer a malicious intent in him at the time. (R. *v.* Meakin, 7 C. & P. 297.)

If a man is drunk, this is no excuse for any crime he may

commit; but where provocation by a blow has been given to a person, who kills another with a weapon which he happens to have in his hand, the drunkenness of the prisoner may be considered on the question, whether he was excited by passion, or acted from malice; as, also, it may be on the question, whether expressions used by the prisoner manifested a deliberate purpose, or were merely the idle expressions of a drunken man. (R. *v.* Thomas, 7 C. & P. 817.)

Though drunkenness is no excuse for crime, it may be taken into account by the jury when considering the motive or intent of a person acting under its influence. (R. *v.* Gamlen, 1 F. & F. 90.)

Where, on the trial of an indictment for an attempt to commit suicide, it appeared that the prisoner was at the time of the alleged offence so drunk that she did not know what she did:—Held, that this negatived the attempt to commit suicide. (R. *v.* Moore, 3 C. & K. 319.)

On a charge of attempting to commit suicide, the mere fact of drunkenness is no excuse for the crime; but it is a material fact for the jury to consider before coming to the conclusion that the prisoner really intended to destroy his life. (R. *v.* Doody, 6 Cox, C. C. 463.)

Coercion by Husband.

R. *v.* **TORPEY.** (1871) [12]

[12 Cox, C. C. 45.]

The prisoner Martha Torpey was indicted, with one Michael Torpey, for a robbery with violence committed by them together upon James Unett Parkes, and stealing from his person two diamond necklaces and other articles of jewellery, the goods of William Henry Ryder.

The second count of the indictment described the goods as

being, at the time of the robbery, in the possession and under the control of the said J. U. Parkes.

The third count charged both prisoners with feloniously receiving the property, knowing it to have been stolen.

The male prisoner was not in custody, and the female prisoner was, therefore, tried alone. In the gaol calendar she was described as a married woman, but this did not appear on the face of the indictment, which contained no description of either prisoner.

The facts of the case, as appearing from the evidence, were as follows:—

The prosecutor was an assistant to Messrs. London and Ryder, jewellers, of New Bond Street. On the 12th of January, in consequence of an order given to his employers, he went with some jewellery, to the value of over 5,000*l.*, to a house, No. 4, Upper Berkeley Street, W. He reached the house about half-past five o'clock in the evening, and the door was opened by Michael Torpey, who had given the order for the jewellery at the shop. Michael Torpey apologised for the absence of the servant, asked prosecutor to leave his hat in a room on the ground floor, and then to follow him (Torpey) to the drawing room. There they were joined by the prisoner, Martha Torpey, and the prosecutor took out of a bag part of the jewellery, and, placing it on the table, began to show it to the two prisoners, keeping the remainder of the jewellery in his bag under the table. The two prisoners were together on the other side of the table, and as they examined the jewels, the value of each article was explained.

The male prisoner admired a necklace worth 1,100*l.*, and said he should like to have either that or one valued at 750*l.*, but that he thought he should like to consult his wife's sister before a decision was come to. He told the female prisoner to call her sister, and she left the room apparently for that purpose. The male prisoner continued standing at the table in

the same position as before, and the prosecutor remained with his back to the door. In about a couple of minutes the female prisoner returned, and said that her sister would be there directly. She then came quietly behind the prosecutor, and placed a handkerchief saturated with something over his face and mouth, whilst the male prisoner rushed at him and clasped him round the arms in front. They struggled together for two or three minutes, the female prisoner constantly applying the handkerchief to the prosecutor's face, who, after a short time, became unconscious, and was forced by the prisoners on to a sofa. On returning to complete consciousness the prosecutor found himself lying on the sofa, bound with straps. Both prisoners had then left the house, taking with them all the jewellery which had been placed on the table, except a small gold chain.

The house in Upper Berkeley Street had been taken at a weekly rent by the male prisoner from a house agent, to whom he represented his name as Tyrrel, and gave a reference to an hotel keeper at Bath. The reply to the reference, in consequence of which the male prisoner was allowed to engage the house, was as follows:—

"Bath, Royal Hotel.
"Le 10 Jan., 1871.

"M. de Madaillon (being imperfectly acquainted with the English language) has requested me to acknowledge and reply to your letter. We have known Mr. Tyrrel for some years in Paris, and I have no hesitation in assuring you that any engagement into which he may enter with you will be honourably fulfilled.

"I am, faithfully yours,
"Emily de Madaillon."

This letter was proved to be in the handwriting of the female prisoner.

On the afternoon of the robbery, both prisoners arrived at the house in Upper Berkeley Street in a cab; they had no

luggage. Shortly afterwards, the only servant in the house was sent out by the female prisoner with a letter directed to some fictitious Miss Pearson at Tulse Hill, and the servant's unsuccessful search for this person kept her fully occupied until after the robbery had been completed. On her return, the house was in the possession of the police. The direction on the envelope of this letter was also proved to be in the handwriting of the female prisoner.

The two prisoners had been living together as husband and wife since the month of June previously, at the house of a Miss Pitt at Leamington. They had with them an infant whom they treated as their child. On the 9th of January, the male prisoner went to London. On the 11th, the female prisoner received two telegrams at Leamington. On the morning of the 12th (the day of the robbery), she left for London, stating that she might not return that evening, in which case she would send a telegram. On the evening of the 12th, Miss Pitt received a telegram from her, and about two o'clock on the morning of the 13th, both prisoners returned together, and the male prisoner left in a day or two and went abroad, leaving the female prisoner at Leamington, where she was shortly afterwards apprehended.

On the 15th of January, a relative of the female prisoner received from her a parcel containing part of the stolen property, with a letter asking the former to take charge of the parcel for a time. This letter, also, was in the handwriting of the female prisoner. Counsel for the defence referred to R. *v* Cruse, 8 C. & P. 541; and 2 Moody, C. C. 53; and R. *v.* Archer, 1 Moody, C. C. 143.

The prisoner was acquitted.

[Metcalfe and Straight for the prosecution; Montagu Williams and Horace Brown for the prisoner.]

It is not, of course, to be suggested that this case is in any way a binding authority, being merely a decision of a jury and not a

rule of law; but it is made a leading case in order to show to what extent the doctrine of coercion can be carried, and for this reason the facts have been given in detail. It will be observed that the wife took a very active part in the whole matter. It was she who wrote the false reference; it was she who got rid of the servant by sending her out on a fictitious errand; and it was she who commenced the assault on the prosecutor. It would seem from the arguments in this case that the doctrine of coercion applies to misdemeanours as well as to felonies, and the question for the jury is the same in both cases; also that this doctrine applies to the crime of robbery with violence.

A wife who commits a crime in the presence of her husband is in general presumed to have acted under his coercion, and is excused. This proposition, however, must be taken with certain limitations. The presumption does not apply to crimes of the gravest kind, such as treason, murder, or manslaughter. Nor does it apply to those misdemeanours in which the law considers it reasonable to presume that the wife was as guilty as the husband. Thus, she may be convicted of keeping a brothel, though her husband lived in the house and superintended the establishment, for the law presumes that the wife has a principal share in the management of domestic affairs. A wife cannot commit larceny in the company of her husband, for it is deemed his coercion and not her voluntary act; and the law, out of tenderness to the wife, if a felony is committed in the presence of the husband, raises a presumption *primâ facie*, and *primâ facie* only, that it was done under his coercion. But the presumption can in all cases be rebutted by showing that the woman acted voluntarily, and not out of regard to her husband's wishes or commands. It is not necessary for the defence, when taking the point of coercion, to prove the marriage in the strictest way, evidence of reputation, if such as to satisfy the jury, being sufficient. And if the woman is charged in a joint indictment as the wife of the man, no kind of proof is necessary. Mere cohabitation will not, however, suffice to discharge the woman from liability. A wife who has incited her husband to the commission of a felony can be indicted and convicted as an accessory before the fact; but although she knows that he has committed a felony, she has a right to receive and screen him.

In R. *v.* Samuel Smith and Sarah Smith (D. & B. 553), it appeared on the trial that the wife, acting, as the finding of the jury established, under the coercion of her husband, wrote letters to the prosecutor pretending that she had become a widow, and requesting a meeting at a distant place. The meeting was granted, and the wife, dressed as a widow, met the prosecutor at a railway station, and induced him to go with her to a lonely spot, where the husband fell upon him and inflicted the injuries alleged in the indictment. The question was reserved, and the Court quashed the conviction. Pollock, C. B., said:—"The jury have disposed of this case by their finding. They have found that Sarah Smith was a married woman; that she acted under the coercion of her husband; and that she herself did not personally inflict any violence upon the prosecutor. The conviction, therefore, so far as it extends to her, must be reversed."

In Brown *v.* Attorney-General for New Zealand (18 Cox, C. C. 658), the Judicial Committee of the Privy Council held that the mere fact of coverture raises no presumption of compulsion by the husband; and that where the evidence showed that a wife voluntarily aided in arrangements leading up to, and intended to assist, the commission of a criminal offence by her husband, she was rightly convicted, and no question as to marital control should have been left to the jury. Halsbury, L. C, said:—"The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton's time, if the wife was voluntarily a party to the commission of a crime, her coverture furnished no defence. . . . Questions have from time to time arisen how far the mere presence of the husband at the time of the commission of the offence should furnish a presumption of marital control, and the decisions on that subject have not been entirely uniform. But their Lordships are of opinion that here even that question does not arise. The acts attributed to the prisoner were acts done by herself in the absence of her husband, conclusively establishing that she was voluntarily acting and aiding and assisting in arrangements leading up to, and intended to assist, the commission of the offence which was afterwards consummated." The appeal was therefore dismissed.

In R. *v.* Baines (19 Cox, C. C. 524), the Court of Crown Cases Reserved held that coverture is no defence to a criminal charge.

In this case a husband and wife were jointly indicted for receiving stolen goods. There was evidence that the wife had received part of the stolen property from one of the thieves; there was no evidence that the husband was present at the time, and there was no evidence that the wife was acting under his compulsion. The Court affirmed the conviction.

In R. *v.* Booker (2 Cox, C. C. 272), the Court held that if coining implements are found in a house occupied by a man and his wife, the presumption is, that they are in the possession of the husband; and unless there are circumstances to show that the wife was acting separately, and without her husband's sanction, they cannot both be convicted. The Court held also that the fact of a wife attempting to break up coining implements at the time of her husband's apprehension, if done with the object of screening him, is no evidence of a guilty possession.

In R. *v.* Manning (2 C. & K. 903), it was held that if husband and wife jointly commit a murder, both are equally amenable to the law, as the doctrine of presumed coercion of the wife does not apply to murder. So also a wife is amenable as an accessory before the fact to a murder committed by her husband; but if the only part she took in the transaction was in harbouring and comforting her husband after the crime was committed, she is not liable as an accessory after the fact.

In R. *v.* McGinnes (11 Cox, C. C. 391), a woman was indicted for uttering counterfeit coin. At the time of the commission of the offence, she was in company with a man who went by the same name, and who was convicted at the previous assizes of the offence. When the prisoners were taken into custody, the constable addressed the female as the male prisoner's wife. He denied the fact in the hearing and presence of the woman. Since her committal she had been confined of a child. It was held that, under the circumstances, although the woman had not pleaded coverture, and even although she had not asserted she was married to the male prisoner when he stated she was not his wife, it was a question for the jury whether, taking the birth of the child and the whole circumstances, there was not evidence of the marriage, and the jury thought there was, and acquitted her.

In R. *v.* Good (1 C. & K. 183), it was held that where a woman is charged with comforting, harbouring, and assisting a man who

has committed a murder, if the counsel for the prosecution has reason to believe that she was married to the man, and it appears clearly that she considered herself as his wife, and lived with him as such for years, he will be justified in not offering any evidence against her, even though he has also reason to believe that the marriage was in some respect irregular, and probably invalid.

Cases on this subject are:—R. *v.* Knight, 1 C. & P. 116; R. *v.* Price, 8 C. & P. 19; R. *v.* Dicks, 1 Russ. C. & M. 141; R. *v.* Matthews, 1 Den. C. C. 596; R. *v.* Langher, 2 Cox, C. C. 134; R. *v.* John, 13 Cox, C. C. 100; R. *v.* Morris, R. & R. C. C. 270; R. *v.* Cohen, 11 Cox, C. C. 99; R. *v.* Wardroper, 8 Cox, C. C. 284; R. *v.* Hammond, 1 Leach, 447; R. *v.* Conolly, 2 Lewin, 229; R. *v.* Dixon, 10 Mod. 336; R. *v.* Ingram, 1 Salk. 384; R. *v.* Dykes, 15 Cox, C. C. 771; R. *v.* Buncombe, 1 Cox, C. C. 183; R. *v.* Banks, 1 Cox, C. C. 238; R. *v.* Brooks, 6 Cox, C. C. 148; R. *v.* Woodward, 8 C. & P. 561.

Compulsion.

[13] **R. *v.* TYLER & PRICE.** (1838)

[8 C. & P. 616.]

In this case, which was a charge of murder against the two prisoners, a person named John Thom, who called himself Sir William Courtenay, and was insane, collected a number of persons together in the neighbourhood of Canterbury, promising them plenty in this world and happiness hereafter, and asserted that he was above all earthly authority, and was the Saviour of the world. A warrant for his arrest was entrusted to a constable named John Meares, who went with his brother to effect the arrest. Thom shot the brother and tried to stab John Meares. Then Thom hacked Meares' brother with a sword, and the prisoners and two other persons,

by the order of Thom, afterwards took the deceased, who was still alive, and threw him into a dry ditch, where they left him. The Court held that any apprehension that Tyler and Price had of personal danger to themselves from Thom, was no ground of defence for continuing with him after he had declared his purpose of cutting down constables, the apprehension of personal danger not furnishing any excuse for assisting in doing any act which is illegal.

Lord Denman, C. J., in summing up, said: "With regard to one argument you have heard, that these prisoners were induced to join Thom and to continue with him from a fear of personal violence to themselves, I am bound to tell you that where parties for such a reason are induced to join a mischievous man, it is not their fear of violence to themselves which can excuse their conduct to others. You probably, gentlemen, never saw two men tried at a criminal bar for an offence which they had jointly committed, where one of them had not been to a certain extent in fear of the other, and had not been influenced by that fear in the conduct he pursued. Yet that circumstance has never been received by the law as an excuse for his crime, and the law is that no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind."

[Law, Andrews, Serjt., Bodkin, and Channell for the prosecution; Shee and Deedes for the prisoners.]

This case illustrates the doctrine of compulsion, although the actual decision of the Court was that the prisoners were guilty of murder as principals in the first degree.

An apprehension, though never so well grounded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person, will afford no excuse for joining or continuing with rebels, but it is said to be otherwise if the party joins from fear of death or by compulsion, although this does not appear consistent with the doctrine of the leading case.

On an indictment under 7 & 8 Geo. IV. c. 30, s. 4, for breaking a

threshing machine, the judge allowed a witness to be asked whether the mob, by whom the machine was broken, did not compel persons to go with them, and then compel each person to give one blow to the machine; and also whether, at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. (R. *v.* Crutchley, 5 C. & P. 133.)

In general, a person committing a crime will not be answerable if he was not a free agent, and was subject to actual force at the time the act was done. Thus, if A. by force take the arm of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but not B.; but if it be only a moral force put upon B., as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse.

In R. *v.* McGrowther (Foster's Crown Law, 13), there was evidence that the prisoner acted as a lieutenant in a regiment in the rebel army called the Duke of Perth's regiment. The defence of compulsion was set up, and witnesses swore that the Duke of Perth threatened to burn the houses and to drive off the cattle of such of his tenants as should refuse to follow him. Lee, C. J., in summing up said there never was any tenure which obliged tenants to follow their lords into rebellion, and the fear of having houses burnt or goods spoiled is no excuse in the eye of the law for joining and marching with rebels. The only force which excuses is a force upon the person and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual force, and that he quitted the service as soon as he could; agreeably to the rule laid down in Oldcastle's case, that they joined *pro timore mortis, et recesserunt quam cito potuerunt.*

Corporations.

R. *v.* BIRMINGHAM AND GLOUCESTER RAIL. CO. (1842) [14]

[9 C. & P. 469; 3 Q. B. 223; 6 Jur. 804.]

This was an indictment against the defendants in their corporate name, found at the summer assizes for Worcestershire, 1839, for disobeying an order of justices. By the Company's Act (6 Will. IV. c. 14), it was provided that in case the company, in constructing the line of railway, should sever any person's land into detached portions, they should construct such bridges or archways over or under the railway for the purpose of communication, as two justices, on the application of the owner, should direct; and an appeal was given to the quarter sessions. The prosecutor had obtained an order of two justices on the defendants, to make an archway under the railway for the purpose of connecting the severed portions of the prosecutor's lands. On appeal by the company to the quarter sessions, the order was confirmed. The company had not obeyed the order, and the prosecutor preferred the indictment at the assizes. A distringas had issued from time to time to compel the company to appear and plead. When the case came on at the Worcester Assizes, Baron Parke, the presiding judge, expressed themselves in these terms: "There are instances of corporations aggregate being indicted for non-repair of bridges and roads *ratione tenuræ*. The only difficulty is as to how they are to appear. If the indictment were in the Court of Queen's Bench, they would appear by attorney; but the question is whether they can appear by attorney here. At present, I see no other way than by removing the indictment by certiorari, and the company pleading in the Court of Queen's Bench by attorney.

There is no doubt that an indictment lies against a company if they will not do their duty. They have no person, and must appear by attorney. They may be indicted, and it seems to me that they must have a certiorari, and appear by attorney; or if they do not, there may be a distress *ad infinitum*." The defendants accordingly removed the indictment into the Court of Queen's Bench by certiorari, and their counsel moved to quash the indictment, on the ground that the company, as a corporation aggregate, was not liable to be indicted in their corporate name. The case was argued on demurrer, and a great number of cases were cited on each side. Patteson, J., in delivering the judgment of the Court, said: "This was an indictment against the company in their corporate name for neglecting to make an arch and do other works pursuant to an order of justices. The indictment was found at the assizes at Worcester, and removed into this Court by certiorari. The company appeared, and demurred generally to the indictment, on the ground that they were not liable to be indicted in their corporate name. On the argument, it was not contended that trespass might not be brought against a corporation, for, notwithstanding some dicta in the older cases, it must be taken to be settled law, since the case of Lord Yarborough *v.* The Bank of England (16 East, 6), and Maund *v.* The Glamorganshire Canal Co. (Exch. 1840), that both trover and trespass are maintainable. But it was said that an indictment would not lie in this form. The only authority cited for that position was a dictum of Lord Holt's, in Anon., 12 Mod. 559, where he said that 'a corporation is not indictable, but the particular members are.' That dictum was not necessary to the decision of the case then before the Court; nor does it appear what the nature of the offence was to which it had reference; it may have been felony. As a general proposition, it is opposed to many authorities, which show that a corporation may be indicted for a breach of duty,

though not for a felony or crime involving personal violence, or for riot or assault. (Hawk. P. C. c. 76, s. 8; and c. 77, s. 2.) In the case of R. *v.* The Mayor and Corporation of Liverpool (3 East, 86), the judgment was arrested, but no question was raised whether the indictment would lie. In R. *v.* The Mayor, &c., of Stratford-upon-Avon (14 East, 348), the verdict for the Crown was sustained, and there was no question raised generally as to a corporation being liable to an indictment. On the discussion of the question in the present case, counsel for the defendants relied on an objection to this form of the indictment, that at the assizes, where it was found, the appearance must be in person, and, as a corporation aggregate can only appear by attorney, the defendants could not appear and take their trial on it, if so disposed. We think there is no weight in that objection. It may throw some difficulty in the prosecutor's way, and oblige him to remove the indictment by certiorari, but the liability of the corporation is not affected by it. In R. *v.* Gardner (Cowp. 84, 85), a corporation was held liable in their corporate capacity to be rated to the poor; and it was considered that the proper mode of proceeding to enforce that liability was by distress infinite, as was pointed out by Mr. Baron Parke in this very case, in 9 C. & P. 469, and as appears from 2 Hawk. c. 27, s. 10; Vin. Abr. 'Corporations,' B. a; and Com. Dig. 'Pleader,' B. 1. We are therefore of opinion that on this demurrer our judgment must be for the Crown."

[Talfourd, Serjeant, for the Crown; Whateley for the defendants.]

In R. *v.* The Great North of England Railway Company (10 Jur. 755), it was held that an indictment will lie against a corporation for a misfeasance at common law. In this very important case, Lord Denman, C. J., in delivering the judgment of the Court, said:—"The question is whether an indictment will lie at common law against a corporation for misfeasance, it being admitted, in

conformity with undisputed decisions, that an indictment may be maintained against a corporation for nonfeasance. All the preliminary difficulties as to the service and execution of process, the mode of appearing and pleading and enforcing judgment, are, by this admission, swept away. But the argument is that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is, assuming, in the first place, that there is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness, to mere negligence in providing safeguards, or to an act rendered improper by nothing but the want of safeguards. If A. is authorised to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it?

"But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offence, and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments, but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it, and they may as well be compelled to pay a fine for the act as for the omission.

"Some dicta occur in old cases: 'A corporation cannot be guilty of treason or of felony'; it might be added, 'of perjury or offences against the person.' The Court of Common Pleas lately held that a corporation might be sued in trespass, but nobody has sought to fix them with acts of immorality. Those plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases, but they may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large. The late case of The Gloucester and Birmingham Rail. Co. (3 Q. B. Rep. 223), was confined to the state of things

then before the Court, which amounted to nonfeasance only, but was by no means intended to deny the liability of a corporation for a misfeasance.

"We are told that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings, Of this there is no doubt, but the public knows nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purposes of gain, except the remedy by an indictment against those who commit it; that is, the corporation acting by its majority, and there is no principle which places them beyond the reach of the law for such proceedings. The verdict for the Crown, therefore, on the first four counts, will remain undisturbed."

In Two Sicilies (King) *v.* Wilcox (14 Jur. 751), an incorporated company demurred to a bill in equity, because the discovery thereby sought might subject it to a criminal prosecution under 59 Geo. 3, c. 69 (The Foreign Enlistment Act), and it was held that a corporation was not liable to be indicted under that Act, and the Court overruled the demurrer.

Vide also R. *v.* Tyler, [1891] 2 Q. B. 588.

Liability of Master for Acts of Servant.

R. *v.* STEPHENS. (1866) [15]

[L. R. 1 Q. B. 702; 35 L. J. Q. B. 251; 12 Jur. N. S. 961; 14 L. T. 593; 14 W. R. 859; 10 Cox C. C. 340.]

This case decided that the owner of works, carried on for his profit by his agents, is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the

works, though done by them without his knowledge, and contrary to his general orders.

The defendant was tried before Blackburn, J., at the Pembrokeshire Assizes; and it was proved that the Tivy was a public navigable river which flowed through Llechryd Bridge, thence to Kilgerran Castle, and from there past the town of Cardigan to the sea. About twenty years previous, the Tivy was navigable to within a quarter of a mile of Llechryd Bridge, from which place a considerable traffic was carried on in limestone and culm by means of lighters. The defendant was the owner of a slate quarry called the Castle Quarry, situate near the Castle of Kilgerran, which he had extensively worked since 1842. The defendant had no spoil bank at the quarry. The rubbish from the quarry was stacked about five or six yards from the edge of the river. Previous to 1847, the defendant erected a wall to prevent it from falling into the river, but in that year a heavy flood carried away the wall, and with it large quantities of the rubbish. Quantities of additional rubbish were from time to time shot by the defendant's workmen on the same spot, and so slid into the river. By these means the navigation was obstructed, so that even small boats were prevented from coming up to Llechryd Bridge. The defendant, being upwards of eighty years of age, was unable personally to superintend the working of the quarry, which was managed for his benefit by his sons. The defendant's counsel at the trial was prepared to offer evidence that the workmen at the quarry had been prohibited both by the defendant and his sons from thus depositing the rubbish, and that they had been told to place the rubbish in the old excavations and in a place provided for that purpose. The learned judge intimated that the evidence was immaterial; and he directed the jury that as the defendant was the proprietor of the quarry, the quarrying of which was carried on for his benefit, it was his duty to take all proper precautions to

prevent the rubbish from falling into the river, and that if a substantial part of the rubbish went into the river from having been improperly stacked so near the river as to fall into it, the defendant was guilty of having caused a nuisance, although the acts might have been committed by his workmen, without his knowledge and against his general orders. The jury found a verdict of Guilty. This ruling was upheld by the Court of Queen's Bench. Said Blackburn, J., "I see no reason to change the opinion I formed at the trial. I only wish to guard myself against it being supposed that, either at the trial or now, the general rule that a principal is not criminally answerable for the act of his agent is infringed. All that it is necessary to say is this, that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie, if the same nuisance inflicts an injury upon a public right, the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment. That is all that it was necessary to decide and all that is decided."

[H. S. Giffard, Q.C., and Poland for the Crown; J. W. Bowen and Hughes for the defendant.]

During the hearing of the above important case, the following cases were cited as bearing upon the point in issue :—R. *v.* Medley, 6 C. & P. 292; Bush *v.* Steinman, 1 B. & P. 407; Turberville *v.* Stampe, 1 Ld. Raym. 264; Laugher *v.* Pointer, 5 B. & C. 576; R. *v.* Pedley, 1 A. & E. 822; R. *v.* Moore, 3 B. & Ad. 188; Reedie *v.* London and North Western Rail. Co., 4 Ex. 244; R. *v.* Great North of England Rail. Co., 9 Q. B. 315; R. *v.* Birmingham and Gloucester Rail. Co., 3 Q. B. 223; Fletcher *v.* Rylands, L. R. 1 Ex. 265; R. *v.* Huggins, 2 Ld. Raym. 1574; Att.-Gen. *v.* Siddon, 1 C. & J. 220; Hearne *v.* Garton, 28 L. J. (M. C.), 216; Eastern Counties Rail. Co. *v.* Broom, 6 Ex. 314; Whitfield *v.* South Eastern Rail. Co., 27 L. J. (Q.B.) 229; Stevens *v.* Midland Counties Rail. Co., 10 Ex. 352; R. *v.* Gutch, Moo. & M. 433; and R. *v.* Almon, 5 Burr. 2686.

Vide also Wilson *v.* Rankin, 6 B. & S. 216; Budd *v.* Lucas, [1891] 1 Q. B. 408; Brown *v.* Foot, 61 L. J. (M. C.) 110; Mullins *v.* Collins, L. R. 9 Q. B. 292; Newman *v.* Jones, 17 Q. B. D. 132; Chisholm *v.* Doulton, 22 Q. B. D. 736, and Allen *v.* The London and South Western Rail. Co., 11 Cox, C. C. 621.

In Coppen *v.* Moore ([1898] 2 Q. B. 306) it was held that the provisions of sect. 2, sub-sect. 2, of the Merchandise Marks Act, 1887, which make it an offence to sell goods to which a forged trade-mark or false trade description is applied, make a master criminally liable for acts done by his servants in contravention of the section when acting within the general scope of their employment, although contrary to their master's orders, unless the master can show that he has acted in good faith and has done all that it was reasonably possible to do to prevent the commission of offences by his servants.

In Dyer *v.* Munday ([1895] 1 Q. B. 742) the defendant employed a person to manage a branch of his business, which was the sale of furniture on the hire-purchase system. The manager sold a piece of furniture to a person who was lodging in the plaintiff's house, and on one of the instalments being in arrear, went to the house and removed the furniture. While so doing he assaulted the plaintiff. For this assault he was summoned, convicted and fined, and he paid the fine. In an action against the defendant in respect of the assault the jury found that the manager committed the assault in the course of his employment. The Court held that the mere fact that the assault was a criminal offence, and not only a tortious act, did not affect the liability of the defendant for the act of the servant, and that the release of the servant, under 24 & 25 Vict. c. 100, s. 45, from civil proceedings for the assault, did not release the defendant from liability.

In R. *v.* Bennett (Bell, C. C. 1; and 8 Cox, C. C. 74), the prisoner had for years been accustomed to keep fireworks in a house in London for sale, and a part of the process of manufacture of some of them was performed in the house, and by the supposed negligence of one of his servants an ignition of red and blue fire was caused, which communicated to the other fireworks, and a rocket shot across the street and set a house on the opposite side on fire, by which a person's death was caused. It was held that the prisoner was not liable to be indicted for manslaughter, as the

unlawful act of keeping the fireworks was disconnected with the supposed negligence of the servant, which was the proximate cause of the death.

Wives Prosecuting Husbands.

R. *v.* LORD MAYOR OF LONDON. (1886) [16]

[16 Cox, C. C. 81; 55 L. J. (M. C.) 118; 54 L. T. 761.]

This was a rule calling upon the Lord Mayor of London and Alfred Vance (the comic singer) to show cause why the Lord Mayor should not be made to grant a summons to Emma Vance against her husband, Alfred, for libel. Alfred had put an advertisement in the "Daily Telegraph" suggesting that Emma was not his wife, but his mistress. It was held, however, that the Married Woman's Property Acts do not enable a married woman to take criminal proceedings against her husband for libel. The counsel who argued in support of the rule contended that the separate property of the wife was affected by the libel, but the Court replied, "How can a prosecution for a libel, which is criminal only because of the tendency above pointed out [viz., the "tendency to arouse angry passions, provoke revenge, and thus endanger the public peace"], be said to be for the protection and security of the separate estate? It seems to us impossible to so hold, even if it may hereafter be held (upon which we give no opinion) that an action for libel in a case like the present can be maintained by a wife against a husband. It seems to us, moreover, looking at the complaint made, that it would be impossible to hold the separate estate, as contemplated by the statute, was ever here in jeopardy. What was damaged, if

anything, was the fair fame of the applicant, and that, in our judgment, is not separate estate. We are of opinion, that neither as the law stood prior to 1870, nor since, can a wife criminally prosecute a husband, or give evidence against him upon a prosecution for a personal libel upon herself."

[Crispe for the rule; Poland and W. Baugh Allen for the Lord Mayor.]

The tendency of recent legislation has been to establish the independence of the wife, so that she can sometimes prosecute her husband for offences against her property. See, however, 45 & 46 Vict. c. 75, s. 12, and also the case of Lemon *v.* Simmons, 36 W. R. 351. That was an action for slander, the words complained of being to the effect that the plaintiff robbed his wife of 75*l.* before her removal to a lunatic asylum, and was anxious to get rid of her, in order that he might take the remainder of her money. It was held that, as such words did not impute to the plaintiff that he stole his wife's money while they were living apart, or when he was about to leave or desert her, they were not actionable, inasmuch as they did not, even under the Married Women's Property Act, 1882, impute an indictable offence.

By the first section of 47 & 48 Vict. c. 14 (which was passed to supply the omission disclosed in R. *v.* Brittleton, 12 Q. B. D. 266), it is provided that, "in any such criminal proceeding against a husband or a wife as is authorised by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence."

By sect. 12 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), every woman, whenever married, may bring civil or criminal proceedings in her own name against any person, including her husband, for the protection and security of her separate property. In any indictment or other proceeding under this portion of the Act it is sufficient to allege such property to be her property; and husband and wife may give evidence, the one against the other, without the consent of the person charged, both in cases under this and under the 16th section. But no wife may take criminal proceedings against her husband in respect

of property while they are living together; nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Sect. 16 enacts that a wife doing any act with respect to the property of 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 under this Act, is liable to criminal proceedings by her husband.

On the trial of a charge against a wife for stealing the goods of her husband when about to leave or desert him, which is made a criminal offence by ss. 12 and 16 of the Married Women's Property Act, 1882, it is not necessary that the indictment should contain averments that the prisoner was the wife of the prosecutor, and that she took the goods in question when leaving or deserting, or about to leave or desert, her husband. (R. *v.* James, [1902] 1 K. B. 541.)

By the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4, a woman whose husband—

(1) Has been convicted (a) summarily of an aggravated assault upon her, or (b) on indictment of an assault upon her, and sentenced to more than two months' imprisonment, or to pay a fine of more than 5*l.*; or

(2) Has deserted her; or

(3) By persistent cruelty or wilful neglect to provide reasonable maintenance for her has caused her to leave him,

may apply to a Court of Summary Jurisdiction (or to the Court before whom he is convicted on indictment) for an order under this Act.

Such Court can (1) grant an order of separation; (2) give her the custody of any children while under sixteen years of age; (3) order him to pay a sum not exceeding 2*l.* per week and the costs of the application.

Torts and Felonies.

[17] **WELLS *v.* ABRAHAMS.** (1872)

[L. R. 7 Q. B. 554; 41 L. J. Q. B. 306: 26 L. T. 433; 20 W. R. 659.]

In answer to an action for the recovery of a brooch, the defence was raised that, as it appeared from the evidence that the brooch was taken by the defendant under such circumstances as to prove a charge of felony, the plaintiff ought to be nonsuited. If was held, however, that a judge at *nisi prius* is bound to try the issues on the record, and cannot nonsuit under such circumstances.

"No doubt," said Cockburn, C. J., "it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted. But although that is the rule, it becomes a different question when we have to consider how it is to be enforced. It may be that the person, against whom a prosecution for felony is pending, may have a right in an action to show by plea that he is in the position of a felon, and so he may be able to stop the action brought by the person injured by his felonious act, although I think this is open to doubt, because the effect would be to allow a party to set up his own criminality."

Blackburn, J., said: "No doubt there are many dicta of high authority to the effect that when there has been a private injury to a civil right, which may also be the subject of criminal prosecution for felony, it is the duty of the person injured to prosecute for the criminal offence before he can

pursue his remedy by action for the private injury. But although there are many dicta to that effect, I cannot find any case where that rule of law has been acted on before the cases of White *v.* Spettigue, 13 M. & W. 603; and Gimson *v.* Woodfull, 2 C. & P. 41. While the law throws the prosecution of criminal offences on private individuals, it may be, in some cases, that the civil remedy is suspended until there has been a prosecution for the felony. I am not prepared to say that, if an action were brought against a defendant, and it was stated by the Attorney-General on behalf of the Crown that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the Court might not, in such a case, in the exercise of its summary jurisdiction, stay proceedings in the action until the indictment for felony had been tried; or if an action were brought contemporaneously with an indictment for felony, and was an attempt to extort money, then again it might be that the Court would stay proceedings."

Lush, J. said: "It is undoubtedly laid down in the text books, that it is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement; but by what means that duty is to be enforced, we are nowhere informed. I am unable to find a single instance in which there has been directly any attempt to enforce that duty. It has been decided in Lutterell *v.* Reynell (1 Mod. 282), that it does not lie in the mouth of the party to say that he himself was a thief; he cannot be allowed to set up his own crime as a bar to the redress of the person who sues him in an action. When we consider the functions of a judge at *nisi prius*, it seems to me perfectly clear that it is not competent for him to interpose in the middle of the case to enforce that duty. He cannot refuse to try the cause. In the first place, I do not see how he can stay proceedings,

when part of the evidence is given, against the will of the parties, and certainly he cannot nonsuit if the evidence before him is such as ought to be submitted to the jury. His duty is simply to try the cause on the issues that are joined. It seems to me he has no power to stay proceedings and direct a nonsuit or a verdict contrary to the evidence. If the declaration discloses that which would be the subject of a demurrer or a motion in arrest of judgment, I cannot see that the judge dealing with the cause at *nisi prius* has any power to interfere in order to enforce that supposed defect."

[Aspinall, Q.C., for the plaintiff; Torr, Q.C., for the defendant.]

The leading case practically overrules Wellock *v.* Constantine (2 H. & C. 146), where the plaintiff, a housemaid, who tried to get damages from her master for committing a rape upon her, consented to a nonsuit on the judge saying that he should direct a verdict for the defendant, and leaves the question of procedure (assuming the existence of the rule) rather doubtful.

In Ex parte Ball (10 Ch. D. 667), where a clerk had embezzled moneys of his employer to a large amount, it was held that, even if a person injured by a felony is debarred from proving in the bankruptcy of the felon, in respect of the injury, until he has prosecuted the felon, the obligation to prosecute does not extend to his trustee in bankruptcy, even though that bankruptcy occurred after a proof in respect of the injury had been tendered by the injured person himself. Lord Bramwell, L. J., said, "In this case the debt which is sought to be proved arose from the felonious act of the bankrupt in embezzling the moneys of his employers. The question is, whether that being so, and no more having been done than has been done towards prosecuting the bankrupt, the trustee in the liquidation of Messrs. Willis & Co., the employers, can prove the debt in the bankruptcy. The law on this subject is in a remarkable state. For 300 years it has been said in various ways by judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that which was not so much expressed by Mr. Justice Blackburn, in

Wells *v.* Abrahams (L. R. 7 Q. B. 554), as to be inferred from what he said. But though such an opinion has been entertained and expressed for all this time, there are but two cases in which it has operated to prevent the debt being enforced. These two cases are Wellock *v.* Constantine (2 H. & C. 146), and Ex parte Elliott (3 Mont. & A. 110)."

In Appleby *v.* Franklin (17 Q. B. D. 93), which was an action for the seduction of the plaintiff's daughter, a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion, and it was objected to as imputing a felony which ought to be prosecuted for before it could form the foundation of a civil action. It was held, however, that, as the plaintiff was not the person upon whom the felonious act had been committed, and had no duty to prosecute, the paragraph could not be struck out. "The authorities which have been referred to," said Wills, J., "leave no room for poubt that no action can be maintained for a civil injury resulting to the plaintiff from a felonious act on the part of the defendant until public justice has been vindicated by the prosecution of the criminal. It is equally clear that the objection to the maintenance of the action cannot be raised by plea or by demurrer, or, as it would seem, by way of nonsuit, inasmuch as the cause of action still subsists. But here the action is brought not by the person upon whom the felonious act was committed, and who owes a duty to the public to prosecute the offender, but by one who has sustained consequential damage but who is not under any obligation to prosecute. Osborn *v.* Gillett (L. R. 8 Ex. 88) is a distinct authority to show that the present plaintiff is not debarred from maintaining this action."

Mr. Justice Cave suggested, in Roope *v.* D'Avigdor (10 Q. B. D. 412), that the proper way of staying an action, where the facts disclosed a felony which the plaintiff ought to have prosecuted, was by some application made summarily to the Court, and not by demurrer.

In the Midland Insurance Co. *v.* Smith and Wife (6 Q. B. D. 561), an insurance company granted a fire policy to S., and during the currency of the policy S.'s wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by

the act of the wife. The Court held, first, that the action could not be maintained, as the insurer has no rights other than those of his assured, and can enforce those only in his name and after admitting the claim on the policy. Secondly, that the action for the felony if it were maintainable was maintainable without showing that the felon had been prosecuted. In delivering judgment, Lord Penzance said: "The second point raised by the demurrer, namely, that an action cannot be maintained to recover damages for a wrongful act amounting to a felony, unless the public right has been first vindicated by a prosecution of the felon, has in the present view of the case ceased to be material, but as the case may go to the Court of Appeal, I think it better not to pass the point over wholly unnoticed. The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one."

In R. *v.* Daniell (3 Salkeld, 191) the defendant was indicted for enticing an apprentice to depart from his master and absent himself from his service; and it was held that an indictment would not lie for seducing an apprentice to leave his master, but only an action on the case.

In R. *v.* Richards (8 Durnford & East, 634) the defendants were indicted for not repairing a private road constructed by an Act of Parliament for draining and dividing a certain moor, called King's Sedgmoor, in the county of Somerset. The Court held that there was no legal ground on which this indictment could be supported. That the known rule was, that those matters only that concerned

the public were the subject of an indictment, and that the road in question, being described to be a private road, did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it. That the question was not varied by the fact that many individuals were liable to repair; or by the fact that many others were entitled to the benefit of it, for each party injured might bring his action against those on whom the duty was thrown. That the circumstance of this road having been set out under a public Act of Parliament did not make the non-repair of it an indictable offence; for many public Acts are passed which regulate private rights, but it never was conceived that an indictment lay on that account for an infringement of such rights. That here the Act was passed for a private purpose, that of dividing and allotting the estates of certain individuals. That, even if it were true that there was no remedy by action, the consequence would not follow that an indictment could be supported; but, in truth, the parties injured had another legal remedy, *i.e.*, by action.

Treason Felony.

R. *v.* GALLAGHER AND OTHERS. (1883) [18]

[15 Cox, C. C. 291; Sessions Paper, C. C. C., vol. 98, p. 279.]

The prisoners were indicted under the Treason Felony Act, 1848 (11 & 12 Vict. c. 12),—

(1) For feloniously and unlawfully compassing, imagining, and devising and intending to depose the Queen from the Imperial Crown of Great Britain and Ireland, and expressing the same by divers overt acts set out in the indictment;

(2) Intending to levy war upon the Queen in order, by force and constraint, to compel her to change her measures and counsels.

(3) To intimidate and overawe the Houses of Parliament.

Secret clubs were formed in America, branches of a society called the Fenian Brotherhood, whose object was said to be to procure "the freedom of Ireland by force alone." The prisoners, members of these clubs, came to England provided with funds, their intent being to destroy public buildings by nitro-glycerine and other explosives. One of the prisoners appeared to be the director of the movements of the others; another was detected in manufacturing nitro-glycerine in large quantities at Birmingham; and others were employed in the removal thereof, when manufactured, to London, under the director's superintendence. There was evidence that the House of Commons and Scotland Yard Office of the Detective Police were pointed out as places to be destroyed, as well as that the nitro-glycerine was to be used for destroying other public buildings. At the close of the case for the prosecution, Edward Clarke, Q.C., on behalf of Thomas Gallagher, submitted that there was no evidence to go to the jury in support of the second and third counts of the indictment. Prior to the Treason Felony Act, and under the statute of Edward III., the question of what amounted to "a levying of war" had often come before the Courts for judicial decision, and the current of the authorities substantially amounted to this—that there must be numbers arrayed for the purpose of opposing the forces of the Crown, and a premeditated design of conflict with the Royal forces. These elements were essential to the crime of levying war against the Crown, and he contended that they were wholly wanting in this case. He referred to Coke's Institute, vol. 3, p. 9; Hale's Pleas of the Crown, p. 149; Foster's Crown Law, c. 2, p. 208; State Trials, vol. 24, p. 902; R. *v.* Frost, 9 Carrington and Payne, p. 129; and R. *v.* Dammaree, 15 State Trials, p. 522. The Lord Chief Justice (Lord Coleridge) said: "The words 'levying war' are words general and descriptive. It is obvious that

war may be levied in very different ways and by very different means, in different ages of the world. And the judges have never attempted to say that there could not be a 'levying of war' in any other way than in the way brought before them in earlier times. I am of opinion that it is enough to say in this case, if the jury should be of opinion that the prisoners, or any of them, have agreed among themselves that some one of them should destroy the property of the Crown, and destroy or endanger the lives of the Queen's subjects by explosive materials, such as it has been suggested have been made use of, and if they should be further of opinion that such acts have been made out, then the prisoners are guilty of treason felony within the meaning of this Act." The jury were directed—(1) That if they thought that one or more of the prisoners did compass, devise, or intend to force the Queen to change her counsels, and to overawe the Houses of Parliament by violent measures, directed either against the property of the Queen, the public property, or the lives of the Queen's subjects, and not with the view of repaying any private spite or enmity against any particular subjects of the Queen, it would be a levying of war against the Queen within the meaning of the first count of the indictment; and that it was not the less compassing, and intending levying war, because, by the progress of science, two or three men could do now what could not have been done years ago except by a large number of persons; that the question was, was there proof that the prisoners did what they did with the intention of depriving and deposing the Queen from the style of the Imperial Crown of the United Kingdom, or with the intention of separating Ireland from the Crown of England, and establishing an independent Republic? (2) That if what the prisoners did was done to compel Her Majesty or her ministers, by force, to change the present Constitution, and to alter the relations between England and Ireland, or even to set up a

separate Parliament in Ireland, it would be within the second count of the indictment. (3) That if what the prisoners did was done for the purpose of intimidating and overaweing both or either Houses of Parliament so as to frighten them into doing what otherwise they would not have done, it would be within the third count.

On the trial, which took place at the Central Criminal Court in June, 1883, before Lord Coleridge, C.J., the Master of the Rolls, and Grove, J., four of the prisoners were convicted and sentenced to penal servitude for life.

[The Attorney-General, the Solicitor-General, Poland, and R. S. Wright for the Crown; Edward Clarke, Q.C., Bowen Rowlands, Q.C., J. J. Sims, M. W. Mattinson, Keith Frith, Burnie, H. J. Broun, and T. Waite for the prisoners.]

War levied against the King is of two kinds—direct and constructive. Open and armed rebellion against the person of the sovereign would, of course, belong to the former class. Instances of the latter are attempts to effect innovations of a public and general nature by force. Therefore, where a mob assembled for the purpose of destroying all the Protestant dissenting meeting-houses, and actually pulled down two, it was held to be treason. (R. *v.* Dammaree, 15 St. T. 522.) But in another case, it was held that, if a person act as the leader of an armed body, who enter a town, and their object be neither to take the town nor to attack the military, but merely to make a demonstration to the magistracy of the strength of their party, either to procure the liberation of certain prisoners convicted of some political offence, or to procure for those prisoners some mitigation of their punishment, this, though an aggravated misdemeanour, is not high treason. (R. *v.* Frost, 9 C. & P. 129.) Nor would a tumult, with a view to the pulling down of a particular house, or the laying open of a particular enclosure, be treason, this being no general defiance of public government.

In R. *v.* Thistlewood and others (33 State Trials, 381), "The Cato Street Conspiracy," there was a conspiracy to assassinate the King's Cabinet Ministers when assembled at dinner at Lord

Harrowby's house in Grosvenor Square. It being found that their particular purpose was only intended as one of the steps to the general purpose of subverting the Constitution, the prisoners were found guilty of high treason, the act in question being held to be the compassing a levying of war against the King.

In R. *v.* Davitt and Wilson (11 Cox, C. C. 676), the prisoners were indicted for feloniously compassing and devising to deprive and depose the Queen from her style and title of the Imperial Crown of the United Kingdom. Thirty-three overt acts were set out, including a conspiracy to subvert the constitution, and a conspiracy to provide arms and ammunition for levying war within the realm. The overt acts relied upon in support of the conspiracy were the procuring and producing arms for the purpose of being used in the intended insurrection against the royal authority in Ireland. Both the prisoners were convicted.

The Naturalization Act, 1870, provides that "Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily becomes naturalized in such State, shall, from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien." The King's Bench Division held that the section does not empower a British subject to become naturalized in an enemy State in time of war; and that the act of becoming naturalized under such circumstances is itself an act of treason, and ineffectual to afford protection against an indictment for treason in subsequently joining the military forces of the enemy. (R. *v.* Lynch, [1903] 1 K. B. 444, and 20 Cox C. C. 468.)

The principal statutes relating to the crime of treason are—25 Edw. 3, stat. 5, c. 2; 1 Mary, sess. 1, c. 1; 36 Geo. 3, c. 7; 5 & 6 Vict. c. 51; and 11 & 12 Vict. c. 12.

Cases on this subject are—R. *v.* Oxford, 9 C. & P. 525; R. *v.* Lord George Gordon, 2 Dougl. 590; R. *v.* Delamotte, 1 East, P. C. 53; R. *v.* Burke, 10 Cox, C. C. 519; Mulcahy *v.* Regina, L. R. 3 H. L. 306; R. *v.* Meaney, 10 Cox, C. C. 506; R. *v.* Deasy and others, 15 Cox, C. C. 334; R. *v.* Vaughan, 2 Salk. 634; R *v.* Lord Preston, 12 How. St. Tr. 646; R. *v.* Charnock, 2 Salk. 633.

Foreign Enlistment.

[19] R. *v.* SANDOVAL. (1887)

[16 Cox, C. C. 206; 56 L. T. 526; 35 W. R. 500; 51 J. P. 709.]

The defendant, a foreigner, but resident in this country, was indicted for a breach of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), by fitting out an expedition within the Queen's dominions against a friendly State. It was held that an offence under sect. 11 of that Act is sufficiently constituted by the purchase of guns and ammunition in this country, and their shipment for the purpose of being put on board a ship in a foreign port, with a knowledge of the purchaser and shipper that they are to be used in a hostile demonstration against such State, though the shipper takes no part in any overt act of war, and the ship is not fully equipped for the expedition within any port belonging to the Queen's dominions. Day, J., said: "Now, it is said that this expedition represented a *bonâ fide* commercial transaction; that the ship's papers were thoroughly regular (which one might expect in a transaction which was not *bonâ fide*); and that there was nothing inconsistent with a mercantile adventure; but that was for the jury to judge of. Again, it was said that there was no evidence that the defendant did 'prepare or fit out' an expedition within the Queen's dominions. But I am clearly of opinion (if we are to make use of our common sense) that there was abundant evidence of a preparation and fitting out of an expedition. Mr. Grain has urged that there is no offence unless there has been a complete fitting out and equipment; that the ship must take her last biscuit on board. But the Act was passed to prevent such mischiefs as the present; and I am of opinion that the moment any overt act of preparation

is done the statutory offence is committed, so that such attempts may be defeated and the mischievous consequences likely to ensue to this country may be prevented. The defendant bought the guns and the ammunition which were eventually used on board. In my judgment, there was a substantial preparation made in this country. These guns and ammunition were bought over here and then shipped to Antwerp. For what? For that which amounted to both a naval and military expedition. A number of persons were collected together on board the ship, the *Justitia*, and proceeded together for the unmistakable purpose of levying war or creating a disturbance within the territory of a friendly State. The defendant, then, did make preparation in this country for such an expedition. We entertain no doubt that there was abundant evidence of preparation in this country to be left to the jury, and to support their very proper verdict."

"Nothing can be more mischievous," said Wills, J., "than that persons who act as the present defendant has done should suppose that they can escape the responsibility for acts done in violation of the municipal law, passed to maintain the requirements of international comity; acts which might be followed by consequences most mischievous, and which under certain circumstances it might be impossible to exaggerate. The present expedition was contemptible, and not of a character seriously to affect our relations with a foreign power; but the law is the same as to a small expedition and a formidable one, as to an expedition against a small State and a great State, and those who took part in it are criminally liable."

[J. P. Grain for the prisoner.]

In R. *v.* Jameson and others ([1896] 2 Q. B. 425 & 18 Cox, C. C. 392), it was held that, if there be an unlawful preparation of an expedition by some person within her Majesty's dominions, any British subject who assists in such preparation shall be guilty of

an offence, even though he renders the assistance from a place outside her Majesty's dominions.

In this case, also, the indictment alleged that "within the limits of her Majesty's dominions, and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,'" certain offences against the said Act were committed. The Court held that the indictment sufficiently alleged the Act to have been in operation in that part of her Majesty's dominions in which the alleged offences were committed.

The second section of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), provides that: "This Act shall extend to all the dominions of her Majesty."

The third section enacts that: "This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation."

The fourth section says that if any person, without the licence of her Majesty, being a British subject, within or without her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with her Majesty, and in this Act referred to as a friendly State, or whether a British subject or not within her Majesty's dominions, induces any other person to accept or to agree to accept any commission or engagement in the military or naval service of any such foreign State as aforesaid, he shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted, and imprisonment, if awarded, may be either with or without hard labour.

The fifth section deals with the case of a British subject leaving her Majesty's dominions with intent to serve a foreign State.

The eighth section has reference to illegal ship-building and illegal expeditions.

The eleventh section provides that: "If any person within the limits of her Majesty's dominions, and without the licence of her Majesty, prepares or fits out any naval or military expedition to

proceed against the dominions of any friendly State, the following consequences shall ensue :—(1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour. (2) All ships, and their equipments, and all arms and munitions of war used in or forming part of such expedition, shall be forfeited to her Majesty."

Offences against Foreign Sovereigns.

R. *v.* BERNARD. (1858) [20]

[1 F. & F. 240.]

The prisoner was charged with being an accessory before the fact to the murder of two persons who were among the victims of Orsini's attempt upon the life of the Emperor of the French on the 14th of January, 1858. During the trial the following points of importance were decided :—(1) Evidence that A. was privy to a plot to murder B. by explosive machines, held sufficient to go to the jury on counts charging A. with the murder of C. (accidentally killed by the explosion), with conspiring to murder him, and as an accessory to the murder. (2) The attempt to assassinate having been made in Paris, and B. and C. being both Frenchmen, and A., the prisoner,

being also an alien, residing in England, *quære*, whether (within 9 Geo. IV. c. 31, s. 7) he was indictable either as principal or as accessory? (3) The prisoner declining to plead to an indictment, the Court directed a plea of Not Guilty to be entered. (4) A special commission for the trial of the prisoner having been read in open Court at the opening of the commission immediately before the delivery of the charge to the grand jury, an application made at the arraignment by his counsel for the commission to be then read a second time, upon the ground that it had not been read in the presence of the prisoner, was refused. (5) Upon a charge of murdering a person named by means of explosive grenades, evidence of other deaths and wounds suffered by others at the same time held admissible for the purpose of proving the character of the grenades. (6) A witness being called to prove that he manufactured certain grenades by which the death in question had been caused:—Held, that the name of the person who gave the order for them might be asked, as a fact in the transaction, even though he had not then been shown to be connected with the prisoner. (7) A sergeant in the police, after stating in cross-examination that he attended a debating society where political subjects were discussed, by the direction of the commissioners of police, for the purpose of noticing and reporting, and that he went in private clothes, was asked if he went as a spy. Held, that the question could not be put, as it required the witness to draw an inference from facts; but that he might be asked under what directions, and for what purpose, he went, and what he did when there. (8) At a period of the trial when it had been proved that the grenades by which the death in question had been caused had been ordered by A., but when there was no evidence to connect A. with the prisoner, it was proved that a letter in A.'s handwriting, bearing a memorandum in the handwriting of the prisoner, was found at the prisoner's residence after his arrest

upon the present charge. Held, that such letter was admissible against him, not upon the ground that A. was a co-conspirator, but upon the ground that it was found in the possession of the prisoner, and was relevant to this inquiry. (9) Evidence as to the way in which, and the time at which, the prisoner and other conspirators had procured passports for Belgium, and for other countries (not France) through which they might obtain access to France, was admitted. (10) Not more than two counsel are entitled to address the Court for a prisoner during the trial upon a point of law. (11) 11 & 12 Vict. c. 78, applies to points of law arising upon trials under special commission, and authorizes the Court to reserve points of law arising at the trial.

The prisoner was acquitted.

[Sir Fitzroy Kelly, A.-G., Macaulay, Q.C., Welsby, Bodkin, and Clerk for the Crown; Edwin James, Q.C., Simon, Hawkins, Sleigh, Brewer, and Scobel, for the prisoner.]

In the case of R. *v.* Most (7 Q. B. D. 244 and 14 Cox, C. C. 583), the prisoner was indicted under 24 & 25 Vict. c. 100. s. 4. The encouragement and endeavour to persuade to murder, proved at the trial, was the publication and circulating by him of an article written in German, in a newspaper called "*Freiheit*" published in London, exulting in the recent murder of the Emperor of Russia, and commending it as an example to revolutionists throughout the world. The jury were directed that if they thought that by the publication of the article the prisoner did intend to, and did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find him guilty:—Held, by the Court of Crown Cases Reserved (Lord Coleridge, C. J., Grove and Denman, JJ., Huddleston, B., and Watkin Williams, J.), that such direction was correct, and that the publication and circulation of a newspaper article might be an encouragement or endeavour to persuade to murder, within sect. 4 of 24 and 25 Vict.

c. 100, although not addressed to any person in particular. Lord Coleridge, C. J., said: "The question arises upon sect. 4 of 24 & 25 Vict. c. 100, which enacts that all persons who shall, or any one who shall, encourage, or who shall endeavour to persuade any person to murder any other person, whether a subject of the Queen, or within the Queen's dominions or not, shall be guilty of a misdemeanour. . . . . We have to deal here with a publication proved by the evidence at the trial to have been written by the defendant, to have been printed by the defendant, that is, he ordered and paid for the printing of it, sold by the defendant, called by the defendant his article, and intended as the jury have found, and most reasonably found, to be read by the twelve hundred or more persons who were the subscribers to, or the purchasers of, the '*Freiheit*' newspaper; and, further, one which the jury have found, and I am of opinion have quite rightly found, to be naturally and reasonably intended to incite and encourage, or to endeavour to persuade persons who should read that article to the murder either of the Emperor Alexander, or the Emperor William, or, in the alternative, the crowned and uncrowned heads of States, as it is expressed in one part of the article, from Constantinople to Washington. The question, therefore, simply is on these facts which are undisputed, and with regard to which the jury have pronounced their opinion—do these facts bring it within these words? I am of opinion they clearly do. An endeavour to persuade or an encouragement is none the less an endeavour to persuade or an encouragement because the person who so encourages or endeavours to persuade does not in the particular act of encouragement or persuasion personally address the number of people, the one or more persons, whom the address which contains the encouragement or the endeavour to persuade reaches. The argument has been well put, that an orator who makes a speech to two thousand people, does not address it to any one individual amongst those two thousand; it is addressed to the number It is endeavouring to persuade the whole number, or large portions of that number, and if a particular individual amongst that number addressed by the orator is persuaded, or listens to it and is encouraged, it is plain that the words of this statute are complied with, because, according to well-known principles of law, the person who addresses those words to a number of persons must

be taken to address them to the persons who, he knows, hear them, who he knows will understand them in a particular way, do understand them in that particular way, and do act upon them."

Upon the ground that malicious and scurrilous reflections upon those who are possessed of rank and influence in foreign states may tend to involve this country in disputes and warfare, it has been held that publications tending to degrade and defame persons in considerable situations of power and dignity in foreign countries may be treated as libels. Thus, an information was filed, by command of the Crown, for a libel on a foreign ambassador, then residing at the British Court, consisting principally of some angry reflections on his public conduct, and charging him with ignorance in his official capacity, and with having used stratagem to supplant and depreciate the defendant at the Court of Versailles (R. *v.* D'Eon, 1 Blac. 510); and Lord George Gordon was found guilty in 1787 upon an information for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction; upon which occasion Ashurst, J., observed, in passing sentence, that the object of the publication being to rekindle animosities between England and France by the personal abuse of the sovereign of one of them, it was highly necessary to repress an offence of so dangerous a nature; and that such libels might be supposed to have been made with the connivance of the state where they were published, unless the authors were subjected to punishment.

In the case of R. *v.* Vint (27 St. Tr. 627), the defendant was convicted of publishing a libel on the Emperor of Russia in the "Courier" newspaper. The libel was in the following terms:— "The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency; he has now passed an edict prohibiting the exportation of timber, deals, &c. In consequence of this ill-timed law, upwards of 100 sail of vessels are likely to return to this kingdom without freights."

In R. *v.* Peltier (28 St. Tr. 530), the defendant was convicted of a libel upon Napoleon Bonaparte, at that time First Consul, but war broke out between England and France, and the defendant was not sentenced. In this case Lord Ellenborough, C. J., in his

address to the jury, said:—"I lay it down as law, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be, and treated as, libel; and particularly when it has a tendency to interrupt the pacific relations between the two countries."

In R. *v.* Antonelli (70 J. P. 4), it was held that an indictment which charged a person with encouraging persons unknown to murder the sovereigns and rulers of Europe was good, as a sufficiently well-defined class was referred to by the words "sovereigns of Europe."

Unlawful Assemblies.

[21] BEATTY *v.* GILLBANKS. (1882)

[9 Q. B. D. 308; 51 L. J. (M. C.) 117; 47 L. T. 194; 31 W. R. 275; 46 J. P. 789; 15 Cox, C. C. 138.]

On the 23rd of March, 1882, a religious association, calling themselves the Salvation Army, assembled to the number of about a hundred persons, and, forming a procession, headed by flags and music, marched through the streets of Weston-super-Mare, as they had done on previous occasions. They were met by an organized band styled the Skeleton Army, who also were in the habit of parading the streets, and who were antagonistic to the Salvation Army. On several occasions, previous to the date in question, the procession of the Salvation Army, accompanied

by a mob, had come into collision with the Skeleton Army, and other persons who were antagonistic to the Salvation Army, and thereupon a free fight, great uproar, blows, tumult, stone-throwing, and disorder had ensued. On the 23rd of March the Salvation Army formed their procession, and paraded the streets and places accompanied by a disorderly and riotous mob of over 2,000 persons, who had been collected as the Salvation Army proceeded. In the midst of the mob was great disturbance, stone-throwing, and noise. The police were for a long time overpowered and unable to cope with the disturbance, and the Salvation Army forced their way through several public streets to a public place called the Railway Parade, where a general fight occurred. The appellant, William Beatty, a captain and leader of the Salvation Army, led and directed the Salvation Army on the occasion in question, but neither he nor the other appellants were seen to commit any overt act of violence. The police were ultimately reinforced, and the crowd then dispersed. In all probability bloodshed and injury was prevented by the interference of the police. The same thing occurred on the 26th of March, which was a Sunday. Meanwhile a notice had been signed by the justices prohibiting the procession; this notice had been served on Beatty, but as he and the other appellants acted in defiance of the notice, they were arrested.

Edward Clarke, Q.C., for the appellants, contended that, to constitute an unlawful assembly, there must be either an illegal object, or, if the object be legal, the mode of carrying it out must be tumultuous; that neither had been made out, and that the intention of other persons to commit unlawful acts could not affect the question whether there had been an offence by the appellants.

It was held that the Salvationists, having assembled for a lawful purpose, and with no intention of carrying it out unlawfully, could not be rightly convicted of an unlawful

assembly, notwithstanding that they were aware that a breach of the peace would be very likely to result from their action.

Field, J., said :—" The appellants have, with others, formed themselves into an association for religious exercises among themselves, and for a religious revival, if I may use the word, which they desire to further among certain classes of the community. No one imputes to this association any other object; and so far from wishing to carry that out with violence, their opinions seem to be opposed to such a course, and, at all events, in the present case, they made no opposition to the authorities. That being their lawful object, they assembled as they had done before, and marched through the streets of Weston-super-Mare. No one can say that such an assembly is, in itself, an unlawful one. The appellants complain that in consequence of this assembly they have been found guilty of a crime of which there is no reasonable evidence that they have been guilty. The charge against them is, that they unlawfully and tumultuously assembled, with others, to the disturbance of the public peace and against the peace of the Queen. Before they can be convicted it must be shown that this offence has been committed. There is no doubt that they, and with them others, assembled together in great numbers; but such an assembly to be unlawful must be tumultuous and against the peace. As far as these appellants are concerned, there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said that the conduct pursued by them on this occasion was such as, on several previous occasions, had produced riots and disturbances of the peace and terror to the inhabitants; and that the appellants, knowing when they assembled together that such consequences would again arise, are liable to this charge.

" Now I entirely concede that every one must be taken to

intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary, it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them. . . . What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together; and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition."

[E. Clarke, Q.C., Sutherst, and L. C. Jackson for the appellants; A. R. Poole and Valpy for the respondent.]

Beatty *v.* Gillbanks does not go further than to establish the proposition that an assembly which is lawful in itself does not become unlawful merely because of the disorderly intentions of others. It cannot be regarded as an authority to show that, under all imaginable circumstances, people have a right to have processions through the streets.

"An unlawful assembly is an assembly of three or more persons:—

"(a) With intent to commit a crime by open force; or

"(b) With intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it.

"Every unlawful assembly is a misdemeanour." (Stephen's Digest of the Criminal Law.)

In the case of R. *v.* Vincent (9 C. & P. 91), it was held that any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to

the tranquility and peace of the neighbourhood, is an unlawful assembly; and in viewing this question the jury should take into their consideration the hour at which the parties met, and the language used by the persons assembled, and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace; as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage.

In R. *v.* Neale (9 C. & P. 431), it was decided that any assembly of persons attended with circumstances calculated to excite alarm is an unlawful assembly, and it is not only lawful for magistrates to disperse an unlawful assembly, even when no riot has occurred, but if they do not do so, and are guilty of criminal negligence in not putting down any unlawful assembly, they are liable to be prosecuted for a breach of their duty.

In R. *v.* Clarkson (17 Cox, C. C. 483), it was held that the marching of nine men, carrying with them musical instruments, upon a Sunday through the public streets of a town (in which town processions other than those of Her Majesty's naval, military and volunteer forces are prohibited from taking place on Sunday if accompanied by instrumental music) is no evidence of an unlawful assembly (although the so marching is calculated to, and does, excite others to the commission of a breach of the peace) if such men did not know that their acts were calculated to lead to a breach of the peace. But, quære whether where two or more persons are assembled together in pursuit of a common object, lawful in itself, and in the carrying out of such object do something which may lead to a breach of the peace (or which is calculated to lead others to believe that a breach of the peace will be committed), such assembly does not amount at common law to an unlawful assembly.

A rout is a 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 circumstances that the enterprise is not actually executed.

A riot is a disturbance of the peace by three persons at the least,

who, with an intent to help one another against any person who opposes them in the execution of some enterprise, whether lawful or unlawful, actually execute that enterprise in such a violent and turbulent manner as to alarm firm and courageous persons in the neighbourhood.

There is no right of public meeting in any public thoroughfare or public place of resort analogous to a public thoroughfare. A public meeting held at a place of public resort after the publication of a notice by a competent authority prohibiting the meeting is not rendered unlawful merely by reason of such publication. Whether persons are guilty of participating in a riotous assembly depends on whether they, with others following them, approached a place of public resort with the intention of holding a meeting there come what might, or merely approached it with the intention of requesting to be allowed to hold a meeting there, and of departing if their request was refused. If persons head a mob with the intention of getting to the place of public resort if they can, and by so doing endanger the public peace and alarm reasonable persons, the jury may find them guilty of rioting.

In R. *v.* John Burns, William H. Champion, Henry M. Hyndman, and John E. Williams (16 Cox, C. C. 355), the defendants were indicted for unlawfully and maliciously uttering seditious words of and concerning Her Majesty's Government, with intent to incite to riot, and in other counts with intent to stir up ill-will between Her Majesty's subjects, and for conspiring together to effect the said objects. The case arose out of the Trafalgar Square riots in February, 1886, and was tried before Cave, J., at the Central Criminal Court in April, 1886. The trial ended in a verdict of acquittal for the four defendants, and the summing-up of the learned judge who tried the case should be read in the original report, as it is a very clear and exhaustive treatment of the whole subject. The gist of the ruling in the above case is that an intention to excite ill-will between different classes of Her Majesty's subjects may be a seditious intention; whether or not it is so in any particular case, must be decided upon by the jury after taking into consideration all the circumstances of the case. Sedition embraces everything, whether by word, deed, or writing, which is calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the government and

laws of the empire. Where in a prosecution for uttering seditious words with intent to incite to riot, it is proved that previously to the happening of a riot seditious words were spoken, it is a question for the jury whether or not such rioting was directly or indirectly attributable to the seditious words proved to have been spoken. A meeting lawfully convened may become an unlawful meeting if during its course seditious words are spoken of such a nature as to produce a breach of the peace. And those who do anything to assist the speakers in producing upon the audience the natural effect of their words will be guilty of uttering seditious words as well as those who spoke the words.

In R. *v.* Robert G. B. Cunninghame Graham and John Burns (16 Cox, C. C. 420), the defendants were indicted for a riot and an unlawful assembly, for assaults upon William Blunden and John Martell, police constables, in the due execution of their duty, and also for common assaults upon William Blunden and John Martell. The prosecution arose out of disturbances in Trafalgar Square, which occurred on Sunday, the 13th day of November, 1887. It appeared from the evidence that in the month of February, 1886, a meeting took place in Trafalgar Square, the consequence of which was that a riot occurred, and that great damage was done to property in the West of London. In October, 1887, meetings commenced again to be held in Trafalgar Square, which were of a more or less turbulent character, attracting great numbers of roughs and other idle and disorderly people, the presence of whom in and about the Square and the surrounding thoroughfares caused danger to the public peace. From these meetings several deputations were sent to the Mansion House, various police courts, and other places in London, which caused great commotion and inconvenience, as well as disorder, in the streets through which they passed. The meetings becoming more frequent, caused increased difficulty to the police in keeping order. The defendants, however, were not proved to have been present at any meetings prior to the 13th day of November, nor were they members of the Metropolitan Radical Federation, which held a meeting on the 2nd of November with regard to the proposed demonstration in Trafalgar Square. On the afternoon of Sunday, November 13th, serious conflicts with the police occurred in Trafalgar Square, and about seventy policemen in all were injured, pieces of iron gas-

piping, iron bars, and sticks having been used by persons forming part of or accompanying the deputation. About four o'clock the defendants Graham and Burns were seen to come across from the south-east corner of the Square arm in arm, and when in the roadway Graham shouted, turning his head to the people who were following him, about 150 in number: "Now for the Square." Just before Graham and Burns reached the pavement on the Trafalgar Square side of the roadway, Burns let go the arm of Graham, and, getting behind him, pushed him forward to the line of police; they both then fought with their fists with the police, attempting to break the line and pass through the Square, and Graham said: "I have as much right in the Square as a policeman." It was at this time, in attempting to force the line of police, that the assaults upon the two constables, who were stationed at the point at which the attempt was made, took place. The two defendants were then taken into custody, and passed through the ranks into the open space in the centre of the Square. Subsequently, when at Bow Street police station, Burns said: "We attacked you at your weakest point." After the arrests took place there was great disorder, stones were thrown, and sticks freely used by the people against the police, and about 4.30 the military were called out at the Commissioner's request. The disturbance lasted until 6.30. The evidence as to the actual assaults on the two constables Blunden and Martell was very conflicting, and witnesses for the defence were called, who stated that the police were very violent, and that Graham and Burns were attacked by the front-rank men on the south-east corner of the Square, and were obliged to protect themselves from blows both from the truncheons and fists of the constables.

It was held that, whether the defendants were guilty of participating in a riotous assembly depended upon whether they, with others who were following them, or who they expected would follow them, approached the Square with the intention of holding a meeting come what might, or merely approached it with the intention of requesting to be allowed to hold a meeting, and of departing if their request was refused.

It was also held that if the jury were satisfied that the defendants headed a mob with the intention of getting to the place of public resort if they could, and by so doing endangered the public peace

and alarmed reasonable people, they would be justified in finding them guilty of rioting. The jury convicted the defendants, who were sentenced to six weeks' imprisonment.

In this case the whole question of riots, unlawful assemblies, rights of public meeting in public thoroughfares, duties of magistrates in regard to apprehended riots, and participation in riotous assemblies was carefully reviewed in the summing-up of Charles, J.

In R. *v.* Fursey (6 C. & P. 81) the prisoner was indicted for wounding John Brooks, a serjeant in the Metropolitan police force. On the 13th of May, 1833, the prosecutor was with a considerable number of the police at a vacant space of ground adjacent to the west side of Coldbath Fields prison.

It appeared that there was a meeting there, consisting of a number of persons, and that there were four flags. The prisoner carried an American flag, which a police constable named Redwood tried to take from him, when he stabbed both the prosecutor and Redwood with a sort of dagger. It was stated for the defence that a considerable number of the police constables behaved with considerable violence, striking everybody they met with. It was also stated that there was no order given to the people to disperse, nor was the proclamation from the Riot Act read. It also appeared that a paper was fixed up to the wall of Coldbath Fields cautioning persons "By order of the Secretary of State" not to attend an illegal meeting. The prisoner was acquitted.

Gaselee, J., in summing up, said:—"The question for you to consider will be, whether there was sufficient provocation to reduce the offence of the prisoner below the crime of murder, if death had ensued. And although it is not mentioned in the indictment, you are at liberty to inquire whether the meeting was an illegal meeting or not; for if it was, the police would be justified in taking away the flag; but if the meeting was not an illegal one, then they would have no right to take the flag away from the prisoner. Taking it that the meeting was a legal one, this question will arise, whether the taking away of the flag was a sufficient provocation to justify the prisoner in striking with such a deadly weapon; and it makes a great difference whether a man under provocation takes up a deadly weapon on the sudden, or whether he goes out with the weapon, intending to use it to prevent the taking away of the flag. . . . Now a riot is not the less a riot, nor an illegal meeting the

less an illegal meeting because the proclamation of the Riot Act has not been read. The effect of that proclamation is to make the parties guilty of a capital offence if they do not disperse within an hour. But, if that proclamation be not read, the common law offence remains, and it is a misdemeanour; and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and, if they cannot otherwise succeed in doing so, they may use force. . . . But without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence."

In R. *v.* Hunt (1 St. Tr. (N. S.) 171) the prisoners were indicted for riot and unlawful assembly. The case arose out of what was called the "Peterloo Massacre" at Manchester in 1819. In summing up Bayley, J., said:—"In all cases of unlawful assembly, you must look to the purpose for which they meet; you must look to the manner in which they come; you must look to the means which they are using. All these are circumstances which you must take into your consideration."

In R. *v.* Kennett (5 C. & P. 283) the defendant was Lord Mayor of London at the time of Lord George Gordon's "No Popery" riots; and an information was filed by the Attorney-General against the defendant for having wilfully omitted to suppress these riots. Lord Mansfield, C. J., said:—"The common law and several statutes have invested justices of the peace with great powers to quell riots, because, if not suppressed, they tend to endanger the constitution of the country."

In Wise *v.* Dunning ([1902] 1 K. B. 167; 20 Cox, C. C. 121), the appellant, a Protestant lecturer, had held meetings in public places in the town of Liverpool, causing large crowds to assemble and obstruct the thoroughfare. In addressing those meetings, he used gestures and language which were highly insulting to the religion of the Roman Catholic inhabitants, of whom there is a large body in Liverpool. The natural consequence of his words and conduct on those occasions was to cause, and his words and conduct had in fact caused, breaches of the peace to be committed by his opponents and supporters; and he threatened and intended to hold similar meetings in the town, and to act and speak in a similar way, in the future. At one of the meetings he told his supporters that he had been informed that the Catholics were

going to bring sticks; and, on some of his supporters saying that they would bring sticks too, he said that he looked to them for protection. A local Act in force in Liverpool prohibits, under a penalty, the use of threatening, abusive, and insulting words and behaviour in the streets whereby a breach of the peace may be occasioned. The Court held that, on proof of those facts before the Liverpool stipendiary magistrate, he had jurisdiction to bind over the appellant in recognizances to be of good behaviour. Moreover, justices have jurisdiction to bind over to be of good behaviour a person who, in addressing meetings in public places, although he does not directly incite to the commission of breaches of the peace, uses language, the natural consequence of which is that breaches of the peace will be committed by others, and who intends to hold similar meetings, and use similar language in the future.

Vide also R. *v.* Pinney, 5 C. & P. 254.

Cases on the question of highways used for places of public meeting are:—Homer *v.* Cadman, 34 W. R. 413; and Back *v.* Holmes, 16 Cox, C. C. 263.

Forcible Entry.

[22] **LOWS *v.* TELFORD.** (1876)

[1 App. Cas. 414; 45 L. J. (Ex.) 613; 35 L. T. 69; 13 Cox, C. C. 226.]

Lows became the mortgagee in fee of certain premises, of which it appeared that he did not at once take actual possession. The mortgagor, whose position had not been interfered with, made an agreement with Telford and Westray to allow them (at a rent) the use of these premises, and for some little time Telford and Westray did have the use of them, and deposited goods there. On one morning, at an early hour, Lows,

without notice to anyone, went, accompanied by a carpenter and another man, and, by taking off the lock of the outer door, entered into actual possession. Telford and Westray, hearing of this, went to eject him, and not being able to get in at the door, obtained an entrance through a side window, then came down and did eject Lows. On this Lows indicted them for a forcible entry; they were acquitted, jointly paid their attorney's bill, and then brought a joint action against Lows for malicious prosecution without reasonable and probable cause.

Held, that on these facts they could not sustain the action, and that Lows was entitled to have the verdict entered in his favour.

This case decides that where a person having the legal title to land is in actual possession of it, the attempt to eject him by force brings the person who makes it within the provisions of the statute against forcible entry. It will do so, though the possession of the person having the legal title has only just commenced, though the person who attempts to eject him may even set up a claim to the possession of the land. If for civil purposes the legal possession is in a person, the foundation for a charge of forcible entry is sufficiently established.

In delivering judgment Lord Hatherley said: "I agree with my noble and learned friend (Lord Cairns, L. C.) in not being surprised that the jury, under the circumstances of this case, refused to convict the persons indicted for an offence against the statute. At the same time, taking the ground of law laid down as common ground by all the Judges in both the Courts, when you come to apply the law to the facts of this case, when you find there is possession by persons who have the right of possession, it is impossible to say that there was not a reasonable and probable cause, under the circumstances which took place afterwards, for proceeding under the statute, although that proceeding failed because the jury did not think it right

to convict the persons against whom that proceeding was taken. We have only to look at the facts in the case, and it being almost conceded in argument, I certainly think it was conceded by the learned Judges who took the opposite view, that the whole point in the case turns upon whether or not Lows had, in fact, obtained the possession he was *de jure* entitled to, I cannot help thinking that it is established that he was in such possession before Westray came up, and that the attempt to displace him from the possession justified the indictment."

Lord Selborne, after citing several cases, said: "The law laid down by these authorities was not disputed by the counsel for the respondents; but they insisted that, although such was the law for all civil purposes, it was nevertheless not applicable to the present case, in which the question is, whether there was reasonable or probable ground for the criminal charge of forcible entry against the respondents. The question, however, whether there was any reasonable ground for that charge, or not, must necessarily depend upon the state of the legal possession of the *locus in quo* at the time when the acts alleged to constitute the forcible entry were done; and if for civil purposes the legal possession was then in the appellant, the foundation for such a charge, so far as the state of possession is concerned, was sufficiently and properly established. I am unable to see how it can be denied, consistently with these authorities, that the evidence on this record is sufficient to prove a possession of the *locus in quo* complete in fact and in law by the appellant, before Westray and Telford came upon the ground, on the morning of the 14th of July, 1870. He had the legal title, he had (when no one was present to oppose him) effected an actual entry into the premises, beyond all doubt for the purpose of taking possession, and he by himself and his servants had already acquired such a dominion and control over the property, when Westray first came upon the

ground, that the respondents could not enter it without putting a ladder against the house and getting in through a window. I cannot doubt that in these circumstances and upon the evidence his possession was legally complete and exclusive, and that it was forcibly disturbed by the respondents, who knew of the mortgage before they became occupiers under the mortgagor, and whose own evidence shows that they understood their own act to be an attempt not to maintain an existing position, but to resume a possession which had been displaced."

[C. Russell, Q.C., and Trevelyan for the appellant; Herschell, Q.C., and Kenelm Digby for the respondents.]

"Every one commits the misdemeanour called a forcible entry, who, in order to take possession thereof, enters upon any lands or tenements in a violent manner, whether such violence consists in actual force applied to any other person or in threats, or in breaking open any house, or in collecting together an unusual number of persons for the purpose of making such entry. It is immaterial whether the person making such an entry had or had not a right to enter, provided that a person who enters upon land or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry. Every one commits the misdemeanour called a forcible detainer, who, having wrongfully entered upon any lands or tenements, detains such lands and tenements in a manner which would render an entry upon them for the purpose of taking possession forcible." (Stephen's Digest.)

To constitute a forcible entry, or a forcible detainer, it is not necesary that anyone should be assaulted, but only that the entry or detainer should be with such numbers of persons and show of force, as is calculated to deter the rightful owner from sending the persons away and resuming his possession. (Milner *v.* Maclean, 2 C. & P. 17.)

A licence by a tenant to his landlord to eject him on a specified day without any process of law is void, as authorizing the commission of an act which is made illegal by 5 Rich. II. st. 1, c. 7. If a person who has a legal entry upon land which is in the possession

of a wrongdoer, is allowed to enter peaceably through the outer door, it is still illegal for him to turn out the wrongdoer by violence. (Edwick *v.* Hawkes, 18 Chanc. Div. 199.)

In an indictment for forcible entry it is not necessary to allege the prosecutor's title to the property; it is sufficient to state possession; but if the title is stated it need not be proved. Rolfe, B.: "Whether it may be proper to allege the title or not, it is clearly not in issue here. I shall merely leave it to the jury to say whether the prosecutor was in possession of this land; and if so, did the defendants in a violent and tumultuous manner deprive him of such possession." (R. *v.* Child, 2 Cox, C. C. 102.)

In Newton *v.* Harland (1 Scott N. R. 474), a case which was tried three times, the Court held that where a tenant remains in apartments after the expiration of his term, the landlord is not justified in forcibly asserting his right to the possession, by expelling him.

In Pollen *v.* Brewer (7 C. B. (N. S.) 371), pending a negotiation for an assignment of a lease, A. was (as the jury found) let into possession of the premises as tenant of some kind. The negotiation going off, B. (the landlord) demanded the key, and wrote to A. telling him that he never intended to let him into possession at all, and, A. refusing to go out, B. entered and forcibly expelled him and his family, in the doing of which the plaintiff and his wife were assaulted. The Court held that, although the plaintiff was entitled to recover damages for the assaults, he was not entitled to damages for the expulsion, his tenancy being at the most a tenancy at will, and that having been properly determined.

In Beddall *v.* Maitland (17 Chanc. Div. 174), the Court held that damages cannot be recovered against the rightful owner for a forcible entry on land, for the statute 5 Rich. II. st. 1, c. 8, only makes a forcible entry an indictable offence, and does not create any civil remedy for it. But for any independent wrong (such as an assault or an injury to furniture) committed in the course of the forcible entry, damages can be recovered, even by a person whose possession was wrongful, for the statute makes a possession obtained by force unlawful, even when it is so obtained by the rightful owner.

The principal statutes relating to forcible entry are:—5 Rich. II. st. 1, c. 7; 8 Hen. VI. c. 9; 31 Eliz. c. 11; 21 Jac. I. c. 15.

Other cases on this subject are :—Allen *v.* England, 3 F. & F. 49; R. *v.* Smyth, 5 C. & P. 201; Collins *v.* Thomas, 1 F. & F. 416; R. *v.* Wilson, 8 T. R. 357; Attwood *v.* Joliffe, 3 New Sess. Cas. 116; R. *v.* Studd, 14 L. T. 633; R. *v.* Dillon, 2 Chit. 314; R. *v.* Hoare, 6 M. & S. 266; R. *v.* Harland, 1 P. & D. 93; R. *v.* Spurgeon, 2 Cox, C. C. 202.

Refusing to Aid a Constable

R. *v.* **SHERLOCK.** (1866) [23]

[L. R. 1 C. C. R. 20; 35 L. J. (M. C.) 92; 12 Jur. N. S. 126; 13 L. T. 643; 14 W. R. 288; 10 Cox, C. C. 170.]

An indictment for refusing to aid a constable in the execution of his duty, and to prevent an assault made upon him by persons in his custody with intent to resist their lawful apprehension, need not show that the apprehension was lawful, nor aver that the refusal was on the same day and year as the assault, or that the assault which the defendant refused to prevent was the same as that which the prisoners made upon the constable; neither is it any objection that the assault is alleged to have been made with intent to resist their lawful apprehension by persons already in custody.

[No counsel appeared.]

To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove—(1) that the constable saw a breach of the peace committed; (2) that there was a reasonable necessity for calling on the defendant for his assistance; (3) that, when duly called upon to assist the constable, the defendant, without any physical impossibility or lawful excuse, refused to do so; and in such case it is no ground of defence that from the number of the rioters the single aid of the defendant would not have been of any use. (R. *v.* Brown, Car. & M. 314.) In this case Baron Alderson

said: "The offence imputed to the defendant consists in this—that Herbert being a constable, and there being a breach of the peace actually committing under his own view, he called upon the defendant to assist him in putting an end to it, and that he, without lawful excuse, refused to do so. It is no unimportant matter that the Queen's subjects should assist the officers of the law, when duly required to do so, in preserving the public peace; and it is right that the state of the law should be known, and that all parties violating the duty which the law casts upon them should be fully aware of the very serious risk they run in case of refusal. It is necessary that you should be satisfied of three particulars—first, that the constable actually saw a breach of the peace committed by two or more persons. It is clear that all prize-fights are illegal, and that all persons engaging in them are punishable by law. The constable, therefore, saw parties breaking the law, and if a breach of the peace is in the act of being committed in the presence of a constable, that constable is not only justified but bound to prevent it, or put a stop to it if it has begun, and he is bound to do so without a warrant. Secondly, you must be satisfied that there was a reasonable necessity for the constable Herbert calling upon other persons for their assistance and support; and in this case there is no doubt that the constable could not by his own unaided exertions have put an end to the combat. Lastly, the prosecutor must prove that the defendant was duly called upon to render his assistance, and that, without any physical impossibility or lawful excuse, he refused to give it. Whether the aid of the defendant, if given, would have proved sufficient or useful is not the question or the criterion. Every man might make that excuse, and say that his individual aid would have done no good: but the defendant's refusal may have been, and perhaps was, the cause of that of many others. Every man is bound to set a good example to others by doing his duty in preserving the public peace."

In R. *v.* Forbes and Webb (10 Cox, C. C. 362), it was held that in order to support a charge of assault on a constable in the execution of his duty, it is not necessary that the defendant should know that he was a constable then in the execution of his duty; it is sufficient that the constable should have been actually in the execution of his duty and then been assaulted. *Vide* also R. *v.* Marsden, 11 Cox, C. C. 90.

Prize-Fighting.

R. *v.* ORTON. (1878) [24]

[14 Cox, C. C. 226; 39 L. T. 293.]

Divers persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as at prize-fights. The combatants fought for about forty minutes with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators. Upon the trial of an indictment against them for unlawfully assembling together for the purpose of a prize-fight, the chairman directed the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize-fight, whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize-fight or not:—Held, that the jury were properly directed.

Kelly, C. B.: The question in this case is whether the prisoners were guilty of the offence of unlawfully assembling together for the purpose of prize-fighting. The jury found that this was a prize-fight. No doubt the combatants wore gloves, but that did not prevent them from severely punishing each other. There can be no doubt that, upon the facts, the conviction ought to be affirmed.

Denman, J.: I am of the same opinion. The jury examined the gloves in their private room, and having the fact proved that the combatants severely mauled each other, they found

rightly that this was a prize-fight. The question was entirely one for the jury.

Lindley, Manisty, and Hawkins, JJ., concurred.

[No counsel appeared.]

"No one," says Mr. Justice Stephen, in his Digest of the Criminal Law, "has a right to consent to the infliction of bodily harm upon himself in such a manner as to amount to a breach of the peace, or in a prize-fight, or other exhibition calculated to collect together disorderly persons." "All these fights are illegal," said Mr. Justice Burrough, in R. *v.* Billingham, 2 C. & P. 234. "Prize-fights are altogether illegal," said Mr. Justice Patteson, in R. *v.* Perkins, 4 C. & P. 537.

All prize-fights are illegal, and all persons engaged in them are punishable by law. (R. *v.* Brown, Car. & M. 314.) If one of the combatants in a prize-fight is killed, not only is his antagonist guilty of manslaughter, but also the seconds, promoters and everybody present and approving. (R. *v.* Murphy, 6 C. & P. 103.)

In R. *v.* Taylor (L. R. 2 C. C. R. 147), it was held that a mere stakeholder, who was not present at the fight, was not liable as an accessory before the fact in manslaughter, where one of the pugilists had been killed. "Nothing that the accused did," said Bramwell, B., "assisted or enabled the fight to take place."

There is nothing unlawful in sparring, unless, perhaps, the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match does not amount to manslaughter. The spectators of a sparring match are not *participes criminis*, and their evidence, touching what occurred at the match, does not require corroboration. (R. *v.* Young, 10 Cox, C. C. 371. *Vide* also R. *v.* Hargrave, 5 C. & P. 170.)

Persons who are present at a prize-fight, and who have gone thither with the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants; and it is not at all material which of the combatants struck the first blow. (R. *v.* Perkins, 4 C. & P. 537.)

Where a prize-fight is expected, the magistrates ought to cause

the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions; and if they refuse to enter into such securities, to commit them. (R. *v.* Billingham, 2 C. & P. 234.)

Presence at a Prize-Fight.

R. *v.* CONEY AND OTHERS. (1882) [25]

[8 Q. B. D. 534; 51 L. J. (M. C.) 66; 46 L. T. 307; 30 W. R. 678; 46 J. P. 404; 15 Cox, C. C. 46.]

Two men fought with each other in a ring, formed by ropes supported by posts, in the presence of a large crowd. Amongst that crowd were the prisoners. It did not appear that the prisoners took any active part in the management of the fight, or that they said or did anything. They were tried and convicted of assault, as being principals in the second degree. The jury were directed that prize-fights are illegal, and that all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are guilty in law of an assault, and that if the persons charged were not casually passing by, but stayed at the place, they encouraged the fight by their presence, although they did not do or say anything. Upon this direction the jury found the prisoners guilty, but added that they did so in consequence of such direction of law, as they found that the prisoners did not aid or abet:—Held, by Denman, J., Huddleston, B., Manisty, Hawkins, Lopes, Stephen, Cave, and North, JJ. (Lord Coleridge, C. J., Pollock, B., and Mathew, J., dissenting), that the above direction was not correct, that mere voluntary presence

at a fight does not as a matter of law necessarily render persons so present guilty of an assault as aiding and abetting in such fight, and that the conviction could not be sustained.

Held, by Lord Coleridge, C. J., Pollock, B., and Mathew, J., that the conviction could be sustained, that the legal inference to be drawn from mere presence, as a voluntary spectator, at a prize-fight is, in the absence of other evidence to rebut such inference, that the person so present is encouraging, aiding, and abetting such fight, and consequently guilty of an assault.

Held, by the whole Court, that a prize-fight is illegal, and that all persons aiding and abetting therein are guilty of assault, and that the consent of the persons actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault.

Semble, that the mere presence of a person, unexplained, at a prize-fight affords some evidence for the consideration of a jury of an aiding or abetting in such fight.

Hawkins, J., said: "It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not in itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power to do so, or at least to express his dissent, might under some circumstances afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not. So if any number of persons arrange that a criminal offence shall take place and it takes place accordingly, the mere presence of any of those who so arranged it would afford abundant evidence for the consideration of a jury of an aiding and abetting."

[Poland, J. R. W. Bros, and R. G. C. Mowbray for the

Crown; H. D. Greene and Hammond Chambers for the prisoner Coney.]

Although mere voluntary presence at a prize-fight does not, as a matter of law, necessarily render persons so present guilty of an assault, as aiding and abetting in such fight, still, if it were shown that the defendants took a walk in the direction of the fight, for the purpose of seeing something of it, and *à fortiori* if they went by train with a large party for the purpose of being present, there would be evidence for the jury of participation and encouragement.

Libel—The Nature of the Offence.

R. *v.* MUNSLOW. (1895) [26]

[[1895] 1 Q. B. 758; 18 Cox, C. C. 112; 64 L. J. M. C. 138; 72 L. T. 301; 43 W. R. 495.]

The defendant was tried at the Warwick Assizes upon an indictment for libel under 6 & 7 Vict. c. 96, s. 5. None of the counts in the indictment contained an averment that the defendant published any of the libels maliciously. The defendant was convicted, and the Court of Crown Cases Reserved affirmed the conviction.

Lord Russell, C. J., said: "The Libel Act, 1843, provides by sect. 5 that if any person maliciously publishes a defamatory libel, he shall, being convicted thereof, be liable to fine or imprisonment or both, such imprisonment not to exceed one year. The section does not create a new offence, nor does it purport to give a definition of an existing offence; it provides for the application, to that which was already an offence at common law, of the appropriate punishment. The word

'maliciously' was introduced into the section in order to prevent the section working great injustice. Any one who publishes defamatory matter of another, tending to damage his reputation or expose him to contempt and ridicule, is guilty of publishing a defamatory libel; and the word 'maliciously' was introduced in order to show that, though the accused might be *primâ facie* guilty of publishing a defamatory libel, yet if he could rebut the presumption of malice attached to such publication he would meet the charge. For example, upon the production of the alleged libel, it is for the judge to determine whether it is capable of being regarded as a libel by the jury; his function is then ended, and if the jury determine it to be a libel, then, in the absence of evidence of the motive for publication, the law attaches to the fact of publication the inference that the publication was malicious. But the accused may be able to show that, though the matter is defamatory, it was published on a privileged occasion, or he may be able to avail himself of the statutory defence that the matter complained of was true, and that its publication was for the public benefit; and those classes of cases were meant to be excluded from the purview of the section by the use of the word 'maliciously.' Here the case went to the jury after the objection was taken; and we must assume that the language was capable of bearing the innuendoes placed on it, and was capable of being a libel, that the jury found that it was in fact a libel, and that there was no lawful excuse, such as privilege, for its publication. In that state of facts, is the prisoner to be absolved from the consequences of the verdict? and is the conviction to be quashed merely because the word 'maliciously' has been omitted from the indictment? The argument for the defendant is, in effect, that the indictment is an indictment under the statute, and is in respect of an offence under the statute; but, in my judgment, that is a mistaken view. The indictment is for a common law offence,

but it is so framed as to bring it within the section, for the purpose of punishment."

[Hugo Young for the prosecution; Stanger for the defendant.]

A libel has been defined as "a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule." It is no answer to an indictment for libel for the defendant to prove that the libel is true, unless he can also show that it was for the public benefit.

In R. *v.* Bradlaugh and Besant (3 Q. B. D. 607 & 14 Cox, C. C. 68) the Court of Appeal held, reversing the judgment of the Queen's Bench Division, that in an indictment for publishing an obscene book, it is not sufficient to describe the book by its title only, for the words alleged to be obscene must be set out; and if they are omitted, the defect will not be cured by a verdict of guilty, and the indictment will be bad either upon arrest of judgment or upon error. But *vide* the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 7, and R. *v.* Barraclough, *post*, p. 107.

In R. *v.* Sir Robert Carden (5 Q. B. D. 1), which was an application for a mandamus directed to Sir Robert Carden, an alderman and magistrate of the City of London, it was held that upon an information for maliciously publishing a defamatory libel under the 5th section of 6 & 7 Vict. c. 96, the magistrate has no jurisdiction to receive evidence of the truth of the libel, inasmuch as his function is merely to determine whether there is such a case against the accused as ought to be sent for trial, and a defence based upon the truth of the libel under sect. 6 of the Act can only be inquired into at the trial upon a special plea framed in accordance with the terms of that section.

In R. *v.* Labouchere (12 Q. B. D. 320), which was an application for leave to file a criminal information in respect of a libel upon a deceased foreign nobleman, made by his representative, who was not resident in this country, the Court held that in the exercise of its discretion, it must reject the application, for the rule to be collected from the modern decisions is that a criminal information for libel can only be granted at the suit of persons who are

in some public office or position, and not at the suit of private persons. The Court held also that the fact that the applicant does not reside in this country is a strong reason for rejecting such an application. *Semble,* that an application for a criminal information for a libel upon a deceased person made by his representatives will not be granted.

In Monson *v.* Tussaud's ([1894] 1 Q. B. 671), the plaintiff had been tried in Scotland for the murder of a young man named Hambrough. The case was known as "the Ardlamont mystery," and attracted considerable public attention, and Madame Tussaud's placed in their exhibition a portrait model of the plaintiff, bearing his name, with a gun in close proximity thereto described as his gun. From the room in which the plaintiff's effigy was exhibited access could be obtained by descending some stairs, without further payment, to a room known as the "Chamber of Horrors," in which were exhibited figures, the bulk of which represented murderers and malefactors, and also relics connected with, and models of the scenes of, notorious murders. In this room there was a representation of the place where Hambrough's body was found, described by the words, "Ardlamont Mystery: Scene of the Tragedy." The plaintiff applied for an injunction against Tussaud's, and although in the end, after the production of fresh evidence, the injunction was refused, the case is of extreme importance as an instance that there may be libel without the use of words.

During the hearing of the application for the injunction, Collins, J., said: "The law is clearly settled that a person may be defamed as well by a picture or effigy as by written or spoken words."

Oral defamation is not a crime, *vide* R. *v.* Burford (1 Vent. 16), and R. *v.* Langley, 6 Mod. 125.

In order to secure an acquittal for a defendant on a charge of criminal libel it is necessary not only to prove that it is true, but that its publication is for the public benefit.

In R. *v.* Holbrook (4 Q. B. D. 42; 13 Cox, C. C. 650 and 14 Cox, C. C. 185) the defendants were the proprietors of a newspaper, and it appeared that they had appointed an editor with general authority to conduct the paper, and left it entirely to his discretion what should be inserted therein, and that such editor had inserted

the libel in question without the knowledge or express authority of the defendants. On a motion for a new trial it was held that the general authority given to an editor of a newspaper is not *per se* evidence of the proprietors having authorized the publication of a libel. In R. *v.* Boaler (21 Q. B. D. 284), on an indictment for publishing a defamatory libel, "knowing the same to be false," it was held that the defendant might be convicted of merely publishing a defamatory libel.

In R. *v.* Barraclough ([1906] 1 K. B. 201; 21 Cox, C. C. 91), the Court of Crown Cases Reserved held that although it would have been better for the indictment to have followed the old forms, and to have averred that the tendency of the obscene matter was to corrupt the public morals, and that the libel had been published with that intent, the conviction might under the circumstances be upheld.

In this case the defendant, who was an assistant overseer, and held other public offices at Farnley, had published to the men mentioned in the first and second counts of the indictment, who were courting, or intending to court, the girl mentioned in the indictment, to whom he had been for some time engaged to be married, and to herself, copies of a type-written document entitled, "Extracts from the Diary of the Rejected One." The document in question contained obscene matters concerning the girl and of certain immoral practices of which the defendant alleged the girl had been guilty with him "to the evil example of all others in like case offending and against the peace."

Darling, J., said: "It seems to me that if a thing which is properly called obscene is alleged to be unlawfully published, it follows that all the usual allegations in an indictment for obscene libel are included. Even in such an indictment as this, intent is, I think, part of the indictment. It is no doubt *sous-entendu* and not set out with the wearisome reiteration to which we are accustomed in indictments, but it is still part of the charge or the publication would not have been unlawful."

Other cases on this subject are—R. *v.* Burdett, 4 B. & Ald. 314; Sir Baptist Hicke's Case, Pop. 139, and Hob. 215; R. *v.* Curl, 2 Str. 789; R. *v.* Ransford, 13 Cox, C. C. 9; R. *v.* Wegerer, 2 Stark. 245; R. *v.* Peltier, 28 Howell's St. Tr. 530; R. *v.* Pugin, Sessions Paper, C. C. C., vol. 80, p. 349; R. *v.* "The World," 13 Cox, C. C.

305; Milissich *v.* Lloyds, 13 Cox, C. C. 575; Leyman *v.* Latimer, 13 Cox, C. C. 632 and 14 Cox, C. C. 51; R. *v.* Perryman, 61 L. J. (M. C.) 91.

The statutes connected with this subject are—9 & 10 Will. III. c. 32 (Attacks on Christianity); Fox's Act (32 Geo. III. c. 60); Lord Campbell's Act (6 & 7 Vict. c. 96); the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60); and the Act to Amend the Law of Libel, 1888 (51 & 52 Vict. c. 64).

Libel—Publication.

[27] R. *v.* ADAMS. (1888)

[22 Q. B. D. 66; 16 C. C. 544.]

The defendant was tried at the Central Criminal Court in September, 1888, and convicted on an indictment charging him with having unlawfully and maliciously written and published to a young woman of virtuous and modest character a defamatory libel of and concerning her, and of and concerning her character for virtue and modesty. The defendant having seen an advertisement for a situation inserted by the young woman in a newspaper, wrote, and sent to her at the address given, a letter which began thus:—"I have seen your advertisement in the 'Daily Telegraph.' I have no situation to offer you, but I should like to ask you a thing or two. I am a young man twenty-five. . . . I should like to make certain proposals to you. Of course, this is strictly private between you and I." The letter then proceeded to state, in very plain language, that if Emily Susan Yuill (the advertiser) was a virgin, the writer would offer her anything up to 10*l.* to allow him to have immoral intercourse with her. He also said that perhaps one day she would lose her virginity

for nothing; that he would treat her well; that he was a highly respectable young man; and gave his word that, if she was willing to consent to his proposals, she should have whatever she asked in money. He asked her to reply in an evening paper stating the number of pounds she wanted; and he concluded: "Think over it, dearest; and if you are willing and answer as above, I will write to the same address as this letter."

Evidence was given that Emily Susan Yuill, the younger, inserted an advertisement for a situation, and that it was stated in it that replies were to be addressed to "K. S.," 21, Radnor Street, Old Street, E.C.; that the prisoner wrote the letter in question, and that it was received by Emily Susan Yuill, the elder, who opened and read it, and then handed it to her husband, who handed it to a sergeant of police, and that it was never seen by Emily Susan Yuill, the younger.

At the close of the case for the prosecution, counsel for the prisoner submitted that there was no case to go to the jury, on the grounds (*inter alia*) that to write and send to a person letters in the form of those set out in the indictment was not an indictable offence; that the letter set out in the third count was neither a defamatory nor an obscene libel; and that there had been no publication of it.

The jury convicted the prisoner and the Court of Crown Cases Reserved affirmed the conviction.

Lord Coleridge, C. J., said: "It is unnecessary to discuss some of the important questions which have been raised in this case. Upon those questions, therefore, I, and I believe the other members of the Court, desire to give no opinion. It appears to me that there is a very short and plain ground upon which this conviction can be sustained. It is a conviction upon an indictment the third count of which charges that the letter there set out is a defamatory libel tending to defame

and bring into contempt the character of the person to whom it was sent. I am of opinion that the letter is of such a character as that it tended to provoke a breach of the peace. At all events, the sending of such a letter to the person to whom it was sent might, under the circumstances of her position and character, reasonably or probably tend to provoke a breach of the peace on her part, or on the part of those connected with her. The jury must be taken to have found that it was a defamatory libel which was calculated to provoke a breach of the peace; and on that short ground I am of opinion that the conviction must be affirmed on the third count of the indictment."

[Poland and C. W. Mathews for the prosecution; Blackwell for the prisoner.]

The reason why a libel is punishable criminally is, that it tends to provoke a breach of the peace, and therefore, in cases which tend to a breach of the peace, there need be no publication to a third party.

In Barrow *v.* Lewellin (Hobart, 62), the plaintiff preferred a bill in the Star Chamber against the defendant for writing unto him a despiteful and reproachful letter, which (for aught that appeared the Court) was sealed, and delivered to his own hands and never otherwise published. And it was resolved that though the plaintiff in this case could not have an action of the case, because it was not published, and therefore could not be to his defamation without his own fault of divulging it, yet the Star Chamber for the King doth take knowledge of such cases and punish them. Whereof the reason is, that such quarrellous letters tend to the breach of the peace and to the stirring of challenges and quarrels. And therefore the means of such evils, as well as the end, are to be prevented.

In Clutterbuck *v.* Chaffers (1 Starkie, 471), which was an action for the publication of a libel, the witness who was called to prove the publication of the libel (which was contained in a letter written by the defendant to the plaintiff) stated, on cross-examination, that the letter had been delivered to him, folded up, but unsealed, and

that, without reading it, or allowing any other person to read it, he had delivered it to the plaintiff himself, as he had been directed, Lord Ellenborough held, that this did not amount to a publication which would support an action, although it would have sustained an indictment, since a publication to the party himself tends to a breach of the peace.

It is not necessary in an indictment for libel to allege an intent to provoke a breach of the peace. (R. *v.* Brooke, 7 Cox, C. C. 251; and R. *v.* Palmer, Sessions Paper, C. C. C., vol. 106, p. 495.)

In R. *v.* De Marny ([1907] 1 K. B. 388) the defendant inserted in a newspaper of which he was the editor advertisements which, though not obscene in themselves, related, as he knew, to the sale of obscene books and photographs. A police officer wrote to the addresses given in the advertisements, and received in return from the advertisers, who were foreigners resident abroad, obscene books and photographs. The defendant was tried on an indictment charging him with causing and procuring obscene books and photographs to be sold and published, and to be sent by post contrary to the Post Office (Protection) Act, 1884, s. 4. The defendant was convicted, and the Court of Crown Cases Reserved affirmed the conviction. Lord Alverstone, C. J., said: "It would, in my opinion, be a lamentable state of things if the law of this country were not strong enough to deal with a man who has done so much towards bringing about the publication of indecent literature. The evidence in this case shows that the result of the insertion of the advertisements in the defendant's paper was to give information as to where these things could be obtained to persons who, but for the advertisements, would or might never have known of their existence, and, therefore, it is not going too far to say that the publication was directly brought about by the act of the defendant, and it is further proved that the defendant had knowledge that that would be the consequence of inserting the advertisements in the paper."

Perjury—Competent Jurisdiction.

[28] R. *v.* HUGHES. (1879)

[4 Q. B. D. 614; 48 L. J. (M. C.) 151; 40 L. T. 685; 14 Cox, C. C. 284.]

A police constable in Wales procured a warrant to be illegally issued, without a written information or oath, for the arrest of a man named Stanley, on a charge of "assaulting and obstructing him in the discharge of his duty." On this warrant Stanley was arrested, and brought before the justices, who, on the testimony of the police constable, convicted him. The accused defended himself on the merits, and did not take any objection to the illegality of the manner in which he had been brought before the Court. It afterwards turned out tha Stanley had not really "assaulted and obstructed" the constable as he had sworn. Accordingly the constable was put on his trial for perjury, and it was contended on his behalf that he ought to be acquitted, because, on account of the original informality, the proceedings in which he had sworn were *coram non judice*, in other words, were not before a competent jurisdiction. This view, however, was not adopted by the Court, and the conviction was affirmed.

"I think," said Lopes, J., "the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant, is immaterial. Being before the justices, however brought there, the justices, if they had jurisdiction in respect of time and place over the offence, were competent to entertain the charge, and,

being so competent, a false oath, wilfully taken, in respect of something material, would be perjury."

Hawkins, J., said: "I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion, I have assumed as a fact, from the case as stated, that Stanley was arrested and brought before the justices upon as illegal a warrant as ever was issued. A warrant signed by a magistrate, not only without any written information or oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of the illegality executed it, were liable to an action for false imprisonment. If authority were wanting for this, I need but refer to Caudle *v.* Seymour (1 Q. B. 454); Morgan *v.* Hughes (2 T. R. 225, 231), *per* Ashurst, J.; Stevens *v.* Wright (1 C. & M. 509). Wrongful, however, as were the proceedings by which Stanley was brought into the presence of the magistrates, to answer a charge which up to that moment had never been legally preferred against him, before those magistrates, and in his presence, a charge was made, over which, if duly made, they had jurisdiction. Upon that charge it was that the hearing proceeded; and in support of that charge it was that the defendant was sworn; and in giving his evidence swore corruptly and falsely. The case case expressly finds, that the alleged perjury was committed "on the hearing of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty." Comparing this finding with the language of 24 & 25 Vict. c. 100, s. 38, which enacts that "whosoever shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, shall be guilty of a misdemeanour," I come, without hesitation, to the conclusion that the charge was that of the indictable offence created by that statute; and I do not think a doubt could have been

suggested as to this, had we not been informed in the course of the argument that the justices, in the result, dealt summarily with the case, and convicted Stanley under sect. 12 of 34 & 35 Vict. c. 112, of an assault upon Hughes, being a constable in the "execution" of his duty, and sentenced him to six months' imprisonment with hard labour. The case does not find in what form the charge was made, whether in writing or otherwise. In my opinion writing was unnecessary; but even were it so, I would, in the absence of evidence to the contrary, assume it to have been properly made, as did Crompton, J., in Turner *v.* Postmaster-General (10 Cox, C. C. 15). Now a charge having been made before them, of an indictable offence, committed within their jurisdiction, by a person then bodily present, it seems to me the justices were bound to take cognizance of it. The 17th section of 11 & 12 Vict. c. 42, expressly recognises the legality of depositions of witnesses taken in cases in which persons charged with indictable offences are "brought" before justices "with or without warrant." Had the justices proceeded upon the defendant's deposition to commit Stanley for trial, instead of convicting him summarily, it is difficult to see what possible objection could have been made to the legality of their proceedings. They did not, however, think fit to adopt that course. They took, it is true, the evidence on oath of the defendant upon the charge for the indictable misdemeanour created by 24 & 25 Vict. c. 100; but having done so, they proceeded to convict summarily under a different statute, 34 & 35 Vict. c. 112, without, as I collect, any new information or charge of the latter offence. In short, they convicted him of an offence with which he had never been legally charged. In this, I am of opinion, they were wrong; and upon this ground I am strongly inclined to think the conviction may be quashed. Martin *v.* Pridgeon (1 E. & E. 778), and Reg. *v.* Brickhall (33 L. J. (M. C.) 156), more particularly referred to hereafter, are strong authorities in favour of this view. It does not,

however, seem to me necessary to decide that point; for in the case before us we have only to determine whether the justices, at the moment when they swore the defendant in support of the charge which was made, had jurisdiction to hear that charge. Whether they afterwards pronounced a legal or an illegal judgment is immaterial to the present enquiry."

Manisty, J., said: "In my opinion it is immaterial, for the present purpose, how the justices disposed of the charge, the only question before us being whether the justices had jurisdiction to hear it, and to receive evidence upon oath in support of it. I think they had, and that the question put to us should be answered in the affirmative."

Huddleston, B., said: "Upon such a charge being made, although it was entirely false, the magistrate before whom it is made must enquire into its truth, and to do so, must have jurisdiction to administer an oath, and false swearing in that enquiry on a material point would be perjury. In my view, therefore, I am of opinion that the conviction must be affirmed."

[Sir John Holker, A.-G., Poland, and Dicey for the Crown; C. S. Bowen and Muir Mackenzie for the prisoner.]

To constitute the crime of perjury it is necessary not only that the defendant should swear falsely, but also that the swearing should be in a judicial proceeding and before a competent jurisdiction. If it turns out at the trial that the oath was taken before a person who had no lawful authority to administer it, or who had no jurisdiction of the cause, the defendant must be acquitted.

In R. *v.* Lloyd (19 Q. B. D. 213), the prisoner was convicted of perjury, alleged to have been committed in an examination by "the Court" under sect. 27 of the Bankruptcy Act, 1883. It appeared that he was summoned under sect. 27 before a County Court (Liverpool) having jurisdiction in bankruptcy. The oath was administered to the prisoner in Court by the registrar, but having administered it that official seems to have thought he had done enough. He remained in Court while the prisoner's examination was conducted in another room. It was held that there had

been no valid examination by "the Court" within the meaning of sect. 27, and that the conviction must be quashed. "A man is brought before the registrar," said Lord Coleridge, C. J., "who under the Act and Rules is the Court. The registrar administers the oath, but ceases to take any active part in what follows. He goes away and transacts other business. The witness, who, according to the Act and Rules, is to be examined before him, is taken to a room, where the examination proceeds in the registrar's absence. What has been called his legal presence is his actual absence. The witness is then indicted for perjury committed before the registrar. But the examination has not been conducted before the registrar." "It is said in the case," said Hawkins, J., "that the registrar was at hand and ready to come if wanted. But this does not disturb the fact that he was not in the room. The examination which is said to have taken place before him took place behind his back."

As already stated, to constitute the full crime of perjury, the false swearing must have been in a judicial proceeding. But if it has been before some person authorized to administer an oath, though not in a judicial proceeding,—*e.g.*, before a surrogate, in order to obtain a marriage licence—there may be a conviction for a common law misdemeanour. (R. *v.* Chapman, 1 Den. 432.)

In the case of R. *v.* Coles (16 Cox, C. C. 165), it was held by Mr. Justice Stephen at Chester Assizes, that, on the trial of a prisoner for perjury, the indictment preferred at the trial at which the perjury was committed is not sufficient proof of the proceedings there; there must be either the record of the trial, or a certificate of it under 14 & 15 Vict. c. 100, s. 22.

The 16th section of 14 & 15 Vict. c. 99, provides that, "Every Court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

In R. *v.* Whybrow (8 Cox, C. C. 438), A. was indicted for wilful and corrupt perjury committed at the Westminster Police Court. A summons was granted upon an information, and upon the hearing of the summons the perjury assigned was committed. At the trial the information was produced, but not the summons, and

this was held not to be sufficient; the summons should have been produced. And it seems, according to R. *v.* Hurrell (3 F. & F. 271), that in an indictment for perjury before justices of the peace there must be formal proof of the commencement of the proceedings by production of the summons or charge book.

In R. *v.* Smith (L. R. 1 C. C. R. 110), the prisoner was convicted of perjury alleged to have been committed upon the hearing of an application for an order of affiliation. The information laid by the mother was duly proved, and it was shown that the putative father appeared before the justices, and that evidence was given on both sides. The Court of Crown Cases Reserved held that, the father having appeared and not having raised any objection to the summons, it was not necessary to refer to it or to give any evidence of its existence at the trial for perjury.

In R. *v.* Fletcher (L. R. 1 C. C. R. 320) the prisoner was convicted of perjury alleged to have been committed on the hearing of a bastardy summons. It appeared that the summons had been issued against the prisoner before the birth of the child. Upon the application for it no written deposition was made, but only a verbal statement upon oath by the woman. The prisoner appeared to the summons, and made no objection to its validity or to the jurisdiction of the Court. The Court of Crown Cases Reserved held that the Court had jurisdiction to hear the summons, and that the conviction for perjury was right, and that the irregularity was waived by the prisoner's appearing to the summons and not objecting.

In R. *v.* Dunning (L. R. 1 C. C. R. 290 and 11 Cox, C. C. 651), an indictment for perjury stated the offence to have been committed on the trial of "a certain indictment for misdemeanour" at the quarter sessions for the county of Salop, but it did not state what the misdemeanour was, nor that the quarter sessions had jurisdiction to try it. The Court of Crown Cases Reserved held that the indictment was good.

Master and apprentice. (R. *v.* Proud, L. R. 1 C. C. R. 71.)

Deputy coroner. (R. *v.* Johnson, L. R. 2 C. C. R. 15.)

Election commissioners, 26 Vict. c. 29, s. 7. (R. *v.* Buttle, L. R. 1 C. C. R. 248.)

In R. *v.* McDonald (21 Cox, C. C. 70), in an indictment charging perjury in an affidavit sworn before a commissioner acting under

sect. 2 of the Commissioners for Oaths Act, 1889 (52 & 53 Vict. c. 10), it was held that it is not sufficient simply to allege the general authority of the commissioner to administer the oath: the indictment must state the circumstances under which the oath was administered, showing that the commissioner had authority to administer the oath in the particular matter before him.

Other cases in point are:—R. *v.* Stone, Dears. C. C. 251; R. *v.* Dunn, 12 Q. B. 1026; R. *v.* Ewington, 2 M. C. C. 223; R. *v.* Hallett, 2 Den. C. C. 237; R. *v.* Hanks, 3 C. & P. 419; R. *v.* Clegg, 19 L. T. 47.

By 52 & 53 Vict. c. 10, s. 7 (The Commissioners for Oaths Act, 1889), a false oath taken before a commissioner for oaths is made punishable as perjury.

Perjury—Materiality.

[29] **R. *v.* TYSON.** (1867)

[L. R. 1 C. C. R. 107; 37 L. J. (M. C.) 7; 17 L. T. 292; 16 W. R. 317; 11 Cox, C. C. 1.]

Upon the trial of one Sullivan for robbery, the prisoner, who was under-deputy at a lodging-house, numbered 20, Mint Street, Borough, swore, in support of an alibi on behalf of Sullivan, first, that Sullivan was at 20, Mint Street, at the time of the robbery; secondly, he swore that Sullivan had lived in that house for the last two years; and thirdly, that Sullivan had never been absent from it for more than two or three nights together during that time. The second and third allegations were distinctly contradicted by the oaths of two of the warders of Wandsworth House of Correction, who proved that Sullivan was under their charge in that house of correction during one out of those two years. Sullivan was convicted

of robbery notwithstanding the alibi, and sentenced to seven years' penal servitude. The prisoner Tyson was tried for perjury at the Central Criminal Court in June, 1867, and convicted on the last two allegations, and the question was reserved for the consideration of the Court of Crown Cases Reserved, whether the last two allegations upon which perjury was assigned were sufficiently material on the trial of Sullivan to support the indictment for perjury in respect of them.

Held, that the second and third allegations were material as tending to render more credible the truth of the first, and that the prisoner was rightly convicted of perjury assigned upon them.

Kelly, C. B.: "The real question is, whether on this indictment these two statements were material. We all agree that they were, as they tended to render more probable the truth of the first allegation. When it had been sworn by the witness that at the time of the robbery Sullivan was in Mint Street, it tended to render that statement infinitely more credible to add, 'I, as deputy, know that he lodged there for nearly two years, and never was absent more than a night or two all the time.' Under the circumstances, without giving any opinion as to whether the conviction could have been supported if the evidence had affected the witness's credit only, we affirm the conviction."

Bramwell, B.: "Were the questions material? Clearly they were. Suppose the witness had said: 'Sullivan was at such a house from eight to ten on a particular night,' and his statement had stopped there, the jury would have been rightly told that, in considering his statement, they must bear in mind that the witness had given no reasons or circumstances which enabled him to remember the fact. But, to guard against any such direction to the jury, the witness was asked his reasons for remembering, and thereupon he proceeded to state those circumstances which made him competent to swear to the

cardinal matter. One of these circumstances is untrue; why, is that not perjury?"

Lush, J.: "I was embarrassed at first; but now I am quite satisfied that the allegations on which the prisoner was convicted were calculated to make the jury give a readier credit to the substantial part of his evidence, and therefore became material."

[Metcalfe for the Crown.]

Even although there is no doubt about the prisoner's having sworn falsely, or that it was in a judicial proceeding, and before a competent jurisdiction, there remains something else that must be proved against him. It must be shown that what he swore was material to the issue being tried. What, then, is "materiality"? "It is here said by my brother Eyre," said Lord Holt, C. J., in a case tried a couple of hundred years ago, "that the matter in which the perjury is assigned is immaterial to the issue, and therefore no perjury punishable by indictment. But I hold it is perjury to swear falsely in any circumstance which conduceth to the issue, or to the discovery of the truth: though, if it be only in some impertinent or minute circumstance, as where the witness dined on such a day, or the like, which is usual among the vulgar in giving evidence, it is not perjury, because this does *not* conduce to the issue, or to the truth of the matter to be tried." It would be very difficult indeed, in point of clearness and accuracy, to improve on this statement of the law.

The case of R. *v.* Townsend (4 F. & F. 1089; and 10 Cox, C. C. 356) illustrates this branch of the law. There the defendant, who wished to become a Doncaster town councillor, found it necessary to prosecute for libel a person who accused him of having knowingly let a house to a Birmingham prostitute during the race week. When the case came on before the magistrates, the candidate went into the witness-box and falsely denied all the imputations made against him. Thereupon, he was himself prosecuted for perjury, and it was held, that as magistrates are not entitled to hear evidence as to the truth of a libel (except where the prosecution is under sect. 4 of 6 & 7 Vict. c. 96, for publishing a libel

"knowing the same to be false"), what the defendant had sworn was immaterial to the issue, and he must be acquitted.

It was held, in the case of R. *v.* Gibbon (Leigh & Cave, 109), that perjury may be assigned upon evidence going to the credit of a material witness, although such evidence, being legally inadmissible, ought not to have been received. The perjury imputed to the defendant in that case was that, on the hearing of an affiliation summons against one of his friends, he had gone into the witness-box and falsely sworn that he had himself had connection with the woman about six months before the baby was born. The woman had denied this on cross-examination, and, the question being merely one of credit, her answer ought to have been taken as conclusive on the subject.

In R. *v.* Baker ([1885] 1 Q. B. 797) the defendant had been charged with selling beer without a licence, and had falsely sworn that, when previously charged with a similar offence, he had not authorized a plea of Guilty to be put in, and that such plea had been put in without his knowledge and against his will. The Court of Crown Cases Reserved held that, as such statements affected the defendant's credit as a witness, they were material, and he was rightly convicted of perjury. This case establishes the rule that all false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect of such statements.

In R. *v.* Mullany (Leigh & Cave, 593), the defendant, in a County Court case, swore falsely about his name, in consequence of which the Judge, who had already come to the conclusion that the debt was due, refused leave to amend the plaint, and struck out the cause. It was held, that his statements were sufficiently material to sustain a conviction for perjury. "He swore it," said the Court, "in a judicial proceeding for the purpose of affecting the decision; and the statement he made was material, because, on the strength of it, the County Court judge altered his judgment for the plaintiff into one for the defendant. The case, therefore, clearly comes within the rule laid down in R. *v.* Philpotts, 2 Den. C. C. 302, and R. *v.* Gibbon, Leigh & Cave, 109. When the question arises, whether false swearing in a judicial proceeding, with intent to mislead, is to be free from punishment because it is wholly

irrelevant and immaterial to the issue that is being tried, it will be a question for the fifteen Judges to decide, though for my own part, I should be inclined to hold that any false swearing in a judicial proceeding, with intent to mislead, whether material or not, would amount to the crime of perjury. That, however, will be a question of importance when it does arise. The present case is clearly governed by the cases referred to."

The following are also important cases with regard to materiality: —R. *v.* Scott, 13 Cox, C. C. 594; R. *v.* Hare, 13 Cox, C. C. 174; R. *v.* Fairlie, 9 Cox, C. C. 209; R. *v.* Tate, 12 Cox, C. C. 7; R. *v.* Courtney, 7 Cox, C. C. 111; R. *v.* Hadfield, 16 Cox, C. C. 148; R. *v.* Worley, 3 Cox, C. C. 535; R. *v.* Holden, 12 Cox, 167.

In R. *v.* Gaunt and another (L. R. 2 Q. B. 466) a bastardy summons, under 7 & 8 Vict. c. 101, having been heard and dismissed on the merits, one of the chief witnesses for the defendant was afterwards convicted of perjury on the evidence he had given. A fresh application was then made, and on the hearing of the summons, it was objected for the defendant that the justices had no jurisdiction, by reason of the previous dismissal on the merits. The justices determined to hear the application, saying the previous dismissal was obtained by false evidence; and having heard the applicant and corroborative evidence, made an order of affiliation. The Court of Queen's Bench held that the justices had jurisdiction, and the order was valid.

Perjury—Evidence.

[30] **R. *v.* HOOK.** (1858)

[D. & B. 606; 27 L. J. M. C. 222; 4 Jur. N. S. 1026; 6 W. R. 518; 8 Cox, C. C. 5.]

The prisoner, who was a policeman, having laid an information against a publican for keeping open his house after lawful hours, swore on the hearing that he knew nothing of the

matter except what he had been told, and that "he did not see any person leave the defendant's house after eleven" on the night in question. The perjury was assigned on this last allegation, and the evidence to prove its falsehood was as follows:—The magistrate's clerk proved that the prisoner when laying the information said that he had seen four men leave the house after eleven, and that he could swear to one as Williamson. It was also proved that on two other occasions the prisoner made a similar statement to two other witnesses; that Williamson and others did in fact leave the house after eleven o'clock on the night in question; that on the hearing the prisoner acknowledged that he had offered to smash the case for 30*s.*; that he had talked in the presence of another witness of making the publican give him money to settle it; that he had in fact offered to the publican to settle it for 1*l.*; and had said that he had received 10*s.* to smash the case and was to have 10*s.* more. The prisoner was convicted of perjury, and the Court of Crown Cases Reserved held that the evidence was sufficient to prove the perjury assigned, and that the conviction was right.

Pollock, C. B. said: "The prisoner swore to a fact, and it was proved by more than one witness that on other occasions he had made statements, not upon oath, inconsistent with the truth of his statement upon oath on which perjury was assigned. It was said in the argument against the conviction that a man could not be convicted of perjury merely by opposing his oath at one time to his oath at another time; and probably a conviction obtained in that way would not be considered right, unless there were also evidence by which the truth of the two statements might be distinguished—evidence to show that one was true and the other false; but there certainly is a direct authority that such a conviction would be good. In R. *v.* Harris (5 B. & Ald. 926) the defendant was charged with perjury upon a count in which his evidence upon

oath before a committee of the House of Commons, and his contradictory evidence before the House of Lords, was set out, and the indictment proceeded to say: 'and so the jurors aforesaid do say that the said E. H. did commit wilful and corrupt perjury'; but there was no averment as to which of these two statements upon oath was false, and the Court of Queen's Bench held that the count was bad in arrest of judgment."

Wightman, J., said: "In order to convict a defendant of perjury it is necessary that there should be two witnesses, for this obvious reason, that if there is but one oath against another oath it is altogether in doubt which is true, and therefore two witnesses are required to contradict the oath on which perjury is assigned. But it is not necessary that there should be two independent witnesses to contradict the particular fact, if there be two pieces of evidence in direct contradiction. Here one piece of evidence is, that the defendant himself is proved to have made statements directly contrary to his statement upon oath; that alone would not do; but in addition to that you have the oaths of other witnesses which go to show that that which he stated when not upon oath was true, and therefore you have two pieces of evidence. I ought rather to put it that, instead of two witnesses being necessary to prove each fact, you must have the evidence of two persons giving evidence in contradiction to what has been sworn to by the defendant; as, one witness who could prove, as in this case, that on other occasions the defendant had stated that which was diametrically opposed to that which he has sworn, and the other witness to give evidence of that which is directly opposite. You have therefore two contradictions; you have the contradiction of the defendant himself as deposed to on oath by one witness, and you have the contradiction of another independent witness who speaks to the falsehood of the fact—you therefore have two independent contradictions on oath. It therefore seems to me that

there was sufficient evidence, and I am of opinion that the conviction is right."

Bramwell, B., said: "The question in this case is, whether any matter be sufficiently proved which, if proved, would be enough to convict the prisoner of perjury. Now the matter proved was his own statement over and over again, which if true showed that which he swore was false. Well, were those statements not upon oath true, or was his statement upon oath true? The answer to that is, there is abundant evidence by which you can tell, because there is plenty of evidence to induce you to give a preference to the unsworn statement over the sworn one. Well, then, the matter which, if true, though contradicted, is enough to convict, is sufficiently proved by other circumstances, and that is sufficient to support the conviction. As I said before, if there be two opposing oaths only you could not properly convict a man of perjury, because the only legitimate conclusion to be drawn is that one was false. But when the oath complained of is sufficiently established, and you have other evidence to show that the oath not complained of was true, then it follows that the oath complained of was a false one. Whether in the case of two contradictory oaths the truth of the oath not complained of would have to be proved by two witnesses, I do not undertake to say at the present moment. The case of Rex *v.* Knill goes to show that it would not. Here you have a witness to prove that the defendant stated that he had seen a man come out of the house, and that proves that which, if true, goes to show that the defendant was guilty of perjury. Then, that that was true is proved by other witnesses, so that the matter is not left in doubt. I think therefore the conviction was right."

Byles, J., said: "The rule of law requiring two witnesses to prove an assignment of perjury reposes on two reasons; first, that it would often be dangerous and always unsatisfactory to convict the defendant when there is but the oath

of one man against the oath of another; secondly, that in all judicial proceedings all witnesses, even the most honest, would be constantly exposed to the peril, annoyance and oppression of indictments for perjury if the single oath of another man, without any confirmatory evidence, might, in point of law, suffice to convict. But the letter and spirit of the rule, and both the reasons for it, appear to me to be satisfied where, of two distinct admissions of the defendant inconsistent with his innocence, one is proved by one witness and one by another. It has been already held that the testimony of one witness deposing to the defendant's admission on oath, if there is corroboration, is enough. (Reg. *v.* Wheatland, 8 C. & P. 238.) But if a single witness deposing to an admission of the defendant be one witness within the rule, then, another witness, deposing to another admission, must surely be a second witness within the same rule. Indeed, where the reasons for the rule requiring two witnesses in perjury do not exist, the rule itself no longer holds; and therefore the Court of Queen's Bench, in Rex *v.* Knill, have gone so far as to decide that where the only evidence of the defendant's guilt is his own admission on oath (perjury being properly assigned in the indictment), the defendant may be convicted on the single testimony of one witness swearing to this contradictory deposition of the defendant himself. For these reasons I think the conviction right."

[H. Lloyd for the prosecution; McIntyre for the prisoner.]

The evidence of one witness is not sufficient to convict of perjury, as there would be only oath against oath; but two witnesses are not essentially necessary to disprove the fact sworn to; for, if any material circumstance is proved by other witnesses in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction; and the rule does not apply where the evidence consists of the contradictory oath of the party accused. To prove perjury it is sufficient if the

matter alleged to be falsely sworn is disproved by one witness, if, in addition to the evidence of that witness, there is proof of an account, or a letter written by the defendant contradicting his statement on oath. The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness in some slight particulars only is not sufficient to warrant a conviction. Although an assignment of perjury must be proved by two witnesses, it is not necessary to prove by two witnesses every fact which goes to make out the assignment of perjury; and two witnesses are not essentially necessary to contradict the oath on which the perjury is assigned, but there must be something more than the oath of one, to show that one party is more to be believed than the other. To convict a person of perjury in swearing falsely before a grand jury, it is not sufficient to show that the person swore to the contrary before the examining magistrate, as *non constat* which of the contradictory statements was the true one.

In R. *v.* Mary Jackson (1 Lewin, 270) the prisoner had made two statements on oath, one of which was directly at variance with the other. Holroyd, J., who tried the case, said: "Although you may believe that, on one or other occasion, she swore that which was not true, it is not a necessary consequence that she committed perjury. For there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and, from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse; without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict if it is not possible to tell which was the true and which was the false."

A solicitor was indicted for perjury in having sworn that there was no draft of a certain statutory declaration made by a client. No notice to produce the draft had been given to the solicitor, and upon his trial it was proved to have been last seen in his possession. Secondary evidence having been given of its contents, the Court held, that, in the absence of such notice, secondary evidence was inadmissible. (R. *v.* Elworthy, 37 L. J. (M. C.) 3. *Vide post*, p. 479.)

When perjury is alleged as having been committed before justices at petty sessions on the hearing of a charge contained in a written information, that information must be produced, or its loss or destruction proved, before secondary evidence of its contents can be given on the trial of an indictment for perjury. (R. *v.* Dillon, 14 Cox, C. C. 4.)

Offences against Public Justice.

[31] R. *v.* VREONES. (1891)

[[1891] 1 Q. B. 360; 64 L. T. 389; 39 W. R. 365; 17 Cox, C. C. 267; 55 J. P. 536.]

The defendant was tried and convicted upon a count of an indictment alleging, in substance, that by the terms of a contract for the purchase of a cargo of wheat, to be shipped by the sellers from a port in the Black Sea to the buyer at the port of Bristol, it was provided that any dispute arising under the contract should be referred to two arbitrators, whose award should be final and conclusive, and might, upon the application of either contracting party, be made a rule of Court in England; that the defendant was appointed by the sellers to take samples of the cargo upon the arrival of the ship at Bristol; that such sample was then taken, and placed in bags sealed with the seals of the buyer and seller of the cargo, in accordance with the custom of merchants at the port, and for the purpose of being used as evidence before the arbitrators in case any arbitration was had under the contract; that the defendant afterwards, intending to deceive the arbitrators to be appointed under the contract, and wrongfully to make it appear to them that the bulk of the cargo was of

better quality than it really was, so as to pervert the due course of law and justice, unlawfully and designedly removed the contents of the sealed bags and altered their character, and returned to the bags a quantity of wheat in a different condition, and altered in character and value, with intent thereby to pass the same off as true and genuine samples of the bulk of the cargo, and that afterwards the defendant forwarded the samples so altered to the London Corn Trade Association, with intent that the same should be used as evidence before such arbitrators, and thereby to injure and prejudice the buyer, and to pervert the due course of law and justice.

It was urged by counsel for the defendant that the indictment ought to be quashed upon the ground that it contained no charge for which an indictment for misdemeanour could be supported; but Denman, J., who tried the case, left the case to the jury, who found the defendant guilty. On the question being reserved the Court of Crown Cases Reserved held that the count stated an indictable misdemeanour at common law.

Lord Coleridge, C. J., said: "The first count of the indictment in substance charges the defendant with the misdemeanour of attempting, by the manufacture of false evidence, to mislead a judicial tribunal which might come into existence. If the act itself of the defendant was completed, I cannot doubt that to manufacture false evidence for the purpose of misleading a judicial tribunal is a misdemeanour. Here, in point of fact, no tribunal was misled, because the piece of evidence was not used; but I am of opinion that that fact makes no difference; it is none the less a misdemeanour although the evidence was not used. All that the defendant could do to commit the offence he did. There was a contract for the sale of a cargo of wheat, and it provided a mode of settling by arbitration possible disputes which might

arise. The particular piece of evidence, namely, the samples of wheat placed in sealed bags, would be, if not absolutely conclusive, of the greatest possible weight in determining any dispute as to the quality of the wheat sold. . . . I think that an attempt to pervert the course of justice is in itself a punishable misdemeanour; and though I should myself have thought so on the grounds of sense and reason, there is also plenty of authority to show that it is a misdemeanour in point of law. There is, of course, no case in which the facts are exactly like these; but in R. *v.* Crossley (7 T. R. 315) the principle which applied here was clearly laid down."

Pollock, B., said: "The real offence here is the doing of some act which has a tendency and is intended to pervert the administration of public justice. The question is, whether the sending of these adulterated samples, which by previous arrangement were to be sent to the Association in London to be used by the arbitrators, is such an act as I have described. I think that it was. I think that the arbitrators are to be considered as a tribunal administering public justice. Such a tribunal is one specially sanctioned by Courts of law, and its decisions are enforced and carried out by the Courts of law. I am of opinion that by tampering with the evidence which was to be laid before that tribunal the defendant was interfering with the course of justice. I agree with my Lord that his act was completed."

[Poole, Q.C., and Bernard Coleridge for the Crown; C. W. Mathews for the prisoner.]

Under this heading may be classed such offences as aiding a prisoner to escape, prison breach, obstructing lawful arrest, perjury, bribery, giving false evidence, compounding crimes, &c., &c.

In R. *v.* Tibbits and Windust ([1902] 1 K. B. 77 and 20 Cox, C. C. 70) the defendants were charged in an indictment with (1) an unlawful attempt to obstruct and pervert the due course of law and justice; (2) the unlawful doing of an act calculated and

tending to the same result; (3) the composing, printing, and publishing of matters with the same intent; and (4) a conspiracy to obstruct and pervert the due course of law and justice. The defendant C. J. Tibbits was the editor of the *Weekly Dispatch*, and the defendant C. Windust was a reporter on the staff of that newspaper, and styled himself "Crime Investigator." It appeared that during the course of the trial of two persons for felony Windust sent to Tibbits articles affecting the conduct and character of the persons under trial which would have been inadmissible in evidence against them. Tibbits published the articles, and, after the conviction and sentence of the two persons, he and Windust were convicted on the aforesaid indictment for unlawfully attempting to pervert the course of justice. The Court of Crown Cases Reserved affirmed the conviction.

Lord Alverstone, C. J., said: "We have no doubt whatever that the publication of the articles in this case, at the time when, and under the circumstances in which, they were published, constitutes a criminal offence by whomsoever they were published. We think that the facts, which bring the incriminated articles within the category of misdemeanour, abundantly appear upon the face of each count, and that, under those circumstances, it is perfectly immaterial whether the articles be described and charged as libels or contempts or not. With reference to the argument, which was strongly urged, that there was no evidence of any intention to pervert the course of justice, we are clearly of opinion, for the reasons given in the authorities to which we have referred, that this is one of the cases in which the intent may properly be inferred from the articles themselves and the circumstances under which they were published. It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. . . . A person accused of crime in this country can properly be convicted in a court of justice only upon evidence which is legally admissible and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offence charged against him, the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to

approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence."

In Bastable *v.* Little ([1907] 1 K. B. 59) the facts were as follows: Two constables, having measured certain distances on a road much frequented by motor cars, were watching in order to ascertain the pace at which each car passed over the measured distance, with a view to discovering whether it was proceeding at an illegal rate of speed. The respondent gave warning of this fact to approaching cars, which then slackened speed. There was no evidence that the respondent was acting in concert with any of the drivers of the cars, or that any car when the warning was given was going at an illegal pace. The Court of King's Bench held that the respondent was not guilty of the offence of obstructing the constables when in the execution of their duty within the meaning of s. 2 of the Prevention of Crimes Amendment Act, 1885 (48 & 49 Vict. c. 75).

Lord Alverstone, C. J., said: "In my opinion this case is not free from difficulty, and I am, for my own part, by no means satisfied that no offence was committed by the respondent. If the case had contained allegations that a breach of the law had been committed by any of these motor cars, and that there was a proximity of detection, the case would be different, but I think that the magistrates were right in holding that on the facts before them no offence was disclosed against sect. 2 of the Prevention of Crimes Amendment Act, 1885. That section provides that the provisions of sect. 12 of the Prevention of Crimes Act, 1871, which deals with assaults on constables when in the execution of their duty, shall apply to all cases of resisting or wilfully obstructing any constable when in the execution of his duty. I think that the section points to something done in regard to the duty which the constable is performing, and does not apply to what is said or done to third parties. To take an instance which was put during the argument: suppose a party of men are engaged in the offence of night poaching, and a person passing near warns them that the police are coming, I think it is clear that that could not be held to be an offence within this section. We must not allow ourselves to be warped by any prejudice against motor cars, and so to strain

the law against them. We are asked to infer from the fact that all the motor cars, on receiving the warning, slackened their speed, that all or most of them were then exceeding the speed limit and breaking the law. I do not think that we can draw any such inference. The magistrates only say that in consequence of the warning the drivers may have been enabled to avoid travelling at an illegal speed past the policemen. They do not say as a fact they were at the time they received the warning travelling at an illegal rate of speed. I cannot draw the inference that the cars were breaking the law when they received the warning. I also attach importance to the fact that there was a complete absence of any evidence of conspiracy or agency on the part of the respondent and the drivers of the cars. Under the circumstances, therefore, I think that the magistrates came to a right conclusion, and that the appeal must be dismissed."

Darling, J., said: "If the case had stated definitely that any of these cars when approaching the measured mile was going at an illegal rate of speed, and that the warning prevented the police constables from taking the real pace of the car as it passed, and so securing the conviction of the driver, I should desire to reserve my opinion whether the respondent had committed an offence under the section, although no physical obstruction of the police constables in the execution of their duty had taken place. In my opinion it is quite easy to distinguish the cases where a warning is given with the object of preventing the commission of a crime from the cases in which the crime is being committed and the warning is given in order that the commission of the crime may be suspended while there is danger of detection, with the intention that the commission of the crime should be re-commenced as soon as the danger of detection is past. I do not wish to be understood to say that in order that there should be an offence under this section there must be some physical obstruction of the constables. In my opinion a policeman who in seeking information which might lead to the conviction of the perpetrators of a crime was wilfully misled by false information would be obstructed in the execution of his duty, and I should not like to say that the person who so wilfully misled him was not committing an offence within the meaning of the section."

Lord Alverstone, C. J., added: "I also wish to guard myself

from saying that the only obstruction contemplated by this section is a physical obstruction."

As to contempt of Court, speeches at public meetings with regard to a criminal case still pending, and vituperation of the judge who is to try it, and attacks on the witnesses for the prosecution, *vide* R. *v.* Onslow and Whalley, 12 Cox, C. C. 358, and R. *v.* Skipworth, and R. *v.* De Castro, 12 Cox, C. C. 371.

Compounding Crimes.

[32] R. *v.* BURGESS. (1885)

[16 Q. B. D. 141 ; 15 Cox, C. C. 779 ; 55 L. J. (M. C.) 97 ; 53 L. T. 918 ; 34 W. R. 306 ; 50 J. P. 520.]

The prisoner was employed to levy a distress for two weeks' rent, amounting to 28*s.*, upon the goods of a Mr. Bedford, and upon that occasion Arthur Bagley, whilst in possession as the prisoner's assistant, stole the sum of 28*s.* belonging to Mr. Bedford from a drawer in Bedford's room, and absconded. The prisoner was informed of this fact by Bedford, and urged Bedford to put the matter into the hands of the police, but Bedford told prisoner he would leave it in his hands, and the prisoner on the 3rd of April gave information of the theft to the police. The prisoner entered into some negotiations with Bagley's family, and finally handed Bagley's mother a document to this effect :—

" I, W. H. Burgess, undertake not to charge Arthur Bagley with any criminal case that I have now against him on the money being provided to pay what he took from Peckham Road while in possession, viz., 30*s.*

W. H. Burgess."

The money was paid to Burgess, but Bagley was nevertheless, on the evidence of Mr. Bedford, convicted summarily of the theft. Burgess was then prosecuted for compounding a felony, and committed for trial to the Central Criminal Court, the indictment stating, that one Arthur Bagley feloniously stole certain money to the amount of 28*s*. of Henry Bedford, and that the prisoner, "well knowing the said felony to have been done and committed by the said Arthur Bagley as aforesaid, and contriving and intending to prevent the due course of law and justice, and to cause and procure the said Arthur Bagley for the felony aforesaid to escape with impunity, afterwards, to wit, on the 5th day of July, 1885, unlawfully and for gain's sake did compound the said felony with the said Arthur Bagley, and did then exact, take, receive, and have from the said Arthur Bagley the sum of 28*s*. for and as a reward for compounding the said felony, and desisting from prosecuting the said Arthur Bagley, and for procuring that the said Arthur Bagley should not be prosecuted for the felony aforesaid, to the great hindrance of justice, in contempt of our said lady the Queen, &c."

Before plea pleaded, the prisoner's counsel moved to quash the indictment on the ground that, though it professed to charge the prisoner with the offence of compounding a felony, it did not in fact disclose any offence, there being no allegation that the prisoner desisted from prosecuting the felon, which, he contended, was a material part of the offence of compounding a felony, and that, if after receiving money from the felon as an inducement not to prosecute the prisoner had in fact prosecuted, no offence would have been committed; and he cited R. *v.* Stone and others, 4 C. & P. 379. For the prosecution, it was contended that the offence consisted in the corrupt agreement not to prosecute. The Recorder declined to quash the indictment, and the prisoner pleaded not guilty.

At the close of the case for the prosecution, the prisoner's

counsel submitted that there was no case to go to the jury, on the ground that the owner of the property stolen, or a person whose evidence should be necessary to convict the thief, are the only persons who can compound a larceny, and that in this case the prisoner was not a necessary witness on the trial of Bagley, and that, therefore, his undertaking not to charge Bagley with a criminal offence could not impede the course of justice. The Recorder overruled the objection, and the jury found the prisoner guilty. The questions reserved were, whether the indictment was bad on the face of it as not disclosing any offence at law, and ought to have been quashed; and, secondly, whether there was evidence to be left to the jury against the prisoner upon the indictment. The Court for Crown Cases Reserved affirmed the conviction, and Lord Coleridge, C. J., in delivering the judgment of the Court, said:—"This case raises two questions, the first being whether this indictment is bad on the face of it, and the second being whether there was any evidence upon the indictment, as framed, to go to the jury. With regard to the first question, it is admitted that the indictment sufficiently alleged the offence, if the offence is complete without the allegation that the defendant abstained from prosecuting. It is suggested that the indictment is bad because it does not allege that the defendant did abstain from prosecuting. The difficulties in the way of that contention are to my mind enormous. One question which at once arises is, when on that view can the offence be said to be complete? A man might conceivably make an illegal agreement not to prosecute, and abstain from prosecuting for six years, and then might turn round and prosecute after all in breach of the agreement. According to the contention, he could not be guilty of the offence, because he did ultimately prosecute, and if so it is difficult to see when such an offence can be said to be complete. The way in which one of my learned brothers put the contention seems to me to

be a *reductio ad absurdum* of the argument. It being admitted that such an agreement is unlawful in the sense that it is not enforceable at law, it is said that, if the maker of it keeps his agreement, he is guilty of an offence, but if, in addition to making such an illegal agreement, he is guilty of the further fraud towards the other party of breaking it, he is guilty of no offence at all. Thus stated, the proposition seems to me to be contrary to good sense, and to be a sufficient answer to itself. Then it is said that the offence alleged is the old offence of theft-bote, and that no one can be guilty of that offence except the owner of the goods. I do not deny that by some writers, especially by Lord Coke, expressions have been used which may be read so as to afford some countenance to this contention. It seems to me, however, that, when the writers in question so expressed themselves, it was probably because the question whether the offence could be committed by persons other than the owner of the goods was not present to their minds, and they were dealing with what would be the case on ninety-nine out of a hundred occasions, viz., the case where the person who was guilty of interfering with the course of justice for his own benefit was the owner of the goods. One can easily see, I think, how it has happened in this way, that language has been used which seems to favour to some extent the contention for the defendant; but it must be observed that the writers of the passages to which I refer do not use any negative expression to the effect that the offence can only be committed by the owner of the goods. But, on the other hand, there are not wanting in some of the other authorities indications of the contrary view. The language used by Blackstone in his Commentaries concerning theft-bote seems to me to show that he can hardly have considered the offence as capable of being committed by the owner of the goods. I admit that he does not say expressly that it can be committed by another person. But neither, on the other hand, do the writers who

have been cited expressly say that it cannot. He says of theft-bote, "this is frequently called compounding a felony, and formerly was held to make a man an accessory, but is now punished only with fine and imprisonment. This perversion of justice in the old Gothic constitutions was liable to the most severe and infamous punishment, and the Salic law, '*latroni eum similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere.*' This latter portion of what he says on the subject clearly seems inconsistent with the notion that he thought that the offence of compounding the felony could only be committed by the owner of the goods; for it seems to imply that the definition as given by the Salic law was a good definition of the offence of compounding a felony, and that anyone was guilty of the offence '*qui furtum celare vellet, et occulte sine judice compositionem ejus admittere.*' These expressions seem to me to indicate that there was present to his mind the possibility of the offence being committed by a person other than the owner of the goods. I am of opinion that the defendant, upon the facts stated, was guilty of the offence of compounding a felony, and that therefore the conviction must be affirmed."

[Poland for the prosecution; Burnie for the prisoner.]

To take a reward, which need not be of a pecuniary nature, for refraining from prosecuting a person for a felony is a misdemeanour punishable by fine and imprisonment. Every person, whether owner of the stolen goods or not, commits this crime who agrees with a thief that if he restores the plunder he shall hear no more of the matter. But merely to receive back one's goods without showing any favour to the thief is not criminal.

Section 101 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), provides that "whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanour have been stolen, taken, obtained," &c., "shall, unless he shall

have used all due diligence to cause the offender to be brought to trial for the same, be guilty of felony," and liable to seven years' penal servitude.

And sect. 102 of the same statute makes a person who advertises a reward for the return of the stolen property, with a hint that no unpleasant questions will be asked, liable to "forfeit the sum of fifty pounds for every such offence to any person who will sue for the same." The printer and publisher are also liable to this forfeiture, but newspapers are specially protected by 33 & 34 Vict. c. 65, s. 3. Compounding misdemeanours is strictly as illegal as compounding felonies; but it is a common practice for the Court to allow a defendant who has been convicted of some misdemeanour more particularly affecting an individual to "speak with" the prosecutor in private, and, if the latter expresses himself satisfied with the result of the interview, to pass only a nominal sentence. The misdemeanour of compounding informations on penal statutes is committed by the informer, who, under pretence of enforcing any penal law, makes a composition without the leave of one of the Courts. On conviction he forfeits 10*l.*, is liable to such imprisonment and further fine as the Court may inflict, and is for ever disabled from suing on any popular or penal statute.

Somewhat analogous to the offence of compounding a felony is that of "misprision of felony," which consists in the concealment, or procuring the concealment, of felony, whether such felonies be at common law or by statute. Silently to observe the commission of a felony without using any endeavour to apprehend the offender, is a misprision. If to the knowledge there be added assent, the party will become an accessory. The punishment for this offence is fine and imprisonment, and provisions against the commission of it by sheriffs, coroners, and other officers are contained in 3 Edw. I., c. 9. (See also Flower *v.* Sadler, 10 Q. B. D. 572.) Prosecutions for this offence are, however, practically obsolete at the present day.

A dog is included in the words "any property whatsoever" in sect. 102 of the Larceny Act, 1861, which imposes a penalty on anyone who publicly advertises a reward for the return of any property whatsoever which shall have been stolen or lost, and uses in such advertisement any words purporting that no questions will be asked, and on anyone who prints or publishes such an

advertisement. (Mirams v. "Our Dogs" Publishing Company, [1901] 2 K. B. 564.)

Vide also R. *v.* Daly, 9 Car. & P. 342; R. *v.* Stone, 4 Car. & P. 379; R. *v.* Crisp, 1 B. & Ald. 282; Bury *v.* Levy, 1 W. Bl. 443; R. *v.* Gotley, R. & R. 84; R. *v.* Best, 9 Car. & P. 368; R. *v.* Pascoe, 3 Cox, C. C. 462.

As to compounding a misdemeanour, *vide* Windhill Local Board of Health *v.* Vint, 17 Cox, C. C. 41; and Jones *v.* Merionethshire Permanent Benefit Building Society, 17 Cox, C. C. 334, 389.

Bigamy—Bonâ fide Belief in Death.

[33] **R.** *v.* **TOLSON.** (1889)

[23 Q. B. D. 168; 16 Cox, C. C. 629; 58 L. J. (M. C.) 97.]

The prisoner was convicted under 24 & 25 Vict. c. 100, s. 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. It appeared that the marriage of the prisoner to Tolson took place on September 11, 1880; that Tolson deserted her on December 13, 1881; and that she and her father made inquiries about him, and learned from his elder brother and from general report that he had been lost in a vessel bound for America, which went down with all hands on board. On January 10, 1887, the prisoner, supposing herself to be a widow, went through the ceremony of marriage with another man. The circumstances were all known to the second husband, and the ceremony was in no way concealed. In December, 1887, Tolson returned from America. The jury found that at the time of the second marriage she, in good faith and on reasonable grounds, believed her husband to be dead. The Court for the Consideration of Crown Cases

Reserved (five judges dissenting) held that it is a good defence to an indictment for bigamy to prove to the satisfaction of the jury that the prisoner at the time of contracting the bigamous marriage *bonâ fide* believed, and had reasonable grounds for believing, that his or her wife or husband was dead. Such defence is good, although such wife or husband may not have been continually absent from the prisoner for seven years, or seven years had not elapsed at the time of such marriage since the prisoner last knew of his or her wife or husband being alive.

Stephen, J. (who reserved the case), said : " My view of the subject is based upon a particular application of the doctrine usually, though I think not happily, described by the phrase '*non est reus, nisi mens sit rea.*' Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crime, such a thing exists as a '*mens rea*,' or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. '*Mens rea*' means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence, it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a '*mens rea*,' or guilty mind. . . . It is argued that the proviso that a re-marriage after seven years' separation shall not be punishable operates as a tacit exclusion of all other exceptions to the penal part of the section. It appears

to me that it only supplies a rule of evidence which is useful in many cases, in the absence of explicit proof of death. But it seems to me to show not that belief in the death of one married person excuses the marriage of the other only after seven years' separation, but that mere separation for that period has the effect which reasonable belief of death caused by other evidence would have at any time. It would to my mind be monstrous to say that seven years' separation should have a greater effect in excusing a bigamous marriage than positive evidence of death, sufficient for the purpose of recovering a policy of assurance or obtaining probate of a will, would have, as in the case I have put, or in others which might be even stronger."

Hawkins, J., said: "The statute 24 & 25 Vict. c. 100, s. 57, enacts that 'whosoever, being married, shall marry any other person during the lifetime of the former husband or wife, shall be guilty of felony.'

"Undoubtedly the defendant, being married, did marry another person during the life of her former husband. But she did so believing in good faith and upon reasonable grounds that her first husband was dead; and the sole question now raised is whether such belief afforded her a valid legal defence against the indictment for bigamy upon which she was tried. I am clearly of opinion that it did, and that she ought to have been acquitted. The ground upon which I have arrived at this conclusion is simply this: that, having contracted her second marriage under an honest and reasonable belief in the existence of a state of things which, if true, would have afforded her a complete justification, both legally and morally, there was an absence of that '*mens rea*' which is an essential element in every charge of felony."

[A. Henry for the prisoner.]

The leading case sets at rest a grave doubt which existed. The question had frequently arisen before single judges, and there was

a conflict of authorities. R. *v.* Gibbons, 12 Cox, C. C. 237; and R. *v.* Bennett, 14 Cox, C. C. 45, were decisions in favour of a conviction; whilst R. *v.* Turner, 9 Cox, C. C. 145; R. *v.* Horton, 11 Cox, C. C. 670; and R. *v.* Moore, 13 Cox, C. C. 544, were authorities in favour of an acquittal. In the first of these, viz., R. *v.*.Turner, Martin, B., said: "The law says seven years shall elapse before it may be presumed that the first husband is dead. In this case seven years had not elapsed, and beyond the prisoner's own statement there was the mere belief of one witness. Still the jury are to say if upon such testimony she had an honest belief that her first husband was dead; if they believe she had, then the prisoner would not be guilty of the offence charged in the indictment." The prisoner was accordingly acquitted.

In R. *v.* Curgerwen (L. R. 1 C. C. R. 1 and 10 Cox, C. C. 152) the prisoner was a man-of-war's man, and married one Charlotte Curgerwen, at Buryan, in Cornwall, on September 1, 1852. In June, 1853, in consequence of some disagreement, his wife left him and returned to her father's house at Buryan. Then the Crimean War broke out, and the prisoner was away from England for years. On July 9, 1862, being then at a coastguard station at a small place on the Devonshire coast, and never having heard of his wife since 1854, he went through the form of marriage with one Eliza Hardy. It being found that his former wife was alive, a prosecution for bigamy was instituted, and it was held that the prisoner was entitled to be acquitted; and the rule stated to be that, upon a trial for bigamy, when it is proved that the prisoner and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to show that during that time he was aware of her existence. This view of the law was an exceedingly merciful one for the prisoner; for on his return to England he seems to have got married again without taking the slightest trouble to inquire what had become of his first wife, but the ground of the decision is, that the prisoner in such a case is not to be called upon to prove a negative.

In R. *v.* Jones (11 Q. B. D. 118), the prisoner married one Winifred Dodds in 1865, and they lived together after the marriage. In 1882, he went through the marriage ceremony with one Phœbe Jones, Winifred being still alive. On the trial for bigamy, it was shown that the prisoner had married Winifred, and also that they

had lived together; and there was no evidence at all as to their having ever separated, or as to when, if separated, they last saw each other. This being so, it was held that the facts could not be brought within the case of R. *v.* Curgerwen. "There is proof," said Lord Coleridge, C. J., "of the existence of a state of things, and no evidence of the cessation of that state of things; consequently, the presumption is that the existing state continued. That presumption could only have been displaced by evidence, and no evidence displacing it was forthcoming."

The mere fact that there are no circumstances leading to the inference that the absent party has died does not raise a presumption of law that such party is alive. The prosecution must satisfy the jury that, as a matter of fact, such party is alive, and it is a question entirely for them. Where the only evidence is that the party was alive more than seven years ago, then there is no question for the jury, and it is a presumption of law that he is dead.

In R. *v.* Willshire (6 Q. B. D. 366 and 14 Cox, C. C 541) the prisoner married B. in 1868, his wife A. being then alive, and was on such charge convicted. In 1879 he married C., and in 1880, C. being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D., C. being then alive, the prisoner was convicted, it being held by the presiding judge that there was no evidence that A. was alive when the prisoner married C. or that the marriage with C. was invalid by reason of A. being then alive. The Court of Crown Cases Reserved held that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A. was alive or not when the prisoner married C.

Other cases on this subject are:—R. *v.* Heaton, 3 F. & F. 819; R. *v.* Lumley, L. R. 1 C. C. R. 196; R. *v.* Ellis, 1 F. & F. 309; R. *v.* Briggs, 7 Cox, C. C. 175.

Bigamy—Invalidity of Second Marriage.

R. *v.* **ALLEN.** (1872) [34]

[L. R. 1 C. C. R. 367; 41 L. J. (M. C.) 97; 26 L. T. 664; 20 W. R. 756; 12 Cox, C. C. 193.]

The prisoner, while his second wife was yet alive, went through the ceremony of marriage with another woman who was within the prohibited degrees of affinity, she being a niece of his first wife, so that, even if the parties had been free, they would have been under a statutory inability to marry one another. It was held that, notwithstanding such inability, the prisoner was guilty of bigamy.

In delivering the judgment of the Court for Crown Cases Reserved, Cockburn, C. J., said: "The ground on which such a marriage is very properly made penal is that it involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, which the law allows to be applied only to a legitimate union, to a marriage at best but colourable and fictitious, and which may be made, and too often is made, the means of the most cruel and wicked deception. . . . It is obvious that the outrage and scandal involved in such a proceeding will not be less because the parties to the second marriage may be under some special incapacity to contract marriage. Now, the words 'shall marry another person' may well be taken to mean 'shall go through the form and ceremony of marriage with another person.' The words are fully capable of being so construed without being forced or strained; and, as a narrower construction would have the effect of leaving a portion of the mischief

untouched, which it must have been the intention of the legislature to provide against, and thereby, as is fully admitted by those who contend for it, of bringing a grave reproach on the law, we think we are warranted in inferring that the words were used in the sense we have referred to, and that we shall best give effect to the legislative intention by holding such a case as the present to be within their meaning. To assume that the words must have such a construction as would exclude it, because the second marriage must be one which but for the bigamy would have been as binding as the first, appears to us to be begging the entire question and to be running directly counter to the wholesome canon of construction which prescribes that, where the language will admit of it, a statutory enactment shall be so construed as to make the remedy co-extensive with the mischief it is intended to prevent.

"In thus holding it is not at all necessary to say that forms of marriage unknown to the law, as was the case in Burt *v.* Burt (2 Sw. & Tr. 88), would suffice to bring a case within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorized person or in an unauthorized place, would be a marrying within the meaning of the 57th section of 24 & 25 Vict. c. 100. It will be time enough to deal with a case of this description when it arises. It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through a form of marriage known to, and recognized by, the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties,

or make the form of marriage resorted to inapplicable to their individual case."

[Warry for the prosecution; E. V. Bullen for the prisoner.]

In deciding this case the Court expressed their disapproval of the Irish case of R. *v.* Fanning (10 Cox, C. C. 411), where a Protestant, having a wife living, had been married by a Roman Catholic priest to a Roman Catholic lady, contrary (even a part from questions of bigamy) to the statute 19 Geo. II. c. 13 (Ireland). At the time of the second marriage the prisoner represented himself to the woman and to the officiating clergyman as a Roman Catholic. It was proved that he was a professing Protestant within twelve months prior to the time of the second marriage. The view of the Irish Court was that, to constitute the offence of bigamy, the second marriage must have been one which but for the existence of the previous marriage would have been a valid marriage. In the case of R. *v.* Kay (16 Cox, C. C. 292), the prisoner was acquitted on account of the invalidity of the first marriage through undue publication of banns.

Other cases with regard to the invalidity of the second marriage are:—R. *v.* Brawn, 1 C. & K. 144; Burt *v.* Burt, 2 Sw. & Tr. 88; R. *v.* Millis, 10 Cl. & F. 689; R. *v.* Allison, R. & R. C. C. 109; R. *v* Clarke, 10 Cox, C. C. 474.

Cases on the invalidity of the first marriage are:—R. *v.* Althausen, 17 Cox, C. C. 630; R. *v.* McLaughlin, Sessions Paper, C. C. C., vol. 117, p. 723.

As to proof of the first marriage, *vide* R. *v.* Simpson, 15 Cox C. C. 328.

In R. *v.* Creeswell (1 Q. B. D. 447) upon an indictment for bigamy, it was proved that the first marriage was solemnized, not in the parish church of the parish, but in a chamber in a building a few yards from the church, while the church was under repair. It was further proved that divine service had several times been performed in the building in question. The Court of Crown Cases Reserved held that the building must be presumed to have been licensed, and, therefore, the first marriage was valid, and the prisoner was properly convicted of bigamy. Lord Coleridge, C. J., said: "The case states that divine service had been several times celebrated in the place where the marriage in question was

solemnized. This is sufficient, in accordance with the maxim *omnia præsumuntur rite esse acta*, to give rise to the presumption that the building was licensed. The presumption is the stronger because the clergyman who celebrated the marriage might, by 6 & 7 Will. IV. c. 85, s. 3, have been indicted for felony if he knowingly did so in an unlicensed place."

Bigamy—Jurisdiction.

[35] **R. *v.* EARL RUSSELL.** (1901)

[[1901] A. C. 446; 20 Cox, C. C. 51; 70 L. J. K. B. 998; 85 L. T. 253.]

This was a prosecution initiated by the Director of Public Prosecutions against Earl Russell for bigamy in America. Earl Russell was married to Mabel Edith Scott on February 6, 1890, in England. Much litigation followed between Earl Russell and his wife from 1890 to 1897. On April 14, 1900, Earl Russell obtained from the First Judicial District for the county of Douglas, in the State of Nevada, in the United States of America, an order for divorce from his wife; and on April 15 he went through the ceremony of marriage before Judge Curler in the State of Nevada with one Mollie Cooke, otherwise known as Mrs. Somerville. In June, 1890, Mabel Edith, Lady Russell, presented a petition against Earl Russell for divorce on the ground of his bigamous adultery, and on March 24, 1901, a decree *nisi* was pronounced, the suit being undefended. On June 17, 1901, Earl Russell was arrested and charged with bigamy. Subsequently the grand jury found a true bill, and the Recorder wrote to the House of

Lords informing their Lordships that a true bill had been found against Earl Russell, a peer of the realm.

The trial took place on June 18, Lord Halsbury, L. C., presiding as Lord High Steward. Sir Francis Jeune, and Mathew, Wills, Wright, Lawrance, Kennedy, Darling, Bigham, Cozens-Hardy, Farwell, and Buckley, JJ., were also present. Before Earl Russell pleaded to the indictment, Robson, K.C., on his behalf, submitted that the indictment ought to be quashed inasmuch as it disclosed no offence according to the true construction of the 57th section of the Offences against the Person Act, 1861.

The Lord High Steward said: "My Lords,—We have the advantage of having His Majesty's Judges here. I have been myself of opinion for some time that the matter which has been discussed at such inordinate length was really too plain for argument. The statute is plain in its ordinary signification, and the only ground upon which the learned counsel can suggest that we should not give it its ordinary signification is apparently because of the use of certain words in other statutes enacted under other circumstances in relation to other crimes. My Lords, I thought it right to ask His Majesty's Judges whether there is anything in the argument suggested which should call for the Attorney-General to reply, and they are unanimously of opinion that there is not, and that it is not necessary to hear the Attorney-General."

Thereupon Earl Russell pleaded guilty.

[Sir R. B. Finlay, A.-G., Sir Edward Carson, S.-G., H. Sutton, R. D. Muir, Bodkin, and G. R. Askwith, for the prosecution; Robson, K.C., Horace Avory, K.C., Charles Mathews, Llewelyn Davies, and J. H. W. Pilcher, for the defendant.]

Sect. 57 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), is as follows:—Whosoever being married shall marry any other person during the life of the former husband or

wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding seven years, and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended, or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place.

In R. *v.* Audley ([1907] 1 K. B. 383) the Court of Crown Cases Reserved held that on a trial for bigamy where the second marriage has been contracted elsewhere than in England or Ireland it is not necessary that the indictment should contain an averment that the accused was not a British subject. Bigham, J., said: "The gist of the offence of bigamy is the second marriage during the first wife's lifetime, and when that fact has been established by the prosecution the case is complete. The fact that the accused is not a British subject, and the other matters specified in the proviso to sect. 57, are all matters of confession and avoidance, and they must be alleged and proved by the defence."

Uttering Counterfeit Coin.

[36] **R. *v.* HERMANN.** (1879)

[4 Q. B. D. 284; 48 L. J. (M. C.) 106; 40 L. T. 263; 27 W. R. 475; 14 Cox, C. C. 279.]

The prisoner was indicted for uttering and putting off two false and counterfeit sovereigns, knowing them to be false and counterfeit. The coins, however, were not "false and counterfeit" in the usual way, but were composed of as good gold as ever came out of the Mint. They were real sovereigns which had been fraudulently filed at the edges to such an

extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely, and, in order to restore the appearance of the coins, a new milling had been made on each coin with tools. It was held that these coins were "false and counterfeit" within the meaning of 24 & 25 Vict. c. 99, s. 9.

"A sovereign from which the milling has been fraudulently removed," said Pollock, B., "ceases to be current coin, but is something else intended to resemble current coin. It is like the case of a man taking part of the gold out of a sovereign, and filling up the hollow left with alloy, and then passing it as genuine. It is substantially a passing of a fake and counterfeit coin."

Lord Coleridge, C. J., said: "I am clearly of opinion that the present case is within the 9th section of the statute. The coins were counterfeit in the strict and grammatical sense of the word; they were made other than they ought to be; they were made to resemble that which they were not. They were not perfect and whole sovereigns; they were imperfect coin, milled so as to conceal their imperfections. It may be that it is wrong to place too much reliance upon strict or grammatical meanings in construing words in an Act of Parliament. I therefore desire to say that if the word 'counterfeit' is to be taken in its ordinary or popular sense, these coins seem to me to be counterfeit. In the ordinary sense of this word the idea of imitation is conveyed. These sovereigns had been filed, and then a new milling added to make them imitate current gold coin, to 'restore the appearance,' as the case states. Before the milling was put on they were not perfect sovereigns, then by milling they were made to look like current sovereigns. The interpretation section (sect. 1) adds strength to my view. The words 'shall include' are not identical with, or put for, 'shall mean.' The definition does not purport to be complete or exhaustive. By no means does it exclude any interpretation

which the sections of the Act would otherwise have; it merely provides that certain specified cases shall be included. It is to include taking a farthing and gilding it, though the farthing is a coin with an obverse and reverse differing from a sovereign, so that the eye by looking would detect the difference, and where there can scarcely be said to be an imitation, or more than a mere surface change of the farthing, without any resemblance to a genuine sovereign. These coins were passed for whole sovereigns, and made so to pass by the operation of giving them false millings. The conviction must be affirmed."

[Eyre Lloyd for the Crown.]

It is to be observed, however, that two very eminent judges, viz., Lush and Stephen, JJ., were dissentient in this case, considering that, although the coins had been fraudulently dealt with, they were genuine coins, and not false or counterfeit.

The giving of counterfeit coin to a woman as the price of connection with her is an uttering (R. *v.* ———, 1 Cox, C. C. 250); and so, probably, is the giving of bad money in charity, notwithstanding an old decision of Lord Abinger's to the contrary (R. *v.* Page, 8 C. & P. 122); for clearly the giver must be presumed to intend that the recipient of his bounty shall put the money in circulation. The same remark applies to the case of a collection in church or at a meeting.

It is an "uttering and putting off," as well as a "tendering," if the counterfeit coin be offered in payment, though the person to whom it is offered refuses it. (R. *v.* Welch, 2 Den. 78.)

Counterfeiting the gold or silver coin of the realm is a felony punishable with penal servitude for life. If, however, the coin counterfeited is copper coin of the realm, or foreign gold or silver, such counterfeiting is a felony punishable with seven years' penal servitude only.

Counterfeiting foreign coin other than gold or silver coin is only a misdemeanour, and for the first offence can only be punished with one year's imprisonment. On a second conviction, however, the offender is liable to seven years' penal servitude. Uttering counterfeit gold or silver coin of the realm is a misdemeanour

punishable with one year's imprisonment; but uttering it after a previous conviction for uttering it is a felony, and punishable with penal servitude for life.

A ticket of leave found upon a prisoner when apprehended for passing counterfeit coin was put in evidence by the prosecution. Counsel for the defence contended that under sect. 37 of 24 & 25 Vict. c. 99, this could not be given in evidence, and, after a conviction, asked to have the point reserved; this was refused. The ticket of leave showed that the prisoner had undergone seven years' penal servitude for possessing counterfeit coin. (R. *v.* Looks, Sessions Paper, C. C. C., vol. 101, p. 455.)

In R. *v.* Worger (Sessions Paper, C. C. C., vol. 95, p. 314), the prisoner was indicted for unlawfully uttering a medal resembling a sovereign. The medal in question was what is termed a Hanover medal. The Recorder considered that it was impossible for anyone to say that this medal at all resembled a sovereign, and the jury accordingly acquitted the prisoner.

Four persons were tried for uttering after a previous conviction, which by statute is a felony; three were convicted, one acquitted. Upon a subsequent indictment for unlawful uttering, held by the Common Serjeant (Sir W. T. Charley, Q.C.), as to the one, that *autrefois acquit* could not be pleaded, the two offences, although on the same facts, being different, and that the indictment could not on motion be quashed. As to two of the other convicts: held, that they could not be tried again, as on conviction the misdemeanour was merged in the felony. (R. *v.* Smith, Sessions Paper, C. C. C., vol. 108, p. 746; and Sessions Paper C. C. C., vol. 109, p. 33.) *Vide* also R. *v.* Whiley (2 Leach, 983), as to previous utterings.

By 24 & 25 Vict. c. 99, s. 11, whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall be guilty of a misdemeanour, and liable to five years' penal servitude.

Concealing Treasure Trove.

[37] R. *v.* THOMAS AND WILLETT. (1863)

[9 Cox, C. C. 376; L. & C. 313; 33 L. J. (M. C.) 22; 9 L. T. 488; 12 W. R. 108.]

On the 12th of January, 1863, a labourer named William Butchers, while ploughing, found hidden under the soil some large rings of old gold of the value of more than 500*l.* It was evident that they had been deposited there in ancient times. Not in the least understanding their value, he sold them to the prisoner Thomas, who afterwards found out that they were gold, and through the assistance of his brother-in-law, the prisoner Willett, a cheque on Glyn's for over 529*l.* was obtained for the gold rings. The Court of Crown Cases Reserved held that the prisoners were properly convicted of concealing treasure trove from the Crown, and that it was not necessary to show in such a case that the concealment was fraudulent.

Erle, C. J., said: "I am of opinion that in this case the conviction was good. It appears to me, first of all, with respect to the form of the indictment, that there is no law which has said that it is essential to the validity of the indictment that the concealment should be charged to be a fraudulent concealment. The old authorities describe the offence to consist in the *occultatio fraudulosa*, for two or three use the word *fraudulosa*, and two or three more show clearly what they mean by it, viz., that the party knew that he was concealing from the King treasure trove without any of the excuses which it is afterwards said the party may bring forward. He may say, 'I hid it myself.' He may say, 'My friend hid it and I knew it at the time, and I always intended

to find it.' He may have other causes which will justify the concealment. We find that the meaning of the words '*occultatio fraudulosa*' in the earlier writers was an unlawful concealment, because the offence is, that if you know that it is treasure trove and do conceal it, you are guilty of an unlawful act, '*occultatio fraudulosa*,' unlawful concealment. The whole line of authorities, which we are very much obliged to Mr. Denman for going through, satisfies us that it is by no means the essence of the offence that it should be a fraudulent concealment. If a statute makes an offence and uses a word by which the defendant is to be indicted under that statute that word must be used. If a statute gives a short form of indictment and says that the description of the offence may be as follows, then using that short form of indictment, the leaving out of the essential description which is given in that short form loses the benefit of the statute which gives that form. Nothing of that sort applies to the present case. Then as to the offence itself, the law is perfectly clear. At one time this was a branch of the revenue to which importance was attached. Probably it may have been, after disturbed times, a source of considerable wealth. The Queen has a right to the treasure which is concealed, and the party who finds it is bound not wilfully to hinder the finding from coming to the knowledge of the Queen's officers. If he is guilty of a wilful act of concealment, by which he has deprived the Queen of this treasure, this is the offence which all the law writers have laid down, and that is the offence charged in this indictment."

[Denman, Q.C., and Hance for the Crown.]

"The term 'treasure trove' derived from the French word *trover*, to find, called in Latin *thesaurus inventus*, is where any money, or coin, gold, silver, plate, or bullion is found hidden *in* the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the Crown; but if he that hid it be known, or afterwards found out, the owner, and not the

Sovereign, is entitled to it. Also if it be found in the sea, or *upon* the earth, it does not belong to the King, but the finder, if no owner appears. So that it seems it is the *hiding*, and not the *abandoning*, of it that gives the Crown a property; Bracton defining it, in the words of the civilians, to be '*vetus depositio pecuniæ*.' This difference clearly arises from the different intentions which the law implies in the owner. A man that hides his treasure in a secret place evidently does not mean to relinquish his property but reserves a right of claiming it again when he sees occasion. And if he dies, and the secret also dies with him, the law gives it to the Sovereign in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it, and therefore it belongs, as in a state of nature, to the first occupant or finder, unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property.

"Formerly all treasure trove belonged to the finder, as was also the rule of the civil law. Afterwards it was judged expedient, for the purposes of the State, and particularly for the coinage, to allow part of what was so found to the Crown, which part was assigned to be all *hidden* treasure; such as is *casually lost* and unclaimed, and also such as is *designedly abandoned*, still remaining the right of the fortunate finder. And that the Prince shall be entitled to this *hidden* treasure is now grown to be, according to Grotius, '*jus commune et quasi gentium*'; for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our Constitution than at present. When the Romans, and other inhabitants of the respective countries which composed their empire, were driven out by the northern nations, they concealed their money underground, with a view of resorting to it again when the heat of the irruption should be over, and the invaders driven back to their deserts. But as this never happened, the treasures were never claimed, and on the death of the owners the secret also died along with them. The conquering generals, being aware of the value of these hidden mines, made it highly penal to secrete them

from the public service. In England, therefore, as among the feudists, the punishment of such as concealed from the Crown the finding of hidden treasure was formerly not less than death, but now it is only fine and imprisonment." (Blackstone's Commentaries.)

In Coke's 3rd Institute, c. 58, it is said: "Treasure trove is when any gold or silver, in coin, plate, or bullion hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property, it doth belong to the King, or to some lord or other by the King's grant or prescription. The reason wherefore it belongeth to the King is a rule of the common law, that such goods whereof no person can claim property belong to the King, as wrecks, strays, &c. . . . It appeareth by Bracton and Glanvil also, that *occultatio thesauri inventi fraudulosa* was such an offence as was punished by death." In Bracton, lib. 3 de Coronâ ff. 119, 120 (edit. 1569), the words are: "Est inter cœtera gravis præsumptio contra regem et dignitatem et coronam suam quœ quidem est quasi crimen furti scilicet occultatio thesauri inventi fraudulosa ut si quis accusatus fuerit quod thesaurum inveniret, scilicet aurum vel argentum vel aliud genus metalli quocunque loco cum super hoc apud bonos et graves fuerit diffamatus per patriam &c. . . . Est autem thesaurus quœdam depositio pecuniæ vel alterius metalli, cujus non extat modo memoriâ ut jam dominum non habeat et sic de jure naturali sit ejus qui invenerit ut non alterius sit."

In R. *v.* Toole (11 Cox, C. C. 75), it was held that it is not necessary, in an indictment for concealing treasure trove, to allege an inquisition before the coroner, or to show the title of the Crown by office found.

Gold and silver mines, when discovered, belong to the Crown; nor need any compensation be paid to the landowner. In the case, however, of gold or silver being found in a base mine (for example, a lead mine), the Sovereign must pay a specified price for the ore, if he wants it. The reason why the King has a right to all the gold and silver mines opened in his dominions is that he is supposed to need them for the purposes of his coinage.

Conspiracy.

[38] **R. *v.* ORMAN.** (1879)

[14 Cox, C. C. 381.]

Mary Orman and Maria Barber, her mother, were indicted for conspiring together to get a quantity of jewellery and other goods from various Ipswich tradesmen by false pretences and fraud. One of them obtained goods on credit in order to sell them to the other below their value; that other aiding as a referee and giving a character. It was held that, though the acts complained of might not amount to a crime in an individual, yet that an indictment might lie for conspiracy when they were the result of an agreement between two or more persons.

"The getting goods on credit," said Bramwell, L. J., "without meaning to pay for them, may not be unlawful in the sense of being criminal or punishable; but it is not lawful, and it is fraudulent at common law; and, at all events, for several to combine together to enable a person to get goods by means of a false character, knowing that he did not intend ever to pay for them, is surely criminal."

[Poyser for the Crown. Blofield, Reeve, and Frere for the prisoners.]

An act which may be done innocently by individuals separately may be an offence where several do it in concert.

The case of R. *v.* Parnell, Dillon, Biggar, and others (14 Cox, C. C. 474 & 508), illustrates this branch of the law. The charge against the defendants, some notorious agitators, was that they had conspired to induce agricultural tenants in Ireland to break their contracts with their landlords and refuse to pay rents. The law was clearly laid down by Fitzgerald, J., who said, "This law of conspiracy is not an invention of modern times. It is part

of our common law; it has existed from time immemorial. It is necessary to redress classes of injury which at times would be intolerable, and but for it would go unpunished. If the defendants have broken the law in the manner alleged in the information, there is no law of this land by which they could be reached but by the law of conspiracy. It has been said that this law has been in England entirely disused. But that is untrue; it is a law repeatedly put in force. It is seldom resorted to in political trials; but in a political trial such as the present, if the defendants have broken the law, their offence can only be reached by the common law indictment for conspiracy. Again, a great deal has been said, in the way of illustration, as to conspiracy to effect objects which would not be criminal in themselves, and you were above all referred to the action of trades unions. But the action of trades unions, which is now regulated by statute, is totally and essentially different from the charge which is here made against the defendants. Workmen may agree in common not to work unless they are paid certain prices. The same in the case of the employers of labour. They may agree not to take men into their employment unless at certain rates, and they are free to do that. But see how different the circumstances are. A man, or a body of men, may say, 'We will not give our labour unless we are paid in a certain way'; or a body of employers, 'We cannot give employment profitable to ourselves unless you work at a certain rate.' How different is the case before us; for the combination alleged here is an agreement to incite farmers, who have agreed to pay certain rents, not to pay them, and not alone not to pay the rents which they have contracted to pay, but to keep the farms by force, and against the law of the country. There is no analogy between the two cases."

In R. *v.* Cox and Railton (14 Q. B. D. 153; and 15 Cox, C. C. 611), the prisoners were partners under a deed of partnership. A Mr. Munster brought an action against Railton & Co., and obtained judgment therein, and issued execution against the goods of Railton. The goods seized in execution were then claimed by Cox as his absolute property under a bill of sale executed in his favour by Railton at a date subsequent to the above-mentioned judgment. An interpleader issue was ordered to determine the validity of the bill of sale, and upon the trial of this issue, the

partnership deed was produced on Cox's behalf, bearing an indorsement purporting to be a memorandum of dissolution of the said partnership, prior to the commencement of the action by Mr. Munster. Subsequently Cox and Railton were tried and convicted upon a charge of conspiring to defraud Mr. Munster, and upon that trial the case for the prosecution was, that the bill of sale was fraudulent, that the partnership between Railton and Cox was in truth subsisting when it was given, and that the memorandum of dissolution indorsed on the deed was put there after Mr. Munster had obtained judgment, and fraudulently ante-dated, the whole transaction being, it was alleged, a fraud intended to cheat Mr. Munster of the fruits of his execution. Upon the trial a solicitor was called on behalf of the prosecution to prove that after Mr. Munster had obtained the judgment Cox and Railton together consulted him as to how they could defeat Mr. Munster's judgment, and as to whether a bill of sale could legally be executed by Railton in favour of Cox so as to defeat such judgment, and that no suggestion was then made of any dissolution of partnership having taken place. The reception of this evidence being objected to on the ground that the communication was one between solicitor and client, and privileged, the evidence was received, but the question of whether it was properly received was reserved. The Court of Crown Cases Reserved, consisting of eleven judges, held that the evidence was properly received, and decided that all communications between a solicitor and his client are not privileged from disclosure, but only those passing between them in professional confidence and in the legitimate course of professional employment of the solicitor. Communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure.

In R. *v.* Howell (4 F. & F. 160), the prisoners were found guilty upon an indictment which charged them with conspiring to persuade a young girl to become a common prostitute, and the conviction was held to be right, because, though common prostitution is not an indictable offence, it is unlawful.

So, in R. *v.* Warburton (L. R. 1 C. C. R. 274; and 11 Cox, C. C 584), it was held that, although it may not be criminal offence at

common law for a person to cheat his partner, yet where one of two partners combines, during the continuance of the partnership, with a third party to enable the one partner to cheat the other with regard to the division of the partnership property on a contemplated dissolution of the partnership, this combination is a conspiracy. "A civil wrong," said Cockburn, C. J., "was intended to Lister. The facts of the case fall within the rule that, when two fraudulently combine, the agreement may be criminal, although, if the agreement were carried out, no crime would be committed, but a civil wrong only would be inflicted on a third party. In this case the object of the agreement was, perhaps, not criminal. It is not necessary to decide whether or not it was criminal; it was, however, a conspiracy, as the object was to commit a civil wrong by fraud and false pretences."

The case, however, of R. *v.* Turner (13 East, 228) is usually cited to shew that an indictment will not lie for a conspiracy to commit a mere civil trespass. "I should be sorry," said Lord Ellenborough, C. J., "that the cases in conspiracy against individuals, which have gone far enough, should be pushed still further." But in R. *v.* Rowlands (17 Q. B. 671), Lord Campbell, C. J., said plainly, "as to Turner's case I have no doubt whatever that it was wrongly decided." R. *v.* Pywell (1 Stark. N. P. C. 402), again, where Lord Ellenborough held that an agreement between two persons to give a false warranty to the purchaser of a horse was not the subject of an indictment for conspiracy, appears to have been overruled by R. *v.* Kenrick (5 Q. B. 49).

A money-lender, having a claim for a small debt against a borrower for money lent and high interest, caused an attorney to enter process for a sum double the amount, making up the difference by items charged on various pretences, and after receiving payment from a third party of the sum lent, so that only a sum of 5*l.* remained due for interest, still prosecuted the suit for the whole amount indorsed on the process, and then tried to get from the debtor a charge on property of far greater value, and represented to the third party that the whole sum claimed was really due. The money-lender and the attorney being indicted for conspiracy to defraud the borrower, it was held that there was a case for the jury, and that if the jury believed the two combined together to enforce by legal process payment of sums they knew not to be due,

and falsely represented them to be due, in order to obtain payment, they were liable to be convicted, as they accordingly were; and on a motion for a new trial on behalf of the two defendants, it was held that there was evidence for the jury on the charge, that a direction to the jury that if they were satisfied of these facts they ought to convict was correct, and that the conviction, therefore, was right. (R. *v.* Taylor, 15 Cox, C. C. 268.)

In R. *v.* Brailsford ([1905] 2 K. B. 730 and 21 Cox, C. C. 16), it was held that a combination by two or more persons, to obtain by false representations from the Foreign Office a passport in the name of one person with the intent that it should be used by another person is an act tending to bring about a public mischief, and is therefore an indictable misdemeanour at common law. It is for the Court, and not for the jury, to say whether a particular act tends to the public mischief. It is not an issue of fact upon which evidence can be given.

In R. *v.* Duguid (94 L. T. 887 and 21 Cox, C. C. 200) the Court of Crown Cases Reserved held that, assuming that immunity from prosecution is given to the mother of a child by the proviso contained in sect. 56 of the Offences Against the Person Act, 1861, such immunity has no bearing upon the question whether a conspiracy between her and another person to do an act which is unlawful under the section is an offence against the criminal law; and the other person may, therefore, be convicted for conspiring with the mother to commit an offence under the section.

Other important cases are:—R. *v.* Hibbert, 13 Cox, C. C. 82; R. *v.* Bauld, 13 Cox, C. C. 282; R. *v.* Druitt, 10 Cox, C. C. 592; R. *v.* Hewitt, 5 Cox, C. C. 162; R. *v.* De Kromme, 17 Cox, C. C. 492; R. *v.* Whitchurch, 24 Q. B. D. 420; R. *v.* Boulton and others, 12 Cox, C. C. 87; Mulcahy *v.* Reg., 3 H. L. 306; O'Connell *v.* Reg., 11 Cl. & F. 155; R. *v.* Bunn, 12 Cox, C. C. 316; R. *v.* Hollingberry, 6 D. & R. 345; R. *v.* Pollman, 2 Camp. 229; R. *v.* Ripsal, 1 W. Bl. 368; R. *v.* De Berenger, 3 M. & S. 68; R. *v.* Brown, 7 Cox, C. C. 442; Levi *v.* Levi, 6 C. & P. 239; R. *v.* Bykerdyke, 1 M. & Rob. 179; R. *v.* Duffield, 5 Cox, C. C. 404; R. *v.* Timothy, 1 F. & F. 391; Smith *v.* Moody, [1903] 1 K. B. 56; R. *v.* Quinn, 19 Cox, C. C. 78; R. *v.* Perrin, 72 J. P. 144.

The crime of conspiracy comes within the Vexatious Indictments Act (22 & 23 Vict. c. 17).

Conspiracy—must be of Two at least.

R. *v.* MANNING. (1883) [39]

[12 Q. B. D. 241; 53 L. J. (M. C.) 85; 51 L. T. (N. S.) 121; 32 W. R. 720.]

The defendant Manning and a person named Hannam were indicted at the Winchester summer assizes for conspiring together to cheat and defraud. Lord Coleridge, C. J., tried the case, and directed the jury that they might find one prisoner guilty and acquit the other. This was afterwards held to have been a misdirection, and the principle was clearly laid down that where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both convicted.

"The rule appears to be this," said Mathew, J., "in a charge for conspiracy in a case like this, where there are two defendants, the issue raised is whether or not both the men are guilty, and if the jury are not satisfied as to the guilt of either, then both must be acquitted. In Rex *v.* Cooke (5 B. & C. 538) the Court could not have pronounced the judgment they did unless they had assumed the existence of the rule. So in Reg. *v.* Thompson (16 Q. B. 832) it appears that the Court were of opinion that this rule existed. The authority does not rest there. There is, in addition, a passage in the judgment in Robinson *v.* Robinson and Lane (1 Sw. & Tr. 362), in which the rule of law is treated as perfectly clear. Lastly, there is the judgment of the House of Lords in O'Connell *v.* The Queen (11 Cl. & F. 155), which seems to me to be another clear illustration of the rule. It appears to me, therefore, that the direction given here was one which should not have been given to the jury, and that there must be a new trial."

"I have arrived at the same conclusion," said Stephen, J., "with great reluctance, and entirely upon the authority of the passage in O'Connell *v.* The Queen (11 Cl. & F. 155). The decision is of the highest authority, and clearly shows that it is a legal impossibility that, when several persons are indicted for a conspiracy, any verdict should be found which implies that some were guilty of one conspiracy and some of another. With regard to the other two cases which bear upon the matter, namely, Rex *v.* Cooke (5 B. & C. 538) and Reg. *v.* Thompson (16 Q. B. 832), I should have had no difficulty in saying that I thought they left open the matter which O'Connell *v.* The Queen (11 Cl. & F. 155) appears to have decided. In Robinson *v.* Robinson and Lane (1 Sw. & Tr. 362), I think the part of the judgment relating to the criminal law is a mere dictum. The rule applicable to divorce cases is, as it appears to me, founded on common sense, and general principles would be in favour of the contention which is raised on the present occasion by the prosecution. I cannot, however, see any distinction between the rule that should apply to the present case and that cited from O'Connell *v.* The Queen (11 Cl. & F. 155), and that being so, I think the direction cannot be supported."

[C. W. Mathews and the Hon. Bernard Coleridge for the Crown; Charles, Q.C., and Warry for the defendant.]

Lord Coleridge, C. J., in his judgment admitted that he had been wrong at the trial, having been misled by the practice in the Divorce Court in such cases as Robinson *v.* Robinson and Lane (1 Sw. & Tr. 362); and Stone *v.* Stone and Appleton (3 Sw. & Tr. 608), which was based on the fact that that which is evidence against one person is by no means necessarily evidence against another.

In O'Connell *v.* The Queen, referred to above, a count in an indictment charged eight defendants with one conspiracy to effect certain objects, and a finding that three of the defendants were guilty generally, and that five of them were guilty of conspiracy to effect some and not guilty as to the residue of these objects, was

held bad and repugnant; the principle of the decision being that where there are two or more persons charged with conspiracy in the same count, the count is a single and complete count, and cannot be separated into parts.

It may be mentioned that a man and his wife cannot be indicted for conspiring together alone, because they are in law one person. But one person alone may be tried for conspiracy, provided the indictment charges him with conspiring with others who have not appeared, or who are since dead (R. *v.* Kinnersley, 1 Str. 193; and R. *v.* Nicholls, 2 Str. 1227); and one of several prisoners indicted for conspiracy may be tried separately, and, upon conviction, judgment may be passed on him, although the others, who have appeared and pleaded, have not been tried.

In R. *v.* Plummer ([1902] 2 K. B. 339 and 20 Cox, C. C. 269) the Court of Crown Cases Reserved held that on the trial of an indictment charging three persons jointly with conspiring together, if one pleads guilty and has judgment passed against him, and the other two are acquitted, the judgment passed against the one who pleaded guilty is bad and cannot stand.

Vide also R. *v.* Thompson, 5 Cox, C. C. 166.

Receiving Lunatics in Unregistered House.

R. *v.* **BISHOP.** (1880) [**40**]

[5 Q. B. D. 259; 49 L. J. (M. C.) 45; 14 Cox, C. C. 404; 42 L. T. 240; 28 W. R. 475; 44 J. P. 330.]

The defendant was indicted, under 8 & 9 Vict. c. 100, s. 44, for receiving two or more lunatics into a house not duly licensed or registered. Defendant received into her house several young women for the purpose of medical treatment, and advertised for patients suffering from "hysteria, nervousness, and perverseness." She had besides these patients one inmate who was admitted to be a lunatic, with regard to whom

she had complied with the requisitions of sect. 90 of the same Act.

There was conflicting evidence upon the question whether any of the other patients were lunatics or not, and as to the nature and degree of restraint to which they were subjected, and there was strong evidence to shew that the defendant believed in good faith, and on reasonable grounds, that no one of them was a lunatic, but that they were all suffering only under hysteria, nervousness, or perverseness.

The learned Judge read to the jury the interpretation of "lunatic" given in sect. 114: "Lunatic shall mean every insane person and every person being an idiot or lunatic or of unsound mind," and he told them that, in his opinion, these words would include every one whose mind was so affected by disease that it was necessary for his own good to put him under restraint.

The learned Judge also told them that in his opinion the words "receive one or more lunatics," meant "receive as lunatics, and in order to be treated as lunatics are treated in asylums," and he gave them this direction: "In order that the defendant may be convicted the jury must be of opinion that at least one other patient in the house beside the admitted lunatic was either an insane person, or an idiot, or a lunatic, or of unsound mind when received, and that such person was received into the house to be treated as a lunatic is treated in an asylum."

The learned Judge also told them that he was of opinion that if one other such person besides the admitted lunatic was so received, an honest belief on the part of the defendant that that person was not a lunatic would be immaterial; but at the request of the counsel for the defendant, he asked them, if they convicted the defendant, to find specially whether she believed honestly and on reasonable grounds that any person so received was not a lunatic.

The jury convicted the defendant, but found that the defendant honestly, and on reasonable grounds, believed that no one of her patients was a lunatic except, of course, the admitted lunatic. The Court of Crown Cases Reserved held that the direction of the learned Judge was correct, and that the defendant's belief was immaterial.

Lord Coleridge, C. J., said: "I think the conviction was right. If the knowledge of the parties so receiving lunatics is the only question it is quite plain."

Denman, J., said: "I also agree that the conviction in this case ought to be sustained. The question reserved was whether the fact that the defendant thought the person not lunatic was a defence. If we were to so hold, the object of the statute might be frustrated."

Pollock, B., said: "I agree that the conviction ought to be sustained, and I wish it to be thoroughly understood that we affirm the direction of my brother Stephen, when he told the jury that the word 'lunatic' would include everyone whose mind was so affected by disease that it was necessary for his own good to put him under 'restraint,' in the sense that by 'restraint' is meant restraint *ejusdem generis* with that applied to lunatics in asylums. The further direction that they must find 'one other patient in the house besides the admitted lunatic was either an insane person, or a lunatic, or of unsound mind when received into the house to be treated as a lunatic is treated in an asylum,' protects hysterical patients, or patients suffering from any disturbance of mind for which it would be advisable for her or his own good that he or she should be restrained in one sense temporarily. With regard to the point whether the knowledge, or absence of knowledge, of the keeper is material, I am clearly of opinion it is not."

Field, J., said: "I am also of opinion that this conviction should be affirmed. If it were necessary to decide who are

and who are not lunatics, I should wish to consider, but it is not. The object of the Act was to place all such persons under a competent authority."

[Mellor, Q.C., and Harris for the Crown.]

Lunatics are protected against ill-treatment by various statutes. 16 & 17 Vict. c. 96, s. 9, for instance, makes it a misdemeanour for "any superintendent, officer, nurse, attendant, servant, or other person employed in any registered hospital or licensed house, or any person having the care or charge of any single patient," to abuse, ill-treat, or wilfully neglect such patient. It was held, in R. *v.* Rundle (1 Dears. 482), that a husband could not be convicted under this section, because it was not intended to apply to persons whose care or charge arose from natural duty. But in R. *v.* Porter (L. & C. 394), where a man voluntarily took upon himself the care and charge of a lunatic brother in his own private house, he was held to be liable to be indicted for ill-treating him under the above statute. "The statute," said Pollock, C. B., "was not intended to interfere with persons in the relation of husband and wife; but a brother has no legal control over a brother." In the case, however, of Buchanan *v.* Hardy (18 Q. B. D. 486), the principle of Rundle's case was questioned, and it was held that the parents of a lunatic who resides with them under their care, are persons "having the care or charge" of a lunatic within the section, and may be convicted under it. "I am of opinion," said Lord Coleridge, C. J., "that the case of R. *v.* Rundle, if it is an authority at all, can only be held to be a binding authority in the case of a husband and wife. . . . I cannot say that the reasons given in R. *v.* Rundle are satisfactory to my mind, nor do I think that Pollock, C. B., was satisfied with them when he had occasion to re-consider them in R. *v.* Porter. The principle which must be adopted is that if any person has the care or charge or custody of a lunatic, and in the course of that custody he in any way abuses, ill-treats or wilfully neglects that lunatic, then, whether the custody be or be not what has been called 'domestic custody,' the person so ill-treating, &c. the lunatic comes within 16 & 17 Vict. c. 96, s. 9, and is liable to the provisions of that section."

In R. *v.* Shaw (L. R. 1 C. C. R. 145 and 11 Cox, C. C. 109) the Court of Crown Cases Reserved held that imbecility and loss

of mental power, whether arising from natural decay or from paralysis, softening of the brain, or other natural cause, and although unaccompanied by frenzy or delusion of any kind, constitute unsoundness of mind amounting to lunacy within the meaning of 8 & 9 Vict. c. 100.

The Idiots Act, 1886 (49 & 50 Vict. c. 25), contains provisions for the care and education of persons coming under that description.

The two most important statutes on the subject of lunacy are the Lunacy Act, 1890 (53 & 54 Vict. c. 5), and the Lunacy Act, 1891 (54 & 55 Vict. c. 65).

Obstructing Trains.

R. *v.* HADFIELD. (1870) [41]

[L. R. 1 C. C. R. 253; 11 Cox, C. C. 574; 39 L. J. (M. C.) 131; 22 L. T. 664; 18 W. R. 955.]

At about eleven o'clock on the night of the 14th of January, 1870, the clerk in charge of the Dukinfield Station of the Manchester, Sheffield, &c. Railway, arranged the signals for the night. There was a semaphore signal on the platform, having several arms, with a separate lever to work each arm, and there were two signals at about 200 yards distance from and on either side of the station, one on the "up" line and the other on the "down" line, and both worked by levers from the platform at the station. The clerk put out the lights of the semaphore signal, and placed the arms down to indicate the lines "all clear," and the two distant signals he arranged so as to show white lights, also indicating that the lines were clear. Subsequently the prisoner climbed over a door in the wall of the station and altered the signals. He placed one arm of the semaphore at right angles with the first, and another at an acute angle, the former signifying "danger," the latter "caution." He made both the danger

signals show red lights, indicating "danger." The prisoner was not sober. The clerk gave him into custody for meddling with the signals. On his way back to the station, after giving the prisoner into custody, the clerk saw a goods train which, under ordinary circumstances, would have passed through Dukinfield station without slackening speed, moving slowly through the station on the "up" line.

The driver of the goods train proved that he had observed the distant signal on the "up" line showing the red light, and that in consequence he shut off steam and approached the Dukinfield station cautiously, and that at the station he brought the train "very near to a stand, and could have come to a stand at any moment," but seeing no one on the platform he passed on. It was also proved that the mail train going in the same direction, and on the same rails as the goods train, was due at Dukinfield station in about half-an-hour after the goods train so passed through the station. The jury found the prisoner guilty, and the Court of Crown Cases Reserved held that the prisoner had unlawfully and wilfully obstructed a train within the meaning of sect. 36 of 24 & 25 Vict. c. 97.

"I think," said Kelly, C. B., "that there was as much an obstruction as if a log of wood had been placed across the rails. There was a direct obstruction, which I think is within the words as well as the spirit of the section."

Blackburn, J., said: "Sect. 35 of 24 & 25 Vict. c. 97, deals with malicious obstruction to railways. The felony under this section consists not in the wrongful act alone, but in its being done with a malicious intent. Then comes sect. 36, which creates a misdemeanour. Sect. 36 deals with an offence much less serious than that mentioned in sect. 35. The offence under sect. 36 is the unlawfully obstructing a train, not in obstructing it unlawfully with a malicious intent, as required by sect. 35. In this case a drunken man unlawfully changed the signals. The natural result of this would be to

stop the train, and to cause derangement of the whole machinery of the railway. If this is the natural result of the prisoner's act, is it not a causing a train to be obstructed? There is nothing in sect. 36 to show that the obstruction must be a physical one. It is sufficient if a train is in fact obstructed."

Mellor, J., said: "Sect. 35 defines a number of unlawful acts, including the altering of signals, which if done with a malicious intent, are felonies. Sect. 36 says, if 'by any unlawful act' any person shall obstruct an engine, &c. he shall be guilty of a misdemeanour. I think the acts specified in sect. 35 are all included in sect. 36 under the terms "unlawful act," and as an actual obstruction was caused in this case by one of the acts mentioned in sect. 35, I think the prisoner was guilty of obstructing a train within the meaning of sect. 36."

Montague Smith, J., said: "I think that sect. 36 may be read by reference to sect. 35, which assumes that a train may be obstructed by dealing with the signals, and as the train in this case was in fact obstructed, I think the case comes within sect. 36, and that the prisoner was rightly convicted."

[Horatio Lloyd for the prosecution.]

Baron Martin, however, dissented from the view of the majority, considering it to be straining the meaning of the section to hold that stopping a train by changing the signals was an "obstruction."

Sect. 35 of 24 & 25 Vict. c. 97, enacts that, "Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove or displace any rail, sleeper, or other matter or thing, belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near any railway, or shall unlawfully and maliciously do, or cause to be done, any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or

destroy any engine, tender, carriage or truck using such railway, shall be guilty of felony."

Sect. 36 enacts that, "Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct, or cause to be obstructed, any engine, or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanour." The leading case was followed in R. *v.* Hardy (L. R. 1 C. C. R. 278 and 11 Cox, C. C. 656), where the prisoner, who was not a servant of the railway company, stood on a railway between the two lines of rails, at a point between two stations. As the train was approaching, he held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations. This, as the prisoner intended that it should, caused the driver to shut off steam and diminish the speed, and led to a delay of four minutes. The Court held that the prisoner had obstructed a train within the meaning of 24 & 25 Vict. c. 97, s. 36.

24 & 25 Vict. c. 100, ss. 32, 33 and 34, also deals with the offences of putting wood across a railway, displacing rails, removing signals, throwing stones, &c. with intent to injure or endanger the safety of railway passengers. *Vide* R. *v.* Monaghan and Grainger, 11 Cox, C. C. 608. *Vide* also R. *v.* Strange, 16 Cox, C. C. 552.

Homicide—Necessity.

[42] R. *v.* DUDLEY AND STEPHENS. (1884)

[14 Q. B. D. 273; 15 Cox, C. C. 624.]

This was the celebrated case of the crew of the "Mignonette." The two prisoners, a man named Brooks, and a boy of seventeen were cast away in a storm on the high seas, and compelled to put into an open boat. The boat was drifting on the ocean, and was probably more than 1,000 miles from land. It appeared that on the eighteenth day, when they had been seven days without food, and five without water, Dudley proposed to Stephens that lots should be cast

who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the twentieth day Dudley, with the assent of Stephens, killed the boy, and both Dudley and Stephens fed on his flesh for four days; that on the fourth day after the act the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration; that they were carried to the port of Falmouth, and committed for trial at Exeter; that if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine; that the boy, being in a much weaker condition, was likely to have died before them; that at the time of the act there was no sail in sight, nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then, or very soon, fed upon the boy, or one of themselves, they would die of starvation; that there was no appreciable chance of saving life except by killing some one for the others to eat; that assuming any necessity to kill anyone, there was no greater necessity for killing the boy than any of the other three men.

The jury found a special verdict setting out all the facts of the case, and referred the question to the Court as to whether, upon the whole matter, the prisoners were guilty of murder.

The five senior Judges of the Queen's Bench Division sat as a Divisional Court to consider the result of this verdict.

Lord Coleridge, C. J., in delivering their judgment said: "Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well recognized excuse admitted by law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called 'necessity.' But the temptation to the act which

existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be a fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances it which in is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the 'Birkenhead,' these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others; from which in no country, least of all it is to be hoped, in England, will men shrink, as, indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. '*Necesse est ut eam, non ut viram*,' is a saying quoted by Lord Bacon himself with high eulogy, in the very chapter on necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language, as resulting from the principles of heathen ethics. It is enough in a Christian country to remind ourselves of the example which we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity

which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be 'No.' . . . It is quite plain that such a principle, once admitted, might be made the legal cloak for unbridled passion and atrocious crime. . . . We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it; nor allow compassion for the criminal to change, or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder."

[Sir H. James, A.-G., A. Charles, Q.C., C. Mathews, and Danckwerts for the Crown; A. Collins, Q.C., H. Clarke, and Pyke for the prisoners.]

A dictum of Lord Bacon's is often quoted, to the effect that, supposing two persons who have been shipwrecked get on to the same plank, and then find that it will not bear both: either of them is justified in shoving the other off, and is not responsible if his friend gets drowned in consequence; self-defence and unavoidable necessity being said to be a sufficient excuse. This, however, is not the law now, and probably never was.

But homicide is justifiable if a person takes away the life of another in defending himself, supposing the fatal blow which takes away life to be really necessary for his preservation. Not only that, but master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused, the act of the relation assisting being construed the same as the act of the party himself. A sad case was tried in the year 1884 at the Oxford assizes in which the father of the

family took to drinking, and then, without any reason, got possessed with the idea that his wife was unfaithful to him, and frequently threatened to murder her. He was on one occasion apparently going to carry out his threat when their son, a young fellow of two-and-twenty, shot him dead. Mr. Justice Lopes, who tried the case, told the jury that if the young man, at the time he fired the shot, honestly believed, and had reasonable grounds for believing, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then the prisoner ought to be acquitted; which was done. (R. *v.* Rose, 15 Cox, C. C. 540.)

In R. *v.* Symondson (60 J. P. 645), it was held that upon a charge of manslaughter, before a person can avail himself of the defence that, in taking the life of another person, he was acting in self-defence, he must shew that his act was necessary to protect his life, and that he did all he could to avoid it, and that he had a reasonable apprehension that his life was in immediate danger. Before he can avail himself of the defence that he was protecting his property, he must shew that he was preventing the commission of a crime of a serious and felonious nature intended to be carried out by force.

Mr. Justice Stephen, in his "Digest of the Criminal Law," says:—

"An act which would otherwise be a crime may be excused if the person accused can shew that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose; and that the evil inflicted by it was not disproportionate to the evil avoided."

And he gives the following illustration:—

"A., the Governor of Madras, acts towards his council in an arbitrary and illegal manner. The council depose and put him under arrest, and assume the powers of government themselves. This is not an offence if the acts done by the council were the only means by which irreparable mischief to the establishment at Madras could be avoided." (R. *v.* Stratton, 21 St. Tr. 1045.)

Other cases in point are:—R. *v.* Scully, 1 C. & P. 319; R. *v.* Forster, 1 Lewin, 187.

Homicide—Real Cause of Death.

R. *v.* PYM. [43]

[1 Cox, C. C. 339.]

The prisoner was second in a duel in which a Mr. Seton was wounded in the right side. The duel was fought between a Mr. Hawkey and Mr. Seton on the 20th of May, and the deceased lingered on until the 2nd of June, when he died, his death being attributed to the result of an operation. The prisoner Pym only was put upon his trial, the other accused party not having been taken into custody.

After the examination of the first medical witness, who stated his opinion that the operation was the only chance of saving the life of the deceased, the counsel for the prisoner was proceeding to cross-examine him as to the nature and seat of the wound, to show that the opinions he had expressed of its danger and the necessity of the operation were not correct, when Erle, J., who was trying the case, interposed and said: "I presume you propose to call counter-evidence, and impeach the propriety of the operation; but I am clearly of opinion that if a dangerous wound is given, and the best advice is taken, and an operation is performed under that advice, which is the immediate cause of death, the party giving the wound is criminally responsible."

Cockburn, for the defence, in answer to this, said: "I propose to show that the opinion formed by the medical men was grounded upon erroneous premises, and that no operation was necessary at all, or at least that an easier and much less dangerous operation might and ought to have been adopted. I may therefore cross-examine the witnesses as to the grounds of their opinion. I shall submit that a person is not criminally responsible where the death is caused by consequences which

are not physically the consequences of the wound, but can only be connected with the first wound by moral reasonings; as here, that which occasioned death was the operation, which supervened upon the wound, because the medical men thought it necessary. The point has never been solemnly decided in this country. The cause of death is a question for the jury."

To this Erle, J., replied: "I am clearly of opinion, and so is my brother Rolfe, that where a wound is given, which in the judgment of competent medical advisers is dangerous, and the treatment which they *bonâ fide* adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible, and of course those who aided and abetted him in it. I so rule on the present occasion; but it may be taken, for the purposes of future consideration, that it having been proved that there was a gunshot wound, and a pulsating tumour arising therefrom, which, in the *bonâ fide* opinion of competent medical men, was dangerous to life, and that they considered a certain operation necessary, which was skilfully performed, and was the immediate and proximate cause of death, the counsel for the prisoner tendered evidence to show this opinion was wrong, and that the wound would not inevitably have caused death, and that by other treatment the operation might have been avoided, and was therefore unnecessary. I will reserve this point for the consideration of the Judges, although, as I have already stated, I have no doubt upon the subject. To admit this evidence would be to raise a collateral issue in every case as to the degree of skill which the medical men possessed."

The prisoner, however, was acquitted on the facts.

[Rawlinson and M. Smith for the Crown; Cockburn and Kinglake, Serjt., for the prisoner.]

In R. *v.* McIntyre (2 Cox, C. C. 379), where the prisoner was indicted for the murder of his wife by kicking her, Coleridge, J., held that it would not help the prisoner if the evidence showed that the woman had really died from the effects of some brandy which

had been administered to her by a surgeon after the kicking, and which had gone the wrong way, into the lungs. "This," said the Judge, "is like a case where a dangerous wound has been given, and an operation is performed, of which the person dies."

In R. *v.* Holland (2 M. & R. 351) the prisoner was indicted for the murder of a man named Garland. It appeared that the prisoner had waylaid and assaulted the deceased, cutting him severely across one of his fingers with an iron instrument. The deceased in all probability would not have died if he had submitted to the amputation of his finger. As, however, he would not, lockjaw came on and caused death. It was held that the obstinate refusal of the deceased to submit to proper surgical treatment, by which the fatal result would have been prevented, was no defence.

So, if the evidence is that a person's death was hastened by the treatment he received from the prisoner, it is no defence that the former was already so diseased that he could not have lived much longer. (R. *v.* Murton, 3 F. & F. 492.)

Where the prisoner, in unlawfully assaulting a woman who had an infant of four months old in her arms, so frightened the child that it had convulsions, from the effects of which it eventually died in about six weeks, it was held that he was guilty of manslaughter, if the jury thought that the assault on the woman was the direct cause of death. (R. *v.* Towers, 12 Cox, C. C. 530.)

If a person, being attacked, should, from an apprehension of immediate violence—an apprehension which must be well grounded and justified by the circumstances—throw himself for escape into a river, and be drowned, the person attacking him is guilty of murder. (R. *v.* Pitts, C. & M. 284.)

Forcing a person to do an act which is likely to produce his death, and which does produce it, is murder. (R. *v.* Evans, 1 Russ. C. & M. 651.)

But a person cannot be indicted for murder in procuring another to be executed by falsely charging him with a crime of which he was innocent. (R. *v.* Macdaniel, 1 Leach, 44.)

Where an injury was inflicted on a person by a blow which, in the judgment of a competent medical man, rendered an operation advisable, and, as a preliminary to the operation, chloroform was administered to the patient, who died during its administration, and it was agreed that the patient would not have died but for its

administration, it was held that the person causing the injury was liable to be indicted for manslaughter. (R. *v.* Davis, 15 Cox, C. C. 174.)

A person is not deemed to have committed homicide, although his conduct may have caused death, when the death takes place more than a year and a day after the injury causing it.

Homicide—"Constructive Murder."

[44] R. *v.* SERNÉ AND GOLDFINCH. (1887)

[16 Cox, C. C. 311.]

The prisoners Leon Serné and John Henry Goldfinch were indicted for the murder of a boy, Sjaak Serné, the son of the prisoner Leon Serné, it being alleged that they wilfully set on fire a house and shop, No. 274, Strand, London, by which act the death of the boy had been caused.

It appeared that the prisoner Serné with his wife, two daughters, and two sons, were living in the house in question, that Serné was in a state of pecuniary embarrassment, and that the goods in the house were only worth about 30*l.*, whereas Serné had insured his stock and furniture for 600*l.*, his rent for another 100*l.*, and also the life of the boy Sjaak Serné, who was imbecile. On September 17th the premises were burnt down under suspicious circumstances, and Sjaak Serné and his brother were burnt to death. The prisoners were acquitted on the charge of murder. In summing up to the jury, Stephen, J., said: "The two prisoners are indicted for the wilful murder of the boy Sjaak Serné, a lad of about fourteen years of age; and it is necessary that I should explain to you, to a certain extent, the law of England with regard to the crime of wilful murder,

inasmuch as you have heard something about constructive murder. Now that phrase, gentlemen, has no legal meaning whatever. There was wilful murder according to the plain meaning of the term, or there was no murder at all, in the present case. The definition of murder is unlawful homicide with malice aforethought, and the words 'malice aforethought' are technical. You must not, therefore, construe them, or suppose that they can be construed, by ordinary rules of language. The words have to be construed according to a long series of decided cases, which have given them meanings different from those which might be supposed. One of those meanings is the killing of another person by an act done with intent to commit a felony. Another meaning is, an act done with the knowledge that the act will probably cause the death of some person. Now it is such an act as the last which is alleged to have been done in this case; and if you think that either or both of these men in the dock killed this boy, either by an act done with intent to commit a felony—that is to say, the setting of the house on fire in order to cheat the insurance company—or by conduct which, to their knowledge, was likely to cause death, and was therefore eminently dangerous in itself—in either of these cases the prisoners are guilty of wilful murder in the plain meaning of the word. I will say a word or two upon one part of this definition, because it is capable of being applied very harshly in certain cases, and also because, though I take the law as I find it, I very much doubt whether the definition which I have given, although it is the common definition, is not somewhat too wide. Now when it is said that murder means killing a man by an act done in the commission of a felony, the mere words cover a case like this, that is to say: a case where a man gives another a push with an intention of stealing his watch, and the person so pushed, having a weak heart, or some other internal disorder, dies. To take another very old illustration, it was said that if a man shot at a fowl

with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law, or whether the Court for the Consideration of Crown Cases Reserved would hold it to be so. The present case, however, is not such as I have cited, nor anything like them. In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed, whilst that part of the law under which the Crown in this case claim to have proved a case of murder is maintained. I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that everyone would say in a case like that, that when a person began doing wicked acts for his own base purpose he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began. That I take to be the true meaning of the law on the subject."

[Poland and C. W. Mathews for the prosecution; Fulton and Geoghegan for the prisoners.]

It is considered that this case is fairly entitled to rank as a leading case, as Mr. Justice Stephen in his charge to the jury seems to have doubted the old and curious doctrine of "constructive murder." So recently as in August of 1881, that doctrine was defended from

the bench. In reply to Mr. Ribton, counsel for the defence in R. *v.* Nash (Sessions Paper, C. C. C., vol. 94, p. 391), who contended that the doctrine of constructive murder was only founded on dicta long acted upon, but not really coming within the words "malice aforethought," Mr. Justice Grove said that he was clearly of opinion that the case must go to the jury as one of murder, the argument submitted by Mr. Ribton being entirely contrary to the ruling always laid down by the judges.

In R. *v.* Horsey (3 F. & F. 287), a case tried at the Kent Summer Assizes in 1862, the prisoner had wilfully set fire to a stack of straw in an enclosure in which also was an outhouse or barn, but not adjoining to any dwelling-house. While the fire was burning, the deceased was seen in the flames, and heard to shriek, and his body was afterwards found in the enclosure. It did not very clearly appear whether he had been in the outhouse or merely lying on (or by the side of) the stack. Baron Bramwell, in summing up, adopted the rule laid down by Foster (page 258), but told the jury that the law is that a man is not answerable except for the natural and probable result of his own act; and, therefore, if the jury should not be satisfied that the deceased was in the enclosure at the time when the prisoner set fire to the stack, but came in afterwards, then as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act, and the prisoner ought to be acquitted.

In 1868 a man named Barrett was charged with murder in connection with the Clerkenwell explosion, which caused the death of several persons, although it was only intended to release one or two men from custody. Barrett was convicted and hanged. This was the last public execution in England.

In R. *v.* West (2 Cox, C. C. 500), it was held that if a person engaged in a felonious attempt to procure abortion does an act which causes the premature birth of a child, at a period when it cannot maintain an existence separate from and independent of the mother for any considerable time, and the child, being born alive does afterwards die in consequence of its premature birth, the person so acting is guilty of the murder of that child.

As to murder by abortion, see R. *v.* Whitmarsh, 62 J. P. 711.

Agreement to Commit Suicide.

[45] R. *v.* DYSON. (1823)

[R. & R. 523; Sessions Papers, C. C. C., 1822—1823, p. 373.]

The prisoner was indicted for the murder of a woman named Eliza Anthony, with whom he had cohabited, and who was with child by him. They were in a state of extreme distress. Being unable to pay for their lodgings, they quitted them in the evening of the night on which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre. After the performance was over they called at a house in Sherrard Street, and from thence went to Westminster Bridge to drown themselves in the Thames. They got into a boat, and from that into another boat. The water where the first boat which they entered was moored was not of sufficient depth to drown them. They talked together for some time in the boat into which they last got, he standing with his foot on the edge of the boat and she leaning on him. The prisoner then found himself in the water, but whether by actual throwing of himself in or by accident did not appear. He struggled to get back into the boat again, and then found that Eliza Anthony was gone. He then endeavoured to save her, but he could not get to her, and she was drowned. In his statement before the magistrates, which was read in evidence, he said that he intended to drown himself, but dissuaded Eliza Anthony from following his example.

The learned Judge told the jury that if they believed that the prisoner only intended to drown himself, and not that the woman should die with him, they should acquit the prisoner; but that if both went to the water for the purpose of drowning themselves together, each encouraged the other in the

commission of a felonious act, and the survivor was guilty of murder.

He also told the jury that, although the indictment charged the prisoner with throwing the deceased into the water, yet, if he was present at the time she threw herself in, and consented to her doing it, the act of throwing was to be considered as the act of both, and so the case was reached by the indictment.

The jury told the learned Judge that they were of opinion that both the prisoner and the deceased went to the water together for the purpose of drowning themselves; and the prisoner was convicted. But the learned Judge thought it right to submit a question to the consideration of the Judges —namely, whether his conviction was right.

The case was considered by nine of the Judges, who were clear that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example, in pursuance of their previous agreement, he was a principal in the second degree and was guilty of murder; but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either of them; and the prisoner was recommended a pardon.

[Walford for the prosecution; Andrews for the prisoner.]

In R. v. Alison (8 C. & P. 418), the prisoner was indicted for the murder of a woman named Emma Cripps. It appeared that the prisoner and the deceased, who passed as man and wife, on the 13th February, 1838, engaged the back parlour of a house in Leonard Street, Shoreditch, for which they were to pay 3*s*. 6*d*. a week; the furniture was the landlord's. When they went there they had nothing to eat but a piece of bread and butter; they had not got a change of clothes, and those they had did not sufficiently cover them; and while they were there they pledged the furniture to procure means of subsistence. They continued to occupy the lodgings until Thursday, the 1st of March; on the morning of which day the deceased, Emma Cripps, was discovered, by a person

who looked through the keyhole of the door, lying dead on the bed sacking. The prisoner left the house that morning about half-past eight, having locked the door and taken the key, and did not return till the evening, when he came back, bringing with him his mother, his aunt, and his sister. A person who lodged in the adjoining room to that in which the body was found said that in the course of the Wednesday night she heard some person sick in the prisoner's room, and another person moaning, apparently a female, from the sound of the voice. The *post-mortem* examination revealed the usual symptoms of poisoning by laudanum, and the prisoner was found to have purchased laudanum on two occasions a short time before the woman's death. The prisoner made a voluntary statement to the following effect:—

"We both agreed to take poison. On Monday we talked about hanging ourselves, and on Tuesday night we agreed to take it, but we did not take it till the Wednesday night; it was about a quarter of an ounce of laudanum. I bought it at several places in Shoreditch. . . . At six o'clock yesterday morning she was awake and breathing; I awoke again at nine o'clock; she felt cold, and I put my hand against her mouth; I lit a lucifer match, which I held over her mouth, but I could not see any breath come from her. I got up and went to my mother's, down Whitecross Street, and did not know what to do. She told me not to go for a medical man; she was quite dead when she was cold. . . . If I had sent for a medical man, I had no money to pay him. We were in very great distress at the time, having pawned the bed-clothes to support us. I had 300*l.* left me in May last, but I spent it in my support. I was in very great distress, completely starving; I am fully innocent of giving her the poison. We wished to die in each other's arms; we broke off a small piece of bread, and laid down on the bed directly, and we both drank it together."

Patteson, J., said: "This case undoubtedly presents some very extraordinary features. There is an old case which occurred as far back as the reign of James I., which was very similar to the present. In that case a husband and wife, being in extreme poverty and great distress of mind, were conversing together on their unfortunate condition, when the husband said: 'I am weary of life, and will destroy myself;' upon which the wife replied: 'If you do, I will also.' The man then went out, and having bought

some poison he mixed it with some drink, and they both partook of it. The draught was fatal to the husband; but the wife, in her agony from the effect of the poison, seized a flask of salad oil and drank it off, which caused a sickness of the stomach, and the consequence was that she voided the poison and her life was saved. She was afterwards tried for the murder of her husband in this very Court, and acquitted, but solely on the ground that, being the wife of the deceased, she was under his control; and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the Judge who tried the case, pronounced her not guilty. . . . I should not be discharging my duty if I did not tell you that, supposing the parties in this case mutually agreed to commit suicide, and one only accomplished that object, the survivor will be guilty of murder in point of law." The prisoner was convicted.

In R. *v.* Jessop (16 Cox, C. C. 204), the prisoner, John Jessop, was indicted for the murder of John Allcock. The prisoner was twenty-two and Allcock was twenty-seven years old, and on the 13th day of January, 1887, they took laudanum together. Allcock died from the effects of the poison; but the prisoner, though rendered very ill, recovered sufficiently to take his trial. The prisoner made the following statement:—"We had arranged to kill ourselves. Jack (Allcock) said to me, 'I am going to kill myself. Shan't you die with me?' I said, 'I'm not particular.'" It was proved that both the prisoner and deceased purchased the laudanum in small quantities at several chemists' shops. On some occasions the prisoner went into the shop and made the purchase while Allcock remained outside; on other occasions the purchases were made by Allcock while the prisoner waited outside the shops. All the laudanum so bought was poured into a large bottle. The prisoner stated that he first drank more than half the laudanum, and Allock then complained that the prisoner was getting more than his share; that he (the prisoner) thereupon handed the bottle to Allcock, who drank off the remainder of the laudanum. One of the witnesses for the prosecution stated that, some months before the 13th day of January, Allcock had stated his intention to commit suicide. Field, J., said: "The prisoner is charged with wilfully and of his malice aforethought killing Allcock. A person who

administers poison to another with the intention of killing him is guilty of murder if that person dies; and if two persons agree that they will each take poison, each person is a principal and each is guilty." The prisoner was convicted.

In R. *v.* Stormonth (61 J. P. 729), the prisoner was indicted for the wilful murder of Sarah Jane McLean on or about the 28th of August, 1897. The prisoner and the woman McLean came to an hotel in Guilford Street on the 14th of August. On the 28th of August the landlord refused to supply them with any more food, &c. until their bill was paid. It was shown that, at various times between the 26th and 28th of August, the prisoner (by himself) had bought laudanum—in all 1½ ozs.—and that between the same dates the woman (by herself) had also bought laudanum to the extent of 2½ ozs. On the 28th of August, in the evening, the woman was seen in the bedroom with the prisoner. On the 28th and 30th the prisoner was seen in the bedroom by a servant, who was not able to see far into the room. On the 30th the prisoner left the hotel and did not return, but went to Derby, where he was arrested on the 2nd of September. On the 1st of September the door of the bedroom was forced open, and the woman was found in the room dead. She had died from the effects of laudanum poisoning, and had probably been dead at least three days. In the room documents were found in the handwriting of the prisoner, saying that he and the woman had decided to put an end to their existence by poison, and also that the woman had taken laudanum, which had proved fatal, but that he had taken laudanum which had had no effect, and so other means must be resorted to.

Ridley, J., said that, "if two persons mutually agreed to commit suicide, and accordingly took poison or attempted to destroy themselves, and one of them survived, he was guilty of murder." The prisoner was convicted.

In R. *v.* Abbott (67 J. P. 151) the prisoner and his wife sold most of the furniture that they possessed, and the prisoner afterwards bought some *aqua fortis*, which he said he wanted for testing metals. About ten o'clock the same night the prisoner came down to his landlady's room, and asked her to go and fetch a policeman, saying, "The missus has took poison and I've took poison." Afterwards, to his sister-in-law, he said: "We have both taken poison; she took some and I took some. We have been making

up our minds since Christmas, as I could not get any work, to take our lives." As soon as a policeman arrived he administered an emetic to both; it was successful in the case of the man, but not in the case of the woman. On the way to the hospital the prisoner said: "I've been out of work some time; she could not stand it; it worried her. I bought the stuff in North Street and took it home. She gave me some, and took the other herself. I've got a good character." The woman was taken to the Poplar Hospital, and died from *aqua fortis* poisoning some hours later.

Kennedy, J., in summing up the case, said: "The law is quite clear. If two parties mutually agree to commit suicide, and only one accomplishes that object, the survivor is guilty of murder. Was there such an agreement here? If so, there can be only one verdict. 'A person who administers poison to another with the intention of killing him is guilty of murder if that person dies, and if two persons agree that they will each take poison, each person is a principal and each is guilty. A case has been cited by the learned counsel for the prisoner which is said to warrant the statement that a consideration for such an agreement must be proved, but I have no hesitation in saying that this is not the law of the land. The entering into the agreement to kill themselves was illegal. It is contrary to the law of the land to commit suicide, and if two persons meet together and agree so to do, and one of them dies, it is murder in the other.' (Field, J., in R. *v.* Jessop.) If you think there was such an agreement it is your duty to find a verdict of wilful murder."

It will be noticed that the facts in each of the above five cases are somewhat different. The various dates—viz., 1823, 1838, 1887, 1897, and 1903—cover a long period of time, and show that the law on this point is in no way altered.

Homicide by Correction.

[46] **R. *v.* HOPLEY.** (1860)

[2 F. & F. 202.]

The prisoner was a schoolmaster at Eastbourne, and in 1859 the deceased, a boy of thirteen or fourteen, had been entrusted to his charge. He was a dull boy. At Christmas there were some complaints of chastisement inflicted on him by the prisoner. He returned to school, however, after the holidays, and again at Easter on the 16th April.

On the 18th April the prisoner wrote to the father, stating that the boy was obstinate, and that, were he his own child, he should, after warning him (as he had done), subdue his obstinacy by chastising him severely; that, if necessary, he should do it again and again, and "continue it at intervals, even if he held out for hours." The letter concluded thus:— "I cannot be blind to the fact that at Christmas I ran a serious risk of having my character damaged for life, and I do not think it right to run that risk again; I therefore write this to know your wishes."

On the 20th April the father wrote in reply, "I do not wish to interfere with your plan."

There was no evidence that the boy had been guilty of any obstinacy after Easter, and the prisoner had, just before Easter, reported favourably of him.

On the night of the next day, Saturday, the 21st April, the prisoner took the boy into a room downstairs, and beat him for about two hours, between ten and twelve, with a thick stick; using also a skipping-rope.

About midnight the prisoner was heard dragging or pushing the boy upstairs to his bedroom, and there he beat him again,

until about half-past twelve, when the beating and crying suddenly stopped.

From the evidence of the servants (who were the principal witnesses to all this), it appeared that the prisoner and his wife were for some time going up and down stairs engaged in washing out the stains of blood downstairs and upstairs, but that some of these stains were discerned next morning. Early next morning (about seven) the prisoner said he had found the boy dead, and almost "stiffening." He then went for a surgeon, who saw only the face of the boy. A subsequent examination showed that the thighs and other parts of the body were covered with bruises, and the medical evidence was that there had been profuse bleeding and extravasation of blood caused by excessive and protracted bleeding, and that the immediate cause of death was exhaustion arising therefrom. The medical witnesses also stated that, upon the evidence, coupled with the prisoner's statement, the boy, at seven o'clock in the morning, must have been dead about six hours, so that their evidence went to show that he died about half-past twelve, when the beating was heard suddenly to cease.

The prisoner had not avowed the beating until its effect had been discovered by the *post-mortem* examination, and had sent the body so closely wrapped up, that the bruises were not detected until the coverings were removed in consequence of rumours prevailing. There was no *post-mortem* examination of the body prior to the inquest, at which the surgeon, who had seen only the boy's face, was examined, and the prisoner, who suggested that the boy had died of disease of the heart. The verdict of the coroner's jury, therefore, did not inculpate him. The stick was produced in Court, and appeared at one end an inch thick; at the other end it was edged with brass about the circumference of a sixpence, and there were holes in the shins of the deceased corresponding therewith, and which

the medical witnesses thought must have been produced by poking therewith.

Cockburn, C. J., in summing up to the jury, said: "By the law of England, a parent or a schoolmaster (who for this purpose represents the parent and has the parental authority delegated to him) may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment; always, however, with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter. The first question is, whether the death was caused by the beating inflicted? Secondly, was it excessive in degree? Now, there can be no doubt as to the first point, that the boy's death was occasioned by the beating received at the hands of the prisoner.

Then as to the second point, whether the beating was excessive, the question can surely be only answered in one way; for had the correction been moderate, it is contrary to common experience that it should have resulted in death. One can scarce conceive of moderate chastisement resulting in death, except under circumstances of a very peculiar character, or in the case of a child with an unusual organisation. We have, however, here positive evidence as to the nature, amount, and degree of punishment inflicted. It was inflicted with a thick stick; it was continued downstairs for two hours and upstairs for half an hour longer, and, according to the medical evidence, until the boy actually died. That question, however, it is not material here to determine, viz., whether the boy did not

actually die under the beating so protracted. For whether he did so die or not, if he died from the effects of the beating then or subsequently, and it was excessive, the prisoner is guilty of manslaughter. The evidence, to my mind, is all one way, that the boy died at the time, and under the prisoner's hand, but that upon this charge does not matter. The stick with which the punishment was inflicted was not (though that, may be, is a matter for you to determine) an instrument fitted for the purpose of chastisement. And the beating was manifestly protracted far beyond the bounds of reason, moderation or humanity. If you think that was so, and caused the death of the boy, find the prisoner guilty.

"It is true that the father authorized the chastisement, but he did not, and no law could, authorize an excessive chastisement. There can be no doubt that the prisoner thought the boy obstinate, but that did not excuse extreme severity and excessive punishment. The prisoner's motives, however, upon this charge, matter not. If his excessive violence caused the death, find him guilty."

The jury convicted the prisoner, and he was sentenced to four years' penal servitude.

[Parry, Serjt., and Knapp for the Crown; Ballantine, Serjt., and G. Denman for the prisoner.]

The corporal punishment administered by a father to a son, or a master to his scholar, must be moderate and reasonable; if it is not, and death results, it will be murder or manslaughter according to the circumstances. "In a case at Norwich Assizes in 1670," says Sir Matthew Hale, "where the master struck a child that was his apprentice with a great staff, of which it died, it was ruled murder." Perhaps, considering the size of the stick which Hopley used, and the cruel vigour with which he wielded it, he had reason to congratulate himself on being convicted only of manslaughter.

In R. *v.* Griffin (11 Cox, C. C. 402), it was held that a father who for some childish fault gave an infant of two and a half years about a dozen strokes with a strap an inch wide and eighteen inches

long, from the effects of which the child died, was guilty of manslaughter. "The law as to correction," said Martin, B., "has reference only to a child capable of appreciating correction, and not to an infant two years and a half old. Although a slight slap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable."

In R. *v.* Cheeseman (7 C. & P. 455), it was held that where a person *in loco parentis* inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies, the death being of consumption, but hastened by the ill-treatment, it will not be murder, but only manslaughter, in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was shamming illness and was really able to do the quantity of work required.

Homicide—Provocation.

[47] R. *v.* **FISHER.** (1837)

[8 C. & P. 182.]

The prisoner was indicted for the wilful murder of James Randall, by stabbing him with a knife. From the evidence of two draymen, who were the only witnesses called to prove the fact of the stabbing, it appeared that on the 3rd of November, 1837, between one and two in the day, they saw a mob coming up Mount Row, and the prisoner was beating the deceased with a short stick, which afterwards dropped from his hand, and he then drew a table knife out of his right-hand coat pocket, and stabbed the deceased with it. The witnesses said that they did not see the beginning, but the parties were scuffling when

they first saw them, and that the prisoner appeared to be in a great passion. The deceased expired at six o'clock in the evening of the next day. When the prisoner was taken into custody, he said he had stabbed the man because he had taken unnatural liberties with his son; that he had only done what a father and an Englishman would have done under similar circumstances, and that he had not seen the deceased until two minutes before, when he was pointed out to him. The landlord of the deceased proved that for a short time previous to the 1st of November his conduct appeared suspicious, several youths being in the habit of calling on him and going into his bedroom, either late at night or early in the morning. On the evening of the 1st of November, the deceased came in with a lad about fifteen, who proved to be the son of the prisoner; the landlord's suspicions were excited, and he burst open the door of the bedroom where they were, and found them in a state which left no doubt of their being in the act of committing an unnatural offence. The landlord said: "You wretch. I suspected you; you are now detected." The deceased instantly fell on his knees, and said: "You have a family of your own, don't give me into custody; any property I possess is yours; I will give you 100*l.*, only don't give me into custody." A scuffle then took place, and the boy ran downstairs; the landlord ran down to stop him, and the deceased made his escape. On the evening of the 2nd of November, the prisoner, who had been apprized of what had happened, went to the landlord to know if he could tell him of any of the deceased's connections, as he thought he would be able to trace him. The landlord said: "He appeared very low, and shed tears two or three times while in my house. I saw him the next morning, between eight and nine; he then said, 'Have you seen anything of Randall?' He said he should get assistance, and he had no doubt he should be able to secure him. He seemed to be on both occasions in great

misery. No expression escaped him from which I could be led to believe that he contemplated attacking the deceased."

Park, J., in summing up, said: "The counsel for the prisoner admits that if the blood had time to cool, it will be murder. But I say, in the hearing of two very learned persons, that that is not exactly a question for you. Whether the blood had time to cool or not, is rather a question of law. But the jury may find the length of time which elapsed. In all cases the party must see the act done. What a state should we be in if a man, on hearing that something had been done to his child, should be at liberty to take the law into his own hands and inflict vengeance on the offender! In this case the father only heard of what had been done from others. I say, therefore, and I do it with the assent of those who are with me, that there is not enough to reduce the offence from murder to manslaughter. We think there is not sufficient provocation to reduce this offence even to manslaughter. It is clearly no case of acquittal. It would be a gross dereliction of duty in a Judge to put it as a case of acquittal. I think that from the prisoner's carrying the instrument about him, it is clear that he meditated an attack on the deceased."

The jury, however, convicted the prisoner of manslaughter, and recommended him to mercy.

[Bodkin for the Crown; C. Phillips for the prisoner.]

In. R. *v.* Maddy (1 Ventr. 158) it was held that if a man finds another in the act of adultery with his wife, and kills him in the first transport of passion, and with no precedent malice towards him, he is only guilty of manslaughter, for the law recognizes the immensity of the provocation; but Justice Twisden, who tried Maddy's case, said there was a case found before Justice Jones which was the same with this, only it was found that the prisoner, being informed of the adulterer's familiarity with his wife, said he would be revenged of him, and after finding him in the act, killed him; which was held by Justice Jones to be murder; and which

the Court said might be so, by reason of the former declaration of his intent.

To reduce murder to manslaughter, the provocation must be such as would upset not merely a hasty and hot-tempered person, but one of ordinary sense and calmness; and, in any case, twenty minutes or half an hour would be considered ample time for passion to subside and reason to resume its sway.

Mere words, however irritating or insulting, cannot constitute the kind of provocation required by the law; and in the case of R. *v.* Rothwell (12 Cox, C. C. 145), where Blackburn, J., held, on the Northern Circuit, that special circumstances may take a case out of the general rule, must be regarded as a decision of very doubtful authority. But an assault too slight in itself to be sufficient provocation to reduce murder to manslaughter may become sufficient when coupled with words of great insult. This was held in a case in which a wife not only used the most frightful language to her husband, but also spat at him. Neither the language nor the spitting would have been enough provocation by itself, but together they effected the reduction. (R. *v.* William Smith, 4 F. & F. 1066.) "If two military officers," said Byles, J., "met in the street, and one called the other a coward and a scoundrel, and spat in his face, and if the one so treated immediately drew his sword and stabbed the person assaulting him, this, I think, would be manslaughter."

In R. *v.* Brown (1 Leach, 176) the prisoner was tried and convicted for murder. The learned Judge had directed the jury to find a verdict of manslaughter, but they disregarded the Judge's direction and persisted in their verdict. This somewhat curious case arose of a quarrel between soldiers and sailors at Sandgate in 1776. The prisoner was a soldier on a recruiting party at Sandgate, and killed by mistake a person whom he took for one of the opposing faction, the prisoner having first brandished his sword, and then struck fire with the blade of it upon the stones of the street, calling out to the people to keep off. The evidence which had been given against the prisoner was submitted to the consideration of the twelve Judges, and they were clearly of opinion that it was only manslaughter.

Provocation is no defence where there has been express malice, or where it was sought by the prisoner himself. "If a person has

received a blow," said Coleridge, J., in R. *v.* Kirkham (8 C. & P. 117), where the prisoner was indicted for the murder of his son, "and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and, therefore, as in the case of poisoning, though there have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, all the blows will go for nothing."

"Provocation to a person by an actual assault or by a mutual combat, or by a false imprisonment, is, in some cases, provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for his defence. But it is uncertain how far this principle extends." (Stephen's Digest Cr. Law.)

Other cases on this subject are:—R. *v.* Rankin, R. & R. C. C. 43; R. *v.* Noon, 6 Cox, C. C. 137; R. *v.* Willoughby, 1 East, P. C. 288; R. *v.* Welsh, 11 Cox, C. C. 336; R. *v.* Lynch, 5 C. & P. 324; R. *v.* Eagle, 2 F. & F. 827; R. *v.* Fray, 1 East, P. C. 236; R. *v.* Kelly, 2 C. & K. 814; R. *v.* Harrington, 10 Cox, C. C. 370; R. *v.* Hayward, 6 C. & P. 157.

Homicide—Negligence.

[48] R. *v.* SALMON AND OTHERS. (1880)

[6 Q. B. D. 79; 14 Cox, C. C. 494; 50 L. J. (M. C.) 25; 43 L. T. 573.]

In this case three young men named George Salmon, Hancock, and John Salmon were indicted for the manslaughter of William Wells, a little boy of ten years old. It appeared that the prisoner George Salmon was a member of the Frome Selwood Rifle Corps. On the 29th of May, 1880, he attended

rifle practice. He took his rifle from the armoury, had fourteen ball cartridges served out to him, and fired them all away. After the practice was over, he took away with him his rifle, which it was his duty to return to the armoury. He did not take it back, and the drill instructor missed six cartridges from the magazine when he went there about half an hour after the practice was over. The same evening the three prisoners took the rifle, which would have been deadly at a mile, and began practising firing with it at a target, which they erected in a field near to roads and houses, from a distance of about 100 yards. No precautions of any kind were taken to prevent danger from such firing. One of the shots thus fired (it was not proved by which man) killed a boy in a tree in a neighbouring garden, at a spot 393 yards from the firing point. It was held that all three were guilty of manslaughter.

Lord Coleridge, C. J., said: "If a person will, without taking proper precautions, do an act which is in itself dangerous, even though not an unlawful act in itself, and if in the course of it he kills another person, he does a criminal act which in law constitutes manslaughter. It was manslaughter in him who killed the boy. The death resulted from the action of the three, and they are all liable."

Field, J., said: "I am of the same opinion. I had some doubt as to whether there was any duty owed by the prisoners to this particular boy, but it seems to me there is a general duty to the public, of which the prisoners committed a breach. They had a duty not to use a weapon likely to cause death or injury in an improper place and without taking proper precautions to avoid injury. The evidence shews that that duty was not observed. The character of the place and the probability of persons being about was such that I am satisfied the conviction was right."

Stephen, J., said: "Manslaughter is unlawful homicide not amounting to murder. It is unlawful where caused by the

culpable omission to discharge a duty tending to the preservation of life. There is a duty tending to the preservation of life to take proper precautions in the use of dangerous weapons or things. It is the legal duty of everyone who does any act which, without ordinary precautions, is or may be dangerous to human life, to employ those precautions in doing it. Firing a rifle under circumstances such as in the present case was a highly dangerous act, and all are responsible, for they unite to fire at the spot in question, and they all omit to take any precautions whatever to prevent danger."

[Norris for the Crown.]

Where an act, in itself lawful, is at the same time dangerous, it must appear, in order to render an unintentional homicide from it excusable, that the party, whilst doing the act, used such a degree of caution as to make it improbable that any danger or injury should arise from it to others; if not, the homicide will be manslaughter at the least.

If a person, whilst doing or attempting an unlawful act, but not amounting to felony, undesignedly kill a man, he is guilty of manslaughter. For instance, in the well-known football case, R. *v.* Bradshaw (14 Cox, C. C. 83), it was laid down that if, while engaged in a friendly game, one of the players commits an unlawful act whereby death is caused to another, it is manslaughter; nor is it material to consider whether the act which caused the death was or was not in accordance with the rules and practice of the game. "No rules or practice of any game whatever," said Bramwell, L. J., "can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another." So if a man throws a stone at a horse, and it hits the rider and kills him, it is manslaughter. (1 Hale, 39.) But a mere civil wrong committed by one person against another cannot be made the foundation of the crime of manslaughter. So where, one summer day in 1882, a man who was on the West Pier at Brighton snatched up a big box from the refreshment-stall and pitched it recklessly into the sea, thereby unintentionally killing a boy who happened just then to be bathing, it was held that the civil wrong against the refreshment-stall

keeper was immaterial to the charge of manslaughter. If he was to be convicted, it must be upon the broad ground of negligence, and not upon the narrow ground of his having committed a trespass. "I have a great abhorrence," said Field, J., who tried the case, "of constructive crime." (R. *v.* Shanklin, 15 Cox, C. C. 163.)

In R. *v.* Dant (L. & C. 567; and 10 Cox, C. C. 102), the prisoner was indicted for manslaughter of a child about nine years old, who was killed by a kick from a horse belonging to the prisoner. The horse which caused the death of the child had been in the possession of the prisoner about four years. There was evidence that it was a very vicious and dangerous animal; that it had kicked and injured several persons; that some of these instances had been brought to the knowledge of the prisoner; and that he otherwise knew the propensities of the horse.

There is a large common adjoining the town of Cambridge, between Jesus College and the river, called Midsummer Common, on which the ratepayers in the borough of Cambridge were accustomed to depasture their horses. Through this common there are defined public footpaths, a yard wide or more, kept and gravelled by the municipal corporation of Cambridge. Two of these paths converge about twelve yards from a bridge over the river and, from the point where they meet, form a broad pathway to the river; but the boundaries of the public footpath from the said point to the river are ill defined. These paths are all unfenced and open to the rest of the common. It was proved that the public have a right to use these footpaths; but it was not proved that the public had a right to traverse the other parts of the common, although they often did traverse it. The prisoner claimed a right, as a ratepayer of the borough of Cambridge, to turn out his horses to depasture on this common; and it was not disputed by the counsel for the prosecution that he had this right. It appeared that the deceased, with some other children, was on the common; and, when she was either on or very near to the broad pathway above described, the vicious horse of the prisoner, which had been turned out loose on the common by him, and which was then on the common near the broad path, kicked at the deceased with his heels, struck her on the head and killed her.

The learned judge left to the jury the question whether the

death of the child was occasioned by the culpable negligence of the prisoner; and told them they might find culpable negligence if the evidence satisfied them that the horse was so vicious and accustomed to kick mankind as to be dangerous, and that the prisoner knew that it was so, and with that knowledge turned it out loose on the common, through which to his knowledge there were open and uninclosed paths on which the public had a right to pass and were accustomed to be. He also asked the jury to find, as a separate question, whether the deceased, at the time she was kicked by the horse, was on the footpath or beyond it. The jury found the prisoner guilty of having caused the death of the child by his culpable negligence; but answered the last question by saying that the evidence did not satisfy them, one way or the other, whether the child at the time she was kicked was on the pathway or beyond it.

On the case being reserved, the Court of Crown Cases Reserved affirmed the conviction. Erle, C. J., said: "The defendant turned a dangerous animal on to a common where there was a public footpath. That has been found by the jury to be culpable negligence, and the child's death was caused by it. Ordinarily speaking, there are all the requisites of manslaughter. It is contended, however, that no offence was committed, because, as we must take it, the child was not on the path; the jury having found that it was very near, but that they could not say whether it was on or off. In my opinion the defendant is responsible for having brought so great a danger on persons exercising their right to cross the common; and it is not a ground of acquittal that the child had strayed from the path."

In R. *v.* Lowe (3 C. & K. 123), the prisoner was indicted for manslaughter. It appeared that he was an engineer, and that his duty was to manage a steam-engine employed for the purpose of drawing up miners from a coal-pit. When the skip containing the men arrived on a level with the pit's mouth, his duty was to stop the revolution of the windlass so that the men might get out. He was the only man so employed on the premises. On the day in question he deserted his post, leaving the engine in charge of an ignorant boy, who, before the prisoner went away declared himself to the prisoner to be utterly incompetent to manage such a steam-engine. The prisoner neglected this warning and threatened the

boy in case he refused to do as he was ordered. The boy superintended the raising of two skips from the pit with success. But on the arrival at the pit's mouth of a third containing four men he was unable to stop the engine; and, the skip being drawn over the pulley, the deceased, who was one of the men, was thrown down into the shaft of the pit and killed on the spot. It appeared that the engine could not be stopped "in consequence of the slipper being two low," an error which it was proved that any competent engineer could have rectified, but which the boy in charge of the engine could not.

Counsel for the prisoner contended that a mere omission or neglect of duty could not render a man guilty of manslaughter; but Lord Campebll, C. J., who tried the case, said, "I am clearly of opinion that a man may, by a neglect of [even an active] duty, render himself liable to be convicted of manslaughter, or even of murder."

In R. *v.* Longbottom (3 Cox, C. C. 439), it was held that wherever death ensues from injuries inflicted by parties engaged in any illegal act, an indictment for manslaughter will lie, even though it appears that the deceased had materially contributed to his death by his own negligence.

Other cases on this subject are :—R. *v.* Doherty, 16 Cox, C. C. 306; R. *v.* Walker, 1 C. & P. 320; R. *v.* Swindall, 2 Cox, C. C. 141: R. *v.* Kew, 12 Cox, C. C. 355; R. *v.* Jones, 11 Cox, C. C. 544; R. *v.* Birchall, 4 F. & F. 1087; R. *v.* Ledger, 2 F. & F. 857; R. *v.* Haines, 2 C. & K. 368; R. *v.* Rigmalden, 1 Lewin, 180; R. *v.* Marcus, 4 F. & F. 356; R. *v.* Knight, 1 Lewin, 168; R. *v.* Hilton, 2 Lewin, 214; R. *v.* Finney, 12 Cox, C. C. 625; R. *v.* Jones, 12 Cox, C. C. 628; R. *v.* Bruce, 2 Cox, C. C. 262; R. *v.* Martin, 3 C. & P. 211.

Homicide—Neglect of Duty.

[49] **R. *v.* SENIOR.** (1898)

[[1899] 1 Q. B. 283; 19 Cox, C. C. 219; 79 L. T. 562; 47 W. R. 367; 63 J. P. 8; 68 L. J. Q. B. 175.]

The prisoner was indicted and tried at the Central Criminal Court for the manslaughter of his child, an infant of the age of eight or nine months. The child had died of diarrhœa and pneumonia. The prisoner had not supplied it with any medical aid or medicine, though aware that the case was of great gravity and that the child would probably die. The medical evidence was that the child's life would certainly have been prolonged, and in all probability saved, if medical assistance had been procured. No question was raised as to the prisoner's ability to procure and pay for medical assistance, and it was shown that he earned about 35*s.* a week. He was shown to have been a good and kind father in all other respects, and he bore an excellent character for general good conduct. He had had twelve children, of whom seven were dead, and he had had before experiences of the same kind as those relating to the present inquiry; for the question he put to the inspector of police was: "Except in regard to this case"—and he then corrected himself—"except in regard to these cases, have you ever known anything against me?"

The prisoner was a member of a sect called the "Peculiar People," whose religious doctrines as to the treatment of sick people are certainly to the ordinary apprehension remarkable. They base them on the Epistle of James, chapter v., 14th and 15th verses: "Is any sick among you? Let him call for the elders of the church, and let them pray over him, anointing him with oil in the name of the Lord: and the prayer of faith shall save the sick, and the Lord shall raise him up; and if

he have committed sins, they shall be forgiven him." They do not allege that medical aid is here expressly forbidden, but say that to make use of it is to indicate a want of faith in the Lord. The learned Judge inquired if they held that any other parts of the Scriptures—the Gospels, for instance—were of Divine authority, and was answered that the Gospels certainly were so recognized. He also called attention to the fact that our Lord said, "They that are whole need not a physician, but they that are sick" (Luke v. 31), and asked why they thought that it could be wrong to consult a physician, if the sick man was pronounced on such authority to need a physician. The answer was that the sickness here alluded to was moral sickness or sin, and that the physician meant our Lord himself. The learned Judge inquired, further, if they held that it was wrong to give extra food, or wine, or brandy, to a sick person, or to put an extra blanket on his bed if the weather were cold, or the nature of his sickness required him to be kept warm. The answer was, No, that they gave the sick every species of comfort; and it appeared that the child had had much attention paid to its food and diet, though the medical witnesses did not think the dietary altogether judicious, and that it had had brandy administered. He inquired also if they objected to experienced nursing. They said No, and that they resorted to it, and did so in the case of this child, but that the nursing must be by one of their own people, who would not use drugs.

It thus appeared distinctly that they did not object to the use of many human appliances and efforts to save the sick; but they drew the line at the doctors and drugs, and, the learned Judge thought, at doctors, not so much on account of their superior knowledge of the human frame and its needs as because they are likely to use and prescribe drugs.

By the Prevention of Cruelty to Children Act, 1894, s. 1, "If any person over the age of sixteen years, who has the

custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child . . . in a manner likely to cause such child unnecessary suffering or injury to its health, . . . that person shall be guilty of a misdemeanour." The learned Judge who tried the case told the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by want of medical assistance; and, secondly, that medical aid and medicine were such essential things for the child that reasonably careful parents in general would have provided them; and, thirdly, that the prisoner's means would have enabled him to do so, without such expenditure as could not be reasonably expected from him. The jury convicted the prisoner; and the Court of Crown Cases Reserved affirmed the conviction, and held that there was evidence that the prisoner had wilfully neglected the child in a manner likely to cause injury to its health within the meaning of 57 & 58 Vict. c. 41, s. 1, and, having thereby caused or accelerated its death, he was rightly convicted of manslaughter.

Lord Russell, C. J., said: "'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind—that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. . . . In the present case the prisoner is shewn to have had an objection to the use of medicine; but other cases might arise, such, for instance, as the case of a child with a broken thigh, where a surgical operation was necessary, which had to be performed with the aid of an anæsthetic. Could the father refuse to allow the anæsthetic to be administered? Or, take the case of a child that was in danger of

suffocation, so that the operation of trachæotomy was necessary in order to save its life, and an anæsthetic was required to be administered.

"I think it cannot be doubted that if this case had arisen under the Act of 1868, there would have been ample evidence to warrant a conviction, and, in my opinion, there is also ample evidence where the case arises under the Act of 1894. I am of opinion that the summing-up of the learned Judge was right, and the conviction ought to be affirmed. I wish to add that I dissent entirely from the view attributed to Pigott, B., in R. *v.* Hines (Sessions Paper, C. C. C., Vol. 80, p. 312), and I am not satisfied that in the present case there was not sufficient evidence at common law to justify a conviction."

Wills, J., said: "I am of the same opinion. I will not deal with the question whether the evidence might have justified a conviction at common law, because it is unnecessary here to decide that question. As to the rest of the case, I can see no reason to doubt that I was right in the direction which I gave to the jury; but I was anxious to have the point settled by this Court, because the same question is not unlikely to arise in other cases, and similar questions may also arise, and have arisen within my own experience, in proceedings under the Prevention of Cruelty to Children Act, 1894, in cases where the cruelty charged is not followed by death. For these reasons I thought it wise to reserve the point for the consideration of this Court, though I had not at the trial, and have not now, any serious doubt upon the question."

Grantham, J., said: "I am of the same opinion, and I agree with the judgment of the Lord Chief Justice. Taking the last of the two words, 'wilfully neglect,' first, was the omission of what was left undone by the prisoner, neglect? The jury say it was. Then was what was left undone wilfully left undone —that is, was the neglect to provide medical aid—the wilful act of the prisoner? Mr. Sutton can only rely upon the fact that

the prisoner was one of the sect called the 'Peculiar People'; but that fact of itself goes to show that what he omitted he left undone with intent—that is, wilfully. Can it be said that this is not a wilful neglect? I am clearly of opinion that the prisoner's conduct amounted to wilful neglect, and that the summing-up of the learned Judge was right. It may be asked, Why should the line be drawn at drugs? A case might arise where it was necessary to apply an instrument where an injury had been suffered. To omit to do that would be wilful neglect. Or take the case of a fever, where quinine was necessary, or ice. Suppose the doctor were to say, 'I know that if ice is applied the fever will abate.' Could the father refuse to allow the application of ice without being guilty of wilful neglect?"

[Avory for the Crown; H. Sutton for the prisoner.]

In R. *v.* Morby (8 Q. B. D. 571; and 15 Cox, C. C. 35), the prisoner was also one of the "Peculiar People." On the 27th of December, 1881, his little boy of eight years old was known to be suffering from confluent small-pox, and yet no medical aid was called in, owing to certain religious views held by the prisoner. On January 8th the child died—as the post-mortem examination showed—of the disease. Nothing could be clearer than that, if the doctor had been sent for at once, the child's life might have been saved, but, on the other hand, it might not have been; and, there being therefore no positive evidence that the death was caused or accelerated by the neglect to provide medical aid or attendance, the Court of Crown Cases Reserved held that the father could not be properly convicted of manslaughter.

"It is not enough," said Lord Coleridge, C. J., "to show neglect of reasonable means for preserving or prolonging the child's life; but to convict of manslaughter it must be shown that the neglect had the effect of shortening life. . . . In order to sustain the conviction affirmative proof is required."

In the earlier case of R. *v.* Downes (1 Q. B. D. 25; and 13 Cox C. C. 111), where the facts were somewhat similar, it was distinctly shown, and found by the jury, that the child's death

was caused by the neglect to provide medical aid, and therefore the conviction for manslaughter was upheld. "I agree with my Lord Coleridge," said Bramwell, B., "as to the difficulty which would have existed had it not been for the statute. But the statute imposes an absolute duty on parents, whatever their conscientious scruples may be. The prisoner wilfully — not maliciously, but intentionally—disobeyed the law, and death ensued in consequence. It is therefore manslaughter."

In R. *v.* Cook (62 J. P. 712), it was held that the fact that a person conscientiously objects to call in medical assistance, and *bonâ fide* believes that he would be wrong to do so, is no defence to a charge of manslaughter, if through the neglect to call in such assistance the death of any one in his care or control is accelerated.

In R. *v.* Nicholls (13 Cox, C. C. 75), an old woman was put upon her trial for the manslaughter of her grandson, an infant of tender years who was said to have died from the neglect of the prisoner to supply him with proper nourishment. "If a grown-up person," said Brett, J., "chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without, at all events, wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter. Mere negligence will not do; there must be wicked negligence."

In R. *v.* Jeffery (Sessions Paper, C. C. C., Vol. 108, p. 540), the prisoner and deceased were not married, but lived together as man and wife; the woman died through the alleged neglect of the prisoner. It was held by Hawkins, J., that sufficient legal responsibility was made out, but upon the facts it was for the jury to say whether, in their opinion, death was caused or accelerated by gross and criminal neglect on the part of the prisoner.

In R. *v.* Jones (19 Cox, C. C. 678) the Court held that a presumption that the prisoner was, at the time of the neglect which caused or accelerated the death, possessed of sufficient means to have provided food and medicine is raised by proof of possession by her of such means at a certain date prior to the date of the neglect as, having regard to the circumstances, would presumably not be exhausted at the date of the neglect, and affords evidence

to go to the jury of actual possession of means at the date of such neglect.

In R. *v.* Instan ([1893] 1 Q. B. 450; and 17 Cox, C. C. 602), the prisoner, a woman of full age and without any means of her own, lived with, and was maintained by, the deceased, her aunt, a woman of seventy-three. No one lived with them. For the last ten days of her life the deceased suffered from a disease which prevented her from moving or doing anything to procure assistance; during this time the prisoner lived in the house and took in the food supplied by the tradesmen, but apparently gave none of it to the deceased, nor did she procure for her any medical or nursing attendance, or inform anyone of the condition of the deceased, although she had abundant opportunity to do so. No one but the prisoner had any knowledge of the condition of the deceased prior to her death, which was substantially accelerated by want of food, nursing, and medical attendance. The Court of Crown Cases Reserved held that a duty was imposed upon the prisoner, under the circumstances, to supply the deceased with sufficient food to maintain life, and that, the death of the deceased having been accelerated by the neglect of such duty, the prisoner was properly convicted of manslaughter.

In R. *v.* Shepherd (L. & C. 147), a girl of eighteen was taken in labour at her step-father's house during his absence. The mother omitted to procure for her the assistance of a midwife, in consequence of which the girl died. It was held that the mother was not legally bound to procure the aid of a midwife, and that she could not be convicted of manslaughter for not doing so. The case, however, appears to have turned to some extent upon the fact that there was no evidence that the mother had money enough to pay for a midwife.

In R. *v.* Rees (Sessions Paper, C. C. C., Vol. 104, p. 171), a person's death was caused by alleged negligence on the part of a fireman in charge of a fire escape, who was absent from his post when the alarm was given. It was held that there was not sufficient connection between the alleged neglect of the prisoner and the cause of death to warrant a conviction.

In R. *v.* Izod (20 Cox, C. C. 690), it was held that to warrant the conviction of a woman for the manslaughter of her new-born child, whose death was caused by want of proper care at birth, it

is not enough to show that such woman was guilty of criminal negligence by purposely arranging to be unattended at her confinement. She must also be proved to have been further guilty of negligence towards the child after it was completely born.

The case of R. *v.* Curtis (15 Cox, C. C. 746) should be referred to as to the responsibility of relieving officers for refusing medical assistance to destitute persons in cases of urgent necessity.

By 57 & 58 Vict. c. 41, s. 1, it is enacted: "If any person over the age of sixteen years, who has the custody, charge or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour."

In R. *v.* Ryland (L. R. 1 C. C. R. 99), the prisoner was convicted on an indictment which charged him with neglecting to provide food and clothing for his child, but omitted specifically to allege his ability to do so. The Court of Crown Cases Reserved held that the ability to provide was implied, and therefore sufficiently averred, in the use of the word "neglect."

Other cases on this subject are:—R. *v.* Hines, Sessions Paper, C. C. C., Vol. 80, p. 312; R. *v.* Hughes, D. & B. 248; R. *v.* Smith, 11 Cox, C. C. 210; R. *v.* Misselbrook, Sessions Paper, C. C. C., Vol. 88, p. 362; R. *v.* Hook and Bubb, 4 Cox, C. C. 455.

Homicide—Evidence of other Murders.

R. GEERING. (1849) [50]

[18 L. J. (M. C.) 215.]

The prisoner was indicted for the murder of her husband, Richard Geering, in September, 1848, by administering arsenic to him. She was also charged in three other indictments with

the murder of her son George by arsenic, in December, 1848, of another son, James, by arsenic, in March, 1849, and of an attempt to murder another son, Benjamin, in April, 1849, by arsenic. In April, 1849, Benjamin stated to the surgeon who attended him that his symptoms were precisely the same as those exhibited by his deceased father and his two brothers; and this statement having been reduced to writing and read over to the prisoner, she said, "It is quite right."

On the part of the prosecution, evidence was tendered consisting of a medical *post-mortem* analysis of the intestines, of the contents of the stomach, of the heart, &c., of the husband Richard, of James and of George, and also a medical analysis of the vomit of Benjamin Geering, who was still alive, with a view to show that arsenic had been taken into the stomach of the three latter parties above mentioned, that two of them had died of poison, and that the symptoms of all the four parties were the same. Evidence was also tendered that the four parties during their lives lived with the prisoner and formed part of her family, that she generally made tea for them, cooked their victuals, and distributed the same to them on their leaving the house to go to their work in the morning.

Counsel for the prisoner objected to the reception of this evidence, on the ground that the facts proposed to be proved took place subsequently to the death of the husband, and that the effect of them was to show that the three cases of poisoning were felonious. He conceded that the evidence would have been receivable had the deaths of the three sons taken place previously to the death of the husband.

Counsel for the prosecution contended that the evidence was admissible for the purpose of proving, not that the prisoner had feloniously poisoned the deceased, but that the deceased had in fact died of poison, administered by some party; and secondly, that the evidence was admissible for the purpose of proving that the death of the deceased husband was not accidental.

Pollock, C. B., said: "I am of opinion that evidence is receivable that the death of the three sons proceeded from the same cause, namely, arsenic. The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case, I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony. My brother Alderson concurs with me in thinking that the evidence ought to be received."

His lordship took time to consider whether he ought to reserve the point for the consideration of the Judges under the 11 & 12 Vict. c. 28, and afterwards intimated to the prisoner's counsel that Alderson, B., and Talfourd, J., concurred with him in opinion, that the point ought not to be reserved.

[Horn and Creasy for the prosecution; Hurst for the prisoner.]

In the leading case the counsel for the prosecution relied upon the ruling in R. *v.* Dossett (2 Car. & K. 306) and in R. *v.* Bailey (2 Cox, C. C. 311). In R. *v.* Dossett (2 Car. & K. 396) the prisoner was indicted for wilfully setting fire to a rick by firing a gun close to it on the 29th of March, 1846, and the Court held that evidence that the rick was also on fire on the 28th of March, and that the prisoner was then close to it, having a gun in his hand, was receivable to show that the fire on the 29th was not accidental. Maule, J., said: "Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or

wilfully. If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be a poison, evidence would be admissible to show that he knew what the powder was because he had administered it to another person, who had died, although that might be proof of a distinct felony. In cases of uttering forged bank notes, knowing them to be forged, the proofs of other utterings are all proofs of distinct felonies. I shall receive the evidence."

In R. *v.* Bailey (2 Cox, C. C. 311) under an indictment for arson, where the prisoner was charged with wilfully setting fire to her master's house, the Court held that two previous and abortive attempts to set fire to different portions of the same premises were admissible, though there was no evidence to connect the prisoner with either of them. During this case the learned Judge, Sir F. Pollock, C. B., alluded to the case of Donallan, who was tried for the murder of Sir Theodosius Boughton.

In R. *v.* Winslow (8 Cox, C. C. 397), which was an indictment against the prisoner, the manager to Ann James, the keeper of an eating-house, for the murder of the said Ann James, it was held by Martin, B. (after consulting Wilde, B.), that evidence was not admissible that three others in the same family died of similar poison, and that the prisoner was present at all the deaths, and administered something to two of these patients. This decision is exactly the opposite of that in the leading case.

But in R. *v.* Garner and wife (4 F. & F. 346), which was a trial of a husband and wife for the murder of the mother of the former by administering arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident, evidence was admitted that the male prisoner's first wife had been poisoned with arsenic nine months previously; that the woman who waited upon her, and occasionally tasted her food, showed symptoms of having taken poison, that that food was always prepared by the female prisoner, and that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison.

In R. *v.* Cotton (12 Cox, C. C. 400), where the prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a

lodger in her house had died previous to the present charge from the same poison was held to be admissible.

In R. *v.* Roden (12 Cox, C. C. 630), which was the trial of a prisoner for the murder of her infant by suffocation in bed, it was held that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which those children died.

In R. *v.* Heeson (14 Cox, C. C. 40), where the prisoner was indicted for the murder by poison of her infant child, Sarah Heeson, on the 3rd of October, 1877, evidence was admitted of the death of another child of the prisoner, named Lydia Johnson, in March, 1876, and of the death of the prisoner's mother, Lydia Sykes, on the 5th of November, 1877, under like circumstances and from similar symptoms, to show that the poisoning was not accidental. It was also held that, as it was proved that a motive for the death of Sarah Heeson might exist by the fact of the prisoner having insured the child's life in a benefit and insurance society, evidence might also be given upon the same indictment that there might be an equal motive for the deaths of Lydia Johnson and Lydia Sykes by showing that they also were each of them insured by the prisoner in the same or kindred societies.

In R. *v.* Flannagan and Higgins (15 Cox, C. C. 403), in which the prisoners were jointly indicted for the murder of the husband of the latter, and evidence having been given that the deceased had died from arsenic, and had been attended by the prisoners, it was held that it was competent for the prosecution to tender evidence of other cases of persons who had died from arsenic, and to which the prisoners had access, exhibiting exactly similar symptoms before death to those of the case under consideration, for the purpose of showing that this particular death arose from arsenical poisoning—not accidentally taken, but designedly administered by someone. The Court also held that such evidence, however, is not admissible for the purpose of establishing motives, though the fact that the evidence offered may tend indirectly to that end is no ground for its exclusion.

In R. *v.* Neill (Sessions Paper, C. C. C., Vol. 116, p. 1451), evidence was admitted of the deaths of other women by strychnine poisoning, and to connect their deaths with the prisoner. In this case the prisoner, who, although not a qualified medical practitioner,

had previously had medical training, was charged in three indictments with murder, and in a fourth indictment with attempted murder. In each case the woman who was murdered was poisoned by strychnine, and all the women belonged to the class known as "unfortunates," and the circumstances of their deaths were very similar.

In Makin and wife *v.* The Attorney-General for New South Wales ([1894] A. C. 57; 17 Cox, C. C. 704), which was an appeal to the Privy Council, the appellants were indicted for the murder of an infant child whom they had taken in to nurse upon payment of a small sum, alleging that they desired to adopt it as their own. The Court held that evidence that several other infants had been received by the prisoners on like representations, and upon payment of sums inadequate to support them for more than a short time, and that bodies of infants had been found buried in the gardens of several houses occupied by the prisoners, was admissible.

Vide also R. *v.* Waters (Sessions Paper, C. C. C., Vol. 72, pp. 546, 565).

Vide also R. *v.* Bond ([1906] 2 K. B. 389; 21 Cox, C. C. 252), *ante*, p. 8, which deals with an analogous question, although in this case the prisoner was charged, not with murder, but with using instruments with intent to procure abortion.

Unlawful and Malicious Wounding, and causing Grievous Bodily Harm.

[51] R. *v.* LATIMER. (1886)

[17 Q. B. D. 359; 16 Cox, C. C. 70.]

The prisoner was indicted and tried for unlawfully and maliciously wounding Ellen Roiston, and there was a second count charging him with a common assault. The evidence showed that the prisoner, who was a soldier, and one Thomas Evan Chapple quarrelled in a public-house kept by the prosecutrix, and the prisoner was knocked down by Chapple. The

prisoner went out into a yard at the back of the house, but about five minutes afterwards returned and passed hastily through the room in which Chapple was still sitting. The prisoner, as he passed, having in his hand his belt, which he had taken off, aimed a blow with his belt at Chapple and struck him slightly; the belt, however, bounded off and struck the prosecutrix, who was standing talking to Chapple, in the face, cutting her face open and wounding her severely.

The Recorder of Devonport, who tried the case, left these questions to the jury:—

1. Was the blow struck at Chapple in self-defence, or unlawfully and maliciously? 2. Did the blow so struck in fact wound Ellen Rolston? 3. Was the striking of Ellen Rolston purely accidental, or was it such a consequence as the prisoner should have expected to follow from the blow he aimed at Chapple?

The jury found: 1. That the blow was unlawful and malicious. 2. That the blow did in fact wound Ellen Rolston. 3. That the striking of Ellen Rolston was purely accidental, and not such a consequence of the blow as the prisoner ought to have expected.

Upon these findings the Recorder directed a verdict of Guilty to be entered on the first count, and reserved the question whether, upon the facts and findings of the jury, the prisoner was rightly convicted of the offence for which he was indicted.

The Court of Crown Cases Reserved affirmed the conviction.

Lord Coleridge, C. J., said: "It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the Judges call general malice, and that is enough. Such would be the case if the matter were *res integra;* but it is not so, for R. *v.* Hunt (1 Moo. C. C. 93) is an express

authority on the point. There a man intended to injure A., and said so and, in the course of doing it, stabbed the wrong man, and had clearly malice in fact, but no intention of injuring the man who was stabbed. He intended to do an unlawful act, and in course of doing it the consequence was that somebody was injured. But the words of the statute under which the prisoner is indicted carry the case against him further still, because 24 & 25 Vict. c. 100, s. 18, enacts that, 'whosoever shall unlawfully and maliciously cause any grievous bodily harm to any person' with malicious intent shall be guilty of felony. Then sect. 20 leaves out the intent and says, 'whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person . . . shall be guilty of a misdemeanour.' The language of sect. 18 and of sect. 20 is different, and the present conviction is under sect. 20, and not under sect. 18."

Manisty, J., said: "I will add only a few words, for all has been said that could be said, but the facts of the case, no doubt, raise an exceedingly important question, for the man Chapple, whom the prisoner intended to strike, and who was struck, with the belt, was standing close by the woman, and the belt bounded off and struck the prosecutrix. It seems to me that the first and second findings of the jury are quite sufficient to justify the verdict, for they find that the blow was unlawful and malicious, and that it wounded the prosecutrix. That being so, the third finding does not entitle the prisoner to acquittal. The third finding is that the striking of the prosecutrix was purely an accident, and so it was in one sense. The prisoner did not intend to strike her, but in the unlawful and malicious act of striking Chapple the prisoner did unlawfully and maliciously wound the prosecutrix, and the third finding is quite immaterial."

[Melsheimer for the Crown; H. H. S. Croft for the prisoner.]

The prisoner's counsel in this case relied principally on the

authority of R. *v.* Pembliton (L. R. 2 C. C. R. 119), decided in 1874. In that case the prisoner, in the course of a row in a Wolverhampton street, hurled a stone at a man, but missed him and broke a valuable plate-glass window. He was indicted under sect. 51 of 24 & 25 Vict. c. 97, with "unlawfully and maliciously" committing damage, injury, and spoil on property to an amount exceeding 5*l.*, but was acquitted because the jury expressly found that he never intended to break the window, his only desire being to hit the people he had been quarrelling with. "Taking this finding," said Lush, J., "I cannot say that there was an intent, either actual or constructive, and 'malicious' certainly must be taken to imply an intention, either actual or constructive." In the leading case, R. *v.* Pembliton was distinguished, because "there was no intention to injure any property at all." It was not a case of attempting to injure one man's property and injuring another's, which would have been wholly different; and R. *v.* Hunt (1 M. C. C. 93)—where, in a cutting case, it was held that general malice was sufficient under the statute without particular malice against the person cut—was followed.

In R. *v.* Stopford (11 Cox, C. C. 643), it was held that a man might be found guilty of wounding a man with intent to do him grievous bodily harm, although it was found that he had mistaken him for another person. In R. *v.* Fretwell (L. & C. 443), the prisoner had been assaulted and annoyed by several young men, among whom was the prosecutor. Soon afterwards, while these young men were standing together in a group of about fifteen persons, the prisoner drew a pistol from his pocket and fired wildly among them, not aiming at anyone in particular, but intending to injure somebody. The prosecutor received some severe shot wounds in his neck and chin, and it was held that the prisoner could be properly convicted of shooting at him with intent to do him grievous bodily harm.

The case of R. *v.* Martin (8 Q. B. D. 54 and 14 Cox, C. C. 633), was one in which the prisoner shortly before the conclusion of the performance at the Leeds Theatre Royal on the 30th of April, 1881, with the intention and with the result of causing terror in the minds of persons leaving the theatre, put out the gaslights on a staircase which a large number of the people had to descend, and blocked up the exit with an iron bar. The result was that

a large portion of the audience were seized with panic, and rushed wildly down the staircase against the iron bar. Amongst those seriously injured were two men, named Pybus and Dacey. It was held that the prisoner could be convicted of unlawfully and maliciously inflicting grievous bodily harm upon them.

"The prisoner," said Lord Coleridge, C. J., "must be taken to have intended the natural consequences of that which he did. He acted 'unlawfully and maliciously'—not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact injured; just as in the case of a man who unlawfully fires a gun among a crowd, it is murder if one of the crowd is thereby killed. The prisoner was most properly convicted."

Stephen, J., said: "I am entirely of the same opinion, but I wish to add that the Recorder seems to have put the case too favourably for the prisoner, for he put it to the jury to consider whether the prisoner did the act 'as a mere piece of foolish mischief.' Now it seems to me, that if the prisoner did that which he did 'as a mere piece of foolish mischief' unlawfully and without excuse, he did it 'wilfully,' that is, 'maliciously,' within the meaning of the statute. I think it important to notice this, as the word 'malicious' is capable of being misunderstood."

In R. *v.* Driscoll (C. & M. 214), the prisoner was indicted for unlawfully, maliciously, and feloniously assaulting John Sullivan, and wounding him in and upon the left side of his neck and left cheek, with intent to do some grievous bodily harm. It appeared that the prosecutor and the prisoner had some dispute, in the course of which the prisoner called the prosecutor a liar; whereupon the prosecutor clenched his fist and was about to strike him, but the prisoner's wife interposed and pushed him down, and the prisoner inflicted on him the injury stated in the indictment. The prisoner was convicted. In summing up, Coleridge, J., said, "If one man strikes another a blow, that other has a right to defend himself and to strike a blow in his defence. But he has no right to revenge himself; and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and a battery. It is a common error to suppose that one person has a right to strike another who has struck him, in order to revenge himself; and it very often influences people's minds. I have,

therefore, thought it right to state what the law upon the subject really is."

24 & 25 Vict. c. 100, s. 20, provides that, "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour;" and according to the construction which, as we see in the leading case, is to be placed on the word "maliciously," a man acts maliciously when he wilfully does that which he must know will injure another. All that is meant by the presumption of malice is that, when a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is presumed that he has acted advisedly and with an intent to produce the natural consequences of such an act.

In R. *v.* Ward (L. R. 1 C. C. R. 356), the prisoner shot at the prosecutor rather with the intention of frightening him than of hurting him, and yet was held guilty of unlawful wounding under 14 & 15 Vict. c. 19, s. 5. *Vide* also R. *v.* Start, Sessions Paper, C. C. C., Vol. 69, p. 137; R. *v.* Bolter, Sessions Paper, C. C. C., Vol. 81, p. 441; R. *v.* Cox, R. & R. C. C. 362; R. *v.* Gray, 7 Cox, C. C. 326.

The whole question of unlawfully and maliciously inflicting grievous bodily harm was discussed at great length in the important case of R. *v.* Clarence (22 Q. B. D. 23), which was argued before thirteen Judges. *Vide post*, p. 277.)

Abduction.

R. *v.* PRINCE. (1875) [52]

[L. R. 2 C. C. R. 154; 44 L. J. (M. C.) 122; 32 L. T. 700; 24 W. R. 76; 13 Cox, C. C. 138.]

At the Kingston Assizes in 1875, the prisoner was convicted under 24 & 25 Vict. c. 100, s. 55, of having unlawfully taken an unmarried girl, under the age of sixteen, out of the possession and against the will of her father. It was proved that the prisoner did take the girl, and that she was under sixteen; but

that he *bonâ fide* believed, and had reasonable ground for believing, that she was over sixteen. It was held by a Court of fifteen Judges out of sixteen, Brett, J., being the one dissentient Judge, that the latter fact afforded no defence, and that the prisoner was rightly convicted.

Bramwell, B., said :—" A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. Why? Because the act was wrong in itself. So also, in the case of burglary, could a person charged claim an acquittal on the ground that he believed it was past six when he entered? or, in housebreaking, that he did not know the place broken into was a house? Take also the case of libel, published when the publisher thought the occasion was privileged, or that he had a defence under Lord Campbell's Act, but was wrong; he could not be entitled to be acquitted because there was no *mens rea*. Why? Because the act of publishing written defamation is wrong where there is no lawful cause. . . . It seems to me impossible to say that where a person takes a girl out of her father's possession, not knowing whether she is or is not under sixteen, that he is not guilty; and equally impossible when he believes, but erroneously, that she is old enough for him to do a wrong act with safety."

Denman, J., said :—" By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act—viz., in escaping against the will of her natural guardian from his natural care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen, and therefore unable to allege that what he had done was not unlawfully done within the meaning of the clause. In other words, having knowingly done a wrongful act, viz., in taking the girl away from the lawful possession of her father against his will, and in violation of his rights as guardian by nature, he cannot be heard to say that he thought

the girl was of an age beyond that limited by the statute for the offence charged against him. He had wrongfully done the very thing contemplated by the legislature; he had wrongfully and knowingly violated the father's rights against the father's will. And he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing."

[Lilley for the prosecution.]

Although it is no defence that the accused really and reasonably supposed the girl to be over sixteen, yet it is necessary for the prosecution to show that he had good reason for believing her to be under the lawful care or charge of her father or guardian.

In R. *v.* Hibbert (11 Cox, C. C. 246; and L. R. 1 C. C. R. 184), the prisoner met a girl under the age of sixteen years of age in a street and induced her to go with him to a place at some distance, where he seduced her and detained her for some hours. He then took her back to where he met her, and she returned home to her father. The Court held that, in the absence of any evidence that the prisoner knew or had reasons for knowing, or that he believed, that the girl was under the care of her father at the time, a conviction could not be sustained.

In R. *v.* Mankletow (Dears. C. C. 159; and 6 Cox, C. C. 143), a girl under sixteen having by persuasion been induced by the prisoner to leave her father's house, and go away with him without the consent of the father, left her home alone by a preconcerted arrangement between them and went to a place appointed, where she was met by the prisoner, and then they went away together to some distance without the intention of returning; the Court held, first, that there was a taking of the girl out of the father's possession within 9 Geo. IV. c. 31, s. 20, by the prisoner when he met the girl and went away with her at the appointed place, as up to that moment she had not absolutely renounced her father's protection; secondly, that such taking need not be by force, actual or constructive, and it is immaterial whether the girl consents or not.

A man is not bound to return to her father's custody a girl who, without any inducement on his part, has left her home and come to him. Bramwell, B.: "I am of opinion that if a young woman

leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parent's custody, yet his not doing so is no infringement of this Act of Parliament." (R. *v.* Olifier, 10 Cox, C. C. 402.)

Purity of motive is no defence to an indictment under sect. 55 of 24 & 25 Vict. c. 100. The intent to marry or carnally know is not an ingredient of the offence. Thus, in a case tried at Stafford Assizes in 1872, it appeared that the defendant was a married man of excellent character, and it was contended for him by his counsel that, actuated by religious and philanthropic motives, he had taken the girl from her parents simply to save her from being placed in a convent. The Court, however, held that, supposing this to be true, it did not constitute a defence. (R. *v.* Walter Booth, 12 Cox, C. C. 231.)

Where a servant girl under sixteen had permission from her master to go and see her parents from Saturday to Monday night, and went to see them on the Sunday for a few hours, and then told them (by previous arrangement with the prisoner) that she was going back to her employment, instead of which she remained with the prisoner all night, and did not return to her master's employment until some days afterwards; the Court held that the girl was under the lawful charge of her master and not of her father at the time of the alleged offence, and that these facts would not support a conviction under the statute. (R. *v.* Miller, 13 Cox, C. C. 179.)

In R. *v.* Henkers (16 Cox, C. C. 257), it was held that where a girl, under the age of eighteen, has not been taken against her will out of the possession of her father or mother or of the person having the lawful care or charge of her, it is necessary, in order to convict a person charged with an offence under sect. 7 of 48 & 49 Vict. c. 69, in respect of such girl, to prove that the girl left such possession in consequence of persuasions, inducements or blandishments held out to her by the prisoner. Upon an indictment under 48 & 49 Vict. c. 69, s. 7, for taking or causing to be taken a girl out of the possession of her father, it was proved that at the time the alleged offence was committed, the girl was employed as barmaid at a distance from her father's home. The Court held that she was under the lawful charge of her employer, and not in

the possession of her father; and that, therefore, the prisoner could not be convicted of the offence with which he was charged.

In R. *v.* Baillie (8 Cox, C. C. 238), the prisoner had induced a young girl under sixteen to go with him to a Roman Catholic chapel, where they were married. The child was only away from home about an hour, and after her return continued to live with her parents as before, they being quite unaware of the fact of her marriage, which appears not to have been consummated. It was held that the prisoner was guilty of abduction, because the effect of what he had done was to alter the girl's whole relationship to her father, and to give himself power to take her away whenever he liked.

Sect. 7 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), makes it a misdemeanour, punishable, as a maximum, with two years' imprisonment with hard labour, to abduct an unmarried girl under eighteen with intent that she should be carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally; but it is a sufficient defence to any charge under this section if it shall be made to appear to the Court or jury that the person so charged had reasonable cause to believe that the girl was of or above the age of eighteen years.

It will be observed that this last point makes a very great distinction between the two Acts of Parliament, and indictments under the 7th section of the Criminal Law Amendment Act are far more frequent than under the 55th section of 24 & 25 Vict. c. 100, which is now rarely used.

In R. *v.* Nulano (Sessions Paper, C. C. C., Vol. 107, p. 66), the indictment charged the taking of a girl out of the possession and against the will of the mother. It was successfully objected that, the father being alive, and there being no proof of divorce or separation, the mother was under coverture, and therefore had no legal possession of the child.

In R. Jarvis (20 Cox, C. C. 249), it was held that in order to support a charge of taking an unmarried girl, under the age of sixteen out of the possession and against the will of her parents or guardians, it must be shown that the prisoner took some active step, by persuasion or otherwise, to cause the girl to leave her home; and if the suggestion to go away with prisoner came

from the girl only, and he took the merely passive part of yielding to such a suggestion, he is entitled to be acquitted.

Other cases on this subject are :—R. *v.* Biswell, 2 Cox, C. C. 279 ; R. *v.* Kipps, 4 Cox, C. C. 167 ; R. *v.* Mycock, 12 Cox, C. C. 28 ; R. *v.* Burrell, 9 Cox, C. C. 368 ; R. *v.* Ward, Sessions Paper, C. C C., Vol. 59, p. 172 ; R. *v.* Downes, Sessions Paper, C. C. C., Vol. 51, p. 396 ; R. *v.* Timmins, 8 Cox, C. C. 401 ; R. *v.* Packer, 16 Cox, C. C. 57.

Stealing Children under Fourteen.

[53] R. *v.* JOHNSON. (1884)

[15 Cox, C. C. 481 ; 50 L. T. 759 ; 48 J. P. 759.]

The prisoner was indicted under 24 & 25 Vict. c. 100, s. 56, for the unlawful detention of a little girl under fourteen years of age. The evidence was that she had been in the prisoner's service, and was missing. The prisoner had got the mother of the child to sign a paper containing a supposed consent, which she must have known the mother could not read, and which she did not read over to her nor tell her the contents, but which she afterwards said contained a consent to part with the child. The prisoner gave different accounts about what had become of the child, but implying that she had given her up to some third persons. It was held that she was rightly convicted, because, whether her stories were all utterly false, or whether the child was in the actual custody of some third parties to whom she had wrongfully delivered her, it was equally true that she had unlawfully detained the child by fraud.

Grove, J., said : " The defence set up was that the child had got into the possession of somebody else ; but that, if true,

was by the fault of the prisoner, who had told falsehoods about it; and, if she fraudulently detained the child from the mother by placing the child in the custody of someone else, the child, for this purpose, would still be in her own custody, and she would be deemed unlawfully and fraudulently to detain her."

"If the prisoner," said Stephen, J., "having got the child, kept her with the intention of handing her over to someone else, and did so against the will of the parent, that is a detention; and, as she did it by means of falsehoods, the detention was fraudulent."

[Dickens for the prisoner.]

In arriving at this decision, the Court followed a case of Jones *v.* Dowle (9 M. & W. 19), which was an action of detinue for a picture. The plaintiff had bought it at a sale by auction, but the defendant, the auctioneer, had delivered it under a supposed contract of sale to a third party. "Detinue," said Parke, B., "does not lie against him who never had possession of the chattel, but it does against him who once had, but has improperly parted with, the possession of it."

In order to support a conviction under the 56th section, it is not necessary to prove that the fraud by means of which possession of the child was obtained was practised upon the child itself. Where, therefore, a prisoner had been convicted upon an indictment which charged her with such offence, it having been proved that possession of the child, which was of the age of eleven weeks, had been obtained by means of a fraud practised upon its mother, the Court of Crown Cases Reserved affirmed the conviction, and dissented from the dictum of Smith, J., in R. *v.* Barrett, 15 Cox, C. C. 658 (R. *v.* Bellis, 17 Cox, C. C. 660.)

Stealing a child under fourteen (sect. 56) is a felony, punishable with a maximum of seven years' penal servitude; whereas the abduction of a girl under sixteen (sect. 55) is only a misdemeanour and cannot be punished with more than two years' imprisonment, with hard labour.

Abandonment and Exposure of an Infant.

[54] R. *v.* **FALKINGHAM.** (1870)

[L. R. 1 C. C. R. 222; 39 L. J. (M. C.) 47; 21 L. T. 679; 18 W. R. 355; 11 Cox, C. C. 475.]

Mary Falkingham and Martha Falkingham were indicted under 24 & 25 Vict. c. 100, s. 27, for that they "did abandon and expose a certain child then being under the age of two years, whereby the life of the said child was endangered."

Mary Falkingham, the mother of a child five weeks old, and Martha Falkingham put the child into a hamper, wrapped up in a shawl and packed with shavings and cotton wool; and Mary Falkingham, with the connivance of Martha Falkingham, took the hamper to Middlesbrough, about four or five miles off, to the booking office of the railway station there. She then paid for the carriage of the hamper, and told the clerk to be very careful of it and to send it to Gisborough by the next train, which would leave Middlesbrough in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed, "Mr. Carr's, Northoutgate, Gisbro., with care, to be delivered immediately," at which address the father of the child was then living. The hamper was carried by the ordinary passenger train from Middlesbrough to Gisborough, leaving Middlesbrough at 7.45 p.m. and arriving at Gisborough at 8.15 p.m. At 8.40 p.m. the hamper was delivered at its address. On its being opened it was found to contain the child alive and packed in the manner before mentioned, with a paper on which was written, "Please take care of this child, for George Beaumont is the father of it." The child was taken by the relieving officer, the same evening, to the union workhouse, where it lived for three weeks afterwards, and then died from causes not attributable to the

conduct of the prisoners. It was proved to have been a delicate child.

On the proof of these facts at the trial, it was objected for the prisoners that there was no evidence to go to the jury that the life of the child was endangered, and that there was no abandonment and no exposure of the child within the meaning of the statute. The objection was overruled, and the prisoners were found guilty. On the point being reserved for the consideration of the fifteen Judges, the conviction was affirmed.

[No counsel appeared.]

In R. *v.* White (L. R. 1 C. C. R. 311), the facts were these: A woman who was living apart from her husband, and who had the actual custody of their child, under two years of age, brought the child, on the 19th of October, and left it at the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door, and subsequently in the roadway, from about 7 p.m. till 1 a.m., when it was removed by a constable, the child then being cold and stiff. It was held that, though the father had not had the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child, whereby its life was endangered, within the meaning of the statute. "If the child had died," said Blackburn, J., "a jury might have convicted him of murder."

The Act of 57 & 58 Vict. c. 41 (the Prevention of Cruelty to Children Act, 1894), deals with children up to the age of sixteen years.

Concealment of Birth.

[55] R. *v.* BROWN. (1870)

[L. R. 1 C. C. R. 244; 39 L. J. (M. C.) 94; 22 L. T. 484; 18 W. R. 792; 11 Cox, C. C. 517.]

The prisoner put the dead body of her child over a wall 4½ feet high which divided a yard from a field. The yard was at the back of a public-house, and was used by the occupiers of that and three other houses. There was no thoroughfare into or through the yard, and no entrance into it except by a narrow passage from the street. The prisoner did not live in any of the four houses that had the use of the yard, and she must have passed from the street into the yard in order to throw the body over the wall. A person looking over the wall from the yard would see the body, but persons going through the yard or using it in the ordinary way would not see the body. The field was a grass field used by a butcher for grazing. The field had no gate except from the butcher's yard, and there was no public path through the field, nor any path in the field that would take anyone within sight of the body. No persons going into the field in their ordinary occupation would go near the body or see it, nor would they see it unless they went up to the part of the wall where the body lay. A little girl, picking flowers in the field, went accidentally to the wall and found the body; it was close to the wall, as near to it as it could possibly be; it seemed as if it had been thrown over the wall; there was blood on the wall; the body was lying on its face, at twenty yards from the gate, naked, with nothing on or over it, nothing to conceal it but its situation in the field and the wall. The Court of Crown Cases Reserved affirmed the conviction.

Bovill, C. J., said: "The first question is whether there is any evidence of a 'secret disposition' of the body within the statute 24 & 25 Vict. c. 100, s. 60. It seems to me that what is a secret disposition must depend upon the circumstances of each particular case. The most complete exposure of the body might be a concealment. As, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place where the body would not be likely to be found. There would, in such a case, be a secret disposition of the body, and the jury must say, in each case, whether or not the facts show that there has been such a disposition. In this case, there was abundant evidence to go to the jury that the body had been disposed of secretly. The evidence of a secret disposition consisted in the situation in which the body was placed, and it was a question for the jury to say whether placing the body in such a situation was in fact a secret disposition of the body. It is easy to suggest cases where placing a body in a particular situation would undoubtedly be evidence of a secret disposition, as if a body were thrown down from a cliff to the seashore in a secluded place. If, however, the place were very much frequented, there might be no evidence of a secret disposition from such an act. There must, no doubt, be an intent to conceal the body, but here there is no question as to the intent."

[Ridley for the prosecution.]

By 24 & 25 Vict. c. 100, s. 60, if any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour: provided that if any person tried for the murder of any child shall be

acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the Court may pass such sentence as if such person had been convicted upon an indictment for the concealment of the birth. (Former provision, 9 Geo. IV. c. 31, ss. 14, 31.)

In R. *v.* Sleep (9 Cox, C. C. 559), it was held by Byles, J., at Exeter Assizes, that a mother who placed the dead body of her child in an open box in her bedroom and afterwards, on inquiry by the doctor, told him where it was, could not be convicted of concealment. "The concealment," said the Judge, "must be by a secret disposition of the body, and a disposition can only be secret by placing it where it is not likely to be found. Secrecy is the essence of the offence. Can you say that an open box in the prisoner's bedroom is a secret disposition? It is for you to say, but in my opinion it is not."

In R. *v.* Clark (15 Cox, C. C. 171), it was held by Denman, J. (after consulting Day, J.), that a woman who exposed the naked and mutilated dead body of her child in a public highway (one of the back streets of the city), along which many people were certain to pass and repass, was guilty of a nuisance at common law.

The expression "delivered of a child" in sect. 60 does not include delivery of a fœtus which has not reached the period at which it might have been born alive. (R. *v.* Berriman, 6 Cox, C. C. 388.) But a fœtus not bigger than a man's finger, but having the shape of a child, is within the statute. (R. *v.* Colmer, 9 Cox, C. C. 506.)

Although the fact of the mother having placed the dead body of her newly-born child in an unlocked box is not, of itself, sufficient evidence of concealment of birth, yet all the attendant circumstances of the case must be taken into consideration in order to determine whether or not an offence has been committed. (R. *v.* Cook, 11 Cox, C. C. 542.)

Leaving the dead body of a child in two boxes, closed, but not locked or fastened, one being placed inside the other, in a bedroom, but in such a position as to attract the attention of those

who daily resorted to the room, is not a secret disposition of the body within 24 & 25 Vict. c. 100, s. 60. (R. *v.* George, 11 Cox, C. C. 41.)

To constitute the offence of concealment of birth within sect. 60 of the Offences against the Person Act, 1861, there must be a concealment of the fact of the birth, and that concealment must be carried out by the secret disposition of the dead body. The secret disposition must be of such a nature that any one coming to the place where the body is would not be likely to see it. (R. *v.* Rosenberg, 70 J. P. 264.)

In R. *v.* May (10 Cox, C. C. 448), the prisoner, delivered of a child born alive, endeavoured to conceal the birth thereof, by depositing the child while alive in a corner of a field, leaving the infant to die from exposure, which it did, and the dead body was afterwards found in the corner. The Court of Crown Cases Reserved held that she could not be convicted of concealing the birth of the child under 24 & 25 Vict. c. 100, s. 60, which relates to the secret disposition of the dead body of a child. Kelly, C. B., said: "The point reserved in this case is really not arguable when we look at the language of the statutes. The conviction cannot be sustained, for it is clear that the child was born alive, and remained alive for a short time; and as the statute relates only to the disposal of the dead body of a child, this indictment cannot be sustained."

Other cases on this subject are:—R. *v.* Derham, 1 Cox, C. C. 56; R. *v.* Waterage, 1 Cox, C. C. 338; R. *v.* Farnham, 1 Cox, C. C. 349; R. *v.* Morris, 2 Cox, C. C. 489; R. *v.* Hughes, 4 Cox, C. C. 447; R. *v.* Goode, 6 Cox, C. C. 318; R. *v.* Gogarty, 7 Cox, C. C. 107; R. *v.* Perry, 6 Cox, C. C. 531; R. *v.* Opie, 8 Cox, C. C. 332; R. *v.* Thompson, Sessions Paper, C. C. C., Vol. 95, p. 236; R. *v.* Neville, Sessions Paper, C. C. C., Vol. 80, p. 528; R. *v.* Nixon, cited in R. *v.* Clarke, 4 F. & F. 1040, n.; R. *v.* Hewitt, 4 F. & F. 1101; R. *v.* Higley, 4 C. & P. 366; R. *v.* Williams, 11 Cox, C. C. 684; R. *v.* Bate, 11 Cox, C. C. 686.

Burning and Disposing of Dead Bodies.

[56] R. *v.* STEPHENSON. (1884)

[13 Q. B. D. 331; 15 Cox, C. C. 679; 53 L. J. (M. C.) 176; 52 L. T. 267; 33 W. R. 244.]

The prisoners Elizabeth Stephenson and Ann Stephenson were tried upon an indictment in substance charging them with having burnt the dead body of an illegitimate infant child to which the defendant Elizabeth Stephenson had recently given birth, with intent to prevent the holding of an inquest upon it. The defendant Elizabeth was on the 17th of December, 1883, confined of the child in question at the house of a Mrs. Atkinson, at Cayton, near Scarborough, with whom it lived until its death on the morning of the 12th of January following. The dead body was surreptitiously taken away by the two defendants and burnt, with intent to prevent the coroner from holding an inquest upon it. The defendant Ann was the mother of Elizabeth, and they lived together at Cayton.

The jury convicted the prisoners, but certain objections having been taken by the counsel for the defence, the questions were reserved, and the Court of Crown Cases Reserved affirmed the conviction.

"No case that has been referred to," said Grove, J., "is absolutely in point; but there are many cases which show that interference with statutory duties, and the preventing of their performance, is a misdemeanour in general at the common law. It is so in cases where statutory provisions are, as here, for the public benefit, and especially where, as here, the matter is one concerning life and death. It is most important to the public that a coroner, who on reasonable

grounds intends to hold an inquest, should not be prevented from so doing. . . . If it is a crime to bury, *à fortiori* it is one to burn a body; because, if you bury, exhumation is possible, but if you burn, the body is destroyed and exhumation is no longer possible. However, here it is enough to say the coroner had a right to hold the inquest, and the prisoners were wrong in secretly and intentionally burning the body to obstruct him in his duty of holding such inquest."

Stephen, J., said: "If a person destroys a dead body, or removes it to prevent an inquest being held, he is guilty of an offence if the inquest intended to be held was one that might lawfully be held. As has been said in the course of the argument, a man who obstructs an inquest in this way takes his chance of the inquest being one that it was right to hold. It is an obstruction of an officer of justice, it prevents the doing of that which the statute authorizes him to do."

Williams, J., said: "It is quite clear to me that a *bonâ fide* belief in information from reliable sources, which, if true, renders it a coroner's duty to hold an inquest, suffices to give the coroner jurisdiction. The next question reserved is, whether obstruction of the the coroner in this duty of his is, under such circumstances, a misdemeanour; and to that I answer, it most clearly is."

Mathew, J., said: "It is clear, I think, that the coroner must act upon information of other persons, and must hold his inquest, if he believes honestly, and has reasonable grounds for believing, that that information is such as to call for an inquest. It will never do to allow other persons to decide for themselves whether they will permit an inquest to be held or not."

Hawkins, J., said: "If a coroner has information which, if true, makes it his duty to hold an inquest, and he *bonâ fide* believes that information, he must, I think, hold such inquest. Jurisdiction does not depend on actual facts. Jurisdiction to

inquire cannot depend upon the actual result of the inquiry. Destroying the body was to make it impossible to hold the inquest, inquests being held upon the body. I am clearly of opinion that the defendants committed the offence charged in making it, as they did, impossible to hold the inquest, and that the conviction must certainly be affirmed."

[Meek for the Crown; Stuart Wortley and H. G. Taylor for the defendants.]

In connection with the leading case, and the law relating thereto, the reader should refer to Mr. Justice Stephen's charge to the grand jury in R. *v.* Price (12 Q. B. D. 247 and 15 Cox, C. C. 389), where the prisoner was charged with attempting to burn the body of his child instead of burying it, and with attempting to burn the body with intent to prevent the holding of an inquest upon it. The learned Judge said: "With respect to the prevention of the inquest the law is, that it is a misdemeanour to prevent the holding of an inquest which ought to be held by disposing of the body. It is essential to this offence that the inquest which it is prepared to hold is one which ought to be held. . . . After full consideration I am of opinion that a person who burns instead of burying a dead body does not commit a criminal act unless he does it in such a manner as to amount to a public nuisance at common law."

In R. *v.* Byers (71 J. P. 205) the prisoner was indicted under sect. 8, sub-sect. 3 of the Cremation Act, 1902 (2 Edw. VII. c. 8), for having, with intent to conceal the commission of certain specified offences, procured the cremation of certain dead bodies. It appeared that the prisoner burnt certain dead bodies of children in a stove in her own house. It was held that that was not evidence to go to the jury of having "procured the cremation of any body" within the meaning of the sub-section in question.

Certain counts of the indictment in the same case charged the prisoner, Jessie Byers, with having unlawfully, wrongfully, and wilfully omitted and neglected to bury or cause to be buried dead bodies, whereby and by reason of the decomposition of the dead bodies whilst in her care and custody, and whilst remaining unburied in her dwelling-house, "divers noxious, injurious and unwholesome smells and stenches did arise and issue from the

said dead bodies and thereby the air was greatly infected and corrupted and was rendered and became for several days offensive, unwholesome, injurious and dangerous to health, to the great damage and common nuisance of such of the liege subjects of our Lord the King as inhabited in the said house . . . aforesaid to the evil example of all others in like case offending and against the peace, &c., &c." The Court held that these counts were bad, as they did not allege a nuisance to the public, but only a nuisance to certain persons dwelling in a private dwelling-house.

It is a misdemeanour at common law to remove without lawful authority a corpse from a grave, whether in a churchyard or in the burial ground of a congregation of Protestant dissenters; and it is no defence to such a charge that the motives of the defendant were pious and laudable. (R. *v.* Sharpe, D. & B. 160; *vide* also R. *v.* Feist, 8 Cox, C. C. 18.)

The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is also an indictable misdemeanour if his ability to provide such burial can be shown.

A parent who has not the means of providing burial for the body of his deceased child is not liable to be indicted for a misdemeanour in not providing for its burial, even though a nuisance is occasioned by allowing the body to remain unburied, and although the poor law authorities of the union have offered him money to defray the expenses of burial, by way of loan, as he is not bound under such circumstances to contract a debt. (R. *v.* Vann, 2 Den. C. C. 325.)

As to disinterring and removing human remains from an unconsecrated burial ground, *vide* R. *v.* Jacobson, 14 Cox, C. C. 522.

Taking up dead bodies, even though for the purpose of dissection, is an indictable offence. (R. *v.* Lynn, 2 T. R. 733.)

It is an indictable offence against decency to take a person's dead body with intent to sell or dispose of it for gain and profit. (R. *v.* Gilles, R. & R. C. C. 366.)

Public Indecency.

[57] R. *v.* CRUNDEN. (1809)

[2 Camp. 89.]

It is an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses from which he may be distinctly seen, although these houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question.

"I can entertain no doubt," said M'Donald, C. B., "that the defendant, by exposing his naked person on the occasion alluded to, was guilty of a misdemeanour. The law will not tolerate such an exhibition. Whatever his intention might be, the necessary tendency of his conduct was to outrage decency and to corrupt the public morals. Nor is it any justification that bathing at this spot might a few years ago be innocent. For anything that I know, a man might a few years ago have harmlessly danced naked in the fields beyond Montague House; but it will scarcely be said by the learned counsel for the defendant that anyone might now do so with impunity in Russell Square. Whatever place becomes the habitation of civilized men, there the laws of decency must be enforced."

[Shepherd, Serjt., and Gurney for the Crown; Marryat for the prisoner.]

This case has special right to rank as a "leading" case, because, as the Court remarked, it was "the first prosecution of the sort in modern times." The reporter, in a footnote, says: "The only case resembling this to be found in the books is R. *v.* Sir Charles Sedley, 1 Keb. 620."

The principle of the leading case is that whatever openly outrages decency, and is injurious to public morals, is a misdemeanour at common law. If, on the other hand, the indecency is committed in secret, and is only calculated to injure the morals of an individual, it is not indictable unless by statute, as, for instance, under the 11th section of the Criminal Law Amendment Act, 1885. An indecent exposure, though in a place of public resort, if visible only by one person, is not indictable as a common nuisance. (R. *v.* Watson, 2 Cox, C. C. 376; R. *v.* Webb, 3 Cox, C. C. 183.)

A "public place" does not mean a public highway, but simply a place which is open to the view of people generally, even although it may not be visible from any highway. See R. *v.* Thallman (L. & C. 326), where the prisoner indecently exposed himself on the roof of a house in Albemarle Street, Piccadilly, with the object of exciting some female servants in a house opposite. "Surely," said Martin, B., "if the people in twenty or thirty houses round could see it, it is a sufficiently public place."

In R. *v.* Wellard (14 Q. B. D. 63; and 15 Cox, C. C. 559), the prisoner was convicted of indecently exposing his person to divers subjects of the Queen in a certain public place, upon evidence showing that the place in question was out of sight of the public footpath, but was a place to which the prisoner had gone with several little girls, though without any legal right to go there, and was a place to which persons were in the habit of going without having any legal right so to do, and that persons so going were never in any way hindered or interfered with. The Court of Crown Cases Reserved held that the conviction was correct, and that the jury were justified in finding that the place was public. *Semble*, that the offence may be indictable if committed before divers subjects of the realm, even if the place be not public.

Grove, J., said: "A public place is one where the public go, no matter whether they have a right to go or not. The right is not the question. Many shows are exhibited to the public on private property, yet they are frequented by the public—the public go there."

Huddleston, B., said: "The beach at Brighton is not public property, yet an exposure there is punishable."

In R. *v.* Saunders (1 Q. B. D. 15, and 13 Cox, C. C. 116), the defendants, who were travelling showmen, were held to have

committed an indictable offence by keeping a booth on Epsom Downs during the summer races, for the purpose of an indecent exhibition, which anybody who paid was allowed to see. It was also proved that indecent language was used by the prisoners inside the booth, and outside in order to induce people to go into the booth. In R. *v.* Grey (4 F. & F. 73), a herbalist, who had exhibited in his shop window in the High Street, at Chatham, a picture of a man naked to the waist, and covered with eruptive sores, so as to constitute an offensive and disgusting exhibition, was held guilty of a nuisance, although there was nothing immoral or indecent in the picture, and his motive was innocent. "There is no doubt," said Willes, J., "the exhibition of the picture on a highway is a nuisance. It is so disgusting that it is calculated to turn the stomach." (See also R. *v.* Clark, 15 Cox, C. C. 171.)

It is to be observed that the indecent exposure of the person may sometimes be punished summarily as well as on indictment. The 4th section of 5 Geo. IV. c. 83, treats "every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female," as a rogue and vagabond, and gives a bench of magistrates power to send him to prison for three months with hard labour. If a man who has been convicted of the above offence under the above section repeats the act of indecency, he becomes an incorrigible rogue, and the Quarter Sessions have power not only to send him to prison, but to have him whipped.

By sect. 2 of the Criminal Law Amendment Act, 1880 (43 & 44 Vict. c. 45), it is enacted that it shall be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency.

By sect. 11 of the Criminal Law Amendment Act, 1885, "any male person who . . . procures . . . the commission by any male person of any act of gross indecency with another male person shall be guilty of a misdemeanour." It was held, in R. *v.* Jones and Bowerbank, [1896] 1 Q. B. 4; 18 Cox, C. C. 207), that where the prisoner had procured the commission by another male person of an act of indecency with the prisoner himself, the offence was complete.

Other cases are :—R. *v.* Martin, 12 Cox, C. C. 204 ; R. *v.* Orchard, 3 Cox, C. C. 248 ; R. *v.* Harris and Cocks, L. R. 1 C. C. R. 282, and 11 Cox, C. C. 659 ; R. *v.* Holmes, Dearsley, C. C. 207 ; R. *v.* Farrell, 9 Cox, C. C. 446 ; R. *v.* Elliott, Leigh & Cave, 103 ; R. *v.* Reed, 12 Cox, C. C. 1.

Unnatural Offences.

R. *v.* JELLYMAN. (1838) [58]

[8 C. & P. 604.]

The prisoner was indicted for having committed an unnatural offence with his own wife.

Patteson, J., who tried the case, said : "There was a case of this kind which I had the misfortune to try, and it there appeared that the wife consented. If that had been so here, the prisoner must have been acquitted ; for although consent or non-consent is not material to the offence, yet, as the wife, if she consented, would be an accomplice, she would require confirmation, and so it would be with a party consenting to an offence of this kind, whether man or woman."

[Curwood for the prosecution ; Greaves for the prisoner.]

The minimum punishment for the full offence of sodomy, or bestiality, was formerly ten years' penal servitude, but that is now altered by 54 & 55 Vict. c. 69.

Sect. 11 of 48 & 49 Vict. c. 69 (the Criminal Law Amendment Act, 1885) enacts that any male person who, in public or private, commits, or is a party to the commission, or procures, or attempts to procure, the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Before this Act was passed, a large number of persons who had committed acts of gross indecency, and were indicted for inciting to sodomy, were acquitted through the evidence not being sufficiently strong to warrant a verdict of Guilty. It will also be observed that this section of the Act will meet cases where men have been guilty of filthy practices together, but not with sufficient publicity to warrant a conviction for indecent exposure in a public place.

If the evidence is not sufficiently strong to warrant a conviction for the full offence of sodomy or bestiality, the prisoner may be convicted of an attempt, and is in that case liable to ten years' penal servitude.

The crime is complete if the jury is satisfied that penetration took place. (R. *v.* Reekspear, 1 Moo. C. C. 342; R. *v.* Cozens, 6 C. & P. 351.)

To constitute the offence of sodomy, the act must be in that part where sodomy is usually committed, for the act in a child's mouth does not constitute the offence. (R. *v.* Jacobs, R. & R. C. C. 331.)

An indictment for bestiality, which describes the animal as a certain animal called a bitch, is sufficiently certain, although the females of foxes and some other animals are called bitches as well as the female of the dog. (R. *v.* Allen, 1 C. & K. 495.)

In R. *v.* Brown (24 Q. B. D. 357), the Court of Crown Cases Reserved held that domestic fowls are animals within the meaning of 24 & 25 Vict. c. 100, s. 61, and therefore an attempt to commit an unnatural offence with such fowls is indictable under that section. (*Vide ante*, p. 27.)

As to attempt to commit an unnatural offence, and evidence of a child not on oath, *vide* R. *v.* Beer, 62 J. P. 120.

As to conspiracy to commit an unnatural crime, *vide* R. *v.* Boulton and others, 12 Cox, C. C. 87.

Keeping a Disorderly House.

R. *v.* RICE AND WILTON. (1866) [59]

[L. R. 1 C. C. R. 21; 10 Cox, C. C. 155; 35 L. J. (M. C.) 93.]

The defendants were tried upon an indictment which stated that they "unlawfully did keep and maintain a certain common ill-governed and disorderly house, and in the said house, for the lucre and gain of them, the said Peter Rice and Mary Wilton, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and there unlawfully and wilfully did cause and procure to frequent and come together; and the said men and women, in the house of them, the said Peter Rice and Mary Wilton, at unlawful times, as well in the night as in the day, then and there to be and remain, drinking, tippling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet do permit, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen there inhabiting, being, residing, and passing, to the evil example of all others in like case offending, against the peace, &c."

It was proved that the prisoners acted as master and mistress of a house at Chester; that the house was frequented by prostitutes, who were constantly in the habit of bringing men there for the purposes of prostitution; and this was done with the knowledge and assent of the defendants. It was further proved that when a prostitute brought a man to the house for such purpose, such prostitute and man were allowed by the prisoners to have the use of a bedroom in the house, either for a whole night or for a shorter period; that, when such prostitute and man occupied the room for a whole night, the sum of 5*s.* was charged by the defendants, and paid

by the prostitute or man to the defendants for the use of the room; but that, when occupied for a shorter period, the sum of 2*s.* 6*d.* was charged by and paid to them. There was no evidence that any indecency or disorderly conduct was perceptible from the exterior of the house. It was held that they were guilty of keeping a disorderly house.

[No counsel appeared.]

The keeping of a bawdy-house is a common nuisance, both on the ground of its corrupting public morals, and of its endangering the public peace by drawing together dissolute persons. Though the charge in the indictment is general, yet evidence may be given of particular facts, and of the particular time of these facts. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do; but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain the indictment.

25 Geo. II. c. 36 (Disorderly Houses Act, 1751), s. 2, is as follows: "And whereas the multitude of places of entertainment for the lower sort of people is another great cause of thefts and robberies, as they are thereby tempted to spend their substance in riotous pleasures, and in consequence are put on unlawful methods of supplying their wants and renewing their pleasures; in order, therefore, to prevent the said temptation to thefts and robberies, and to correct as far as may be the habit of idleness which is becoming general over the whole kingdom, and is productive of much mischief and inconvenience, be it enacted by the aforesaid authority that:

From and after the 1st day of December, 1752, any house, room, garden, or other place kept for public dancing, music or other entertainment of the like kind in the cities of London and Westminster, or within twenty miles thereof, [*except in the administrative county of Middlesex*, 56 & 57 Vict. c. 15] without a licence, &c., shall be deemed a disorderly house or place."

The proceedings in prosecutions against bawdy-houses are facilitated by this statute, the 5th section of which promises the prosecutors (being "two inhabitants of any parish or place, paying scot and bearing lot therein") a substantial reward on obtaining a

conviction;—"and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of ten pounds to each of such inhabitants; and in case such overseers shall neglect or refuse to pay . . . upon demand the said sum of ten pounds, such overseers, and each of them, shall forfeit to the person entitled to the same double the sum so refused or neglected to be paid." The inhabitants, however, if they want to get their 10*l.* each, must be careful to comply with the conditions not only of this section, but also of sect. 7 of 58 Geo. III., c. 70. See also sect. 13 of 48 & 49 Vict. c. 69 (the Criminal Law Amendment Act, 1885), which authorizes summary proceedings against brothel keepers, whether managers, assistants, tenants, occupiers, landlords, or agents. Even on a first conviction a defendant may, under this section, be sent to prison for three months with hard labour, and without the option of a fine.

The 10th section of the Act just referred to authorizes a justice of the peace to issue a search warrant in any case where there is "reasonable cause to suspect" that a girl is being "unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice." It has been held that this section vests in the justice a judicial as well as a ministerial function, so as to protect a *bonâ fide* applicant against an action for malicious prosecution.

In trials for this offence, it is necessary to prove that the house in question, or a room or rooms in it, were let out for purposes of prostitution. And if a lodger lets her apartment for the purpose of indiscriminate prostitution, it is as much a bawdy-house as if she held the whole house. It must also be proved that the defendants acted or behaved as master or mistress, or as the persons having the care, government, or management of the house in question; which is sufficient evidence that the defendants kept the house. If a weekly tenant of a house uses it as a brothel, and the landlord receives no additional rent by reason of its immoral occupation, the latter cannot be convicted of keeping a brothel merely because, having notice of the nature of the occupation, he does not give the tenant notice to quit; nor would the landlord be liable to be so convicted even if at the time he let the house he knew that it was to be used as a brothel, and, by reason of its occupation as such, received an additional rent. It is also necessary

to prove that the house is situate in the parish mentioned in the indictment, for this being matter of local description, it must be proved as laid, unless amended. The 6th section of the Criminal Law Amendment Act, 1885, deals with a householder, &c., permitting the defilement of a young girl on his premises.

In R. *v.* Webster (16 Q. B. D. 134, and 15 Cox, C. C. 775) the prisoner was convicted under this section of the Act of knowingly suffering a girl under sixteen to be on premises for the purpose mentioned in the section. The girl in question was the prisoner's daughter, and the premises in respect of which the charge was made were her home, where she resided with the prisoner. The Court of Crown Cases Reserved held that, notwithstanding the above-mentioned circumstances, the conviction was good.

Lord Coleridge, C. J., said: "Those acquainted with the administration of our criminal law know that, unfortunately, the relation of the parent to the child is in many cases most grievously abused in respect to matters within the scope of the Act. It seems to me unreasonable to suppose that this Act was passed without regard to facts well known to those having to administer the criminal law, and that a class of persons who in many cases are likely to come within its purview were intended to be omitted from its provisions."

In Singleton *v.* Ellison ([1895] 1 Q. B. 607, and 18 Cox, C. C. 79) a woman occupied a house frequented by day and night by a number of men for the purpose of committing fornication with her. No other woman lived in the house, or frequented it for purposes of prostitution. The Court held that she had not committed the offence of "keeping a brothel" within the meaning of the Criminal Law Amendment Act, 1885, s. 13, sub-s. 1. Wills, J., said: "A brothel is the same thing as a 'bawdy-house' —a term which has a well-known meaning as used by lawyers and in Acts of Parliament. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution. It is certainly not applicable to the state of things described by the magistrates in this case, where one woman receives a number of men."

In Durose *v.* Wilson (71 J. P. 263), the appellant was employed by the owner as the porter-in-charge of a block of eighteen flats, among the tenants of which were twelve women who were in the

habit of bringing men to them for the purpose of prostitution. The appellant knew the purpose for which the women used the premises, and was convicted under sect. 13 (3) of the Criminal Law Amendment Act, 1885, of being wilfully a party to the continued use of the premises or part thereof as a brothel. The Court held that as it was open to the magistrate upon the evidence to find that it was not a case of each single flat being used for prostitution by the woman who was the tenant of it, but of the building as a whole being used as a brothel, the conviction was right.

Lord Alverstone, C. J., said: "But for the fact that there is a distinct finding by the magistrate on a question of fact, I am not prepared to say that I should have affirmed the conviction. I do not wish to be thought to doubt the correctness of the judgment in Singleton *v.* Ellison ([1895] 1 Q. B. 607). I think that if a summons is taken out against a woman who lives in a house and uses it for prostitution, and no other woman is living in the house or frequenting it for purposes of prostitution, she does not commit the offence of keeping a brothel within sect. 13 (1) of the Criminal Law Amendment Act, 1885; but that is not the case we have before us. This is a summons against the agent of the landlord for being wilfully a party to the continued use of the premises, or a part thereof, as a brothel. Paragraph 6 of the case states that there was no evidence to shew which flat was occupied by which woman, nor whether there were other tenants as well as the said women, nor was it proved that any one flat was used by more than one woman. I understand that to mean that in view of the nature of the structure, though the twelve flats in question were separate houses for some purposes, the magistrate came to the conclusion that in fact this nest of rooms was really used as a brothel. Section 13 of the Criminal Law Amendment Act, 1885, does not mention specially single houses or flats, and the word 'premises' in sect. 13 (3) may involve more or less than one house. The question is whether there is evidence on which the magistrate could come to the conclusion of fact at which he arrived. The appellant did not collect the rents, but it was part of his duty to evict undesirable tenants, including women who used the premises for promiscuous prostitution. I understand that to mean not the mere fact that women were leading an immoral life, but that the premises were used for visitation by men and women who came

there and might be said to be carrying on prostitution or immorality. . . . The appellant did not know to what flat the couples went, but after midnight he let them in at the street door, and when they left he called cabs for them and received tips from the men. It is perfectly consistent with this that one woman lent the key of her flat to another to take a man in, even though she did not reside there. The case seems to be very different from Singleton *v.* Ellison ([1895] 1 Q. B. 607), and while I feel myself bound to follow that case, I am not prepared to say that the magistrate has come to a wrong conclusion when he has found that this group of twelve tenements under the control of the proprietor was in fact being used as a brothel. This is not the case of the individual immoral person, but the case of a person who, according to the statute, may be convicted if he has 'been wilfully a party to this user of the premises."

The offence of keeping a disorderly house comes within the Vexatious Indictments Act (22 & 23 Vict. c. 17).

Cases on the responsibility of the owner of a house which is used as a brothel are R. *v.* Barrett, 9 Cox, C. C. 255, and R. *v.* Stannard, 9 Cox, C. C. 405.

Abortion—Administering Noxious Thing.

[60] R. *v.* **CRAMP.** (1880)

[14 Cox, C. C. 390, 401; 5 Q. B. D. 307; 49 L. J. (M. C.) 44; 42 L. T. 442; 28 W. R. 701; 44 J. P. 411.]

The prisoner was indicted at Maidstone Assizes under 24 & 25 Vict. c. 100, s. 58, for feloniously causing one Ellen Verrall to take certain noxious things with intent to procure her miscarriage. The first count charged that he feloniously caused her to take an excessive quantity of oil of juniper with that intent, the same being a noxious thing within the statute. A second count charged that he feloniously caused her to take an excessive quantity of Epsom salts with the same intent.

A third count charged that he caused her to take a noxious thing unknown, &c.

The prisoner had become intimate with the young woman in question, and about three weeks after the act of intercourse she told him that she was not unwell (*i.e.*, not menstruating as usual). He suggested some gin and water, and, as that had no effect, he gave her an ounce bottle full of oil of juniper, with intent to procure her miscarriage, and told her to take it in two doses, half at a time. She took half of it at one dose, and it caused her violent sickness. The bottle contained from 500 to 600 drops of oil of juniper. Oil of juniper is used as a diuretic in small quantities, from five to twenty drops; but when as much as half an ounce is taken it acts as an irritant, and produces violent purging and vomiting, which would have a tendency to procure miscarriage. He then gave her two ounces of Epsom salts, telling her to take them, which she did, and afterwards some pills, admitted to be innoxious, and intended to promote menstruation. Two months later, she, then being clearly pregnant, told her father, and gave him the bottle and the box of pills, and he had an interview with the prisoner and pressed him to marry her, and on his hesitating said to him, "I have here those things which you gave my daughter to produce abortion," which the prisoner, he said, did not deny. This was held to be some corroborative evidence, even assuming the woman to be in the position of an accomplice requiring corroboration. On the prisoner being convicted, and the question being reserved as to whether or not there was evidence that the half-ounce of oil of juniper taken by the prosecutrix was a noxious thing within the meaning of sect. 58 of 24 & 25 Vict. c. 100, the Court of Crown Cases Reserved held that the causing to be taken as much as was taken in this case was the causing a "noxious thing" to be taken within the meaning of the statute; and that a thing may be a "noxious thing"

within the statute if when taken in a large quantity it proves injurious, although when taken in a small quantity it is beneficial.

Lord Coleridge, C. J., said: "I am of opinion that the conviction should be affirmed. The material words of the statute 24 & 25 Vict. c. 100, s. 58, are: 'Whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing,' shall be guilty of felony. In this case the prisoner caused to be taken by the woman a quantity of oil of juniper, with intent to procure miscarriage, a quantity which did cause violent sickness, and which, if the whole supplied had been taken, might have done more injury. The question is, whether he was guilty of administering a poison or other noxious thing with intent to procure miscarriage within the meaning of the statute. The intent was proved, and it was further proved that oil of juniper is noxious when administered in the quantity proved to have been taken in this case. Then why was there not the administration of a noxious thing? It was said that 'noxious thing' in the statute means some kind of poison, and probably that is so. But what is a poison? It is something which, when administered, is injurious to health or life. There is hardly any active drug which, taken in large quantities, may not be so, and, on the other hand, there is hardly any poison which may not in small quantities be useful and salutary. It is therefore in each case a question of the quantity and the circumstances under which the drug is administered. It is in each case a question for the jury whether the thing, administered as it was under the circumstances, is a 'noxious thing.' Here the thing as administered was proved to be noxious, and the intent was proved to be criminal. The ingredients of the offence were therefore established. None of the cases cited touch the question. In R. *v.* Isaacs the drug

was not shown to be capable of doing harm. In R. *v.* Perry the quantity administered was so small as to be innocuous, and in R. *v.* Hennah the thing taken was not noxious in the quantity administered. We are not precluded, therefore, by authority from holding, on principle and good sense, that if a person causes to be taken, with intent to produce miscarriage, something which in the way it is administered is noxious, he causes a noxious thing to be taken. The conviction will therefore be affirmed."

[A. B. Kelly for the prosecution; D. Kingsford and Mead for the prisoner.]

In R. *v.* Hennah (13 Cox, C. C. 547) the prisoner was charged, under 24 & 25 Vict. c. 100, s. 24, with unlawfully and maliciously administering to a woman named Rowe "a poison," to wit, "a certain destructive or noxious thing," called *cantharides*, with intent to injure, aggrieve, or annoy. It was proved by the medical authorities that cantharides (otherwise called Spanish fly), when administered in small quantities, is incapable of producing any effect, although twenty-four grains would kill a man. The prisoner had only given the prosecutrix one or two grains, and such a small quantity could not possibly have done her any harm. On these facts the prisoner was held entitled to his acquittal.

"What is important to the present case," said Cockburn, C. J., "is that the quantity administered was incapable of producing any effect. The statute makes it an offence to administer, although not with the intention of taking life or of doing any serious bodily harm, any noxious thing with intent to cause injury or annoyance. But unless the thing is a noxious thing in the quantity administered, it seems exceedingly difficult to say logically there has been a noxious thing administered. The thing is not noxious in the form in which it has been taken; it is not noxious in the degree or quantity in which it has been given and taken. We think, therefore, the indictment will not hold."

In R. *v.* Perry (2 Cox, C. C. 223) the facts were, that the prisoner came to the prosecutrix, who was then pregnant with a child, subsequently born alive, and of which she alleged him to be the father, and the prisoner gave her two powders, with directions to take one

on each of two successive nights, with a pint of a decoction called featherfew, and that the prisoner then stated that the effect would be to cause miscarriage. The prosecutrix took one of the powders accordingly, with the featherfew, which brought on violent sickness; the other powder she did not take, but put it on one side, and it had since been analysed. At the time of taking the powder the prosecutrix was two or three months gone with child. The prisoner upon two or three subsequent occasions brought her other medicines to take for the same purpose, some of which she did and some of which she did not take. The medical evidence showed that the powder was a mixture of savin and fennigreek. The latter would scarcely produce any effect at all, and savin, in that quantity, might produce a little disturbance in the stomach for the time, but would do no further injury. The Court held that the quantity of savin was not a "noxious thing" within 7 Will. IV. and 1 Vict. c. 85, s. 6.

In R. *v.* Hollis (12 Cox, C. C. 463) the Court of Crown Cases Reserved held that if the drug administered produces miscarriage, although there is no other evidence of its nature, this is sufficient evidence of its being a "noxious thing."

In R. *v.* Wilson (7 Cox, C. C. 190) the Court of Crown Cases Reserved held that if A. procures poison and delivers it to B., both intending that B. should take it for the purpose of procuring abortion, and B. afterwards takes it with that intent in the absence of A., A. may be convicted under 7 Will. IV. and 1 Vict. c. 85, s. 6.

In R. *v.* Farrow (Dears. & B. C. C. 164) the prisoner, in conversation with a woman who was pregnant, told her that he knew of something that would get rid of her child. On being asked what it was, he said it was savin. He afterwards brought the woman some savin, and gave her directions how to take it. She took the savin accordingly, and the prisoner called from time to time to inquire the effect. The prisoner also made up into pills a drug which the woman had obtained at his request. After taking the savin and the pills, the woman became and continued very ill till she was confined. This was held to be a causing to be taken within 7 Will. IV. and 1 Vict. c. 85, s. 6.

In R. *v.* Whitchurch (24 Q. B. D. 420; 16 Cox, C. C. 743) it was held that a woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs

to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion.

Lord Coleridge, C. J., said: "The question arises on an indictment charging the woman, who, we must take it, was not in fact with child, with conspiring with others to procure abortion on herself. There might have been something to be said if the indictment had been for an attempt to procure abortion, for in that case the words of the section would not apply."

Vide also R. *v.* Brown, 63 J. P. 790.

As to evidence of other administerings in order to prove intent, *vide* R. *v.* Calder, 1 Cox, C. C. 348.

As to evidence of using instruments, and words spoken on other occasions in order to prove intent, *vide* R. *v.* Bond, [1906] 2 K. B. 389, *ante*, p. 8.

Abortion—Supplying Noxious Thing.

R. *v.* **HILLMAN**. (1863) [61]

[L. & C. 343; 9 Cox, C. C. 386; 33 L. J. (M. C.) 60; 9 L. T. 518; 12 W. R. 111.]

The prisoner was indicted under 24 & 25 Vict. c. 100, s. 59, for unlawfully supplying and procuring a certain poison or noxious thing called savin, knowing that the same was intended to be unlawfully used or employed by one Sarah Carter to procure the miscarriage of the said Sarah Carter. Upon the trial it was contended by the counsel for the defendant that there was no case against the defendant, because, amongst other objections, it was necessary that the defendant should know that the poison or noxious thing was intended to be unlawfully used or employed with intent to procure the miscarriage of the woman; whereas it was not so intended, except by the defendant himself, to be used at all.

The jury found that the prosecutrix did not intend to take the substance in question, nor did any other person, except

only the defendant himself, intend that she should take it, but convicted the prisoner; and on the question being reserved, the conviction was affirmed.

Erle, C. J., said: "The question is, whether or not the intention of any other person besides the defendant himself, that the poison or noxious thing should be used to procure a miscarriage, is necessary to constitute the offence charged under the 24 & 25 Vict. c. 100, s. 59. We are all of opinion that that question must be answered in the negative. The statute is directed against the supplying or procuring of poison or noxious things for the purpose of procuring abortion, with the intention that they shall be so employed, and knowing that it is intended that they shall be so employed. The defendant knew what his own intention was, and that was that the substance procured by him should be employed with intent to procure miscarriage. The case is therefore within the words of the Act. We confine our judgment to the question submitted to us. The conviction will therefore be affirmed."

[T. W. Saunders for the prisoner.]

By 24 & 25 Vict. c. 100, s. 59, whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for five years.

In R. *v.* Titley (14 Cox, C. C. 502) the defendant was a chemist, and the evidence for the prosecution showed that the police authorities had laid a trap for him. A woman named Martha Diffey was sent to the defendant's shop by a police inspector. Martha Diffey was the wife of a police constable, and was the mother of two daughters, aged twenty and sixteen, neither of whom were pregnant, or in need of any instruments or drugs for procuring abortion. Eventually the defendant supplied two bottles containing a mixture

of ergot of rye and tincture of perchloride of iron, which would in all probability be dangerous if administered to a pregnant woman, and would probably operate by producing a miscarriage. It was held that supplying a noxious thing to a person with the intent that it shall be used by a certain woman to procure abortion, is a misdemeanour within 24 & 25 Vict. c. 100, s. 59, although the woman for whom it is intended is not pregnant; and the prisoner was therefore convicted.

Upon an indictment under 24 & 25 Vict. c. 100, s. 59, for supplying a certain noxious thing, knowing that the same is intended to be used with intent to procure miscarriage, it is necessary to prove that the thing supplied is noxious. The supplying an innoxious drug, whatever may be the intent of the person supplying it, is not an offence against that enactment. (R. *v.* Isaacs, 9 Cox, C. C. 228.)

In R. *v.* Fretwell (9 Cox, C. C. 152) the prisoner was charged with murder. The deceased woman became pregnant by him, and died from the effects of corrosive sublimate taken by her for the purpose of procuring abortion. The prisoner knowingly procured it for the deceased, at her instigation, and under the influence of threats of self-destruction, if the means of producing abortion were not supplied to her. The jury negatived the fact of his having administered it, or caused it to be taken by her. The Court of Crown Cases Reserved held that he was not guilty of murder as an accessory before the fact.

Rape—Consent and Submission.

R. *v.* O'SHAY. (1898) [62]

[19 Cox, C. C. 76.]

The prisoner was indicted for having committed a rape upon a woman of forty-two years of age, and her evidence was that the prisoner, under the guise of being a medical man and of

making a medical examination of her, induced her to allow him to take indecent liberties with her and to have connection with her, but that she did not realise until connection had taken place what the prisoner was doing, and that, if she had suspected his intention, she would not have permitted him to have treated her indecently or to have had connection with her. The counsel for the prosecution relied upon R. *v.* Flattery (2 Q. B. D. 410).

Ridley, J., said: "I adopt the opinion expressed in Art. 270 of Stephen's Digest of the Criminal Law (at page 205 of 5th edition), that rape is overcoming a woman by force, and that, if a woman gives conscious permission to the act of connection, the act does not amount to rape, although such permission may have been obtained by fraud, and although the woman may not have been aware of the nature of the act; the only exception to this rule being that dealt with in the last paragraph of sect. 4 of the Criminal Law Amendment Act, and that the effect of that Act is to make R. *v.* Flattery no longer law. If, however, the prisoner, by pretending to be a doctor, induced the prosecutrix to let him go as far as he did because she thought he was a doctor, the jury may find him guilty of an indecent assault."

[C. F. Vachell for the prosecution; J. B. Matthews for the prisoner.]

In R. *v.* Flattery (2 Q. B. D. 410, and 13 Cox, C. C. 388), a man who kept a stall in a public market, and professed to give medical and surgical advice, fraudulently had sexual connection with a girl of nineteen, under the pretence that he was going to perform an operation which would cure her of an illness. It was only "Nature's string," he remarked, "that wanted breaking." It was held that there was no consent to the intercourse, and that the prisoner was guilty of rape.

Sect. 3 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), enacts that any person who—

(1) By threats or intimidation procures any woman or girl to

have unlawful carnal connection, either within or without the Queen's dominions; or

(2) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without the Queen's dominions; or

(3) Applies, administers to, or causes to be taken by any woman or girl, any drug, matter, or thing, with intent to stupefy or overpower, so as thereby to enable any person to have unlawful carnal connection with such woman or girl,

shall be guilty of a misdemeanour, &c.

Provided that no person shall be convicted of any offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.

Sect. 16 of the Criminal Law Amendment Act, 1885, is as follows:—"This Act shall not exempt any person from any proceeding for an offence which is punishable at common law, or under any Act of Parliament other than this Act, so that a person be not punished twice for the same offence." The crime of rape being an offence at common law, it seems, therefore, doubtful whether the decision in R. *v.* Flattery is any longer law; although, for the future, in such cases prisoners will probably be indicted for the misdemeanour under the Act rather than for the common law offence of rape.

It was formerly held that the having carnal knowledge of a woman by a fraud, which induced her to suppose it was her husband, was not rape; at least, such was the decision in R. *v.* Barrow (L. R. 1 C. C. R. 156, and 11 Cox, C. C. 191); but this ruling was not followed in R. *v.* Dee (15 Cox, C. C. 579). The law on the subject is, however, now settled, since it has been enacted by the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, that whereas doubts have been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be guilty of rape. The same statute makes it a misdemeanour, punishable with two years' imprisonment, to unlawfully and carnally know, or attempt to know, any female idiot or imbecile

under circumstances which do not amount to rape, but which prove that the offender knew the woman was an idiot or imbecile. (Sect. 5, sub-sect. 2.)

In the well-known case of R. *v.* Rosinski (1 M. C. C. 19) a quack doctor, who made a female patient strip naked, under the pretence that he could not otherwise judge of her illness, was held to have committed an assault on her. The jury in this case expressly found that the prisoner had no real belief that the stripping the girl could assist him in enabling him to cure her, and accepted her statement that "she did not put off her clothes willingly, but that he made her," so that there was no difficulty.

In R. *v.* Case (1 Den. C. C. 582, and 4 Cox, C. C. 220) a medical man, to whom a girl of fourteen years of age was sent for professional advice, had criminal connection with her, she making no resistance from a *bonâ fide* belief that the defendant, as he represented, was treating her medically. (*Vide* also R. *v.* Stanton, 1 C. & K. 415.)

It is to be observed that in cases of this kind there is a distinction known to the law between consent and submission. "Mere submission," as Kelly, C. B., said in R. *v.* Worlaston (12 Cox, C. C. 180), "is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done."

It used formerly to be incumbent on the prosecution in a rape case to prove emission, and frequent miscarriages of justice took place in consequence; but evidence of penetration, however slight, of the female organ is now sufficient. Supposing, however, that even penetration cannot be proved, the jury may find the prisoner guilty of an attempt; and after an acquittal for rape the prisoner may be indicted for a common assault. A boy under the age of fourteen cannot be convicted of rape; he is presumed incapable of committing it, and no evidence of premature development can be given to rebut the presumption. Nor can a husband be convicted of a rape on his wife; but boys and husbands, if aiding and abetting others, can be convicted as principals in the second degree; and in R. *v.* Ram (17 Cox, C. C. 609) it was held that a woman may be indicted for rape as a principal in the second degree.

Rape—Complaint of Prosecutrix.

R. *v.* LILLYMAN. (1896) [63]

[(1896) 2 Q. B. 167 ; 18 Cox, C. C. 346 ; 65 L. J. (M. C.) 195 ; 74 L. T. 730 ; 44 W. R. 654 ; 60 J. P. 536.]

The prisoner was tried upon an indictment containing three counts : the first count charged him with an attempt to have carnal knowledge of the prosecutrix, a girl above the age of thirteen and under the age of sixteen years ; the second with an assault upon her with intent to ravish and carnally know her ; the third with an indecent assault upon her.

The prosecutrix was called as a witness, and deposed to the acts complained of having been done without her consent. Counsel for the prosecution tendered evidence in chief of a complaint made by her to her mistress, in the absence of the prisoner, very shortly after the commission of the acts, and proposed to ask the details of the complaint as made by the prosecutrix. The admission of the evidence was objected to by the prisoner's counsel, but the learned Judge overruled the objection and admitted the evidence. The mistress then deposed to all that the prosecutrix had said respecting the prisoner's conduct towards her. The jury found the prisoner guilty, and the Court of Crown Cases Reserved affirmed the conviction.

Hawkins, J., in delivering the judgment of the Court, said : " After very careful consideration, we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. The evidence is admissible only upon the ground that it was a complaint of that

which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negativing her consent, and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it? Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint? And are the jury bound to accept the witness's interpretation of her words as binding upon them without having the whole statement before them and without having the power to require it to be disclosed to them, even though they may feel it essential to enable them to form a reliable opinion? For it must be borne in mind that if such evidence is inadmissible when offered by the prosecution, the jury cannot alter the rule of evidence and make it admissible by asking for it themselves. . . . It has sometimes been urged that to allow the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury, they would naturally so treat it. But it never could be legally so left; and we think it is the duty of the Judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of these facts, or for any other purpose than we have stated. With such a direction, we think the interests of an innocent

accused would be more protected than they are under the present usage. For when the whole statement is laid before the jury they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused. . . . In the result, our judgment is that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted to the jury as a part of the case for the prosecution, and that the evidence in this case was, therefore, properly admitted."

[Sir R. B. Finlay, S.-G., H. Sutton, and Cracroft for the prosecution ; J. E. Fox for the prisoner.]

In R. *v.* Folley (60 J. P. 569) the prisoner was indicted at the Central Criminal Court for feloniously wounding his wife, Alice Folley, with intent to do her grievous bodily harm. The wife, in the absence of the prisoner, made a statement to the police constable. The wife, when called at the trial to give evidence, stated that the wounds were self-inflicted. The Recorder, Sir C. Hall, Q.C., then said that he should hold that the principle of the case of R. *v.* Lillyman applied to all cases, and that if application were made to him by the prosecution he should allow the constable to be recalled to state what the wife had said to him. The police constable was therefore recalled and stated that when he saw the wife she said "Mr. Folley done it."

In R. *v.* Rush (60 J. P. 777) the prisoner was indicted, under sect. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), for carnally knowing a girl under the age of thirteen years. The day after the commission of the alleged offence the girl's mother questioned her, and the girl, in the absence of the prisoner, made a statement in answer. It was proposed to give the particulars of that statement in evidence on behalf of the prosecution on the authority of the leading case. Wright, J., said that the lapse of time between the committing of the offence and the making of the statement was important in these cases. When counsel proposed to open and put in evidence such statements, the Judge's attention

should first be called to the time that had elapsed since the occurrence and the making of the statement, in order that the Judge might be enabled to say whether or not the lapse of time would be an objection to the admissibility of the statement. In the present case the statement was not made immediately after the alleged offence was committed, and he should not allow evidence of the particulars of the statement to be given.

In R. *v.* Kiddle (19 Cox, C. C. 77) it was held that the decision in R. *v.* Lillyman applies to cases where the girl on whom the offence is alleged to have been committed is of such tender years that the Court directs her evidence to be taken, but not upon oath, and where the question of her consent to the assault is immaterial. And such complaint may be admissible although not made at the earliest opportunity.

In R. *v.* Merry (19 Cox, C. C. 442) it was held that where a person indecently assaulted makes a complaint, not of her own initiative, but in answer to a question, the particulars of such complaint, though otherwise admissible within the rule of R. *v.* Lillyman, cannot be given in evidence.

In R. *v.* Rowland (62 J. P. 459) it was held that on the trial of a person for rape the terms of a complaint made by the woman on whom the rape is alleged to have been committed are only admissible as evidence of a want of consent on the part of the prosecutrix, and not as evidence of the truth of the charge against the accused.

In R. *v.* Osborne ([1905] 1 K. B. 551) the prisoner was indicted for an indecent assault on a girl under the age of thirteen years, whose consent to the act was therefore immaterial. At the trial evidence was admitted of the answer given by the girl to a question put by another child, in the absence of the prisoner, as to why the girl had not waited for the other child at the prisoner's house. The girl's reply was a complaint of the prisoner's conduct to her. The Court of Crown Cases Reserved held that the evidence was admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the girl and as evidence of the consistency of her conduct.

On the trial of the defendant for an indecent assault upon two girls under thirteen years of age, a statement made by one of the girls to her sister on the afternoon of the alleged assault as to something which was alleged to have been done by the defendant

three weeks previously was admitted in evidence. The defendant was convicted, and on the question being reserved, the Court of Crown Cases Reserved quashed the conviction. (R. *v.* Pantaney, 71 J. P. 101.)

Rape—Character of Prosecutrix.

R. *v.* **RILEY.** (1887) [64]

[18 Q. B. D. 481; 16 Cox, C. C. 191.]

The prosecutrix, on the trial of an indictment charging an assault with intent to rape, was asked in cross-examination whether she had not had voluntary connection with the prisoner at specified times and places before the time of the commission of the alleged offence. This she denied, and it was proposed, on behalf of the prisoner, to call witnesses to prove times and places. The Court refused to hear these witnesses, and the prisoner was found guilty. The Court of Crown Cases Reserved, however, held that the evidence ought to have been received, and quashed the conviction.

Lord Coleridge, C.J., said: "It has been held that evidence to shew that the woman has previously had connection with persons other than the accused, when she has denied that fact, must be rejected, and there are very good reasons for rejecting it. It should in my view be rejected, not only upon the ground that to admit it would be unfair and a hardship to the woman, but also upon the general principle that it is not evidence which goes directly to the point in issue at the trial. The question in issue being whether or not a criminal attempt has been made upon her by A., evidence that she has previously had connection with B. and C. is obviously not in point. It is obvious, too, that the result of admitting such

evidence would be to deprive an unchaste woman of any protection against assaults of this nature. But to reject evidence of her having had connection with the particular person charged with the offence is a wholly different matter, because such evidence is in point as making it so much the more likely that she consented on the occasion charged in the indictment."

Pollock, B., said: "The only question we have to consider is whether the evidence rejected was or was not material to the issue. It is clear that evidence of the woman having had connection with other men would not be relevant, but where the only question is whether she consented to what was done by the prisoner, I am clearly of opinion that evidence of her having previously allowed him to have connection with her is relevant to the issue. One can understand that until the passing of the Criminal Law Amendment Act, by which the prisoner was enabled himself to give evidence, it could hardly be expected that witnesses would come forward to prove such previous connection, and that may account for the absence of direct authority on this point."

Stephen, J., said: "There is some authority to shew that the law was in the condition in which the decision of this Court in the present case places it, but I thought the matter could not be said to be without doubt. The doubt is now removed by this decision. I will only add that I feel sure that nothing which has been said as to the inadmissibility of evidence of the prosecutrix having had connection with other men is intended to conflict with the right of the prisoner, on an indictment for rape or attempt to ravish, to give evidence that the woman was a common prostitute."

[Addison, Q.C., for the prisoner.]

Evidence may be given to shew that the prosecutrix is of generally immoral character, and she may be asked whether she has had connection with men named to her, but the prisoner is bound by her

answer on that point and is not allowed to call the men to contradict her.

In R. *v.* Clay (5 Cox, C. C. 146), which was a trial for rape in 1851, counsel for the defence submitted that he was at liberty to give general evidence of the character of the prosecutrix, but not particular acts, and referred to R. *v.* Hodgson (R. & R. 211). Patteson, J., who tried the case, at first seemed to think that the evidence was inadmissible, but, on referring to the authorities, said: "In R. *v.* Barker (3 C. & P. 589), which was a trial for rape, the question was allowed to be put, as to whether the prosecutrix had walked the streets of Oxford at a period subsequent to the alleged rape. I cannot understand why that should be. I should have thought the question would more properly refer to the conduct of the prosecutrix before the act complained of. However, upon the authority of that and two or three other cases, very like the present (R. *v.* Clarke, 2 Stark. N. P. 241, and R. *v.* Martin, 6 C. & P. 562), I will allow the general evidence to be given."

In R. *v.* Tissington (1 Cox, C. C. 48) it was held that, on a trial for rape, witnesses may be called on the prisoner's behalf to prove general indecency of the prosecutrix, and witnesses for the prosecution may then be called to rebut their testimony.

In R. *v.* Holmes (L. R. 1 C. C. R. 334, and 12 Cox, C. C. 137), the prosecutrix in an indictment for an indecent assault, which on the facts alleged amounted in substance to an attempt at rape, was asked in cross-examination whether she had not previously had connection with a man other than the prisoner, and denied it. The Court of Crown Cases Reserved held that she could not be contradicted.

In R. *v.* Cockcroft (11 Cox, C. C. 410) it was held that although you may cross-examine the prosecutrix as to particular acts of connection with other men, you may not, if she deny it, call witnesses to contradict her.

Other cases on this subject are:—R. *v.* Robins, 1 Cox, C. C. 55; R. *v.* Hodgson, R. & R. C. C. 211; R. *v.* Barker, 3 C. & P. 589.

Carnal Knowledge of Children.

[65] R. *v.* WEALAND. (1888)

[20 Q. B. D. 827; 16 Cox, C. C. 402: 57 L. J. (M. C.) 44; 58 L. T. 782; 36 W. R. 576; 52 J. P. 582.]

The prisoner was indicted under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, for unlawfully and carnally knowing a girl under the age of thirteen years. The child, not understanding the nature of an oath, gave her evidence under the above section without being sworn. The jury acquitted the prisoner of the charge under sect. 4, but, by virtue of the power given to them by sect. 9, found him guilty of an indecent assault. Apart from the girl's testimony the evidence was insufficient to support the conviction. The Act contains no provision rendering unsworn evidence admissible on an indictment for indecent assault. On the point being reserved, the Court of Crown Cases Reserved held that the conviction was right.

Lord Coleridge, C. J., said: "The prisoner was acquitted of the offence for which he was indicted under 48 & 49 Vict. c. 69, s. 4, but by sect. 9 the jury might on the trial of such an indictment find him guilty of an indecent assault, and they did so. But sect. 9 contains no provision enabling the evidence of a child who does not understand the nature of an oath to be given. The consequence is in this case, and may be in many others, somewhat anomalous, for it follows from the legislation that if a person is indicted for the graver offence under sect. 4, and by virtue of that section unsworn evidence is given in support of the charge, he may be acquitted of it, and yet found guilty, on the unsworn evidence, of the lesser offence, whereas if he had been indicted under the Act for the

lesser offence, the evidence most material to his conviction could not have been given. This consequence was probably not contemplated by the Legislature. It is an anomaly which may lead to a prisoner being indicted for the graver offence under sect. 4, when it is known that he can only be convicted of a less offence under sect. 9, on unsworn evidence given in support of the charge under sect. 4. This is an unsatisfactory state of the law, which I hope will be remedied; but it does not affect the question before us, viz., whether on the words of the statute the conviction was right. We have no doubt that the evidence given under sect. 4 was admissible, even although the conviction was not obtained under sect. 4, but was obtained under sect. 9."

Manisty, J., said: "I am of the same opinion entirely, for the reason given by my lord, that the statute has so provided. It is, no doubt, anomalous that a man may be convicted of an offence on evidence which if he had been indicted for that offence alone could not have been received."

Hawkins, J., said: "I am of the same opinion. I only reserved the point because I found that there were conflicting opinions on it, and I thought it well that the question should be settled."

[No counsel appeared.]

In R. *v.* Paul (25 Q. B. D. 202, and 17 Cox, C. C. 111), on an indictment in two counts, the first charging the prisoner under sect. 4 of the Criminal Law Amendment Act, 1885, with an attempt to have carnal knowledge of a girl under thirteen, the second charging him with an indecent assault, the evidence of the girl, though not given on oath, was received in accordance with sect. 4 of the Criminal Law Amendment Act, 1885, and was corroborated by other material evidence as therein required. The Judge held that there was no evidence of the offence charged in the first count, but that with respect to the charge of indecent assault, though the sworn evidence was in itself insufficient, the unsworn evidence, if admissible, and the sworn evidence, taken

together, constituted sufficient evidence to be left to the jury, and he directed the jury to take into consideration both the unsworn and the sworn evidence. The jury convicted the prisoner, and on the point being reserved, the Court of Crown Cases Reserved held that the unsworn evidence of the girl received as above stated was not admissible in support of the charge of indecent assault, and that the conviction must be quashed. In delivering judgment Hawkins, J., said: "Notwithstanding a passage to be found in 1 Hale, P. C. 634, I do not suppose that any one would, before the passing of the Criminal Law Amendment Act, 1885, have ventured to suggest that the unsworn statement of the girl could have been received in support of any part of the indictment, no matter how strongly it might have been corroborated by other unobjectionable evidence. The Criminal Law Amendment Act, 1885, was passed with a view, among other things, to afford greater protection to young female children of tender years, who were often, when alone or in the companionship merely of other children of their own age, made the victims of wickedly lustful men, who desired carnal knowledge of their bodies, and who, by reason of the inability of such children to understand the nature of an oath, were frequently enabled to carry out their criminal desires with impunity. With a view to remedy this unsatisfactory state of things, it was by the 4th section of the Act enacted that, 'Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of a felony. Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanour.' Later on in the same section occurs that enactment which has given rise to the question now before us, which is in these terms." . . . The learned Judge, after citing the words of the section, and the passage in Hale's Pleas of the Crown as to the admission of the unsworn testimony of children in particular cases, continued as follows:—"Notwithstanding this passage it must, I think, be taken that, before the passing of the Criminal Law Amendment Act, 1885, whatever might have been done in some particular cases, no testimony whatever could on a criminal trial be received except upon oath; and that the testimony of an infant not competent to take an oath could not be accepted at all. . . . The exception to this general rule, relied on in support of this conviction,

depends, therefore, absolutely and entirely upon the true interpretation of the language of the 4th section of the statute, beyond which we cannot look. Now that section renders the evidence admissible only upon the hearing of a charge under that section, and the only charges to which that section relates are having or attempting to have carnal knowledge of a girl under thirteen years of age. The crimes of rape and indecent assault are not even referred to in the section from beginning to end. Why the exception allowing unsworn evidence was not extended to the offences of rape and indecent assaults, to the latter of which little children are perhaps even more often subjected than any other, I do not pretend to say. It may have been an oversight; it may have been intentional. I only know the exception is not, in fact, extended to either of such offences, and we must construe the Act as we find it. It was suggested, however, that inasmuch as the first count of the indictment was in respect of a charge upon the hearing of which the unsworn testimony of the girl was admissible, and as such unsworn testimony was received upon that charge, it became legal evidence upon the whole indictment, although, had the second count stood alone, it would have been clearly inadmissible. I confess I am startled by this proposition. Reg *v.* Wealand (20 Q. B. D. 827) is said to be an authority in favour of that view. To this I cannot assent, and I purpose presently to point out the difference between that case and the present, which renders it no authority at all upon the question we have to decide. . . . I now proceed to discuss R. *v.* Wealand (20 Q. B. D. 827), and to point out the clear distinction between that case and the present. In that case the prisoner was indicted in one count simply for the felony of carnally knowing a girl under thirteen. The evidence of the girl, though not upon oath, was received under sect. 4, and upon that charge it was clearly admissible within the express language of the statute. The jury found the prisoner not guilty of the felony: but, being satisfied that he was guilty of an indecent assault, they, under the express provision contained in sect. 9 of the Act, found him guilty of such assault. But for this section they would have been bound to acquit him altogether. Now in that case no objection could have been made to the unsworn testimony; for the 4th section expressly made it admissible upon the only count which the jury had to dispose of,

and in authorizing the jury under that count to convict of an indecent assault, though no indecent assault was charged, the Legislature must be taken to have intended them, in the consideration of their verdict, to deal with all the evidence before them, forgetting that the exception to the general rule of evidence was not made to extend to charges other than under those in sect. 4. I was a party to the judgment, and agree in all the observations of the Lord Chief Justice in delivering it, and I venture to think they are rather in favour of than against my view of the case. In the present case, upon the first count, no doubt the evidence was admissible, but upon that count the jury had no power to convict of an indecent assault; while upon the second count, which was for an indecent assault simply, the evidence was inadmissible. It is strangely anomalous to suppose that a person being acquitted upon a charge on which unsworn evidence was admissible should nevertheless be lawfully convicted on such evidence upon a count on which it was wholly inadmissible. To my mind such a proposition is contrary to reason, good sense, and law. I note particularly an observation of the Lord Chief Justice in R. *v.* Wealand (20 Q. B. D. 827), that the anomaly therein pointed out 'may lead to a prisoner being indicted for the graver offence under sect. 4, when it is known that he can only be convicted of a less offence under sect. 9 on unsworn evidence given in support of the charge under sect. 4.' On this I can only say that, should such a course be adopted, I should look upon it as a scandalous abuse of the law with a view to convict the accused of a grave offence upon evidence known to be inadmissible if the indictment were confined to an honest statement of the real charge. I agree that the law created by the statute is in a very unsatisfactory state, and requires much amendment; but upon the point raised in this case I entertain no doubt that the conviction cannot be sustained, and ought to be quashed."

In R. *v.* Gray (68 J. P. 327) the Court of Crown Cases Reserved held that the fact that the accused, when charged with attempting to carnally know a girl under the age of thirteen, refused to be examined by a doctor was not evidence corroborative of the girl's testimony within the meaning of sect. 4 of the Criminal Law Amendment Act, 1885.

In R. *v.* Tyrrel ([1894] 1 Q. B. 710, and 17 Cox, C. C. 716) the

Court of Crown Cases Reserved held that it was not a criminal offence for a girl between the ages of thirteen and sixteen to aid and abet a male person in committing, or to incite him to commit, the misdemeanour of having unlawful carnal knowledge of her contrary to sect. 5 of the Criminal Law Amendment Act, 1885. Lord Coleridge, C. J., said: "The Criminal Law Amendment Act, 1885, was passed for the purpose of protecting women and girls against themselves. At the time it was passed there was a discussion as to what point should be fixed as the age of consent. That discussion ended in a compromise, and the age of consent was fixed at sixteen. With the object of protecting women and girls against themselves the Act of Parliament has made illicit connection with a girl under that age unlawful; if a man wishes to have such illicit connection he must wait until the girl is sixteen, otherwise he breaks the law; but it is impossible to say that the Act, which is absolutely silent about aiding or abetting, or soliciting or inciting, can have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves. I am of opinion that the conviction ought to be quashed."

Mathew, J., said: "I am of the same opinion. I do not see how it would be possible to obtain convictions under the statute if the contention for the Crown were adopted, because nearly every section which deals with offences in respect of women and girls would create an offence in the woman or girl. Such a result cannot have been intended by the Legislature. There is no trace in the statute of any intention to treat the woman or girl as criminal."

In R. *v.* West ([1898] 1 K. B. 174, and 18 Cox, C. C. 675) the defendant was committed for trial for rape, the offence having been committed less than three months before his committal for trial. On his trial, which took place more than three months after the commission of the offence, he was indicted only for the misdemeanour under sect. 5 of the Criminal Law Amendment Act, 1885. To sect. 5 there is a proviso, that no prosecution for the offence of carnally knowing a girl between the ages of thirteen and sixteen shall be commenced more than three months after the commission of the offence. The Court of Crown Cases Reserved held that the prosecution for the misdemeanour of which the

defendant was convicted was commenced less than three months from the commission of the offence so as to comply with the proviso to sect. 5. Lord Russell, C. J., said: "The question is—and it is the only question, because the point raised with respect to the Vexatious Indictments Act is the same—can it be properly said that the prosecution for the offence of which the prisoner was convicted was commenced within three months after the commission of the offence? I think it was, on the short ground that a prosecution for rape is in fact and in substance a prosecution for any offence of which, on an indictment for rape, the prisoner could have been found guilty. It does not seem to me necessary that an indictment for rape should go before the grand jury under such circumstances as these. The evidence upon which the magistrates committed the prisoner for trial was evidence upon which they might have had some doubt whether the offence amounted to rape; but they might well think that no harm would be done to the prisoner, nor to justice, by committing him for rape, because if that offence were not made out he could be convicted of the lesser offence under sect. 5. I think the principle '*Omne majus continet minus*' applies. I am of opinion that the learned Judge was right in refusing to direct an acquittal or to quash the indictment, and that our judgment should be for the Crown."

Grantham, J., said: "I am of the same opinion, and I should be sorry if we came to a different decision. It would always be necessary to send up an indictment for rape, and to have a true bill returned for rape, where the case really did not shew that such a serious offence had been committed. That has been often done, in my experience, and I think it ought not to be done."

Darling, J., said: "I am of the same opinion. I think there are many inconveniences, with respect to trial, in charging a person with felony when he is only likely to be convicted of misdemeanour; it is better that he should be charged only with what he appears to have done."

As to proof of age in a prosecution for cruelty to children under the Prevention of Cruelty to Children Act, 1894, *vide* R. *v.* Cox, [1898] 1 Q. B. 179.

The sections of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), dealing especially with this subject are as follows:—

(4) Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony.

Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanour.

Where, upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the Court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the Court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating tne accused. Provided also, that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn.

(5) Any person who—(i.) unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any girl being of or above the age of thirteen years and under the age of sixteen years, shall be guilty of a misdemeanour.

Provided that it shall be a sufficient defence to any charge under sub-section 1 of this section, if it shall be made to appear to the Court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

By sect. 9 power is given on an indictment for rape, or felony under sect. 4 of the Act, to convict of an indecent assault.

By sect. 2 of the Criminal Law Amendment Act, 1880 (43 & 44 Vict. c. 45), it is enacted that it shall be no defence to a charge or indictment for an indecent assault on a young person under

the age of thirteen to prove that he or she consented to the act of indecency.

In R. *v.* Marsden ([1891] 2 Q. B. 149, and 17 Cox, C. C. 297) the prisoner was tried upon an indictment containing a single count for the felony created by the statute 48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885), s. 4, namely, carnal connection with a girl under thirteen years. The jury were satisfied of penetration, but the learned Judge who tried the case directed them that there was no evidence of emission, and that under the circumstances of the case—interruption—it could not be presumed. The jury convicted the prisoner, and the learned Judge reserved the question whether the prisoner could lawfully be convicted of the said felony, emission being negatived. The Court of Crown Cases Reserved affirmed the conviction.

Lord Coleridge, C. J., said: "We are all clearly of opinion that the offence indicated by the words 'carnal knowledge' in the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), is to be considered as fully proved without giving any proof of emission; and that the law remains the same as it has been since the statute of 9 Geo. IV. c. 31, namely, where carnal knowledge constitutes a crime, that crime is complete without emission, upon proof of penetration."

In R. *v.* Waite ([1892] 2 Q. B. 600) the Court of Crown Cases Reserved held that a male under the age of fourteen years cannot be convicted under sect. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), of the offence of carnal knowledge of a girl under the age of thirteen years, even though the offence is fully proved.

Lord Coleridge, C. J., said: "The rule at common law is clearly laid down by Lord Hale, that in regard to the offence of rape *malitia non supplet ætatem;* a boy under fourteen is under a physical incapacity to commit the offence. That is a *presumptio juris et de jure*, and Judges have time after time refused to receive evidence to shew that a particular prisoner was in fact capable of committing the offence. That is perfectly clear, and therefore, unless the Criminal Law Amendment Act has altered the common law, which cannot be successfully contended, this prisoner has not committed the felony charged. The question whether he could be convicted of the attempt does not arise; on that point

R. *v.* Brimilow (9 C. & P. 366), though not in point, bears some resemblance to the present case; but it certainly seems to me that a person cannot be guilty of an attempt to commit an offence which he is physically incapable of committing; that question, however, can be dealt with when it arises. The conviction for the felony must therefore be quashed; but the prisoner will of course undergo the sentence of imprisonment on the conviction for assault, as to which there is no objection."

In R. *v.* Williams ([1893] 1 Q. B. 320) it was held that although a boy under fourteen, who is tried on an indictment under sect. 4 of the Criminal Law Amendment Act, 1885, charging him with having had carnal knowledge of a girl under thirteen, is entitled to be acquitted of that offence, he may be convicted of an indecent assault under sect. 9 of the Act.

Lord Coleridge, C. J., said: "In this case the prisoner was properly indicted for a rape under sect. 4 of the Criminal Law Amendment Act, 1885. He was proved at the trial to be under the age of fourteen, and, therefore, could not by law be convicted of rape; nor could he, in my opinion, be convicted of attempting to do that which the law says he was physically incapable of doing. He was, therefore, properly acquitted of the charge made under the 4th section. But sect. 9 provides that if upon the trial of any indictment for rape, or any offence made felony by sect. 4, the jury shall be satisfied that the defendant is guilty of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then they may acquit the defendant of the felony, and find him guilty of an indecent assault. The Act of Parliament, therefore, says that the defendant may be convicted of an indecent assault under circumstances like these. I am of opinion that the conviction should be affirmed."

Hawkins, J., said: "I think that the conviction should be affirmed; but I do not assent to the notion that a boy cannot be convicted of an attempt to do that which the law says he cannot do. That difficulty, however, does not arise here. The defendant was indicted under the statute for having feloniously, unlawfully, and carnally known a girl under the age of thirteen years. He could not have been convicted of a rape, apart from the statute, because that offence consists of carnally knowing a girl against

her will; but this offence, created by the statute, of having carnal knowledge of a girl under the age of thirteen, seems to me to be of the same character as rape, and it has recently been held that a boy under the age of fourteen cannot be convicted, under sect. 4, of having carnal knowledge of a girl under the age of thirteen. (R. *v.* Waite, [1892] 2 Q. B. 600.) Therefore, though the boy was rightly put on his trial, Wright, J., ruled that the objection taken before him must prevail. It then becomes necessary to consider sect. 9 of the statute, which provides, that 'if upon the trial of any indictment for rape, or any offence made felony by sect. 4 of this Act, the jury shall be satisfied that the defendant is guilty of . . . an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then in every such case the jury may acquit the defendant of such felony, and find him guilty . . . of an indecent assault.' Here there was a trial of an indictment lawfully found and presented by the grand jury. It was a trial of an indictment for an offence under sect. 4. As the defendant could not be convicted of carnally knowing the girl, under sect. 4, the jury were not satisfied that he was guilty of the felony charged in the indictment, and under those circumstances they could, if they thought he had committed an indecent assault, find him guilty, under sect. 9, of that offence."

Cave, J., said: "I am of the same opinion. I think the defendant was properly convicted of an indecent assault. As to the question whether a boy under fourteen could be convicted of an attempt to commit the felony created by sect. 4, I desire a further discussion on that question before deciding it. At present I am inclined to concur in the opinion expressed by my brother Hawkins."

Day, J., and Collins, J., concurred.

In R. *v.* Bostock (17 Cox, C. C. 700), upon an indictment the first count of which charged the prisoner, under sect. 5 of the Criminal Law Amendment Act, 1885, with unlawfully and carnally knowing a girl between the ages of thirteen and sixteen years, and the same count of which charged him with an indecent assault upon the girl, it was held that the prisoner could be convicted of a common assault.

Communicating a Venereal Disease.

R. *v.* CLARENCE. (1891) [66]

[22 Q. B. D. 23; 16 Cox, C. C. 511; 58 L. J. (M. C.) 10 59 L T. 780; 37 W. R. 166; 53 J. P. 149.]

The prisoner was convicted upon an indictment charging him with "unlawfully and maliciously inflicting grievous bodily harm" upon his wife, and with "an assault" upon her, "occasioning actual bodily harm," under sects. 20 and 47 respectively of 24 & 25 Vict. c. 100. It appeared that at a time when the prisoner knew, but his wife did not know, that he was suffering from gonorrhœa, he had connection with her, that the result was that the disease was communicated to her, and that, had she been aware of his condition, she would not have submitted to the intercourse. The question was reserved for the Court of Crown Cases Reserved, and was argued before thirteen Judges, a majority of nine of whom held that the conduct of the prisoner did not constitute an offence under either section of the statute, and that the conviction must be quashed. The four dissentients were Field, Hawkins, Day, and Charles, JJ.

In delivering his judgment, Pollock, B., said: "In R. *v.* Bennett, an uncle was indicted for an indecent assault upon his niece, he being diseased, and she ignorant of the fact. It was held by Willes, J., that the prisoner could be properly convicted, and in his summing-up that learned Judge said, 'An assault is within the rule that fraud vitiates consent, and therefore if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent which she may have given would be vitiated, and the

prisoner would be guilty of an indecent assault.' This case was followed by R. *v.* Sinclair, in which the prisoner, being diseased, had connection with a girl who, being ignorant of the fact, consented. As far as I can discover, these are the only decisions which have any material bearing upon the case now before us. They are not binding upon this Court, and they have been much questioned in the civil case in Ireland of Hegarty *v.* Shine. As at present advised, I see great difficulty in adopting them in their entirety. If the reasoning upon which they are founded be sound, I should have thought that the offence of which the prisoners were guilty was not an assault, but rape. Without, however, further argument and consideration, I am not prepared to say that they should be overruled, especially as in cases of a similar kind, which may well arise, they are undoubtedly important and useful in the administration of the criminal law; but I cannot assent to the proposition that there is any true analogy between the case of a man who does an act which, in the absence of consent, amounts to an indecent assault upon his niece, or any woman other than his wife, and the case of a man having connection with his wife."

[Poland and C. W. Matthews for the prosecution; Forrest Fulton for the prisoner.]

This case should be carefully studied in the original report, where it occupies forty-three pages. There seems a doubt as to whether or not the decision in R. *v.* Clarence has overruled R. *v.* Bennett (4 F. & F. 1105) and R. *v.* Sinclair (13 Cox, C. C. 28). If such is the case, it is not a crime to communicate a venereal disease to any person knowingly and wilfully. In the leading case, however, the question was reserved apparently on the ground that the prosecutrix was the wife of the prisoner, and some of the Judges alluded to the fact of a wife being able to obtain a judicial separation on the ground of venereal cruelty.

A civil action cannot be brought under such circumstances by the injured party, because *ex turpi causâ non oritur actio,* as was held

in Hegarty *v.* Shine (14 Cox, C. C. 124 & 125), in which case the presiding Judge said, "Courts of justice no more exist to provide a remedy for the consequences of immoral or illegal acts and contracts than to aid or enforce those acts or contracts themselves."

Value of Property Stolen.

R. *v.* EDWARDS AND STACEY. (1877) [67]

[13 Cox, C. C. 384; 36 L. T. 30.]

The prisoners were tried at the West Kent Sessions, held at Maidstone, on the 5th January, 1877, on an indictment charging them with stealing three dead pigs, the property of Sir William Hart Dyke, Bart.

The evidence was to the following effect: The three pigs in question having been bitten by a mad dog, Sir William Hart Dyke, to whom they belonged, directed his steward to shoot them. The steward thereupon shot them each through the head, and ordered a man named Paylis to bury them behind the barn. The steward stated that he had no intention of digging them up again, or of making any use of them. Paylis buried the pigs, pursuant to directions, behind a barn on land belonging to Sir William Hart Dyke, in a place where a brake stack is usually placed. The hole in which the pigs were buried was three feet or more deep, and the soil was trodden in over them. The prisoner Edwards was employed to help Paylis to bury the pigs. Edwards was seen to be covering the pigs with brakes; and in answer to Paylis's question why he did so, said that it would keep the water out, and it was as well to bury them "clean and decent." The two prisoners went the same evening and dug up the pigs, and took them to

the railway station, covered up in sacking, with a statement that they were three sheep, and sent them off for sale to a salesman in the London Meat Market, where they were sold for £9 3*s.* 9*d.*, which was paid to the prisoners for them.

The counsel for the prisoners submitted that there was no evidence in support of the charge to go to the jury on the following grounds:—Firstly, that the property was not proved as laid in the indictment, as Sir William Hart Dyke had abandoned his property in the pigs; secondly, that under the circumstances the buried pigs were of no value to the prosecutor; and thirdly, that under the circumstances the buried pigs were attached to the soil, and could not be the subject of larceny.

The chairman, however, thought that the case was one for the jury; and directed them as to the first point, that, in his opinion, there had been no abandonment, as Sir William's intention was to prevent the pigs being made use of, but that if the jury were of opinion that he had abandoned the property they should acquit the prisoners. He also told the jury that he thought there was nothing in the other two objections.

The jury convicted the prisoners, and the Court of Crown Cases Reserved affirmed the conviction.

[No counsel appeared.]

To constitute larceny, the thing stolen must be of some value, although it need not be of the value of any coin known to the law. (R. *v.* Morris, 9 C. & P. 349.) Neither is it necessary that the property should be of value to third persons, if valuable to the owner. (R. *v.* Clarke, 2 Leach, 1036.)

Larceny at common law, however, cannot be committed of things which are not the subject of property, as of a corpse; but it is a misdemeanour to remove a dead body without authority, however laudable may have been the motives of the defendant.

Of things in which no person has any determinate property, as treasure trove, waifs, &c., till seized, it has been said that larceny cannot be committed; but it would seem that the true owner,

though unknown, has still a property in them, before seizure by the lord, unless there be circumstances to show an intended dereliction of the property. (2 East, P. C. 606.) The same has been said of wreck, but wrecking is now punishable as a felony under 24 & 25 Vict. c. 96, s. 64.

Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of larceny at common law. (Ferens *v.* O'Brien, 11 Q. B. D. 21.)

In R. *v.* Beecham (5 Cox, C. C. 181) it was held that the fraudulent taking of a railway ticket for the purpose of using it to travel, and so defrauding the railway company, is larceny, although the ticket would, if used, be returned to the company at the end of the journey.

In R. *v.* Perry (1 C. & K. 725) the Court of Crown Cases Reserved held that the stealing of a piece of paper was sufficient to sustain a count for larceny.

Stealing Wild Animals.

R. *v.* **TOWNLEY.** (1870) [68]

[L. R. 1 C. C. R. 315; 40 L. J. (M. C.) 144; 24 L. T. 517; 19 W. R. 725; 12 Cox, C. C. 59.]

The prisoner and one George Dunkley were indicted at the Northampton Spring Assizes for stealing 126 dead rabbits. In one count they were laid as the property of William Hollis, in another as being the property of the Queen. There were also counts for receiving.

It was proved that Selsey Forest is the property of Her Majesty. An agreement between Mr. Hollis and the Commissioners of the Woods and Forests on behalf of Her Majesty was given in evidence, which the learned Judge thought amounted in legal effect merely to a licence to Mr. Hollis to

kill and take away the game; and the occupation of the soil, and all rights incident thereto, remained in the Queen. No point, however, was reserved as to the proof of the property as laid in the indictment.

The evidence showed that Mr. Hollis's keepers, about eight in the morning of the 23rd of September, discovered 126 dead and newly-killed rabbits and about 400 yards of net concealed in a ditch in the forest, behind a hedge close to a road passing through the forest. The rabbits were, some in bags and some in bundles, strapped together by the legs, and had evidently been placed there as a place of deposit by those who had netted the rabbits. The keepers lay in wait, and at about a quarter to eleven on the same day Townley, and a man who escaped, came in a cab driven by Dunkley along the road. Townley and the man who escaped left the cab in charge of Dunkley, and came into the forest, and went straight to the ditch where the rabbits were concealed, and began to remove them.

The jury, in answer to questions by the learned Judge, found that the rabbits had been killed by poachers in Selsey Forest, on land in the same occupation and ownership as the spot where they were found hidden; that Townley removed them knowing that they had been so killed, but that it was not found that Dunkley had any such knowledge.

The learned Judge thereupon directed a verdict of Not guilty to be entered as regarded Dunkley, and a verdict of Guilty as to Townley, subject to a case for the Court of Criminal Appeal.

It was to be taken as a fact that the poachers had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them. The question for the Court was whether on these facts the prisoner was properly convicted of larceny. The Court of

Crown Cases Reserved held that there was no larceny; that the bag of rabbits had never become reduced into the possession of the owner of the soil, for it had never been intentionally abandoned by the prisoners, and their act must be regarded as one continuous act of killing and carrying away; and so in this case no felony had been committed, though the Judges were careful to point out that circumstances might well exist where the larceny was fully made out.

Bovill, C. J., said: "In animals *feræ naturæ* there is no absolute property. There is only a special or qualified right of property—a right *ratione soli* to take and kill them. When killed upon the soil they become the absolute property of the owner of the soil. This was decided, in the case of rabbits, by the House of Lords in Blades *v.* Higgs (11 H. L. C. 621); and the same principle was applied in the case of grouse in Lord Lonsdale *v.* Rigg (1 H. & N. 923). In this case, therefore, the rabbits, being started and killed on land belonging to the Crown, might, if there were no other circumstance in the case, become the property of the Crown. But before there can be a conviction for larceny for taking anything not capable, in its original state, of being the subject of larceny, as, for instance, things fixed to the soil, it is necessary that the act of taking away should not be one continuous act with the act of severance, or other act by which the thing becomes a chattel, and so is brought within the law of larceny. This doctrine has been applied to stripping lead from the roof of a church, and in other cases to things affixed to the soil. And the present case must be governed by the same principle. It is not stated in the case whether or not the prisoner was one of the poachers who killed the rabbits. But my brother Blackburn says that such must be taken to be the fact. Under all the circumstances of the case I think the jury ought to have found that the whole transaction was a continuous one; and the conviction must be quashed."

Bramwell, B., said: "If a man were unlawfully to dig his neighbour's potatoes, and from being disturbed in his work, or any other cause, were to abandon them at the place where he had dug them, and were afterwards, with a fresh intention, to come back and take them away, I think the case would be the same as if during this interval of time the potatoes had been locked in a cupboard by the true owner. Wherever, in such cases, the goods may be said to have been in the possession of the true owner in the interval between the severance and the removal, I think the removal is larceny."

Byles, J., said: "It is here proved as a fact that the possession of the poachers was never abandoned; and, in fact, the rabbits from the time they were taken remained, in part at least, in the bags of the poachers. I think, therefore, the whole transaction must be regarded as one continuous transaction."

Blackburn, J., said: "To constitute larceny at common law it was necessary that the thief should both take and carry away. And it was early settled that in the case of a thing like a tree, for instance, when the very act which converted it into a chattel was accompanied by the taking of it away, there was no larceny. Almost all the cases falling within this rule have since been made larceny by statute, but the common law rule remains the same. Even in the case of Blades *v.* Higgs (11 H. L. C. 62), in which it was held that game when killed becomes the property of the owner of the land upon which it was raised and killed, it was expressly pointed out that it by no means followed that an indictment for larceny would lie. The doctrine is a very early one: see Book of Assizes, 12th year, plea 32, where it was applied to the case of trees. The result is, that while taking away dead game is larceny, it is otherwise where the killing and taking are one continuous act."

[No counsel appeared.]

In R. *v.* Petch (14 Cox, C. C. 116) the prisoner was indicted under 24 & 25 Vict. c. 96, s. 67, for larceny, as a servant to the Maharajah Dhuleep Sing, of sixty-one dead rabbits, the property of his master. The prisoner was employed by the Maharajah to trap rabbits on a part of his estate, and it was his duty to take them, when trapped, to the head keeper. Contrary to his duty, he from time to time took rabbits which he had trapped to another part of the land, and put them in a bag hidden in a hole near a furze bush, with the intention of appropriating them to his own use. This was noticed by one of the under-keepers, a man named Howlett, who went to the bag while the prisoner was away and found sixty-one dead rabbits concealed. He took twenty of them out of the bag, marked them by cutting a small slit under the throat of each, and then replaced them in the bag, covering it up in the hole as it was before. His reason for nicking them in this way was, of course, that he might know them again. The prisoner afterwards went to the hole and took away the bag and the rabbits. It was held that the act of the keeper in nicking the rabbits was not a reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them.

Rabbits, upon being killed by a wrongdoer, become the property of the owner of the soil (Blades *v.* Higgs, 11 H. of L. Ca. 621); but they are not thereby reduced into possession so as to support an indictment for larceny against a person wrongfully removing and carrying them away.

In R. *v.* Read (3 Q. B. D. 131, and 14 Cox, C. C. 17), a gamekeeper, not authorized to take or kill rabbits for his own use, took and killed some wild rabbits upon his master's land, and converted them dishonestly to his own use by selling them The taking, killing, removing, and selling were parts of one continuous action. The Court of Crown Cases Reserved held that a conviction of such gamekeeper for embezzlement of the rabbits could not be sustained. *Vide post*, p. 402.

Where the indictment was for stealing a dead partridge, and it turned out that it was shot by one of a shooting party, but was only wounded, and was picked up by the prisoner in a dying state, it was held that it was not the subject of larceny, as it was *ferœ naturæ*, and alive, and not reduced into possession. (R. *v.* Roe, 11 Cox, C. C. 554.)

In R. *v.* Cory (10 Cox, C. C. 23), which was a case of stealing pheasants, Channell, B., said: "These pheasants, having been hatched by hens, and reared in a coop, were tame pheasants at the time they were taken, whatever might be their destiny afterwards. Being thus, the prosecutor had such a property in them that they would become the subject of larceny, and the inquiry for stealing them would be of precisely the same nature as if the birds had been common fowls, or any other poultry; the character of the birds in no way affecting the law of the case, but only the question of identity."

In R. *v.* Shickle (L. R. 1 C. C. R. 158) the prisoner was indicted for stealing eleven tame partridges. There was no doubt that the prisoner had taken the birds *animo furandi;* but a question arose whether these birds could be the subject of larceny, and on a conviction the case was reserved.

The young birds had been reared from eggs which had been taken from the nest of a hen partridge, and which had been placed under a common hen. They were about three weeks old, and could fly a little. The hen had at first been kept under a coop in the prosecutor's orchard, the young birds running in and out, as the brood of a hen so confined are wont to do. The coop had, however, been removed, and the hen set at liberty, but the young partridges still remained about the place with the hen, as her brood, and slept under her wings at night.

The birds in question were neither tame by nature nor reclaimed. If they could be said to be tame at all, it was only that their instinct led them during their age of helplessness to remain with the hen. On their attachment to the hen ceasing, the wild instincts of their nature would return, and would lead them to escape from the dominion and neighbourhood of man. On the other hand, from their instinctive attachment to the hen that had reared them, and from their inability to escape, they were practically in the power and dominion of the prosecutor. The Court of Crown Cases Reserved affirmed the conviction.

Bovill, C. J., said: "The case states that 'from their inability to escape, they were practically in the power and dominion of the prosecutor.' That is sufficient to decide the point."

Byles, J., said: "The usual cases of larceny of animals are those which, being at first wild, have become tame and reclaimed. In

this case the only difference is that the birds are tame, and have been so from their birth, though they may become wild at a future time."

A dog stealer is not indictable the first time of stealing, but a second offence is an indictable misdemeanour. (*Vide* 24 & 25 Vict. c. 96, s. 18.)

Fish taken at sea are in the possession of the smack by which they are taken, as soon as they are taken, and are consequently the subject of larceny. A., who was employed as skipper of a smack used for trawling outside territorial waters, during the course of a fishing voyage put into port, sold the fish he had taken, and appropriated the proceeds to his own use. The Court of Crown Cases Reserved held that he was properly convicted of larceny. (R. *v.* Mallison, 20 Cox, C. C. 204.)

Ferrets are "animals kept in a state of confinement" within sects. 21 and 22 of 24 & 25 Vict. c. 96 (the Larceny Act, 1861), and, therefore, persons resisting apprehension by a police officer, who finds them in possession of a ferret which they know to be stolen, are guilty of murder if such resistance directly results in the police officer's death. Darling, J., said: "Even if R. *v.* Searing be well decided, and it is good law that stealing ferrets is not larceny at common law, I think that they are animals within sects. 21 and 22 of the Larceny Act, 1861. The point raised, however, is one that is not free from doubt, and in the event of a conviction for murder I will reserve the point for the consideration of the Court of Crown Cases Reserved." The jury found the prisoner guilty of manslaughter. (R. *v.* Sheriff, 20 Cox, C. C. 334.)

In Threlkeld *v.* Smith ([1901] 2 K. B. 531, and 20 Cox, C. C. 38) it was held that a person who kills and carries away a deer, usually kept in a forest, when it is outside the limits of the forest and upon the land of a third person, cannot be convicted under sect. 14 of the Larceny Act, 1861, of being in unlawful possession thereof.

Other cases in point are:—R. *v.* Head, 1 F. & F. 350; R. *v.* Cheafor, 5 Cox, C. C. 367; R. *v.* Brooks, 4 C. & P. 131; R. *v.* Robinson, Bell, C. C. 34; R. *v.* Searing, R. & R. C. C. 350; R. *v.* Rough, 2 East, P. C. 607; R. *v.* Stride, [1908] 1 K. B. 617. (The pheasants' eggs case.)

"*Corpus delicti.*"

[69] R. *v.* DREDGE. (1845)

[1 Cox, C. C. 235.]

The prisoner, a little boy, was indicted for stealing a doll and some other toys from a shop at Tunbridge. He had gone to the shop dressed in a smock frock, under which, when he was searched, were found concealed a doll, six toy houses, and other things of the same sort. The owner of the toy-shop swore the doll had been his, as he found his private mark on it, but he might have sold it. As to the toy houses, he believed them to be his property too, because they were exactly like other toys of the same sort which he had in his shop. But he could not say definitely that he had missed any of the articles which the prisoner was charged with stealing. On these facts it was held that the prisoner was entitled to be acquitted.

"It seems to me," said Erle, J., "that you have failed to establish in this case the *corpus delicti*. It is true the prosecutor swears that the doll was once his, but he cannot state that it was taken from him; and, for aught that appears to the contrary, the prisoner may have come by it in an honest manner."

[Swaine for the Crown.]

The leading case was distinguished in the case of R. *v.* Burton (6 Cox, C. C. 293), where the prisoner was charged with stealing a quantity of pepper. It was proved that he was seen coming out of the lower room of a warehouse in the London Docks, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable, who suspected him, from the bulky state of his pockets, and said, "I think there is something wrong about you"; to which the prisoner

replied, "I hope you will not be too hard on me," and immediately produced a quantity of pepper from his pockets and threw it on the ground. The witness stated he could not say that any pepper had been stolen, nor that any pepper had been missed, but that found upon the prisoner was of a like description with the pepper in the warehouse. The jury found the prisoner guilty, and the Court of Crown Cases Reserved held that the prisoner, upon these facts, was properly convicted of larceny. "If a man go into the London Docks sober," said Mr. Justice Maule, "without means of getting drunk, and come out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed."

In R. *v.* Mockford (11 Cox, C. C. 16) the prisoner was found with dead fowls in his possession, of which he could give no account, and was tracked to a fowl-house where a number of fowls were kept, and on the floor of which were some feathers corresponding with the feathers of one found on the prisoner, from the neck of which feathers had been removed. The fowl-house, which was closed overnight, was found open in the morning. The spot where the prisoner was found was 1,200 yards from the fowl-house, and the prosecutor, not knowing the number of fowls kept, could not swear that he had lost any. It was held, notwithstanding the prosecutor's ignorance, that the prisoner could be convicted of larceny.

In R. *v.* Tideswell ([1905] 2 K. B. 273, and 21 Cox, C. C. 10) the prisoner was in the habit of buying from time to time from a manufacturing company portions of the accummulated ashes of the company's works. The only agreement made between the managing director of the company and the prisoner with respect to such purchase was as to the price per ton, the prisoner being at liberty to take from the accumulation as much as he required, upon the understanding that the amount of his purchase in each case should be determined by the weight as ascertained by the company's weigher. It was the duty of the company's weigher to enter in a book a record of the weights of the ashes purchased to enable the company to charge the purchasers with the proper amounts. The company's weigher fraudulently and in collusion with

the prisoner weighed and delivered to the prisoner 32 tons 13 cwt. of the ashes and entered the weight in the book as being 31 tons 3 cwt. only. The Court of Crown Cases Reserved held that on these facts the prisoner was rightly indicted for larceny of 1 ton 10 cwt. In delivering judgment, Channell, J., said: "In the present case the jury must be taken to have found that the prisoner was a party to the fraud, though he may not have known what quantity was on any particular occasion to be given to him without paying for it, or even that on a particular parcel being handed to him some part would be so given to him."

In R. *v.* Pinchbeck, Sessions Paper, C. C. C. Vol. 123, p. 205, it was held that, as real property could not be the subject of larceny, it could not be the subject of obtaining by false pretences.

"Asportation" in Larceny.

[70] R. *v.* POYNTON. (1862)

[L. & C. 247; 9 Cox, C. C. 249; 32 L. J. (M. C.) 29; 8 Jur. N. S. 1218; 7 L. T. 434; 11 W. R. 73.]

The prisoner was a letter carrier. It was his duty to deliver letters sorted to him for that purpose, and if from any cause he was unable to deliver them, to bring them back to the post office in his pouch. The prisoner did not deliver a letter containing money which had been sorted to him for delivery, nor did he return it to the post office on the completion of his round; but, on being asked for it soon afterwards, he produced it from his pocket, and gave a false excuse for not having delivered it. The jury found that the prisoner detained the letter with intent to steal it. Pollock, C. B., who tried the case, reserved the question of whether or not this amounted to larceny for the Court of Crown Cases Reserved, and the conviction was affirmed unanimously.

Pollock, B., in delivering judgment, said: "The letter was in a place where it ought not to have been. He ought to have delivered it up at the post office, if he was unable to deliver it to the person for whom it was intended. He put it into his pocket with the intention of stealing it. His producing the letter when asked for it would be of some moment if he had not made up his mind to steal it. Here, however, the jury have found that the felonious intent had been already conceived. When the prisoner put the letter into his pocket, with that intent, the crime was complete. If I had had an opportunity of reconsidering my determination, I should not have reserved this case. The verdict of the jury is conclusive. We are all of opinion that the conviction is good."

[Boden, Q.C., and Mellor for the Crown; Merewether for the prisoner.]

There must be not only a taking, but also a carrying away, or "asportation," to constitute larceny. A bare removal, however, from the place in which the thief found the goods, though he does not make off with them, is sufficient. Thus, to remove a package from the head to the tail of a waggon, with a felonious intent to take it away, is a sufficient asportation to constitute larceny; but merely to alter the position of a package on the spot where it lies is not. (R. *v.* Coslet, 1 Leach, C. C. 236. *Vide* also R. *v.* Cherry, 1 Leach, C. C. 236, n.)

Where a thief was not able to carry off the goods on account of their being attached by a string to the counter (Anon., 2 East, P. C. 556), or to carry off a purse on account of some keys attached to the string of it getting entangled in the owner's pocket (R. *v.* Wilkinson, 1 Hale, 508), there was held in these cases not to be an asportation, because there was no severance.

In cases, however, where there is no asportation, the prisoner may be indicted for an attempt to steal.

It was held in the case of R. *v.* Lapier (1 Leach, C. C. 320) that to remove an ear-ring from the ear to the curls of a lady's hair, where it had accidentally been fixed, is a sufficient carrying away.

A watch was carried in a waistcoat pocket, with a chain attached, passing through a button-hole of the waistcoat, being there secured by a watch-key. The prisoner took the watch out of the pocket, and by force drew the chain out of the button-hole, but the watch-key having been caught by a button of the waistcoat, the watch and chain remained suspended:—Held, a sufficient severance to maintain a conviction for stealing from the person. (R. *v.* Simpson, 6 Cox, C. C. 422.)

To constitute a stealing from the person, the thing must be completely removed from the person; removal from the place where it was, if it remains throughout with the person, is not sufficient, but such removal would be sufficient to constitute simple larceny. (R. *v.* Thompson, 1 M. C. C. 78.)

A prisoner, having lifted up a bag from the boot of a coach, was detected before he had got it out; and it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied. The Court held that this was a complete asportation. (R. *v.* Walsh, 1 M. C. C. 14.)

Against the wall of a public passage was fixed what is known as an "automatic box," the property of a company. In such box was a slit of sufficient size to admit a penny piece, and in the centre of one of its sides was a projecting button or knob. The box was so constructed that, upon a penny piece being dropped into the slit, and the knob being pushed in, a cigarette would be ejected from the box on to a ledge which projected from it. Upon the box were the following inscriptions: "Only pennies, not half-pennies;" "To obtain an Egyptian Beauties cigarette place a penny in the box and push the knob as far as it will go." The prisoners went to the entrance of the passage, and one of them dropped into the slit in the box a brass disc, about the size and shape of a penny, and thereby obtained a cigarette, which he took to the other prisoners. The Court of Crown Cases Reserved held that the prisoners were guilty of larceny "The means," said Lord Coleridge, C. J., "by which the cigarette was made to come out of the box were fraudulent, and the cigarette so made to come out was appropriated. . . . There was undoubtedly a larceny committed." (R. *v.* Hands, 16 Cox, C. C. 188.

Stealing from Co-partners.

R. *v.* ROBSON. (1885) [71]

[16 Q. B. D. 137 ; 15 Cox, C. C. 772.]

The prisoner was tried and convicted at the Autumn Assizes for the county of Northumberland on the 31st of October, 1885, on an indictment framed under 31 & 32 Vict. c. 116, s. 1, charging that he, being a member of a co-partnership called the Bedlington Colliery Young Men's Christian Association, feloniously did embezzle three several sums of money of and belonging to the said co-partnership.

The object of the association was, to use the language of one of its printed rules, "the extension of the Kingdom of the Lord Jesus Christ among young men, and the development of their spiritual life and mental powers." It was composed of members and associates. The number of members did not exceed twenty. Any person was eligible for membership "who gave decided evidence of his conversion to God," but, before he could become a member, he must be proposed and seconded by two members of the association and elected by the committee on their being satisfied of his suitability. Trustees for the time being, in whom the real property belonging to the association was vested, became members by virtue of their appointment as trustees. The agencies for the attainment of the objects of the association were :—1st, the personal efforts of the members ; 2nd, devotional meetings ; 3rd, social meetings ; 4th, classes for Biblical instruction ; 5th, the delivering of addresses and lectures ; and, 6th, the diffusion of Christian and other suitable literature. Before the first of the offences charged against the prisoner was committed, the members of the association proposed to build, and afterwards built, a hall

or place of meeting for the purposes of the association at a cost of nearly 200*l.*, of which about 40*l.* was still owing. To this building every member had the right of entry and was entitled to a latch-key. The Court of Crown Cases Reserved held that this was not a "co-partnership" within the meaning of the Act, and the conviction was therefore quashed. "I cannot find," said Lord Coleridge, C. J., "any authority throwing any doubt on the accuracy of the passage in Lindley on Partnership, which makes the participation in profits essential to the English idea of partnership, and states that, although in former times the word 'co-partnership' was used in the sense of co-ownership, the modern usage has been to confine the meaning of the term to societies formed for gain. A number of definitions given by writers from all parts of the world are appended to the passage, and in all of them the idea involved appears to be that of joint operation for the sake of gain. The association in the present case is not a co-partnership in any sense of the word into which the notion of co-operation for the purpose of gain enters. We must construe the word 'co-partnership' as used in the Act according to the meaning ordinarily attached to it by the decisions and text-books on the subject. This association does not come within that meaning. The only point reserved for us is whether this association is a co-partnership within the Act. Inasmuch as we are of opinion that it is not, the conviction must be reversed."

Denman, J., said: "I am of the same opinion. The word 'co-partnership' in the Act must be construed according to the well-known legal meaning of the term. If the section had only mentioned the case of a co-partnership I should have thought it impossible to say that this case was within the statute. The conclusion to which we come to is, in my opinion, much strengthened by the fact that the section contains another expression which covers the case of co-owner-

ship where there is no co-partnership. Here we are dealing only with the term 'co-partnership,' for the only question reserved is whether this association was a co-partnership within the section. I am clearly of opinion that it was not."

[Walton for the prisoner.]

31 & 32 Vict. c. 116, s. 1, enacts that, "If any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property, of or belonging to any such co-partnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership or one of such beneficial owners." It is to be observed that, in this case, the only question reserved was whether the association was a "co-partnership." The prisoner was not indicted for embezzlement as one of several joint beneficial owners.

The offence created by 31 & 32 Vict. c. 116, s. 1, is a felony, and therefore the word "feloniously" is properly used in an indictment for such offence. (R. *v.* Butterworth, 12 Cox, C. C. 132.) It is not a crime, punishable under sect. 91 of 24 & 25 Vict. c. 96, to receive stolen goods, knowing them to have been stolen, if the stealing is not a crime either at common law or under 24 & 25 Vict. c. 96, although the stealing is a felony under 31 & 32 Vict. c. 116, s. 1. (R. *v.* Smith, L. R. 1 C C. R. 266.)

Any person who has an interest in a sum of money is a "beneficial owner" within the meaning of the Larceny Act, 1868 (31 & 32 Vict. c. 116), s. 1. Where then a number of persons have a right to have a fund applied to the extinction of their liability under a guarantee, these persons are all "beneficial owners," and any one of them who misappropriates the fund to his own use may be properly convicted of stealing it. A. was a member and acted as the secretary of a committee which had guaranteed the expenses of an entertainment. He, in the discharge of his duty, obtained possession of the entrance moneys, and paid the amount into the banking account of one B. Subsequently, by means of false representations, he obtained a cheque for the amount from B.

cashed it, and absconded with the proceeds. The Court of Crown Cases Reserved held that he was properly convicted under 31 & 32 Vict. c. 116, s. 1, of stealing moneys of which he with others was the beneficial owner; and the Court held, also, that a count in the indictment which charged that A. had stolen the moneys of the members of the committee was bad. (R. *v.* Neat, 19 Cox, C. C. 424.)

In R. *v.* Tankard ([1894] 1 K. B. 548) the defendant was convicted on an indictment drawn under 31 & 32 Vict. c. 116, s. 1, and charging him with having, whilst one of a number of beneficial owners consisting of himself, a person named Jackson, and others, embezzled money belonging to such beneficial owners. It was proved at the trial that the prisoner was the treasurer and a member of a trading club, which was an unregistered association of more than twenty persons such as is prohibited from being formed by sect. 4 of the Companies Act, 1862, and that he received money belonging to the association and failed to pay over or account for it. The Court of Crown Cases Reserved affirmed the conviction, and Lord Coleridge, C. J., said: "It would almost seem as if the enactment was for the very purpose of sweeping away such an objection as has been taken here. There are a number of persons who join themselves together, not for any criminal purpose, but their joining together is not legalised. It is true that they have no legal existence as a company, association, or co-partnership; but they are none the less beneficial owners of property. In the indictment, the property was properly laid in the prisoner, W. K. Jackson, and others as beneficial owners. It does not follow that, because the club had no legal existence as a company, association, or co-partnership, the members had no legal existence as beneficial owners of property. It is untrue to say that they are not beneficial owners in fact. It has been decided in Reg. *v.* Stainer (39 L. J. (M. C.) 54), before trade unions were legalised, that, where the property was laid in an association in the nature of a trade union, it will not follow that a person could not be convicted of stealing or embezzling their property, because the association did not in all respects conform to the law, and the grounds of that decision apply here. It seems to me that the case for the prisoner is gone the moment his counsel is obliged to admit that, if his contention be good, the property belonged to nobody, and

could, so to speak, be scrambled for. It would be a very strong thing to hold that an association not expressly sanctioned by law, yet not criminal, is incapable of holding any property at all. I am of opinion that the conviction should be affirmed."

Mathew, J., said: "I am of the same opinion. I think that the persons who framed sect. 1 of 31 & 32 Vict. c. 116 did it in the purpose of meeting such cases as this. The members of the club were clearly 'beneficial owners' within the meaning of the section."

Extortion by Frightening.

R. *v.* McGRATH. (1869) [72]

[L. R. 1 C. C. R. 205; 39 L. J. (M. C.) 7; 21 L. T. 543; 18 W. R. 119; 11 Cox, C. C. 347.]

At the Court of Quarter Sessions for the borough of Liverpool, on the 30th of August, 1869, P. McGrath was tried upon an indictment which charged him with feloniously stealing 26*s.*, the money of Peter Powell.

It was proved that on the 26th of August, 1869, Jane Powell, the wife of the prosecutor, Peter Powell, passing a sale room at Liverpool, was invited to enter, and did so. There were about a dozen persons in the room, and the prisoner was acting as auctioneer, and selling table-cloths and other articles. Although he knew very well that she had not made any bid, the auctioneer knocked down a piece of cloth to Jane Powell for 26*s.*, and refused to let her leave the room till she had paid for it. Simply because she was afraid, she paid the money. The jury were directed that if the prisoner had the intention to deprive Jane Powell of her money, and in order

to obtain it was guilty of a trick and artifice, by fraudulently asserting that she had made a bid, when she had not, as he well knew, and that he obtained the money by such means, he was guilty of the offence charged. The jury found that no bid had been made by Jane Powell, which the prisoner knew, and that he obtained the money from her by the trick and artifice mentioned above. A verdict of guilty was taken, and, on the case being reserved, it was held that the conviction was right: because, if the force used to the woman made the taking a robbery, larceny was included in that crime; whereas, if the force was not sufficient to constitute a robbery, the taking of the money nevertheless amounted to larceny, as she paid the money to the prisoner against her will, and because she was afraid.

Kelly, C. B., said: "The crime of obtaining money by false pretences differs from larceny. It is constituted by the pretence that something has taken place which in fact has not taken place. The present is a different case. Jane Powell was not deceived. She was intimidated, and by the operation of both the intimidation and the surprise of the trick she was induced to give up the money against her will."

Blackburn, J., said: "To constitute a larceny there must be an *animus furandi*, *i.e.*, a felonious intent to take the property of another against his will. The essence of the offence is knowingly to take the goods of another against his will. The goods may be obtained in various ways. If by force, then a robbery is committed. This would include larceny, but force is not a necessary ingredient in larceny. It is sufficient to constitute a larceny if the goods are obtained against the will of the owner. It would be a scandal to the law if goods could be obtained by frightening the owner, and yet that this should not constitute a taking within the meaning of the definitions of larceny. The material ingredient is that the goods should be obtained against the will of the owner. The other ingre-

dients of larceny undoubtedly existed here, as appears from the evidence in the case. There is ample evidence that the money was obtained against the will of Jane Powell. If there had been any doubt upon the point the jury should have been asked the question; but it is clear that Jane Powell did not part with her money of her own free will. This is, in effect, stated in the case. There is evidence that the money was obtained by the prisoner with a felonious intent, and against the will of Jane Powell. The jury have, in effect, found these facts against the prisoner, and these facts constitute larceny. Even if a robbery had, in fact, been committed, that does not preserve the prisoner from the liability to be convicted of larceny. A robbery includes a larceny. There may be some doubt whether a robbery was committed in this case; but it is not necessary to consider that question."

Lush, J., said: "I had some doubt during the argument whether there had been a sufficient taking; but now I think that there was a sufficient taking to constitute larceny, as the money was specifically demanded by the prisoner, and was exacted by him from Jane Powell under coercion, and whilst she was prevented from leaving the room."

Brett, J., said: "The question is whether there was a sufficient taking of the money. If the matter rested on the trick alone, that might be insufficient, as it is rather evidence of the prisoner's motives than the means by which he obtained the money. I had some doubt also whether the fear of a temporary imprisonment not accompanied by any personal violence rendered the taking in this case a robbery. Upon consideration, however, I think that as the threat was capable of being executed, and Jane Powell really parted with her money against her will, that is sufficient to constitute a larceny. There was evidence of such a taking, and the jury have found, in effect, that the money was obtained under a fear sufficient to make the giving of it an unwilling act. Consequently the

taking was against the will of Jane Powell, and was therefore a larceny."

[McConnell for the Crown; Commins for the prisoner.]

The leading case was followed in R. *v.* Lovell (8 Q. B. D. 185), where the prisoner, a travelling grinder, had by menaces extorted an excessive price from a woman in Worcestershire for the grinding of some knives. The prosecutrix gave the prisoner six knives to grind for her, the ordinary charge for grinding which would be 1*s.* 3*d.* The prisoner ground the knives, and then demanded with threats 5*s.* 6*d.* as his charge from the prosecutrix. The prosecutrix, being thus frightened, in consequence of her fears paid the prisoner the sum demanded. The jury having convicted the prisoner, and the point being reserved, the Court of Crown Cases Reserved affirmed the conviction.

It is probable that the facts in these cases would not have sustained an indictment for robbery, enough intimidation not having been employed to constitute that crime. (*Vide* R. *v.* Knewland and Wood, 2 Leach, 721.) But, before the statute referred to in the next leading case, the obtaining of money under a threat of charging the prosecutor with sodomitical practices had been held to be robbery (R. *v.* Donally, 1 Leach, 193); "the law considering the fear of losing character by such an imputation as equal to the fear of losing life itself, or of sustaining other personal injury." (*Per* Ashurst, J., in R. *v.* Knewland and Wood.)

In R. *v.* Walton and Ogden (9 Cox, C. C. 268) the Court of Crown Cases Reserved held that under 24 & 25 Vict. c. 96, s. 45, which relates to demanding property, etc., with menaces or by force, the menaces must be of such a nature and extent as to unsettle the mind of the person on whom they operate, and take away from his acts that element of free voluntary action which alone constitutes consent. It is a question for the jury whether the evidence of any particular case comes within that principle.

In R. *v.* Hazell (11 Cox, C. C. 597) the prosecutor met a man and walked with him. During the walk the man picked up a purse which he said he had found, and that it was dropped by the prisoner. He then gave it to the prisoner, who opened it, and there appeared to be about 40*l.* in gold in it. The prisoner

appeared grateful, and said he would reward the man and the prosecutor for restoring it. The three then went to a public-house and had some drink. Prisoner then showed some money and said, if the man would let him have 10*l.* and let him go out of his sight, he would not say what he would give him. The man handed what seemed to be 10*l.* in money, and the prisoner and prosecutor then went out together. They returned, and prisoner appeared to give the 10*l.* back and 5*l.* more. Prisoner then said he would do the same for the prosecutor, and by that means obtained 3*l.* in gold and the prosecutor's watch and chain from him. The prisoner and the man then left the public-house, and made off with the 3*l.* and the watch and chain. At the trial, the prosecutor said he handed the 3*l.* and the watch and chain to the men in terror, being afraid they would do something to him, and not expecting they would give him 5*l.* The Court of Crown Cases Reserved held that the prisoner was properly convicted of larceny upon this evidence.

As to things taken under a claim of right, *vide* R. *v.* Macdaniel, Foster, 121 ; R. *v.* Hall, 3 C. & P. 409 ; R. *v.* Boden, 1 C. & K. 395; R. *v.* Wade, 11 Cox, C. C. 549.

Threat to accuse of an Infamous Crime.

R. *v.* **REDMAN.** (1865) [73]

[L. R. 1 C. C. R. 12 ; 35 L. J. (M. C.) 89 ; 11 Jur. N. S. 960 ; 13 L. T. 303 ; 14 W. R. 56 ; 10 Cox, C. C. 159.]

The prisoner was indicted under 24 & 25 Vict. c. 96, s. 47, for threatening a boy's father to accuse the boy of an abominable offence upon a mare, with intent to extort money from the father. The prisoner charged the boy with an abominable offence upon a mare in the prisoner's possession. Before giving information against the boy (which he afterwards did, when the charge was dismissed as groundless), the prisoner

went to the boy's father, and stated to him that the offence had been committed, and that, if the father did not buy the mare of him, and pay him 3*l.* 10*s.* for her, he would accuse the boy. The father refused, saying that the prisoner was a liar and wanted to get rid of the mare. The prisoner pursued the same course to the boy's master, who treated his attempt in the same way. No evidence was given as to the value of the mare; but there was the above evidence of the prisoner's desire to get rid of her. The boy was called, and denied the charge, which was a most improbable one. The learned Judge told the jury to find the prisoner guilty, if he threatened the father to make the charge for the purpose of putting off the mare and forcing the father, under terror of the threatened charge, to buy and pay for her at the prisoner's price. The jury convicted the prisoner, and the Court of Crown Cases Reserved held that the prisoner was guilty of threatening to accuse with intent to extort money, within the meaning of 24 & 25 Vict. c. 96, s. 47.

[C. S. Bowen for the prosecution.]

So gravely does the law regard the offence of threatening to accuse another of a serious crime, with intent to extort money, that the person found guilty of it may be sent into penal servitude for life. It is immaterial whether the person against whom the accusation is threatened be innocent or guilty if the prisoner intended to extort money (R. *v.* Gardner, 1 C. & P. 479); and therefore, although the prosecutor may be cross-examined as to his guilt of the offence imputed to him, with a view to shake his credit, yet no evidence will be allowed to be given, even in cross-examination, by another witness, to prove that the prosecutor was guilty of such offence. (R. *v.* Cracknell, 10 Cox, C. C. 408.)

In R. *v.* Richards (11 Cox, C. C. 43) Mr. Justice Blackburn ruled that the guilt or innocence of the prosecutor is material in considering whether, under the circumstances of the case, the intention of the prisoner was to extort money, or merely to compound a felony.

In R. *v.* Tomlinson ([1895] 1 Q. B. 706, and 18 Cox, C. C. 75) the Court of Crown Cases Reserved held that in order to constitute the offence of sending a letter demanding money with menaces, within the meaning of 24 & 25 Vict. c. 96, s. 44, it is not essential that the "menace" should be a threat of injury to the person or property of the prosecutor, or a threat to accuse him of a crime; the offence may be committed if there be a threat to accuse him of misconduct not amounting to an offence against the criminal law. In this case it was proved that the prisoner, who was in the prosecutor's employ, was discovered by the prosecutor and his wife in the commission of an act of immorality with a woman named Kate Youde in the prosecutor's stable, in consequence of which the prosecutor discharged the prisoner from his service. Subsequently the prosecutor received by post the following letter in the prisoner's handwriting: —

"On the rocks only had a day and a half work since leaving Wrexham i want you to let me have 10*s.* so that I can get a can and brush and if I do not get it on or before Tuesday morning I shall let Mrs. Morgan and your friends know of yours doings with (Kate Youde) you must understand i am not going to suffer to hide you i have had enough of you. You are at liberty to show this to your lawyer or anyone else if you like but i shall certainly do it."

The question reserved for the opinion of the Court of Crown Cases Reserved was whether the threats in the above letter were such threats as were contemplated by sect. 44 of 24 & 25 Vict. c. 96.

The Court of Crown Cases Reserved affirmed the conviction. Lord Russell, C. J., said: "The question turns upon the true construction of sect. 44 of the Larceny Act, 1861; but in order to determine it we must look at other sections of that Act which deals with a cognate subject-matter. The next section deals with the demanding of property with menaces or by force with intent to steal it, while sect. 46 deals with the offence of sending a letter threatening to accuse a person of crime with intent to extort money or other property, and it should be observed that the class of accusations dealt with by that section are accusations of crime only. In addition to these sections I need only refer to sect. 49, which makes it immaterial whether the menaces or threats are of

violence, injury, or accusation to be caused or made by the offender or any other person. Coming back to the question of the construction of sect. 44, we have to ask ourselves whether the sending of this letter is evidence of demanding money with menaces."

Wills, J., said: "I think that the case comes within sect. 49, although it is not necessary that it should do so; the words 'injury' and 'accusation' ought to receive a liberal interpretation, and not be confined to any specific class of injuries or accusations; that which will do a person harm comes, in my opinion, within the meaning of 'injury.' I do not think that the word 'accusation' is confined to cases coming within sect. 46, which deals with accusation of offences of a peculiarly bad character, nor can I think that it applies only to accusations of criminal offences; it must have the meaning given it in ordinary language. With regard to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind, I only desire to say that it ought, in my judgment, to receive a liberal construction in practice; otherwise great injustice may be done; for persons who are thus practised upon are not as a rule of average firmness; but I quite appreciate the fact that the threat must not be one that ought to influence nobody."

The threat to accuse need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is sufficient. (R. *v.* Robinson, 2 M. & R. 14.)

Sect. 44 of 24 & 25 Vict. c. 96 provides that a person who sends a letter demanding, with menaces and without reasonable or probable cause, any chattels, money, or other property, may be sentenced to penal servitude for life.

Sending a letter threatening to murder a person, to burn or destroy his house, &c., or to maim his cattle, are felonies punishable with ten years' penal servitude. (*Vide* 24 & 25 Vict. c. 97, s. 50, and 24 & 25 Vict. c. 100, s. 16.)

The prosecutor may be asked what appeared to him the meaning of an alleged threatening letter. Evidence is admissible to show that, under particular circumstances, the words in the letter had not their ordinary meaning, but the meaning imputed to them upon the record; and therefore the witness might be asked whether he understood the meaning to be that which the record imputed. (R. *v.* Hendy, 4 Cox, C. C. 243.)

As to threatening letter; reasonable and probable cause; threat which a man of ordinary firmness could not be expected to resist, *vide* R. *v.* Nathalie Miard, 1 Cox, C. C. 22.

Other cases in point are:—R. *v.* Grimwade, 1 Cox, C. C. 85; R. *v.* Carruthers, 1 Cox, C. C. 138; R. *v.* Shepherd, 1 Cox, C. C. 237; R. *v.* Smith, 2 C. & K. 882; R. *v.* Pickford, 4 C. & P. 227; R. *v.* Girdwood, 1 Leach, C. C. 142; R. *v.* Chalmers, 16 L. T. 363; R. *v.* Wagstaff, R. & R. C. C. 398; R. *v.* Taylor, 1 F. & F. 511; R. *v.* Robertson, 10 Cox, C. C. 9; R. *v.* Hamilton, 1 C. & K. 212; R. *v.* Coghlan, 4 F. & F. 316; R. *v.* Hickman, 1 M. C. C. 34; R. *v.* Norton, 8 C. & P. 671; R. *v.* Cooper, 3 Cox, C. C. 547; R. *v.* Braynell, 4 Cox, C. C. 402; R. *v.* Boucher, 4 C. & P. 562; R. *v.* Southerton, 6 East, 126; R. *v.* Yates, 6 Cox, C. C. 441; R. *v.* Kain, 8 C. & P. 187; R. *v.* Middleditch, 2 Cox, C. C. 313.

Larceny through Mistake of Post Office Clerk.

R. *v.* MIDDLETON. (1873) [74]

[L. R. 2 C. C. R. 38; 42 L. J. (M. C.) 73; 28 L. T. 777; 12 Cox, C. C. 260, 417.]

At the Sessions of the Central Criminal Court, held on Monday, the 23rd of September, 1872, George Middleton was tried for feloniously stealing certain money to the amount of 8*l.* 16*s.* 10*d.* of the moneys of the Postmaster-General. The ownership of the money was laid in other counts in the Queen and in the mistress of the local post office.

It was proved in evidence that the prisoner was a depositor in a Post Office savings bank, in which a sum of 11*s.* stood to his credit. In accordance with the practice of the bank, he duly gave notice to withdraw 10*s.*, stating in such notice the number of his depositor's book, the name of the post office,

and the amount to be withdrawn. A warrant for 10*s.* was duly issued to the prisoner, and a letter of advice was duly sent to the post office at Notting Hill to pay the prisoner 10*s.* He presented himself at the post office and handed in his depositor's book and the warrant to the clerk, who, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for 8*l.* 16*s.* 10*d.*, and placed upon the counter a 5*l.* note, three sovereigns, a half sovereign, and silver and copper, amounting altogether to 8*l.* 16*s.* 10*d.* The clerk entered the amount paid, viz., 8*l.* 16*s.* 10*d.*, in the prisoner's depositor's book and stamped it, and the prisoner took up the money and went away. The mistake was afterwards discovered, and the prisoner was brought back, and, upon being asked for his depositor's book, said he had burnt it. Other evidence of the prisoner having had the money was given.

It was objected by the counsel for the prisoner that there was no larceny, because the clerk parted with the property and intended to do so, and because the prisoner did not get possession by any fraud or trick. The jury found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up. A verdict of Guilty was recorded, and the learned Common Serjeant reserved for the opinion of the Court for Crown Cases Reserved the question whether, under the circumstances above disclosed, the prisoner was properly found guilty of larceny. Fifteen Judges sat to hear the case, and, by eleven against four, they decided that the prisoner was guilty of larceny.

Of these eleven Judges seven held that the prisoner was guilty of larceny on the ground that, even assuming the clerk to have the same authority to part with the possession of, and property in, the money which the Postmaster-General would

have had, the mere delivery under a mistake, though with the intention of passing the property, did not pass the property; and the possession being obtained *animo furandi*, there was both a taking and a stealing within the definition of larceny.

Three Judges supported the conviction on the ground that the clerk had only a limited authority to part with the money to the person named in the letter of advice, and therefore no property passed to the prisoner, and the possession was obtained *animo furandi*.

One Judge (Pigott, B.) upheld the conviction on the ground that the mistaken act of the clerk in placing the money on the counter stopped short of placing it completely in the prisoner's possession, and that his subsequently taking it up was larceny.

Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., concurred in a judgment from which the following are extracts:—

"The finding of the jury, that the prisoner at the moment of taking the money had the *animus furandi*, and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the possession of the money. On the second question, namely, whether, assuming that the clerk was to be considered as having all the authority of the owner, the intention of the clerk (such as it was) to part with the property prevents this from being larceny, there is more difficulty, and there is in fact a serious difference of opinion, though the majority, as already stated, think the conviction right. . . . In the present case, the property still remains that of the Postmaster-General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him, for there was no intention to give it to him or to any one. It was simply a handing it over by a pure mistake, and no property passed. As this was money, we cannot test the case by seeing

whether an innocent purchaser could have held the property. But let us suppose that a purchaser of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk, and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee, though subject to be diverted? . . . We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*."

[Sir J. D. Coleridge, A.-G., Metcalfe, and Slade for the Crown.]

The ground on which the opinion of the four Judges who considered the prisoner not guilty proceeded was that the clerk had a general authority to part with the property in the money, and that he intended, although acting under a mistake, to part with such property to the prisoner at the time he handed over the money to him, and that, having such general authority and such intention, and acting upon them, there was no felonious taking by the prisoner, without the consent and against the will of the owner.

In R. *v.* Little and Eustace (10 Cox, C. C. 559), a carman, having to deliver goods to a certain person, in mistake delivered them to another person, who appropriated them to his own use. It was held that the carman did not part with the property in the goods by delivering them to a wrong person, and that the latter, appropriating them to his own use, was guilty of larceny.

In R. *v.* Prince (L. R. 1 C. C. R. 150) it was held that where a servant is entrusted with his master's property with a general authority to act for his master in his business, and is induced by fraud to part with his master's property, the person who is guilty of the fraud and so obtains the property is guilty of obtaining it by false pretences, and not of larceny, because to constitute larceny there must be a taking against the will of the owner, or of the owner's servant duly authorised to act generally for the owner. But where a servant has no such general authority from his master, but is merely entrusted with the possession of his goods for a special purpose, and is tricked out of that possession by fraud, the person who is guilty of the fraud and so obtains the property is guilty of larceny, because the servant has no authority to part with the property in the goods except to fulfil the special purpose for which they were entrusted to him.

Sovereign mistaken for a Shilling.

R. *v.* **ASHWELL.** (1885) [75]

[16 Q. B. D. 190; 16 Cox, C. C. 1.]

At the Assizes for the county of Leicester in January, 1883, Thomas Ashwell was tried for larceny of a sovereign, the moneys of Edward Keogh.

Keogh and Ashwell met in a public-house on the evening of the 9th of January. At about 8 p.m. Ashwell asked Keogh to go into the yard, and when there requested Keogh to lend him a shilling, saying that he had money to draw on the morrow, and, that he would then repay him. Keogh consented, and, putting his hand in his pocket, pulled out what he believed to be a shilling, but what was in fact a sovereign, and handed it to Ashwell, and went home, leaving Ashwell in the

yard. About 9 the same evening Ashwell obtained change for the sovereign at another public-house.

At 5.20 the next morning Keogh went to Ashwell's house, and told him that he had discovered the mistake, whereupon Ashwell falsely denied having received the sovereign, and on the same evening he gave false and contradictory accounts as to where he had become possessed of the sovereign he had changed at the second public-house on the night before. But he afterwards said, "I had the sovereign, and spent half of it, and I shan't give it back because I only asked him to lend me a shilling."

The jury found that the prisoner did not know that it was a sovereign at the time he received it; but said that they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling; and that the prisoner, having, soon after he received it, discovered that it was a sovereign, could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use and denied the receipt of it, knowing that the prosecutor had not intended to part with the possession of a sovereign, but only of a shilling. They added that if it were competent to them, consistently with these findings and with the evidence, to find the prisoner guilty, they meant to do so.

The case was reserved for the consideration of the Court of Crown Cases Reserved. Seven Judges were for affirming the conviction, and seven for quashing it; the Judges being equally divided in opinion as to whether he had been guilty of larceny at common law. The conviction therefore stood.

Cave, J., said: "The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact, presumed in law until the contrary is shewn; but the acceptance of something which is of doubtful benefit should not be, and is not, presumed. Possession unaccompanied by ownership is of doubtful benefit; for although certain rights

are attached to the possession of a chattel, they are accompanied also by liabilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shewn. Now a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in Merry *v.* Green (7 M. & W. 623) was not in possession of the purse and money until he knew of their existence. Moreover, in order that there may be a consent, a man must be under no mistake as to that to which he consents; and I think, therefore, that Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign. Suppose that, while still ignorant that the coin was a sovereign, he had given it away to a third person who had misappropriated it, could he have been made responsible to the prosecutor for the return of 20*s.*? In my judgment he could not. If he had parted with it innocently, while still under the impression that it was only a shilling, I think he could have been made responsible for the return of a shilling and a shilling only, since he had consented to assume the responsibility of a possessor in respect of a shilling only. It may be said that a carrier is responsible for the safe custody of the contents of a box delivered to him to be carried, although he may be ignorant of the nature of its contents; but in that case the carrier consents to be responsible for the safe custody of the box and its contents whatever they may happen to be; and, moreover, a carrier is not responsible for the loss of valuable articles, if he has given notice that he will not be responsible for such articles unless certain conditions are complied with, and is led by the consignor to believe that the parcel given to him to carry does not contain articles of the character specified in the notice. (Batson *v.* Donovan, 4 B. & A. 21.) In this case Ashwell did not hold himself out as being willing to assume the responsibilities of a

possessor of the coin whatever its value might be; nor can I infer that at the time of the delivery he agreed to be responsible for the safe custody and return of the sovereign. As, therefore, he did not at the time of delivery subject himself to the liabilities of the borrower of a sovereign, so also I think that he is not entitled to the privileges attending the lawful possession of a borrowed sovereign. When he discovered that the coin was a sovereign, he was, I think, bound to elect, as a finder would be, whether he would assume the responsibilities of a possessor; but at the moment when he was in a position to elect, he also determined fraudulently to convert the sovereign to his own use; and I am, therefore, of opinion that he falls within the principle of R. *v.* Middleton (L. R. 2 C. C. R. 38), and was guilty of larceny at common law."

Lord Coleridge, C. J., said: "It appears to me that the sovereign was received by the prisoner and misappropriated by him at one and the same instant of time. In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it. According to all the cases, if at the very moment of the receipt of a chattel the receiver intends to misappropriate and does misappropriate it, he is guilty of larceny. I think, for the reasons I have given, and in the sense I have defined, the prisoner did so here; and this seems to me, with great deference to my brother Smith, to be the answer to the exceedingly able and ingenious passage in his judgment in which he says that it is a fallacy to confound two things so utterly different as the discovery of a mistake and the stealing of a chattel. I do not shrink from the conclusion, which seems to me good sense, that sometimes the discovery of a mistake and the stealing of a chattel may be the same, or rather may be two forms of words equally descriptive of the same facts, if, as here, the chattel is really discovered and stolen at one and the same instant of time. This would be my view if the case were bare

of authority, and the matter were *res integra*. But it is not *res integra*, and there is abundant authority. On this part of the case I concur with my brother Cave. I think we cannot reverse this conviction without practically overruling Lord Eldon in Cartwright *v.* Green (8 Ves. 405), the Court of Exchequer in Merry *v.* Green (7 M. & W. 623), and the dicta cited by my brother Cave from the judgment of the majority of the Judges in R. *v.* Middleton. I can see no sensible or intelligible distinction between the delivery of a bureau not known to contain a sum of money or a purse and the delivery of a piece of metal not known to contain in it 20*s.*; and the passage in the judgment of Sir A. Cockburn, which was assented to by the majority of the Judges in R. *v.* Middleton, appears to me, as it does to my brother Cave, to be decisive of this case."

[A. K. Loyd for the Crown; Sills for the prisoner.]

The leading case was distinguished and discussed in R. *v.* Flowers (16 Q. B. D. 643, and 16 Cox, C. C. 33), where a Leicester workman received some money innocently, but afterwards fraudulently appropriated it. "If the judgments of the seven Judges," said Lord Coleridge, C. J., "who affirmed the conviction in R. *v.* Ashwell are carefully read, it will be seen that there is a substantial difference between that case and the present, and that those Judges were of opinion that, to justify a conviction for larceny, the receipt and appropriation must be contemporaneous." "I am of the same opinion," said Manisty, J., "and am glad that the opportunity has occurred for stating the substance of the decision in R. *v.* Ashwell. The difference of opinion amongst the Judges in that case was founded on the facts of the case, and on the application to those facts of the settled principle of law, that innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny. Some of the Judges thought that the facts of the case did not shew an innocent reception of the sovereign, and said that it was larceny; others thought that the reception was innocent and held that it was not larceny. I am glad to think that the old rule of

law still exists in its entirety." "The old rule of law," said Sir Henry Hawkins, "was never really questioned by any of the Judges in R. *v.* Ashwell. This case is altogether different; the Recorder told the jury that if the prisoner received the 7*s.* 11½*d.* innocently, and afterwards appropriated it to his use, he was guilty of larceny. It is perfectly clear to my mind that it could not be so. The summing up here shews that the learned Recorder was under a misapprehension as to the rule of law."

Where a man, driving a flock of lambs from a field, drove, with the flock, a lamb belonging to another person, without knowing that he did so, and afterwards, when he discovered the fact, sold the lamb, denied having done so, and appropriated the proceeds to his own use, the Court held that he was rightly convicted of larceny; for having in the first instance driven away the lamb, the property of another, he committed a trespass, which as soon as he resolved to dispose of the animal (the trespass continuing all along) became a felonious trespass. (R. *v.* Riley, Dears. C. C. 149.)

In R. *v.* Hehir (18 Cox, C. C. 267), which was a case tried in 1894 at the Munster Assizes held at Cork, and reserved for the Irish Court of Criminal Appeal, the Court held that where a man handed to the prisoner a 10*l.* note in mistake for a 1*l.*, and the prisoner took the note thinking it was a 1*l.* note, and when he suddenly discovered the error, kept it, that he could not be indicted for larceny.

The decision, therefore, of the English Court of Crown Cases Reserved in R. *v.* Ashwell was not followed.

Larceny by Finder.

[76] **R. *v.* THURBORN.** (1849)

[1 Den. C. C. 387; T. & M. 67; 2 C. & K. 831; 18 L. J. (M. C.) 140; 13 Jur. 499.]

The prisoner was tried before Parke, B., at the Summer Assizes for Huntingdon, 1848, for stealing a bank note.

He found the note, which had been accidentally dropped on the highway. There was no mark or name on it, indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up, nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally ; he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor's property, before he thus changed the note.

The learned Baron directed a verdict of Guilty, intimating that he should reserve the case for further consideration.

The case came before the Court of Crown Cases Reserved, consisting of the Lord Chief Baron, Patteson, J., Rolfe, B., Cresswell, J., Williams, J., Coltman, J., and Parke, B., and the judgment of the Court was delivered on the 30th of April, 1849, by Parke, B., in the course of which judgment the learned Baron said : "In order to constitute the crime of larceny there must be a taking of the chattel of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose ; by the term *animo furandi* is to be understood, the intention to take, not a particular temporary but an entire dominion over the chattel, without a colour of right. As the rule of law founded on justice and reason is, that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him, and the crime of larceny cannot be committed, unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner.

* * * * *

"The rule of law on this subject seems to be that if a man find goods that have actually been lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.

"In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination.

"It would probably be presumed that the taker would examine the chattel as an honest man ought to do, at the time of taking it, and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it, *animo furandi*. The mere taking it up to look at it would not be a taking possession of the chattel.

"To apply these rules to the present case: the first taking did not amount to larceny, because the note was really lost, and there was no mark on it or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious: and if the prisoner had changed the note or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note, the owner became known to him, and he then appropriated it *animo furandi*, and the point to be

decided is, whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not: it was dispunishable as we have already decided; and though the possession was accompanied by a dishonest intent, it was still a lawful possession and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny. We, therefore, think that the conviction was wrong."

[No counsel appeared.]

In R. *v.* Glyde (L. R. 1 C. C. R. 130, and 11 Cox, C. C. 103) the prisoner found a sovereign on the highway, believing it had been accidentally lost. Knowing he was doing wrong, he at once made up his mind to keep it, whether he found out who had lost it or not, and, on the owner being soon afterwards discovered, he refused to give it up. There was no evidence to show that the prisoner believed he could find the owner at the time he found the sovereign, and it was held, on the authority of R. *v.* Thurborn, that he was not guilty of larceny.

"If," however, "a person picks up a thing and knows that he can immediately find the owner, but instead of restoring it to the owner, converts it to his own use, this is felony." (*Per* Parke, B., in R. *v.* Pope, 6 C. & P. 346.) Where, for instance, a gentleman left a trunk in a hackney coach, and the coachman, instead of restoring it to the owner, detained it, opened it, destroyed part of the contents, and borrowed money on the rest, this was held to be larceny; for the coachman must have known where he took the gentleman up and where he set him down, and ought to have restored his trunk to him. (R. *v.* Wynne, 2 East, P. C. 664, and 1 Leach, C. C. 413.)

In order, however, to convict the finder of property of larceny, it is essential that there should be evidence of an intention to appropriate the property at the time of finding. If at that time his intentions were honest, his subsequently altering his mind and deciding to keep the chattel, no matter who might be the owner, would not make him legally a thief. (R. *v.* Christopher, 28 L. J. (M. C.) 35.)

A servant indicted for stealing bank notes, the property of her master, in his dwelling-house set up as her defence, that she found them in the passage, and, not knowing to whom they belonged, kept them to see if they were advertised :—Held, that she ought to have inquired of her master whether they were his or not; and that not having done so, but having taken them away from the house, she was guilty of stealing them. (R. *v.* Kerr, 8 C. & P. 176.)

If a bureau is delivered to a carpenter to repair, and he discovers money in a secret drawer of it, which he, unnecessarily as to its repairs, breaks open, and converts the money to his own use, it is a felonious taking of the property, unless it appears that he did it with intention to restore it to its right owner. (Cartwright *v.* Green, 2 Leach, C. C. 952.)

A person purchased, at a public auction, a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained anything whatever:—Held, that if the buyer had express notice that the bureau alone, and not its contents (if any), was sold to him; or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau with its contents (if any), he had a colourable property, and it was no larceny. (Merry *v.* Green, 10 L. J. (M. C.) 154.)

Where a box of plate was brought up from the bottom of the river by ballast heavers while engaged in their ordinary business and the contents were disposed of by them, it is a question for the jury whether, under the circumstances, they had sufficient means of discovering the owner, or had wilfully abstained from making any endeavours towards such discovery to constitute a larceny. (R. *v.* Scully, 1 Cox, C. C. 189.)

A person finding property which has no mark upon it by which the owner can be traced is yet guilty of larceny, if he appropriates it to his own use, without making inquiries on the subject, unless he has fair reason to believe that the property has been abandoned by the owner. (R. *v.* Coffin, 2 Cox, C. C. 44.)

Other cases on this subject are :—R. *v.* Preston, 5 Cox, C. C. 390; R. *v.* York, 3 Cox, C. C. 181; R. *v.* Wood, 3 Cox, C. C. 277, 453; R. *v.* Deaves, 11 Cox, C. C. 227; R. *v.* Mole, 1 C. & K. 417; R. *v.* West, 6 Cox, C. C. 415; R. *v.* Moore, 8 Cox, C. C. 416; R. *v.* Peters, 1 C. & K. 245; R. *v.* Knight, 12 Cox, C. C. 102; R. *v.* Dixon, 7 Cox, C. C. 35; R. *v.* Gardner, 9 Cox, C. C. 253; R. *v.* Pierce, 6 Cox, C. C. 117; R. *v.* Holloway, 5 C. & P. 525; R. *v.* Riley, Dears. C. C. 149.

Larceny by a Bailee.

R. *v.* WYNN. (1887) [77]

[16 Cox, C. C. 231; 56 L. T. 749; 52 J. P. 55.]

This was a case reserved from the Lewis Assizes by Field, J. The prisoner, a travelling watchmaker, on two separate occasions received from different persons watches which he was to repair. One of the watches was pledged by the prisoner in November, 1886, and the other before Christmas in that year. Upon pledging the first watch the prisoner stated that he only wanted the money for which he pledged it temporarily. And upon pledging the second watch he requested the person with whom he pledged it not to part with it, as it was not his property. Upon an indictment under 24 & 25 Vict. c. 96, s. 3, for the fraudulent conversion of the watches by the prisoner while a bailee thereof, the Court of Crown Cases Reserved held that there was some evidence of a fraudulent conversion,

i.e., an intention on the part of the prisoner to deprive the prosecutors permanently of their property, there being no evidence that any effort had been made by the prisoner to redeem the watches; and he never having shewn any intention, beyond the statements referred to, of so doing.

Lord Coleridge, C. J., said: "I am of opinion that in this case the conviction should be affirmed. It is the case of a man who has on two separate occasions within the space of two months had two watches delivered to him under substantially similar circumstances by two different persons. Now, the possession of the watches was no doubt in the first instance obtained in a perfectly legal manner, the watches being in each case delivered to him for the execution of repairs, and the pledging of the watches in neither case taking place immediately. My brother Field told the jury that the prisoner was a bailee of the watches, and the question is, whether the case was within the statute. The jury found that the prisoner had on both occasions fraudulently taken or converted the watches to his own use, and found a verdict of Guilty on both charges. A doubt occurred to my learned brother whether there was reasonable evidence that the taking or conversion was fraudulent. Now, if the taking or conversion was fraudulent, the case is clearly within the words of the statute; but, if it was not fraudulent, and the watches were pledged with an honest intention of redeeming them, it would be a different case. That, however, is not this case, for the jury have found that at the time the watches were pledged the prisoner did so with the intention of converting them to his own use; and the only question which we have to decide is, whether there was any evidence to support such finding. It seems to me that the very circumstance of there being two cases, and of the second case being separated from the other by an interval of only two months, was evidence that the man was doing what was fraudulent. There might have been cir-

cumstances which would have tended to negative a fraudulent intention, but there was no such evidence; and I am therefore of opinion that there was some evidence of a fraudulent taking or conversion, and that the conviction must therefore be affirmed."

Hawkins, J., said: "There was clearly a conversion, and the question is, was there a fraudulent conversion? I think there was abundant evidence that there was an intention on the part of the prisoner to part with the watches, and to derive the benefit himself of their conversion."

Stephen, J., said: "I am of the same opinion. But for the statute the fact that there was no fraudulent intention on the part of the prisoner when pledging the watches would not have afforded him any protection. Under the statute, however, there must now be a fraudulent intention. Now fraudulent involves a fraudulent conversion; a conversion, that is, with no claim of right, and a conversion with the intention permanently to deprive the owner of his property. The question is, whether there was here reasonable evidence of such a fraudulent conversion; that is, was the pledging a real *bonâ fide* pledging with the intention of merely obtaining money temporarily, or with the intention of taking the pledge out of the power of the owner? I agree with the observations of my brother Hawkins as to that; and it is therefore unnecessary for me to say more than that the conviction must be affirmed."

[No counsel appeared.]

By 24 & 25 Vict. c. 96 (the Larceny Act, 1861), s. 3, it is enacted that whosoever being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny. *Vide* also the Larceny Act, 1901, *post*, p. 323.

The mere fact of a bailee pawning the goods committed to his

care is not of itself enough to bring him within 24 & 25 Vict. c. 96, s. 3. It is necessary for the prosecution not only to show a conversion—see Syeds *v.* Hay (4 T. R. 260); and Wilbraham *v.* Snow (2 Saund. Rep. 47)—but also a fraudulent conversion, and the jury might possibly think, under the circumstances of any particular case, that although the prisoner had acted wrongly and foolishly, yet that he had had no intention to deprive the owner altogether of his goods.

The case of R. *v.* Macdonald (15 Q. B. D. 323) shows that an infant may be guilty of larceny by a bailee. In this case the prisoner, who was not of full age when he entered into the contract, was supplied with a quantity of furniture, under a hiring agreement, by Mr. Brown, draper and furniture broker, of Torquay. After paying three or four of the instalments as required, the prisoner fraudulently removed and sold the goods. It was held that, notwithstanding his infancy, he was rightly convicted of larceny by a bailee, under 24 & 25 Vict. c. 96, s. 3.

Lord Coleridge, C. J., said: "It is said that the prisoner cannot be convicted of larceny as a bailee, because being an infant he was not competent to enter into a contract of bailment; that, the offence charged against him depending upon his having acted in a manner inconsistent with the terms of a contract, he being unable to enter into such a contract, cannot be guilty of the offence. It seems to me that this contention is based upon an assumption which is not correct in law. It is not correct, as it appears to me, to use the expression "contract of bailment" in a sense which implies that every bailment must necessarily in itself be a contract. . . . The third section of 24 & 25 Vict. c. 96, says in effect that a person who has obtained delivery of and a special property in goods, and who cannot, therefore, at common law, be guilty of larceny of such goods, shall, if he fraudulently take or convert the same to his own use, be guilty of statutory larceny. It seems to me that undoubtedly the prisoner, though a minor, had the special property in, or right of possession of, these goods which was contemplated by those who framed this enactment when they used the term 'bailee'; that, having such special property, he proceeded to abuse it and fraudulently to convert the goods to his own use; and that he is therefore guilty of the offence created by the section. He is guilty of the offence, not because he has broken

a contract, which he was incapable of making, but because, being capable of becoming a bailee of these goods, and having become one, he dealt with the goods in such a manner as by the terms of the Act to render him guilty of the crime of larceny."

A married woman may be a bailee within the meaning of 24 & 25 Vict. c. 96, s. 3. (R. *v.* Robson, L. & C. 93.)

In R. *v.* Wilson (5 Q. B. D. 28), it was held that since the passing of 37 & 38 Vict. c. 62 (the Infants' Relief Act, 1874), an infant could not be convicted of appropriating any part of his property, "which ought by law to be divided amongst his creditors," where the debts proved against his estate were only trade debts, and it did not appear that there were any debts for necessaries supplied to him.

The Larceny Act, 1901 (1 Edw. VII. c. 10), enacts that:—

1.—(1.) Whosoever—

(a) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody, or apply, pay or deliver, for any purpose or to any person, the property or any part thereof, or any proceeds thereof, or,

(b) having, either solely or jointly, with any other person, received any property for or on account of any other person,

fraudulently converts to his own use or benefit, or to the use or benefit of any other person, the property or any part thereof, or any proceeds thereof, shall be guilty of a misdemeanour, &c.

(2.) Nothing in this section shall apply to or affect any trustee or any express trust created by a deed or will, or any mortgagee of any property, real or personal, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage.

2.—(1.) Sections 75 and 76 of the Larceny Act, 1861, are hereby repealed.

(2.) This Act shall have effect as part of the Larceny Act, 1861, and section 1 of this Act shall be deemed to be substituted for sections 75 and 76 of that Act.

Other cases on this subject are:—R. *v.* Jackson, 9 Cox, C. C. 505; R. *v.* Hassall, L. & C. 58; R. *v.* Hoare, 1 F. & F. 647; R. *v.* Garrett, 2 F. & F. 14; R. *v.* Richmond, 12 Cox, C. C. 495; R. *v.*

Aden, 12 Cox, C. C. 512; R. *v.* Oxenham, 13 Cox, C. C. 349; R. *v.* Tonkinson, 14 Cox, C. C. 603; R. *v.* Townshend, 15 Cox, C. C. 466; R. *v.* Henderson, 11 Cox, C. C. 593; R. *v.* Cosser, 13 Cox, C. C. 187; Ex parte George, 66 L. J. Q. B. 830; 18 Cox, C. C. 631; R. *v.* Bunkall, L. & C. 371; R. *v.* Jones, C. & M. 611.

Persons Employed to Sell appropriating Money Received.

[78] R. *v.* DE BANKS. (1884)

[13 Q. B. D. 29; 15 Cox, C. C. 450.]

The prosecutor gave a mare of his into the care of the prisoner, telling him that it was to be sold on the next Wednesday at Chester Fair. On that day the prosecutor did not go himself to sell his mare, but sent his wife, who went to where the prisoner was and saw him ride the mare about the fair, and sell her to a third party, and receive on such sale some money. The prosecutor's wife after such sale asked the prisoner to give her the money, saying she would pay his expenses. This the prisoner declined to do, and eventually he absconded with the money and without accounting. The Court of Crown Cases Reserved held that there was evidence that the prisoner was a bailee of the money thus paid to him, and that the conviction could be supported.

Lord Coleridge, C. J., said: "The question which we have to consider is not whether the prisoner was a servant and embezzled, but whether there was evidence to justify a conviction for larceny. Probably, the prisoner was intrusted with the horse for sale: the jury have so found; and the evidence of the prosecutor would seem to shew that that finding was correct. He was then to sell the mare, and to receive

the money derived from such sale, and then to hand it over to the prosecutor or to his agent, who, in this case, was his wife It seems to me, that as soon as the prisoner had sold the mare, the wife was entitled to the money; and being asked by the wife for the money, he became bailee of the money, and was guilty of larceny of that money of which he was bailee."

Field, J., said: "Now it was the fair, horses were being sold for cash at that fair, and the prisoner, in whose charge the mare had been put by the prosecutor, sold her, and according to the evidence received some money for her, which was, as a witness proved, 15*l*. Now was he a bailee? In the present case there was no usual course of dealing between the parties by virtue of which the prisoner had a right to mix the money he received with his own moneys, so that no specific money was his employer's. On the contrary, in the present case the prisoner ought to have handed over the money that he had received at once, as I read it, to the prosecutor, or to his wife. The conviction, therefore, can be supported."

Smith, J., said: "I agree with the majority in this matter. The difficulty is on a question of fact, viz., whether the prisoner was a bailee of the money or not. I think there was some evidence that he was bound to hand over the particular money, the wife asks for the money, the prisoner in no way objects to pay the money, though he will not and does not do it, and the jury may have found all these statements of the prisoner about the cheque to be untrue."

[No counsel appeared.]

The Judges expressed their sense of the difficulty of the case, and Mr. Justice Stephen dissented, saying, "My view is, that the man who has been convicted was not the bailee of the money. I think he received the money with no obligation to return the identical coins, and that the present case is governed by R. *v.* Hassall" (L. & C. 58).

In Hassall's case, it may be remarked—the case of a "money club" at Sheffield—it was held that the bailment intended by 20 & 21 Vict. c. 54, s. 4, is a deposit of something to be returned *in specie*, and therefore that a person with whom money has been deposited, and who is under an obligation to return the amount, but not the identical coins deposited, is not a bailee of the money within the meaning of the section.

In the case R. *v.* Tonkinson (14 Cox, C. C. 603), the prosecutor advanced money to the prisoner, a solicitor's clerk, upon the deposit of a deed conveying the equity of redemption to the prisoner in a house of his own, and, subsequently, he obtained a legal mortgage from him as security for the sums so advanced. The prisoner then obtained from the prosecutor the deed conveying the equity of redemption on the representation that he had found a person who would take a transfer of the mortgage. The prisoner then obtained 140*l.* from another person on the deposit of that deed with him, without notice of the prosecutor's mortgage, and appropriated the money to his own use. The Judge at the trial directed the jury that the prisoner was a bailee of the deed, and the jury found that he had fraudulently converted it to his own use. The Court of Crown Cases Reserved held that the direction was right, and that the prisoner was properly convicted of larceny as a bailee.

In R. *v.* The Governor of Holloway Prison (18 Cox, C. C. 631), a rule had been obtained, calling upon the Governor of Holloway Prison to show cause why a writ of *habeas corpus* should not issue directing him to bring up the body of one Emile George before the Court. The prisoner's extradition had been demanded by the French Government; and the magistrate at Bow Street had committed him for extradition for larceny by a bailee. The writ of *habeas corpus* was demanded on the ground that there was no evidence of any act which, if committed in England, would have constituted an offence according to English law. The prisoner had become engaged to the daughter of the prosecutrix, and in order to meet the expenses of the marriage the prosecutrix intrusted him with a French 3 per cent. bond, the value of which was about 40,000 francs, on which the prisoner told the prosecutrix he had found the means of raising a loan, and she gave him authority to borrow on it 10,000 francs, which he was to hand to her. He only handed her 5,000. She consented at his request to negotiate on

her bond a further loan of 6,000 francs; and gave him another authority to receive this money for her; which he did; but he kept the whole of it, and disappeared.

The Queen's Bench Division discharged the rule. Lawrance, J., said: "The case of R. *v.* De Banks is on all fours with the present, for, if you substitute a bond for the horse, the cases are one. It is said that the principle in R. *v.* De Banks is not in accord with R. *v.* Hassall, but the facts of the cases are entirely different. In R. *v.* Hassall, a treasurer of a money club received small weekly payments from each member, and had authority with the secretary's consent to lend the club money to members. There was a periodical division of the funds and profit amongst the members. There it was held that the treasurer could not be indicted as a fraudulent bailee for larceny of moneys paid in by a member. Now, in R. *v.* De Banks the prisoner was employed by the prosecutor to take care of a horse for a few days, and afterwards to sell it and give him the money. He sold it, and absconded with the money. It was held that he was a bailee of the money, and could be convicted. That is practically what occurred here. It was like a person being sent to a bank to cash a cheque, who, after he had cashed it, absconded with the money. He would be a bailee, and could be convicted as such."

Collins, J., said: "There is a marked sum to be returned in this case, and unquestionably he was a mandatory, and, further, he was a depositary. It is said that R. *v.* Hassall bears on this case, but the facts there are altogether different, for obviously in that case there was a fund to be dealt with. He was not a bailee, but a trustee. That has no bearing on this. I think the rule must be discharged. R. *v.* De Banks is a clear authority for the principle in this case."

Larceny by Trick.

[79] R. *v.* BUCKMASTER. (1887)

[20 Q. B. D. 182; 16 Cox, C. C. 339; 57 L. T. Rep. N. S. 720; 57 L. J. (M. C.) 25.]

The prisoner, and another man, during the Ascot race meeting, were standing upon a platform, or stand, made to represent "safes," or iron safe chests. The words "Griffiths the Safe Man" were printed upon it. The stand was outside the course, on a spot on Ascot Heath, where carriages were placed, and was not within any betting inclosure or ring. The prisoner made a bet with the prosecutor, laying odds against a horse named "Bird of Freedom," and the money for which the prisoner backed the horse was deposited with the prisoner. The prosecutor admitted that he would have been satisfied if he did not receive back the same coins. The horse won, but the prisoner went away with the money. Later in the afternoon the prosecutor saw the prisoner on another part of Ascot Heath, and demanded his winnings, but the prisoner denied that he had made the bet. The prisoner was convicted of larceny, and on the question being reserved as to whether there was any evidence to be left to the jury, the Court for Crown Cases Reserved held, that as it appeared that the prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid, while the prisoner obtained possession of the money fraudulently, never intending to pay it in any event, there was no contract by which the property in the money could pass, and therefore there was evidence of larceny by a trick.

"The prosecutor," said Lord Coleridge, C. J., "deposited the money with the prisoner not intending to part with the property, for he was to have his money back in a certain

event, whereas the prisoner, when he received the money, never intended to give it back in any event. It is true that the prosecutor would have been satisfied if he had received back not the identical coins which he had deposited, but other coins of equal value, but that does not show that he meant to part with his right to the money. In my opinion he meant to do nothing of the kind."

Manisty, J., said: "On the authorities it is settled law that if the owner of goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny. Here the prosecutor never intended to part with the property, and the prisoner had the *animus furandi* at the time when he received the possession."

Hawkins, J., said: "The only question is whether there was any evidence of larceny to be left to the jury. I am of opinion that there was abundant evidence. The whole of the prisoner's conduct shows a preconcerted design to get the money fraudulently."

A. L. Smith, J., said: "The prosecutor never intended to part with his money except for a *bonâ fide* bet. There is also evidence that possession of the money was obtained by a preconcerted premeditated trick. There is therefore evidence of larceny at common law."

[Keith Frith for the prisoner.]

This case sets at rest the doubt which had previously existed as to whether a "welsher" could be convicted of larceny. For the prisoner it was contended that, if he was guilty of any crime at all, it was of obtaining money by false pretences, and the following dictum of Parke, B., in Powell *v.* Hoyland (6 Exch. 70), was cited: "If a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." But, on the other hand, Oliver's

case (cited in R. *v.* Walsh, 4 Taunt. 274), and R. *v.* Robson (R. & R. 413), were held to be in favour of the conviction.

In the former of these two cases the prosecutor had handed to the prisoner 35*l.* in bank notes for the purpose of their being cashed, the prisoner, however, intending not to cash them for the prosecutor, but to steal them. "Wherever there is a felonious design," said the Court, "the property, notwithstanding the delivery, is still in the constructive possession of the true owner." In the other case, the facts were somewhat similar to those of the leading case, and the conviction was held right, "because at the time of the taking the prosecutor parted only with the possession of the money."

Where the owner of money or goods parts with the possession of them under a contract induced by fraud, but does not intend to part with the property in them until the other party to the contract has fulfilled his part of the bargain, the person so fraudulently obtaining possession of the money or goods may be convicted of larceny. The prisoner agreed at a fair to sell a horse to the prosecutor for 23*l.*, of which 8*l.* was to be paid to the prisoner at once, and the remainder upon delivery of the horse. The prosecutor handed 8*l.* to the prisoner, who signed a receipt for the money; by the receipt it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse to the prosecutor, but caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it. The Court of Crown Cases Reserved held that the prisoner was rightly convicted of larceny by a trick. (R. *v.* Russett, [1892] 2 Q. B. 312; and 17 Cox, C. C. 534.)

In R. *v.* Hench (R. & R. 163) the prisoner was indicted for larceny of a chest of tea. It appeared that Layton & Co., who were tea brokers, purchased the chest of tea in question, No. 7,100 at the East India House, but did not take it away. The prisoner obtained possession of the property by a regular request note and permit; but he was not employed by Layton & Co., and had no authority from them to demand the chest. The question was reserved as to whether this constituted a felonious taking, and the Judges affirmed the conviction.

In R. *v.* Hollis and another (12 Q. B. D. 25), the two prisoners by a series of tricks fraudulently induced a barmaid to pay over

money of her master to them, without having received from them in return the proper change. The barmaid had no authority to pay over money without receiving the proper change, and had no intention of or knowledge that she was so doing. The Court of Crown Cases Reserved held that the prisoners were properly convicted of larceny. Lord Coleridge, C. J., said: "I cannot see, if a person goes into a place and fraudulently, by a series of tricks, obtains possession of property from another which that other has no intention of parting with, how the offence can fail to be larceny. It is clearly stealing, and the conviction must be affirmed." *Vide* also R. *v.* McKale (L. R. 1 C. C. R. 125; and 11 Cox, C. C. 32).

In R. *v.* Williams (6 C. & P. 390) the prisoner was indicted for stealing a half-crown, two shillings and six penny pieces. It appeared that the prisoner went to the shop of the prosecutor, and asked the prisoner's son, who was a boy, to give him change for a half-crown. The boy gave him two shillings and six penny pieces, and the prisoner held out a half-crown, of which the boy caught hold by the edge, but never got it. The prisoner then ran away. The prisoner was convicted, and Park, J., who tried the case, said: "If the prisoner had only been charged with stealing the half-crown I should have had great doubt. But he is indicted for stealing the two shillings and the coppers. He pretends that he wants change for a half-crown; gets the change and runs off. I think that is larceny."

But where the right of property as well as the possession is parted with by the delivery, there can be no larceny, however fraudulent may be the means by which the delivery of the goods is procured. *Vide* the following case of R. *v.* Solomons, in which the distinction is shown between larceny by trick and false pretences.

Distinction between Larceny and False Pretences.

R. *v.* **SOLOMONS.** (1890) [80]

[17 Cox, C. C. 93; 62 L. T. 672.]

In support of an indictment for the larceny of three shillings and sixpence it was proved that the prisoner had

obtained possession of a shilling, and then of half-a-crown, from the prosecutor by means of what is known as the purse trick. That is to say, he had induced the prosecutor to give him a shilling for a purse into which he had dropped three coins, by first showing the prosecutor three shillings, and then making it appear as if he had dropped them into the purse. In the same way he had induced the prosecutor to give him a half-crown for a purse into which he had made it appear that he had dropped two half-crowns. Having been convicted of obtaining the money by trick on the indictment for larceny, and the question being reserved, the Court held that the prosecutor having parted with the property in his shilling and half-crown in exchange for the purses and their contents, the prisoner had been guilty, if at all, of obtaining the coins by means of a false pretence, and could not be convicted of larceny.

Lord Coleridge, C. J., said: "This case is really upon consideration too clear for me to entertain any doubt about it. Of course, one hesitates to let a man off if he is guilty of a gross fraud, and it is matter for regret to have to let off a man who is really guilty of something. But as long as we have to administer the law we must do so according to the law as it is. We are not here to make the law; and by the law of England, though it is enacted by 24 & 25 Vict. c. 96, s. 88, that a man indicted for false pretences shall not be acquitted if it be proved that he obtained the property with stealing which he is charged in any such manner as to amount in law to larceny, unfortunately the statute stops there, and does not go on to say that if upon an indictment for larceny the offence committed is shown to be that of false pretences, the prisoner may be found guilty of the latter offence. The statute not having said it, and the one offence being a misdemeanour while the other is a felony, you cannot, according to the ordinary principles of the common law, convict for the mis-

demeanour where the prisoner is indicted for the felony. Now, the law is plain that, where the property in an article is intended to be parted with, the offence cannot be that of larceny. Here it is quite clear that the prosecutor did intend to part with the property in the piece of coin, and the case is not like any of those cases in which the prosecutor clearly never intended to part with the property in the article alleged to have been stolen. Whether or not the prosecutor here intended to part with the property in the coin does not signify if what he did was in effect to part with it for something which he did not get. I have already said that you cannot convict of false pretences upon an indictment for larceny, and as the offence here was, if anything, that of false pretences, and the indictment was for larceny, it follows that this man must get off upon this indictment. I am, therefore, of opinion that this conviction must be quashed."

Hawkins, J., said: "I cannot myself imagine a clearer illustration of the difference between the offence of false pretences and that of larceny than is afforded by this case. It is perfectly clear that the prosecutor intended to part with the property in the coins, and that being so, the case is clearly not one of larceny."

[Slade Butler for the prosecution; Keith Frith for the prisoner.]

This case clearly shows the distinction between the crimes of larceny by trick and false pretences, and should be studied together with R. *v.* Buckmaster. *Vide*, also, R. *v.* Harvey, 1 Leach, 467; R. *v.* Adams, R. & R. 225; R. *v.* Thomas, 9 C. & P. 741; R. *v.* Wilson, 8 C. & P. 111; R. *v.* Radcliffe, 12 Cox, C. C. 474; R. *v.* Gillings, 1 F. & F. 36; R. *v.* Kay, Dears. & B. C. C. 231; R. *v.* Prince, L. R. 1 C. C. R. 150; R. *v.* Longstreeth, 1 M. C. C. 137; R. *v.* Jackson, 1 M. C. C. 119.

False Pretence by Conduct.

[81] R. *v.* BARNARD. (1837)

[7 C. & P. 784.]

The indictment charged that the prisoner falsely pretended that he was an undergraduate of the University of Oxford, and a commoner of Magdalen College, by means of which false pretences he obtained a pair of boot-straps from John Samuel Vincent.

It appeared that Mr. Vincent was a boot-maker, carrying on business in High Street, Oxford; and that the prisoner came there, wearing a commoner's cap and gown, and ordered boots, which were not supplied him, and straps, which were sent to him. He stated he belonged to Magdalen College.

It was proved by one of the butlers of Magdalen College that the prisoner did not belong to that college, and that there are no commoners at Magdalen College.

Bolland, B. (in summing up), said: "If nothing had passed in words, I should have laid down that the fact of the prisoner's appearing in the cap and gown would have been pregnant evidence from which a jury should infer that he pretended he was a member of the university, and if so, would have been a sufficient false pretence to satisfy the statute. It clearly is so by analogy to the cases in which offering in payment the notes of a bank which has failed, knowing them to be so, has been held to be a false pretence, without any words being used."

[Walesby for the prosecution.]

In the case of R. *v.* Douglas (1 Camp. 212) the defendant was indicted for obtaining money from the Countess of Ilchester by false pretences. The facts of the case were that the defendant, in

the assumed character of a porter from an inn, delivered a parcel, as from the country, with a printed ticket with writing charging carriage and porterage, and received the money charged. The parcel turned out to be a mock parcel, worth nothing. Part of the false pretences charged in the indictment was taken from the porter's ticket. The prisoner was convicted, the learned Judge who tried the case saying: "I take the defendant to have uttered every word contained on the ticket which he brought with the parcel."

In the case of R. *v.* Cooper (2 Q. B. D. 510, and 13 Cox, C. C. 617) the prisoner was indicted for having obtained a quantity of potatoes by the false pretences that he was a potato dealer in a large way, and able to pay for large quantities of potatoes supplied to him. The only evidence of these pretences was the following letter from him to the prosecutor:—

"Hamerton, Sheffield,
"January 17th, 1877.

"Dear Sir,

"Please send me one truck of regents and one truck of rocks as sample, at your prices named in your letter. Let them be good quality, and then I am sure a good trade will be done for both of us. I will remit you the cash on arrival of goods and invoice.

"Yours truly,
"William Cooper.

"P.S.—I may say, if you use me well, I shall be a good customer. An answer will oblige saying when they are put on."

It was held that this letter reasonably conveyed to the mind the construction put upon it in the indictment, and that the false pretences alleged were proved.

"The question in all these cases," said Lord Coleridge, C. J. "is what was intended to be conveyed to the mind of the prosecutor by the acts, conduct, or silence of the prisoner. If a particular idea is intended to be conveyed to his mind, and is conveyed, and if it be false, the statute is complied with."

In R. *v.* King ([1897] 1 Q. B. 214), upon the trial of an indictment for obtaining goods by false pretences, a letter written by the defendant to the prosecutor respecting the goods was put into

the hands of the prosecutor, who was asked what opinion he formed as to the position or occupation of the defendant upon the receipt of the letter. The Court of Crown Cases Reserved held that, although the question of the proper inference to be drawn from the letter was for the jury, the question was admissible to shew the inference in fact drawn from it by the prosecutor. Cave, J., said: "The first question for us is whether the question which was put to the witness as to the inference which he drew from the letter was admissible. I am of opinion that it was clearly admissible, and that it was absolutely necessary to a conviction. The case of R. *v.* Cooper (2 Q. B. D. 510), so far from bearing out the contention on behalf of the prisoner, is inconsistent with it. The judgments in that case say that it must be shewn not only that the false pretence was made, but that the prosecutor believed it to be true and parted with his property because he so understood it. In a case like the present the charge could not be proved without putting the question in some such form as that in which it was put. It is quite clear that the evidence was admissible, and that the defendant was properly convicted."

In R. *v.* Story (R. & R. C. C. 81), it was held to be a false pretence within 30 Geo. II. c. 24, where the prisoner obtained money from the keeper of a post office, by assuming to be the person mentioned in a money order, which he presented for payment, though he did not make any false declaration or assertion in order to obtain the money.

In R. *v.* Bull (13 Cox, C. C. 608), the prisoner, on entering the service of a railway company, signed a book of rules, a copy of which was given to him. One of the rules was, "No servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service the prisoner knowingly and fraudulently delivered up to an officer of the company, as part of his own uniform, a great-coat belonging to a fellow servant, and so obtained the wages due to him. The Court of Crown Cases Reserved held that he was properly convicted of obtaining the money by false pretences.

In Re Pinter (17 Cox, C. C. 497), bonds, which had been stolen in 1883, were found in 1890 in the possession of the prisoner, who, under an assumed name, was dealing with them and selling them

to innocent purchasers. The Court held that, assuming that the bonds had been stolen, his conduct amounted to a false representation of their genuineness, which was not cured by the fact that, the bonds passing freely from hand to hand, an innocent purchaser would be able to get his money back again. Smith, J., said: "Let it be taken that he was affected with guilty knowledge; in my judgment there is a representation that the bonds were all right and not stolen ones—a representation by conduct constituting a false pretence."

In R. *v.* Jones ([1898] 1 Q. B. 119), the defendant ordered a meal in a restaurant; he made no verbal representation at the time as to his ability to pay, nor was any question asked him with regard to it. After the meal he said he was unable to pay, and that he had (as was the fact) only one half-penny in his possession. The Court of Crown Cases Reserved held that he could not be convicted of the offence of obtaining goods by false pretences, but that he was liable to be convicted of obtaining credit by means of fraud within the meaning of sect. 13, sub-sect. 1, of the Debtors Act, 1869. Lord Russell, C. J., said: "All that the defendant did was to go into an eating-house, order food and refreshment, and eat, but not pay for it; no question was put to him, and no enquiry was made from him by the prosecutor as to his means, nor was any statement made by him whether he had means to pay. The question is whether this can be regarded as a state of things in which a jury would be justified in finding that the defendant obtained consumable articles by false pretences. We do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretence by conduct; for example, the case of R. *v.* Barnard (7 C. & P. 784), where a cap and gown were used by a man who had no right to wear them, in order to convey the notion that he was a member of the university. Nor do we in any way dispute the authority of another class of cases; that is, where a man gives a cheque on a bank where he either has no account or has not sufficient means to meet the cheque, and must have known that he had not sufficient means. In the present case the defendant did nothing beyond what I have already stated: no enquiry was made of him, and no statement was made by him. Under the circumstances, we do not think that the case could properly be left to the jury on

the first count; there was no evidence that the defendant had obtained the articles by false pretences.

A further question arises: it is provided by sect. 88 of the Larceny Act, 1861, that if, upon the trial of any person indicted for the misdemeanour of obtaining goods by false pretences, it is proved that he obtained them in such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanour. But in the present case the defendant did not commit larceny. In the circumstances of the case it is clear that the prosecutor parted not merely with the possession, but also with the property in his goods, and that he intended to do so, for the goods were intended for immediate consumption. The finding of the jury that the defendant was guilty of obtaining the goods by false pretences cannot therefore be supported on that ground, and the conviction on the first count is bad.

The second count is framed upon a different statute, upon sect. 13 of the Debtors Act, 1869, which provides that in certain cases a person shall be deemed guilty of a misdemeanour, the first case being if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud. There are three elements which have to be considered in the construction of that section: first, there must be the incurring of a debt or liability; secondly, there must be an obtaining of credit; and thirdly, there must be fraud: the conjunction of these three ingredients makes the offence. No one can doubt that the defendant did incur a debt or liability: he ordered goods under circumstances which implied a promise to pay for them. Then did he obtain credit? We are of opinion that he did. The prosecutor might have said that he would not furnish him with the goods until he paid the price, or he might have insisted on payment in actual exchange for each article as it was supplied, but he did neither; he furnished the goods under circumstances which passed the possession and property in them, relying on the readiness and ability of the defendant to pay. It does not seem to matter that the period of credit was a short period: he trusted the defendant, and parted with his goods without insisting on prepayment or upon interchangeable payment. We think, therefore, that credit was obtained. Thirdly, was there fraud? There was a debt, and there was credit, and we think

there was ample evidence to justify the jury in arriving at the conclusion that the defendant was guilty of fraud. He goes into an eating-house, where the ordinary custom is to pay directly after the goods have been consumed; he knows that such goods are supplied, not on personal knowledge, but on the understanding that the ordinary custom will be observed. The jury found that he had no intention of paying; he intended to cheat, and so the jury found. We think, therefore, that the conviction was right upon the second count, and that it must be affirmed."

Other cases on this subject are:—R. *v.* Hunter, 10 Cox, C. C. 642; R. *v.* Powell, 15 Cox, C. C. 568; R. *v.* Sampson, 52 L. T. N. S. 772; R. *v.* Randell, 16 Cox, C. C. 335.

False Pretences by means of Worthless Cheques.

R. *v.* HAZELTON. (1874) [82]

[L. R. 2 C. C. R. 134; 13 Cox, C. C. 1; 44 L. J. (M. C.) 11; 31 L. T. 451; 23 W. R. 139.]

The prisoner was indicted for obtaining goods by (amongst others) the false pretence that certain cheques were good and valid orders for the payment of their amount. It was proved that the prisoner ordered goods of the prosecutors, and said he wished to pay ready-money for them. He gave cheques on a bank for the price, and took away the goods. The prisoner had shortly before opened an account at the bank, but had drawn out the amount deposited except a few shillings. Various cheques of his had been refused payment, and he would not have been permitted to overdraw. The jury found that the prisoner did not intend, when he gave the cheques, to meet them, and that he intended to defraud. The Court of Crown Cases Reserved held that the evidence did not support the first

of the false pretences, that he then had money in the respective banks to the amount of the cheques; but that it did the other two, that he had authority to draw the cheques, and that they were good and valid orders for the payment of their amounts.

Kelly, C. B., said: "There are two questions in this case; first, whether the prisoner has expressly or impliedly made a representation upon the faith of which goods have been obtained; and, secondly, whether that representation was false.

"Several representations are laid in the indictment, and are proposed to us in the case as arising from the conduct of the prisoner in the present case. It is suggested that a person acting as the prisoner did, represents that he then has money, to the amount of the cheque which he tenders, in the bank upon which it is drawn. If this had been the only representation suggested, there would have been great difficulty in upholding the conviction. The giving of a cheque does not necessarily imply any such representation. Not only may a banking account be kept under a guarantee upon the express terms that it may be overdrawn, but without any such arrangement, a person of position may often overdraw an account in perfect good faith, and with the tacit sanction of his bankers. Then it is suggested that the conduct of the prisoner amounted to a representation that he had authority to draw upon the bank for the sum for which he drew. I think that representation does not arise. I do not see how it can but be implied.

"But as to the third representation there can be no doubt, namely, that the cheque is a good and valid order for the payment of its amount. The case which has been cited (R. *v.* Parker, 7 C. & P. 829) is express upon the point; and that the goods were obtained upon the faith of the representation admits of no question.

"It remains to consider whether the representation made

was untrue. If a man's account were overdrawn, and he had reason to suppose that his cheque would still be honoured, this might be consistent with his having authority to draw, and with his cheque being a good and valid order. But, in the present case, it is quite clear that the prisoner knew that his account at the bank was virtually closed, and that he knew his cheque would not be paid. He had, therefore, no authority to draw, and his cheque was not a good and valid order, that is to say, one which might be cashed."

Lush, J., said: "I think giving a cheque is not a representation that the giver then has funds in the bank to the amount of the cheque. Many a man draws a cheque, either intending to pay in money to meet it or, having a right, to overdraw. But here the prisoner, when he obtained the goods, said he wished to pay ready money, and that amounts to a representation that the cheque was equal to cash, whereas he had no real account at the bank at all. The facts, therefore, support either the second or the third of the false pretences charged."

Brett, J., said: "It is material, first, to see exactly what the question asked of us is. In order to constitute the offence charged in the indictment a man must make a pretence or representation as to existing facts; it must be false to his knowledge; money or goods must be obtained thereby, and with intent to defraud. . . . A representation must depend upon what a man says and does, and what his words and acts would convey to the mind of another. It cannot depend upon the state of his own mind."

Quain, J., said: "I think the conviction must be affirmed, upon the third representation charged, upon the authority of R. *v.* Parker. The only differences between that case and this are, that there the prisoner had no account at all at the bank, and that the cheque was post dated. But the last point of distinction can make no difference. And I think, when the

prisoner, as here, had no balance, that was practically the same thing as having no account."

Pollock, B., said: "I think the real representation made is that the cheque will be paid. It may be said that that is a representation as to a future event. But that is not really so. It means that the existing state of facts is such that in ordinary course the cheque will be met."

[Besley for the prosecution.]

To obtain goods in exchange for a cheque, falsely representing that the cheque will be honoured on presentation, is to obtain goods, not credit, by false pretences. A person in payment for certain goods gave a cheque drawn on a bank at which he represented that he had an account, knowing that his account had been closed, and that the cheque would not be honoured. The Court of Crown Cases Reserved held that the offence was not obtaining credit but goods by false pretences, and that there was evidence on which he could properly be convicted of that offence. (R. *v.* Cosnett, 20 Cox, C. C. 6.)

In R. *v.* Ollis ([1900] 2 Q. B. 758, and 19 Cox, C. C. 554) the defendant was tried and acquitted on a charge of false pretences by means of a worthless cheque. He was then tried on a second indictment for obtaining money by means of another cheque. The first transaction was given in evidence in order to show guilty knowledge, and the Court of Crown Cases Reserved upheld the conviction. *Vide* post, p. 368.

Other cases on this subject are:—R. *v.* Jackson, 3 Camp. 370; R. *v.* Wavell, 1 M. C. C. 224; R. *v.* Parker, 2 M. C. C. 1; R. *v.* Walne, 11 Cox, C. C. 647.

False Pretences—Existing Fact.

R. *v.* JENNISON. (1862) [83]

[L. & C. 157; 9 Cox, C. C. 158.]

The prisoner, John Jennison, was indicted for obtaining 8*l.* from one Ann Hayes by false pretences. The prisoner, who had a wife living, had represented himself to the prosecutrix, who was a single woman in service, as an unmarried man, and, pretending that he was about to marry her, induced her to hand over to him the sum of 8*l.* out of her wages received on leaving her service, representing that he would go to Liverpool and with the money furnish a house for them to live in, and that having done so he would return and marry her. Having obtained the money, the prisoner went away, and never returned.

The prosecutrix stated that she had been induced to part with her money on the faith of the representations of the prisoner that he was a single man, and would then marry her. There was no doubt that the representations were false, and that, morally, the money had been obtained by false pretences. But it was contended on the part of the prisoner that, as the prosecutrix had been induced to part with her money by the joint operation of the three representations made by the prisoner—that he was unmarried, that he would furnish a house with the money, and that he would then marry her—and as only the first of these pretences had reference to a present existing fact, while the others related to things to be done *in futuro*, the indictment could not be maintained. On the prisoner having been convicted and the point reserved, it was held by the Court for the Consideration of Crown Cases Reserved that the prisoner could be properly

convicted, because though two of the false pretences alleged were merely promises relating to things to be done in the future, the statement that he was unmarried was a false pretence as to an existing fact, without making which he would not have got the money.

Erle, C. J., said: "In this case we are all of opinion that the prisoner was properly convicted. He was indicted for obtaining money by false pretences, the false pretences being, that he was an unmarried man, that he would marry the prosecutrix, and that with the money she was to give him he would furnish a house for them to live in. Now, it is clear that a false promise cannot be the subject of an indictment for obtaining money by false pretences. Here, however, we have the pretence that he was an unmarried man. This was false in fact, and was essential, for without it he would not have obtained the money. Then this false fact by which the money is obtained will sustain the indictment, although it is united with two false promises, neither of which alone would have supported the conviction."

[No counsel appeared.]

A promissory false pretence cannot be made the subject of an indictment. To constitute the crime of obtaining by false pretences, the pretence must be of an existing fact; and so where the prosecutor lent 10*l.* to the prisoner on the false pretence that he was going to pay his rent, it was held that there could be no conviction, for the prisoner's representations related merely to his future conduct. (R. *v.* Lewis Lee, 9 Cox, C. C. 304.) But such representations may render the person who makes them criminally liable if they imply an assertion of his power to carry them out, as in a case where the prisoner used only promissory words about bringing back a woman's husband (who had run away) "over hedges and ditches," but implied that she had power to bring him back. (R. *v.* Giles, L. & C. 502.) And where money was obtained by the defendant by the false representation that Messrs. Warrinor & Co. were about to publish a new directory, and that the defendant was collecting information for it, this was held to be a false

pretence of an existing fact. (R. *v.* Speed, 15 Cox, C. C. 24.) "At the time the money was obtained," said Lord Coleridge, C. J., "the representation was false, and it was not the less a false pretence because at a future time the prisoner might have brought out a new directory with the title of Warrinor & Co.'s Directory."

In R. *v.* Douglas (1 M. C. C. 462) the prisoner was indicted for falsely pretending to the prosecutor, whose mare and gelding had strayed, that he, prisoner, would tell him where they were, if he would give him a sovereign down. The prosecutor gave the sovereign, but prisoner refused to tell. Conviction held bad, as the indictment should have stated that he pretended he knew where they were.

In R. *v.* Johnston (2 M. C. C. 254), an indictment for obtaining money from prosecutrix, under the false pretence that he intended to marry her and wanted the money to pay for a wedding suit he had purchased, held not sufficient to sustain a conviction.

In R. *v.* Bates (3 Cox, C. C. 201), it was held that where an indictment charges a false pretence of an existing fact calculated to induce the confidence which led to the prosecutor's parting with his property, though mixed up with false pretences as to the prisoner's future conduct, it is sufficient. And that where the false pretence is as to the status of the party at the time, or as to any collateral fact supposed to be then existing, it will equally support an indictment under the statute.

In R. *v.* Archer (6 Cox, C. C. 515), where upon an indictment for obtaining goods by false pretences it was proved that the prisoner falsely represented himself to the prosecutors as being connected in business with one J. S. of N., whom he stated to be a person of wealth, and by that misrepresentation obtained the goods for himself and not for the supposed J. S., it was held that, although the credit was given to the prisoner himself, he was properly convicted.

In R. *v.* West (Dears. & B. C. C. 575) it was held that a fraudulent misrepresentation of an existing matter of fact, accompanied by an executory promise to do something at a future period, as that the prisoner had bought certain skins and would sell them to the prosecutor, is a false pretence within the statute, although it appears that a promise, as well as such misrepresentation of fact, induced the prosecutor to part with the money.

In R. *v.* Isaac Gordon (the notorious money-lender) (23 Q. B. D. 354, and 16 Cox, C. C. 622), the prisoner was indicted for inducing certain persons to make a promissory note for 100*l.* by the false pretence "that he was prepared to pay to them the sum of 100*l.*" The learned Judge (Coleridge, C. J.) who tried the case, told the jury that if they were of opinion that the prisoner obtained the promissory note for 100*l.* by falsely pretending to the person defrauded that he was ready to pay and would then pay to them 100*l.* on their signing the note, they might find him guilty. The learned Judge further explained to the jury that a false pretence must be the representation of an existing fact untrue in fact, false to the knowledge of the person making it, and that the money or other subject-matter must be obtained or procured by means of it. The jury convicted the prisoner, and the Court of Crown Cases Reserved affirmed the conviction. The Court further held that the indictment was good, as it must be taken by necessary inference to allege a false pretence by the prisoner if an existing fact, viz., that he was prepared to pay the prosecutors 100*l.* and had the money ready for them on their signing the promissory note; secondly, that the indictment showed an offence within 24 & 25 Vict. c. 96, s. 90, of fraudulently causing a person to "make a valuable security" although the promissory note in question might not be of value until it had been delivered into the hands of the prisoner. In the course of his judgment, Wills, J., said: "I am glad that it is possible to support the conviction without venturing on the somewhat dangerous ground to which I referred in the course of the argument, and rendering it necessary to distinguish between a promise to do something and a statement of intention. I find it difficult to see why an allegation as to the present existence of a state of mind may not be, under some circumstances, as much an allegation of an existing fact as an allegation with respect to anything else."

Other cases on this subject are:—R. *v.* Asterley, 7 C. & P. 191; R. *v.* Copeland, Car. & M. 516; R. *v.* Oates, 6 Cox, C. C. 540; R. *v.* Fry, 7 Cox, C. C. 394; R. *v.* Henshaw, 9 Cox, C. C. 472; R. *v.* Woodman, 14 Cox, C. C. 179; R. *v.* Reust, Sessions Paper, C. C. C., Vol. 94, p. 549; R. *v.* Finch, 72 J. P. 102.

Intent to Defraud in False Pretences.

R. *v.* **NAYLOR.** (1865). [84]

[L. R. 1 C. C. R. 4; 10 Cox, C. C. 149; 35 L. J. (M. C.) 61; 13 L. T. (N. S.) 381; 14 W. R. 58.]

In this case the prisoner had been found guilty of obtaining some carpets by false pretences from the prosecutrix, Mary Ingram, who at the time of the transaction in question, carried on the business of an upholsterer and furniture-dealer at Chester. For some considerable time prior to the month of January, 1865, the prisoner had been employed by the prosecutrix to procure orders for goods to be supplied by her; and, during the six months prior to the transaction in question, goods to a considerable amount had been supplied by the prosecutrix in consequence of representations by the prisoner that he had received orders for them. In the month of January, 1865, the prisoner wrote a letter to the prosecutrix containing the statement set out in the second count of the indictment, that is to say, that a person named Moss, a furniture-dealer at Liverpool, was in want of some carpets of sizes and descriptions mentioned in the letter, and that such carpets were to be sent by passenger train to Moss's place of business. In consequence of this letter the prosecutrix forwarded by railway a package containing carpets of the size and description mentioned in the letter, such package being directed to Moss at his place of business at Liverpool, where it arrived in due course. The value of the carpets so sent was 12*l.* Prior to the arrival of the package, the prisoner, who had been previously acquainted with Moss, and also with persons in his employment, applied to one of such persons, stating that he expected a package of carpets from Chester

to be sent to Moss's, and requested that it might be permitted to remain there. Permission was given, and, after the arrival of the carpets at Moss's, the prisoner applied there for them, and they were delivered to him. The statement in the letter that Moss was in want of the carpets was false. Neither Moss nor any person in his employment had had any communication with the prisoner about carpets prior to his writing the letter containing such statement. The prosecutrix, in cross-examination, stated that payments on account had been made to her by the prisoner, both prior and subsequent to the transaction in question, and that such payments amounted to 465*l.*; but that the carpets in question had never been paid for. She further stated, in cross-examination, that, prior to the transaction in question, the prisoner had accepted bills of exchange for her accommodation. She also stated that she expected to receive the price of the carpets from the prisoner, but that she supplied them in consequence of his representation that Moss wanted them, as she knew that Moss was a respectable and solvent person. The finding of the jury was to the effect that the prisoner's statement that Moss wanted the carpets was false to his knowledge, that he made it to induce the prosecutrix to part with the carpets; that the prosecutrix was induced to part with the carpets by reason of such false pretence; and that the prisoner, at the time he made the pretence and obtained the carpets, intended to pay the prosecutrix the price of them when it should be in his power to do so.

Upon the above findings the Court of Crown Cases Reserved affirmed the conviction.

[No counsel appeared.]

In R. *v.* Gray (17 Cox, C. C. 299) the prisoner was indicted for obtaining food and money by means of false pretences, the false pretences alleged being that the prisoner was a bank clerk and received his salary once a fortnight, and the jury found the

following verdict: "Guilty of obtaining food and money under false pretences. But whether there was any intent to defraud, the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy." Upon a case reserved, it was argued in support of the conviction that the verdict was separable, the latter portion of it being merely the reasons given by the jury for their recommendation; and that, if it was not separable, inasmuch as the falsity of the pretence alleged must have been known to the prisoner, the only possible meaning which could be given to the latter portion of the verdict was that the jury considered that at the time the prisoner obtained the food and money he intended at some future time to pay for the food and repay the money. The Court of Crown Cases Reserved held that the verdict was not separable, and inasmuch as the latter portion of it negatived the intent to defraud, without proof of which the previous portion of the verdict could not have been found, the conviction could not be supported.

Though, to constitute the misdemeanour of obtaining money or goods by false pretences, there must always be an intent to defraud, that intent may be implied sufficiently from the facts of the case.

But in R. *v.* Henry Williams (7 C. & P. 354), where the prosecutor, Peter Williams, owed John Williams, the prisoner's master, a sum of money of which it seemed impossible to get payment, and the prisoner, to secure to his master the means of paying himself, went to the prosecutor's wife in her husband's absence, and falsely told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away, whereupon the prosecutor's wife, believing the story, delivered the sacks to him, it was held that if the prisoner's intention was not to defraud Peter Williams, but merely to put it into his master's power to compel him to pay a just debt, there ought not to be a conviction for false pretences. "It is not sufficient," said the Court, "that the prisoner knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud Peter Williams."

An indictment for false pretences must contain the words "intent to defraud," and, if they are omitted, it cannot be amended. (R. *v.* James, 12 Cox, C. C. 127.)

In R. *v.* Cooper (1 Q. B. D. 19) the prisoner was indicted in four counts for obtaining money by false pretences from four persons named, the false statements alleged being the same in all these counts; in a fifth count for inserting, with intent to defraud the Queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts and obtaining money thereby. It was shown at the trial that the prisoner had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of carte-de-visite papers, and adding, "Trial paper and instructions, 1*s.*," and giving an address. Six envelopes were found in the possession of the prisoner on his being apprehended, each directed to the address given, and containing an answer to the advertisement and twelve postage stamps. Two hundred and eighty-one other letters were produced by a post-office clerk. These letters had been addressed to the prisoner under the address given in the advertisement, and had been received at the post office like the other letters; but having been stopped by the post office authorities none of them had ever been in the prisoner's possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post-office before production at the trial, and each contained twelve stamps. The hundred and eighty-one letters were admitted in evidence, and the Court of Crown Cases Reserved held that, under the circumstances, the letters were rightly received in evidence. In this case the counsel for the prosecution argued that on the authority of R. *v.* Francis (L. R. 2 C. C. R. 128) the letters were admissible to show fraudulent intent.

Puffing not Indictable.

[85] **R. *v.* BRYAN.** (1857)

[Dears. & B. 265; 7 Cox, C. C. 312.]

The prisoner was indicted for obtaining money by false pretences, and among the pretences charged was that certain

spoons produced by the prisoner were of the best quality; that the spoons were equal to Elkington's A. (meaning spoons and forks made by Messrs. Elkington, and stamped by them with the letter A.); that the foundation was of the best material, and that they had as much silver upon them as Elkington's A. The prosecutors were pawnbrokers, and the false pretences were made use of by the prisoner for the purpose of procuring advances of money on the spoons in question, offered by the prisoner by way of pledge; and he thereby obtained the moneys mentioned in the indictment by way of such advances. The goods were of inferior quality to that represented by the prisoner; and the prosecutors said that, had they known the real quality, they would not have advanced money upon the goods at any price. They moreover admitted that it was the declaration of the prisoner as to the quality of the goods, and nothing else, which induced them to make the said advances. The moneys advanced exceeded the value of the spoons. The jury convicted the prisoner, and on the question being reserved the Court of Crown Cases Reserved quashed the conviction.

Lord Campbell, C. J., said: "If you look at what is stated upon the face of the case, it resolves itself into a mere misrepresentation of the quality of the article; and bearing in mind that the article was of the species that it was represented to be to the purchaser, because these were spoons with silver upon them although not of the same quality as was represented, the pawnbroker received these spoons, and they were valuable, although the quality was not equal to what had been represented. Now it seems to me it never could have been the intention of the legislature to make it an indictable offence for the seller to exaggerate the quality of that which he is selling, any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to

that which they really were. . . . As yet I find no case in which a mere misrepresentation at the time of sale of the quality of the goods has been held to be an indictable offence."

Cockburn, C. J., said: "It seems to me to make all the difference whether the man who is selling merely represents, as in this instance it appears he did, the articles to be better in point of quality than they really are, or whether, as in the case of R. *v.* Roebuck (1 Dears. & B. 24), he represents them to be entirely different from what they really are. There the representation was that the things were silver, when in point of fact they were of base metal, and entirely different from what they were represented to be. Here, if the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing; but the representation here made was only a vaunting and exaggerating of the value of the article in which he was dealing, by representing it to be in quality equal to a particular manufacture. I think that makes an essential difference between this case and the cases referred to, and I concur with my lord in opinion that the conviction cannot be supported."

Pollock, C. B., said: "There may be considerable difficulty in laying down any general rule which shall be applicable to each particular case; but I continue to think that the statute was not meant to apply to the ordinary commercial dealings between buyer and seller; still, I am not prepared to lay down the doctrine in an abstract form, because I am clearly of opinion that there might be cases of buying and selling to which the statute would apply—cases which are not substantially the ordinary commercial dealings between man and man. I think if a tradesman or a merchant were to concoct an article of merchandize expressly for the purpose of deceit, and were to sell it as and for something very different even in

quality from what it was, the statute would apply. So, if a mart were opened, or a shop, in a public street, with a view of defrauding the public, and puffing away articles calculated to catch the eye, but which really possessed no value, there, I think, the statute would apply; but I think the statute does not apply to the ordinary commercial transactions between man and man, and certainly, as has been observed by the Lord Chief Justice, if it applies to the seller it equally applies to the purchaser, although it is not very likely that cases of that sort would arise. It would be very inconvenient to lay down a principle that would prevent a man from endeavouring to get the article cheap which he was bargaining for, and that if he was endeavouring to get it under the value he might be indicted for obtaining it for less than its value; and there is this to be observed, that if the successfully obtaining your object, either in getting goods or money, is an indictable offence, any attempt or step towards it is an indictable offence, as a misdemeanour, because any attempt or any progress towards the completion of the offence would be the subject of an indictment, and then it would follow from that, that a man could not go into a broker's shop and cheapen an article but he would subject himself to an indictment for misdemeanour in endeavouring to get the article under false pretences. For these reasons I think it may be fairly laid down that any exaggeration or depreciation in the ordinary course of dealings between buyer and seller during the progress of a bargain is not the subject of a criminal prosecution."

Coleridge, J., said: "In order to determine whether a fraudulent misrepresentation is or is not within the statute, I think you must look, among other things, to the extent to which it goes, and the subject-matter to which it is applied. It seems to me to be a safe rule to say, where it applies simply to the quality, and is only in the nature of an exaggeration on

the one hand, or a depreciation on the other, which too frequently takes place even in tolerably honest transactions between parties, this is not the subject of a criminal proceeding. If you were to make such a representation the subject of a criminal prosecution under the statute or at common law, you would be not only multiplying prosecutions to a most inconvenient extent, but in a number of instances do great injustice, and would be making a party answer criminally where in truth he had no criminal intent in his mind."

Erle, J., said: "I am also of opinion that this conviction cannot be sustained, not on the ground that the falsehood took place in the course of a contract of sale or procuring, but on the ground that the falsehood is not of that description which was intended by the legislature. It is a misrepresentation of what is more a matter of opinion than a definite matter of fact. Whether these spoons in their manufacture, and in the electrotype, were equal to Elkington's A. or not, cannot be, as far as I know, decidedly affirmed or denied in the same way as a past fact can be affirmed or denied, but it is in the nature of a matter of opinion. . . . No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still, it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying that the goods were equal to Elkington's A.; but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise, in the course of a contract of sale, where the vendee has in substance the article he contracted for, namely, plated spoons."

Crompton, J., said: "I also think that this conviction cannot be supported. I think that the statute of false pretences ought not to be construed to extend to transactions where, in the course of a bargain for a specific chattel, the

supposed misrepresentation consists in mere praise or exaggeration or puffing of a specific article to be sold, where the purchaser gets some value for his money; where the thing sold is of an entirely different description from what it is represented to be and of no value whatever, as where a man passes off a chain of base metal for gold or silver, and the buyer really gets nothing for his money, the case is different. This was the ground of the opinion of some of the Judges in The Queen *v.* Roebuck (1 Dears. & B. 24). So where money is obtained for notes of the Bank of Elegance by pretence that they are notes of the Bank of England, the cases show that there is a false pretence. I do not, however, think that the statute was intended to apply to every case of a warranty where there is a real sale and where, in the course of bargaining for a specific chattel, one party praises and exaggerates, or the other party depreciates, the description and quality of the thing to be sold, and where something is got by the bargain; in such cases the party gets a worse bargain for his money, and what he really loses is the difference between the good and the bad thing. No specific money or chattel is obtained by the false pretence or lost to the buyer, but the real loss is for damage by having a worse bargain, and from the difference in value between the thing sold and what it would have been worth if the representation were true, which sounds only in damages. I think that it would be dangerous to construe the statute as extending to every case of a false warranty, and I think that this conviction should be quashed."

[Hardinge Giffard for the Crown; B. C. Robinson and F. H. Lewis for the prisoner.]

The later case of R. *v.* Ardley (L. R. 1 C. C. R. 301, and 12 Cox, C. C. 23) does not in any way conflict with the leading case. There the prisoner induced the prosecutor to buy a chain from him by fraudulently representing that it was 15-carat gold, when he knew

very well it was only of a quality a trifle better than 6-carat. This was held to be a statement as to a specific fact within the knowledge of the prisoner, and therefore a sufficient false pretence to warrant a conviction.

Bovill, C. J., said: "Looking at the whole evidence, the jury found the prisoner guilty; and there is sufficient ground on which the finding of the jury may be supported and the conviction sustained. But the jury have further found that the prisoner, when he represented the chain to be 15-carat gold, knew this representation to be false. And the question whether the conviction can be supported upon that finding alone stands upon a somewhat different footing. The cases have drawn nice distinctions between matters of fact and matters of opinion, statements of specific facts and mere exaggerated praise. These are questions for the jury to decide. And the prisoner has this additional security, that the jury have to consider not only whether the statements made are statements of fact, but also whether they are made with the intention to defraud. . . . The statement here made is not in form an expression of opinion or mere praise. It is a distinct statement, accompanied by other circumstances, that the chain was 15-carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material and fraudulently represents it to be of another? Therefore, whether we look at the whole of the evidence, or only at that which goes to the quality of the chain, the conviction is good. The case differs from R. *v.* Bryan because here there was a statement as to a specific fact within the actual knowledge of the prisoner, namely, the proportion of pure gold in the chain."

So, where the defendant falsely represented to the prosecutrix that certain packages which he sold to her contained good tea, whereas in fact they contained a mixture of which only one-fourth part in each package was tea, the remaining three-fourths consisting of sand and other articles unfit for food or drink, and the jury found that the defendant knew the real nature of the contents of the packages, the conviction was held right. (R. *v.* Foster, 2 Q. B. D. 301.)

Where the defendant pretended that he was carrying on an extensive business as a surveyor and house agent, and thereby

induced the prosecutor to deposit with him 25*l.* as a security for his fidelity as a clerk, whereas, as a matter of fact, the defendant was not carrying on any business as a surveyor or house agent, he was held to be guilty of obtaining the money by false pretences. (R. *v.* Crab, 11 Cox, C. C. 85.)

But a false representation, though "grossly fraudulent," as to the value of a business, supposing the defendant was doing any business at all, will not sustain an indictment for false pretences. (R. *v.* Williamson, 11 Cox, C. C. 328.)

In R. *v.* Lee (8 Cox, C. C. 233) the prisoner was indicted for false pretences, and it was proved that he offered a chain in pledge to a pawnbroker, and required 35*s.* to be advanced upon it, representing that it was gold. On being tested it turned out to be a compound of brass, silver, and gold, but the gold was of a very minute quantity. The Court held that it was not a false pretence within the statute. The Common Serjeant, who tried the case, said: "I think there is no evidence to go to the jury. It is the constant practice for the seller to exaggerate the value of his goods, and for the buyer to depreciate it without coming within the charge of false pretences as meant by the statute. If because a man represents an article to be equal in quality to something which it is not equal to, he is liable to be indicted, charges of this kind would be multiplied to an alarming extent. I think the prisoner must be acquitted."

Other cases in point are:—R. *v.* Harvey, Sessions Paper, C. C. C. Vol. 98, p. 213; R. *v.* Childers, Sessions Paper, C. C. C., Vol. 97, p. 314: R. *v.* Suter, 10 Cox, C. C. 577; R. *v.* Ball, 7 Cox, C. C. 126; R. *v.* Levine, 10 Cox, C. C. 374; K. *v.* Watson 7 Cox, C. C. 364.

Vide also the Merchandise Marks Act, 1887 (30 & 31 Vict. c. 38).

Prosecutor not deceived by False Pretence.

[86] **R. *v.* MILLS.** (1857)

[Dears. & B. 205; 7 Cox, C. C. 263.]

The prisoner was convicted on an indictment for obtaining money by false pretences. The indictment alleged that the money was obtained by the prisoner by the false pretence that he had cut sixty-three fans of chaff, when in fact he had only cut forty-five fans. It appeared by the evidence that the prisoner was employed to cut chaff at twopence per fan, and that, on making the false pretence alleged in the indictment, he demanded 10*s.* 6*d.* from the prosecutor. The prosecutor had previously seen the prisoner remove eighteen fans from an adjoining place and add them to the heap which he pretended he had cut, but, notwithstanding this knowledge, he paid the prisoner the amount he demanded. It was held that there ought not to be a conviction, because the money had not been obtained by means of the false pretence.

"The test is," said Cockburn, J., "what is the motive operating on the mind of the prosecutor which induced him to part with his money? Here the prosecutor knew that the pretence was false; he had the same knowledge of its falseness as the prisoner. It was not the false pretence, therefore, which induced the prosecutor to part with his money; and if it is said that it was parted with from a desire to entrap the prisoner, how can it be said to have been obtained by means of the false pretence?"

Crowder, J., said: "It is always a question whether the prosecutor was induced to part with his money by the false pretence."

Bramwell, B., said: "The prosecutor paid the money with a knowledge of the facts. I doubt if he could get it back in a civil action."

[Orridge for the Crown.]

In such a case as this, however, there can be a conviction for attempting to obtain. (R. *v.* Roebuck, Dears. & B. 24.)

In R. *v.* Jones (15 Cox, C. C. 475) the prisoner went into a shop called London House, at Llanwrst, and asked for some goods, which were put into a parcel for her. She said her name was Miss Jones, of Cefn Shercam, Carnarvon, and that she would return the goods on the following Tuesday. She also said that she wanted to show them to her mother. The Miss Jones, of Cefn Shercam, did not know the prisoner, and never ordered any goods. It was held, however, that a conviction could not be supported, as although the pretence that the prisoner was Miss Jones, of Cefn Shercam, Carnarvonshire, was proved to be false, there was no evidence that the goods had not been delivered to the prisoner before her name and address were asked for. "It must always appear," said Grove, J., "on an indictment for obtaining goods by false pretences, that the prosecutor parted with the goods upon the faith of the false pretence alleged, and here that does not appear." "It is not enough," said Mathew, J., "to show that a false address was given, if it does not appear that the goods were parted with on the faith of it."

Other cases in point are:—R. *v.* Hensler, 11 Cox, C. C. 570; R. *v.* Woolley, 4 Cox, C. C. 193; R. *v.* Hazzlewood, 48 J. P. 151.

Remoteness in False Pretences.

R. *v.* MARTIN. (1867) [87]

[L. R. 1 C. C. R. 56; 10 Cox, C. C. 383.]

In this case the prisoner had, by falsely representing that he was the agent to the Steam Laundry Company, of which some of the leading men in Birmingham were at the head, and that

as such agent he was desired by the company to procure a spring van for the use of the company, induced a wheelwright to make him a spring van ; and it was held that a conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence.

Bovill, C. J., said : "The question asked of us is, whether the verdict was right upon the evidence. This, we understand to mean, whether there was evidence to go to the jury; and so understanding it, we are all of opinion that there was. The objection urged upon us has been answered by my brothers Willes and Blackburn in the course of the case; and it is obvious that there are many cases within the mischief of the statute where the thing obtained is not in existence when the false pretence is made. Thus, a man by false pretences may induce a tailor to make and send him a coat, or a friend to lend him money which may consist of bank-notes not printed when the false pretence was made on which the loan was granted. So also a man might obtain coals which were not got, and therefore not a chattel in the eye of the law, at the time of making the pretence. It is absurd to say that the chattel obtained must be in existence when the pretence is made. The pretence must, indeed, precede the delivery of the thing obtained ; but at what distance of time? What is the test? Surely this : that there must be a direct connection between the pretence and the delivery—that there must be a continuing pretence. Whether there is such a connection or not is a question for the jury. . . . In the present case, when the false pretence was made and the order given, it was never contemplated that the matter should rest there ; and we have no difficulty in holding that there was a continuing pretence, and a delivery obtained thereby."

[Kennedy for the prisoner.]

With the leading case should be compared the cases of R. *v.* Gardner (Dears. & B. 40) and R. *v.* Morris Bryan (2 F. & F. 567). In the former case the prisoner falsely represented himself to be a naval officer, and so obtained lodging, but not board. He subsequently, and without any fresh pretence, obtained articles of food, and was indicted for obtaining them by falsely pretending he was a naval officer. It was held that the obtaining of the articles of food was too remotely the result of the false pretence.

In R. *v.* Morris Bryan, it was held that when a contract has been entered into by reason of false representations, and goods or money obtained under the contract, it is too remote to charge the obtaining of the goods or money by the false pretences, and an indictment for false pretences cannot be sustained.

In R. *v.* Greathead (14 Cox, C. C. 108) the prisoner, who was foreman at some works in Yorkshire, by means of a false wage-sheet obtained from his master a cheque for the amount stated in the sheet to pay the men's wages. In consequence of its being informally drawn, payment was refused at the bank. Thereupon the prisoner returned the cheque to the prosecutor and told him of the omission. The prosecutor tore up the cheque, and drew another which he gave to the prisoner. The prisoner cashed the second cheque, and appropriated to his own use the difference between the actual amount of the wages and the amount falsely stated in the wage-sheet. It was held that the false pretence upon which the first cheque was given continued in force, and was the acting motive which influenced the prosecutor's mind in giving the second cheque.

In the case of R. *v.* Burton (16 Cox, C. C. 62), where the charge was one of obtaining food and lodging by false pretences, the prisoner went to the house of the prosecutrix and requested to be taken in as a lodger. After having lodged with her for a day or two, he stated that he had come from another lodging where he had left some of his clothes, and requested to be furnished with board as well as lodging, for which he promised to pay. The prosecutrix, believing his statement as to his clothes, agreed to supply him, and did supply him, with meat and drink as a boarder. A few days afterwards the prisoner decamped without paying for his accommodation. The prisoner was convicted, and the Court of Crown Cases Reserved affirmed the conviction.

An indictment alleged that the defendant falsely pretended that

he had a lot of trucks of coal at a railway station on demurrage, and that he required forty coal bags. The evidence was that he saw the prosecutor and gave him his card, "J. Willot & Co., timber and coal merchants," and said that he was largely in the timber and coal way, and inspected some coal bags, but objected to the price. The next day he called again, showed the prosecutor some correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately. The prosecutor had only forty bags ready, and it was arranged that the defendant was to have them, and pay for them in a week. They were delivered to the defendant, and the prosecutor said he let the defendant have the bags in consequence of his having the trucks of coal under demurrage at the station. There was evidence as to his having taken premises, and doing a small business in coal, but he had no trucks of coal on demurrage at the station. The jury convicted the defendant. Held, that the false pretence charged was not too remote to support the indictment, and that the evidence was sufficient to sustain it. (R. *v.* Willot, 12 Cox, C. C. 68.)

In R. *v.* Larner (14 Cox, C. C. 497) the prisoner was charged with obtaining a prize in a swimming handicap at the Surrey County Baths by false pretences. He obtained his competitor's ticket for the race by falsely representing himself to be a member of a certain club, and by a forged letter purporting to be written by the secretary of that club. In this way the prisoner got twenty yards start, and being an excellent swimmer, won easily. It was held that the false pretences were too remote, and that, on that charge at all events, he could not be convicted; but in R. *v.* Beharrell (Sessions Paper, C. C. C., Vol. 119, p. 117) the prisoner was indicted for attempting to obtain a gold watch and chain by false pretences, and with uttering a forged document. In this case the prisoner ran in some athletic sports in the name of another person who had previously taken part in other athletic sports without success. A false document was sent in to the handicapper, and by means of this the prisoner, who was a very good runner, obtained a long start and won the race. On his being identified, however, the prize—namely, the watch and chain in question—was withheld from him and awarded to the second competitor, and the prisoner was duly prosecuted at the Central Criminal Court,

and convicted on the whole indictment, no case being reserved. It will be seen that this decision is in direct conflict with R. *v.* Larner.

In R. *v.* Button ([1900] 2 Q. B. 597, and 19 Cox, C. C. 568) it was proved that entries for two handicaps were sent to the secretary of an athletic meeting in the name of Sims, containing statements as to the recent performance of Sims, which were very moderate, and in consequence Sims was given long starts. The entries were not written by either Sims or the prisoner. At the meeting the prisoner, who was a good runner, personated Sims, who was absent, and came in first in both races. After the first race the handicapper asked the prisoner whether he was really Sims, whether the performance given in the entry form was really his, and whether he had never won a race, as stated in the entry. He answered these questions, falsely, in the affirmative. On a case stated, the Court of Crown Cases Reserved held that the attempt to obtain the prize was not too remote from the pretence, and that the prisoner was properly convicted. Mathew, J., said: "It was contended that his coming in first in the races was owing to his own good running; but it was also owing, in part at least, to the false pretences, for by means of the false pretences he obtained a longer start than he would have had if his true name and performances had been known. It is also said that some other act had to be done in order to make the offence complete, and that he could not rightly be convicted because it was not shown that he had applied for the prizes, and that the criminal intention was exhausted. The argument is exceedingly subtle, but unsound. In fact, he was found out before he had the opportunity of applying for the prizes, as no doubt he otherwise would have done. The pretences which the prisoner made were not too remote, and the conviction was good." Wright, J., said: "I am of the same opinion. If nothing more had been shown than that the defendant had entered for the races in a false name, the case would have been different. If he did not run or claim the prize it would be difficult to say that there was an actual attempt to obtain it. But here, in effect, he did claim the prize." Mathew, J., also dissented in express terms from the ruling in R. *v.* Larner. It appears that R. *v.* Beharrell was not cited during the argument of R. *v.* Button, but the decision of the Court of Crown Cases Reserved in the latter case is identical with that in R. *v.* Beharrell, so that R. *v.* Larner is no longer law.

Hiring by False Pretences.

[88] **R.** *v.* **KILHAM.** (1870)

[L. R. 1 C. C. R. 261; 11 Cox, C. C. 561.]

The prisoner, on the 19th of March, 1870, called at the livery stables of Messrs. Thackray, of York, who let out horses for hire, and stated that he was sent by a Mr. Gibson Hartley to order a horse to be ready the next morning for the use of a son of Mr. Gibson Hartley, who was a customer of Messrs. Thackray. Accordingly, the next morning the prisoner called for the horse, which was delivered to him by the ostler. The prisoner was seen, in the course of the same day, driving the horse, which he returned to Messrs. Thackray's stables in the evening. The hire for the horse, amounting to 7*s*., was never paid by the prisoner. On the prisoner being convicted and the case being reserved, it was held by the Court of Crown Cases Reserved that as he had no intention to deprive the owner of his property in the horse, but only intended to obtain the use of it for a limited time, he could not be convicted of obtaining the horse by false pretences, and the conviction was therefore quashed.

Bovill, C. J., said: "The statute 24 & 25 Vict. c. 96, s. 88, enacts that 'whosoever shall, by any false pretence, obtain from any other person any chattel, money or valuable security, with intent to defraud, shall be guilty of misdemeanour.' The word 'obtain' in this section does not mean obtain the loan of, but obtain the property in, any chattel, &c. This is, to some extent, indicated by the proviso that if it be proved that the person indicted obtained the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted; but it is made clear by referring

to the earlier statute from which the language of sect. 88 is adopted. 7 & 8 Geo. IV. c. 29, s. 53, recites that 'a failure of justice frequently arises from the subtle distinction between "larceny" and "fraud,"' and, for remedy thereof, enacts that 'if any person shall, by any false pretence, obtain,' &c. The subtle distinction which the statute was intended to remedy was this: that if a person, by fraud, induced another to part with the possession only of goods and converted them to his own use, this was larceny; while, if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny.

"But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us. . . . In this case the prisoner never intended to deprive the prosecutor of the horse, or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time."

[Simpson for the Crown.]

The counsel who appeared for the prosecution in this case pressed upon the attention of the Court the case of R. *v.* Boulton (1 Den. C. C. 508), where the prisoner had by false pretences obtained a railway ticket to travel by the Lancashire and Yorkshire line from Bradford to Huddersfield, and was held to have been rightly convicted, though the ticket had to be given up at the end of the journey. "The reasons for this decision," said the Court in the leading case, "do not very clearly appear, but it may be distinguished from the present case in this respect: that the prisoner by using the ticket for the purpose of travelling on the railway entirely converted it to his own use for the only purpose for which it was capable of being applied."

Previous False Pretences.

[89] R. *v.* FRANCIS. (1874)

[L. R. 2 C. C. R. 128; 12 Cox, C. C. 612.]

The prisoner was indicted for endeavouring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring. Evidence was held to have been rightly admitted to the effect that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and had endeavoured to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which, in the opinion of the witnesses, was not. The ring was not produced.

"It seems clear upon principle," said Lord Coleridge, C. J., "that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority. . . . Now, in the present case, the prisoner was tried on two charges of attempting on the 8th of January, at Northampton, to obtain money from two different pawnbrokers by the false pretence

that a worthless piece of jewellery consisted of real stones. Evidence that he on the 6th of January, at Bedford, obtained money from another pawnbroker on the pledge of a chain, which he represented to be gold, when it in fact was not gold, was surely matter from which the jury might infer that he was in a course of cheating pawnbrokers by knowingly passing off on them false articles under the pretence that they were genuine, and that inference was greatly strengthened by the fact that he at that time gave a false name, and though the charge on which he was tried was for attempting to pass off a false ring, the inference that he had guilty knowledge is as legitimate as if it had been a second false chain.

It was objected that the evidence of what took place at Leicester was not properly received, because the cluster ring which he there attempted to pass was not produced in Court, and that the evidence of two witnesses who saw it, and swore to its being false, was not admissible. No doubt if there was not admissible evidence that the ring was false it ought not to have been left to the jury; but though the non-production of the article may afford ground for observation more or less weighty, according to circumstances, it only goes to the weight, not to the admissibility of the evidence, and no question as to the weight of the evidence is now before us."

[Hensman for the prisoner.]

This case is useful as showing that there are times when the previous misdeeds of a prisoner may be given in evidence against him. *Vide*, also, R. *v.* Richardson (2 F. & F. 343) and R. *v.* Stephens (16 Cox, C. C. 387), as to embezzlements; R. *v.* Dossett (2 Cox, C. C. 243); R. *v.* Bailey (2 Cox, C. C. 311); R. *v.* Taylor (5 Cox, C. C. 138); and R. *v.* Gray (4 F. & F. 1102), as to arsons; R. *v.* Whiley (2 Leath, 983), as to utterings; and R. *v.* Geering, *ante*, p. 211, as to murders.

On a charge of obtaining money by false pretences from one person, evidence of a subsequent obtaining from another is not admissible. (R. *v.* Holt, 8 Cox, C. C. 411.)

But in R *v.* Smith (92 L. T. 208, and 20 Cox, C. C. 804), on an indictment charging the defendant with obtaining goods by false pretences, evidence was admitted to show that the defendant had a few days subsequent to that charged in the indictment obtained other goods by similar false pretences. The Court of Crown Cases Reserved held that, as it appeared on the facts that it was all one transaction in which the defendant was engaged, the evidence was properly admitted. *Vide*, also, R. *v.* Walford (71 J. P. 215), *post*, p. 369.

On a trial for obtaining eggs by false pretences, it was proved that the prisoner had falsely pretended, by advertisements in newspapers, that he was carrying on a *bonâ fide* dairyman's business. Evidence was admitted that, subsequent to the transaction in question, he had obtained eggs from other persons by means of similar advertisements. The Court of Crown Cases Reserved held that the evidence was properly admitted, and Lord Russell, C. J., said: "I do not think our decision conflicts with R. *v.* Holt. There the false pretence charged was a distinct and separate transaction, and the fact that the prisoner had subsequently made a similar false pretence had no bearing on his guilt or innocence of the particular charge preferred." (R. *v.* Rhodes, [1899] 1 Q. B. 77.)

In R. *v.* Ollis ([1900] 2 Q. B. 758, and 19 Cox, C. C. 554) the defendant was indicted for obtaining a cheque by falsely pretending that another cheque, which he then gave to the prosecutor, was a good and valid order for the payment of money. The prosecutor deposed that he gave his cheque to the defendant on the faith of the defendant's statement that a cheque, which the defendant then gave to the prosecutor, was a good cheque. The cheque given by the defendant was dishonoured. The defendant stated that when he gave the cheque he expected a payment which would have enabled him to meet it. The defendant was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three cheques which were dishonoured. To prove guilty knowledge the prosecutor in the first case was called, and gave the same evidence as in the first case. The defendant was convicted, and the Court of Crown Cases Reserved affirmed the conviction.

In R. *v.* Wyatt ([1904] 1 K. B. 188 and 20 Cox, C. C. 462), upon an indictment for obtaining credit by means of fraud, it was proved

that the defendant hired furnished apartments from the prosecutrix and occupied them for three days, when he left without paying for them or for the food supplied to him. Evidence was admitted that a short time previously to the particular transaction the defendant had gone to several houses and hired apartments and left without paying, and that he still owed the money when he went to the house of the prosecutrix. The Court of Crown Cases Reserved held that the evidence, being evidence of similar acts committed by the defendant at a period immediately preceding the commission of the alleged offence, was admissible as tending to establish a systematic course of conduct, and as negativing any accident or mistake or the existence of any reasonable or honest motive on his part.

In R. *v.* Walford (71 J. P. 215), the defendant was charged that he, in incurring a debt and liability to a person who let apartments, unlawfully did obtain credit for the amount of the debt and liability by means of fraud other than false pretences. Evidence was admitted of other cases in which the defendant had shortly before obtained credit from persons letting houses or apartments, and also from a tradesman for goods supplied. On the point being reserved the Court of Crown Cases Reserved held that the evidence was admissible as tending to establish a system and to negative accident or mistake.

Lord Alverstone, C. J., said: "We have all read the case, and are somewhat surprised that it should have been stated. The question reserved was the subject of a decision of this Court on November 27, 1903—R. *v.* Wyatt (1903), 68 J. P. 31; [1904] 1 K. B. 188—where we pointed out that evidence of the same kind of practice was admissible, when only separated by a short interval of time, as tending to negative accident or mistake, and to show system. It is abundantly clear here that the acts complained of were connected in point of time, and were of the same character as the acts charged in the indictment. The case is covered by R. *v.* Wyatt. The conviction must be affirmed."

False Pretences—Indictment.

[90] **R. *v.* SILVERLOCK.** (1894)

[[1894] 2 Q. B. 766; 18 Cox, C. C. 104; 63 L. J. (M. C.) 233; 72 L. T. 298; 43 W. R. 14; 58 J. P. 788.]

The defendant was tried upon an indictment containing two counts for obtaining a cheque by false pretences. The first count was in the ordinary form, and alleged a false pretence to Rosa Alice Coates, and an obtaining of the cheque from her by means of the false pretence. The second count charged that the defendant, "by inserting and causing to be inserted in a certain newspaper called the 'Christian World' a fraudulent advertisement in the words and figures following, that is to say, 'Housekeeper wanted for branch business establishment in Midlands; one from country preferred. Address, S. C., "Christian World" office,' did falsely pretend to the subjects of her Majesty the Queen that he, the said George Silverlock, then required a housekeeper for a branch business establishment in the Midlands, by means of which last-mentioned false pretence the said George Silverlock did then unlawfully obtain from the said Rosa Alice Coates a certain valuable security," &c.

Before the defendant pleaded, his counsel applied to have the second count quashed, on the ground that it was not stated therein that the false pretence was made to any definite person, but to all the subjects of her Majesty the Queen, and that therefore it was bad in law.

The objection was overruled, and the jury convicted the defendant, and, on a case stated, the Court of Crown Cases Reserved affirmed the conviction.

Lord Russell, C. J., said: "At the trial, no objection was,

or could have been, taken to the first count; but the second count was objected to as being insufficient, and, as the verdict was taken and entered generally, and not separately on each count, the conviction must be quashed if that count is bad. There is no doubt as to what are the essentials of the offence of obtaining money by false pretences; there must be a false pretence made to a definite person, and it must be proved that such person on the faith of the false pretence parted with his money or goods. Those essentials must be stated in the count charging the offence, and the question here is whether the second count complies with these conditions. I cannot say that I have felt no doubt or hesitation about the matter, but upon the whole I think that the count does sufficiently state the offence. The advertisement is addressed to all persons to whose knowledge it may come, and who may desire to act upon it; and if a particular person, after seeing or hearing it, acts upon it and goes to the person from whom it proceeds, and upon the faith of it parts with his money or goods, it becomes an advertisement to that particular person, who is one of the class of persons for whom it was intended. Does that sufficiently appear in this count? I think it does: it states that the defendant procured the insertion of the advertisement, and that by so doing he made a false pretence to her Majesty's subjects, and proceeds with the important averment that by means of that false pretence he obtained a cheque from Rosa Alice Coates. I think, therefore, that this count does satisfy the requirements of the law by stating the essential conditions of the offence."

Mathew, J., said: "The difficulty might have been avoided had the verdict been taken separately on each count—a practice that it is important to bear in mind, seeing that we are still hampered with regard to indictments by the rules of pleading which were in force before the Common Law Procedure Act. In an action for deceit it was necessary to state with

particularity all the ingredients which went to make up the defendant's liability, and in an indictment for false pretences the ingredients of the offence must be set forth in the same way."

[Vachell for the prosecution; Marchant for the prisoner.]

In R. *v.* Sowerby ([1894] 2 Q. B. 173; and 18 Cox, C. C. 767) the defendant was arraigned upon an indictment for attempting to obtain money by false pretences, which was in the following terms: "The jurors for our Lady the Queen, upon their oath, present that William Marr and Obadiah Blenkinsopp, on September 28, 1893, were in the employ and service of the Butterknowle Colliery Company, Limited, at the quarry pit of the Butterknowle Colliery, in the county of Durham, as hewers of coal, and were entitled to payment from their said employers of the sum of fivepence for every tub of coal wrought and filled by them, and the jurors aforesaid, upon their oath aforesaid, do further present that Joseph Sowerby, the younger, on the day and year aforesaid, unlawfully, knowingly, and designedly did, by placing a token upon a certain tub of coals in the said pit, falsely pretend that the said Joseph Sowerby, the younger, had wrought and filled the said tub of coals, by means of which said false pretences the said Joseph Sowerby, the younger, did unlawfully attempt to obtain the sum of fivepence of the moneys of the said colliery company with intent to defraud, whereas in truth and in fact the said Joseph Sowerby, the younger, had not wrought or filled the said tub of coals, as he then well knew, against the form, &c."

Defendant's counsel submitted that the indictment was bad upon two grounds: first, that it was not stated to whom the false pretence was made, and secondly, that it was not stated from whom the money was attempted to be obtained. These objections were overruled, and the prisoner was convicted and a case stated. The Court of Crown Cases Reserved quashed the conviction, and Lord Coleridge, C. J., in delivering the judgment of the Court, said: "We must follow the old authorities and precedents in criminal matters, and no case can be found which says that an indictment for obtaining money by false pretences, which does not state the person to whom the false pretence was made, is a good indictment. A pretence means a holding out to some other person, and that person must be stated in the indictment."

It will be observed that the distinction between R. *v.* Sowerby and the leading case is that in R. *v.* Sowerby averments were absent which were indispensable to the statement of the offence, and which could not be supplied, averments of the person to whom the false pretence was made and of the person from whom the money was obtained.

In Taylor *v.* The Queen ([1895] 1 Q. B. 25; and 18 Cox, C. C. 45), it was held that an indictment under s. 95 of the Larceny Act, 1861, for receiving goods knowing the same to have been unlawfully obtained by false pretences, is good without setting out the false pretences, for, the gist of the offence being the receipt of the goods with knowledge that they have been unlawfully obtained by some false pretence, it is sufficient to allege this, without specifying the nature of the pretence. In this case Mathew, J., said: "It is objected that the indictment is defective on account of the absence of a statement of the nature of the false pretence, and we have to determine whether that objection ought to prevail. For many years it has been the practice in indictments such as this not to set out the particular false pretences by which the money or goods are alleged to have been obtained. It is said on behalf of the plaintiff, in error, that the alleged false pretence might turn out to have been a pretence of a promissory nature, and if that were so it would not be a false pretence in law for which an indictment would lie; but the answer to this argument is that the indictment alleges that the goods were unlawfully obtained by false pretences, and that means that they were obtained by means of what is in law a false pretence."

In R. *v.* James (12 Cox, C. C. 127), it was held that where in an indictment for false pretences the words "with intent to defraud are omitted the indictment is bad and cannot be amended under 14 & 15 Vict. c. 100, s. 1.

As to jurisdiction in cases of false pretences the following decisions are in point:—

In R. *v.* Holmes (12 Q. B. D. 23), the prisoner wrote and posted at Nottingham a letter addressed to one Gabet at Caudry, in France, containing a false pretence by means of which he fraudulently induced Gabet to transmit to Nottingham a draft for 150*l.*, which he then cashed. The Court of Crown Cases Reserved held that there was jurisdiction to try the prisoner at Nottingham,

that the pretence was made at Nottingham, where also the money obtained by means of it was received.

In R. *v.* Ellis ([1899] 1 Q. B. 230), the defendant, who carried on business in the county of Durham, obtained goods on credit in that county from a traveller of the prosecutors by means of false representations made by the defendant to the prosecutors in Glasgow, in which place they carried on business. The Court of Crown Cases Reserved held that the offence was properly triable in the county of Durham.

False Pretences—Inchoate Instrument.

[91] R. *v.* **BOWERMAN.** (1890)

[[1891] 1 Q. B. 112; 17 Cox, C. C. 151; Sessions Paper, C. C. C., Vol. 112, p. 904.]

This was a case of obtaining money by false pretences, and was tried at the Central Criminal Court before Sir Thomas Chambers, Q. C., the Recorder. The prosecutors, Messrs. Tebbitt Brothers, of Bermondsey, being desirous of raising money on their acceptances, entered into an agreement in writing with the prisoner that he should draw bills on them up to a certain amount, and that they should accept the bills; that the prisoner should then endeavour to get the bills discounted, and that, in the event of his succeeding in so doing, he should pay them a certain portion of the proceeds, or, upon failure to get them discounted within a certain time, should return the bills to them. In pursuance of this agreement, the prisoner drew two bills of exchange upon the prosecutors, who accepted them, and handed them back to the prisoner. At the time the bills were so handed back to the prisoner the drawer's name had not been inserted; but in other respects

they were then complete bills of exchange. The prisoner subsequently completed the bills by the insertion of a drawer's name, and succeeded in getting them discounted, but, in breach of his written agreement with the prosecutors, converted the whole of the proceeds to his own use. At the close of the case for the prosecution, the counsel for the prisoner submitted that there was no case to go to the jury, on the grounds that, (1) At the time the documents referred to in the indictment as securities for the payment of money and bills of exchange were entrusted to the prisoner, they did not come within either of these descriptions. (2) There was no evidence that the acceptances were entrusted to the prisoner as a broker or agent. The Recorder, however, decided to leave the case to the jury, and reserved the points raised. The Court of Crown Cases Reserved held that the acceptances at the time of their delivery by the prosecutors to the prisoner were "securities for the payment of money" within the meaning of 24 & 25 Vict. c. 96, s. 75.

Denman, J., said: "It has been contended that these acceptances were not securities for the payment of money at the time that the prisoner was entrusted with them. It is said that they were prevented from being such by the absence of the drawer's name. Except for that, it is not disputed that at that time they would have been complete bills of exchange. The amounts were specified. They only wanted the drawer's signature. But the arrangement was that the drawer was to be the prisoner himself. He therefore had only to fill in his name to make them complete bills. It cannot, under those circumstances, be said that they were not securities for the payment of the specified amounts at the time they were handed to him. . . . As to the second point, whether the prisoner was entrusted as a broker or agent, the only question is, whether there was reasonable evidence on which the jury could so find. I cannot say there was not. The conviction must be sustained."

Pollock, B., said: "Although these documents were only inchoate instruments, and not complete bills of exchange, at the time of the entrusting, still they were documents on the faith of which bankers or other business men would advance money, and, consequently, they were securities for the payment of money within the meaning of the section. With regard to the second point, the prisoner, no doubt, had an interest in the documents beyond that of an ordinary broker; but that fact did not deprive him of the character of a broker, or prevent the relationship from being that of principal and agent."

Hawkins, J., said: "By the terms of the written agreement between the parties, the bills were to be drawn by the prisoner himself. In pursuance of that arrangement, he filled up the bill forms and procured the prosecutors to write their acceptances across them. On their being returned to the prisoner, it was in his power at any moment to convert them into bills, he having the acceptors' authority to fill in the name of the drawer. Nothing remained to be done by the acceptors to render them liable on the bills. From the moment, therefore, of the writing of the acceptances the documents became securities for the payment of money. Suppose a cheque to be drawn payable to order, and handed by the drawer to the payee, it could not possibly be said that the cheque was not a valuable security until the payee had indorsed it.

"As to the other question—the negotiations opened by the prisoner introducing himself as a bill broker—that of itself is some evidence that it was as a bill broker that he was entrusted with the acceptances. But, even apart from that, it is clear to my mind that he was an agent in every sense of the term. Except in that character, he never would have got possession of the documents."

[H. Avory for the prosecution; Poland, Q. C., and A. Metcalfe for the prisoner.]

In R. *v.* Harper (7 Q. B. D. 78), the prisoner purchased goods upon the terms that he should give to the vendors his acceptance for the price, indorsed by a solvent third party. The vendors sent to him for such acceptance and indorsement a document in the form of a bill of exchange for the price, but without any drawer's name thereon. He returned this document accepted by himself, and with what purported to be an indorsement by a solvent third party. The indorsement was fictitious and had been forged by the prisoner. No drawer's name was ever placed upon the document. The Court of Crown Cases Reserved held that the document was not a bill of exchange, as it bore no drawer's name, and that the prisoner could not be convicted of feloniously forging or feloniously uttering an indorsement on a bill of exchange. *Semble*, that he might have been convicted of a common law forgery.

Lord Coleridge, C. J., said: "The conviction cannot be sustained. The instrument was not a bill of exchange; it was an inchoate bill of exchange."

Stephen, J., said: "Though I entirely agree with the opinion expressed by my Lord, I cannot help observing that the act of the prisoner had all the effect of a forgery punishable under the statute as a felony. The prisoner could, however, have been indicted, and ought to have been indicted, for forgery at common law."

Other cases on the subject are:—R. *v.* Hart, 6 C. & P. 106; Stoessiger *v.* South Eastern Ry. Co., 3 E. & B. 549; M'Call *v.* Taylor, 12 L. T. Rep. N. S. 461; R. *v.* Portugal, 16 Q. B. D. 487; Peto *v.* Reynolds, 23 L. J. (Ex.) 98; and R. *v.* Pateman, R. & R. 455.

The crime of obtaining money or goods by false pretences comes within the Vexatious Indictments Act (22 & 23 Vict. c. 17).

Receiving Stolen Goods.

[92] **R. *v.* SCHMIDT.** (1866)

[L. R. 1 C. C. R. 15; 35 L. J. (M. C.) 94; 12 Jur. N. S. 149; 13 L. T. 679; 14 W. R. 286; 10 Cox, C. C. 172.]

Some thieves stole goods from the custody of the London, Brighton and South Coast Railway Company at the Arundel Station, and afterwards sent them in a parcel by the same company's line addressed to the prisoner at Brighton. During the transit the theft was discovered; and, on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it, and then returned it to the porter whose duty it was to deliver it, with instructions to keep it until further orders. On the following day the policeman directed the porter to take the parcel to its address, when it was received by the prisoner, who was afterwards convicted of receiving the goods knowing them to be stolen, upon an indictment which laid the property of the goods in the railway company. The Court for Crown Cases Reserved held that the goods had got back into the possession of the owner, so as to be no longer stolen goods, and that the conviction was wrong.

Martin, B., said: "I am of opinion that this conviction is wrong. The property is either wrongly or rightly laid in the indictment; if rightly laid, there was a delivery by the owners after the goods had been returned to them."

Keating, J., said: "If the goods got back into the possession of the owner, then according to R. *v.* Dolan (Dears. C. C. 436) the conviction is wrong. In this case, the property is laid in the railway company; and they must be taken to be the

owners. Then the property is stolen from them, and subsequently gets back into their possession. The felonious *transitus* was then at an end."

[Hurst for the prosecution; Pierce and Willoughby for the prisoner.]

This case was argued before five judges, and the conviction was only quashed by a majority of one; Erle, C. J., and Mellor, J., dissenting from the rest of the Court.

So in R. *v.* Hancock (14 Cox, C. C. 119), where some stolen cigars were, on the discovery of the theft, restored to the thief in order to catch the receiver, it was held that the latter could not be convicted, the cigars not being stolen property at the time they were received. And in R. *v.* Dolan (Dears. C. C. 436, and 6 Cox, C. C. 449), it was held that if stolen goods are restored to the possession of the owner, and he returns them to the thief for the purpose of enabling him to sell them to a third person, they are no longer stolen goods, and that third person cannot be convicted of feloniously receiving stolen goods, although he received them believing them to be stolen.

In R. *v.* Villensky ([1892] 2 Q. B. 597) a parcel was handed to the prosecutors, Messrs. Carter, Paterson & Co., the well-known firm of carriers, for conveyance to the consignees. While in the prosecutors' depot, a servant of the prosecutors removed the parcel to a different part of the premises, and placed upon it a label addressed to the prisoners by a name by which they were known, and at a house where they resided. The superintendent of Messrs. Carter, Paterson's business, on receipt of information as to this, and after inspection of the parcel, directed it to be replaced in the place to which the thief had removed it, and to be sent, with a special delivery-sheet, in a van, accompanied by two detectives, to the address shown on the label. At that address it was received by the prisoners under circumstances which clearly showed knowledge on their part that it had been stolen. The property in the parcel was laid in the indictment in the carriers, and an offer to amend the indictment by substituting the names of the consignees was declined. The prosecutors' servant pleaded guilty to a count for larceny in the same indictment. The Court of Crown Cases Reserved held, that as the person in whom the property was laid had resumed possession of the stolen property before its receipt by the prisoners, it had then

ceased to be stolen property, and the prisoners could not be convicted of receiving it knowing it to have been stolen.

A person charged with receiving stolen goods may controvert the guilt of the principal felon, even after conviction, and though the conviction is stated in the indictment. Thus, where the principal had been convicted, and on the trial of the receiver the conviction was proved, but it appeared, on the cross-examination of the prosecutor, that, in fact, the party convicted had only been guilty of a breach of trust, the prisoner was acquitted.

If a receiver of stolen goods receives them for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased them. Moreover, it is not necessary to prove an actual manual possession of stolen goods, in order to sustain an indictment for receiving the goods, but it is sufficient if the goods are shown to have been under the control of the person charged with receiving.

To prove the previous felony the thief himself is a competent witness, but his evidence requires confirmation. In cases where a wife in her husband's absence has received goods knowing them to have been stolen, the husband does not become a receiver merely by adopting her receipt to the extent of passive acquiescence; but he can be convicted if, with full knowledge of the circumstances under which the goods are in his wife's possession, he does some distinct act of confirming her receipt, such as paying the balance of the money to the thief.

By 24 & 25 Vict. c. 96, s. 91, whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, &c.

By sect. 95, whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanour by

this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanour, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanour shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice, &c.

In R. *v.* Streeter ([1900] 2 Q. B. 601) two prisoners, a man and a woman, were indicted for stealing property in a dwelling-house, and, in a second count, for receiving the same property. The woman was the prosecutor's wife, and the man had lodged in their house. After he left, the woman packed up the property in question, and sent it to the man, and afterwards left the house and joined him, and the two lived together. The property was found in their possession. The jury found the woman guilty of stealing, and the man of receiving. The question was reserved whether the man could be indicted for receiving the property. The Court of Crown Cases Reserved held, that as the stealing by a wife of her husband's property did not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but was made a criminal offence by the Married Women's Property Act, 1882, ss. 12, 16, the man was not liable to be convicted under the Larceny Act, 1861, s. 91, of receiving property stolen by the woman from her husband, and the conviction was wrong.

In R. *v.* Wiley (2 Den. 37) the three prisoners, Straughan, Williamson, and Wiley, were jointly indicted under 7 & 8 Geo. III., c. 29, s. 54, for stealing and receiving five hens and two cocks, the property of Thomas Davidson. It was proved that about 4.30 in the morning Straughan and Williamson were seen to go into the house of Wiley's father with a loaded stick that was carried by Straughan. Wiley lived with his father in the said house, and was a higgler, attending markets with a horse and cart. Straughan and Williamson remained in the house about ten minutes, and then were seen to come out of the back door, preceded by Wiley with a candle, Straughan again carrying the sack on his shoulders, and to go into a stable belonging to the same house, situated in an enclosed yard at the back of the house, the house and stable being on the same premises. The stable door was shut by one of them, and on the policemen going in they found the sack on the floor tied at the mouth, and the three men standing round it as if they

were bargaining, but no words were heard. The sack had a hole in it, through which poultry feathers were protruding. The bag, when opened, was found to contain six hens, two cocks, and nine live ducks. There were none of the inhabitants up in the house but Wiley, and on being charged with receiving the poultry knowing it to be stolen, he said that he did not think he would have bought the hens. The jury found Straughan and Williamson guilty of stealing, and Wiley guilty of receiving. The question was reserved as to whether the conviction of Wiley was proper. The case was argued in the Court of Criminal Appeal, and four judges were for affirming the conviction and seven for quashing it. The conviction was therefore quashed.

Platt, B., said: "It seems to me that the goods must have been in such a condition as to be under the dominion of the prisoner, and exclusive of that of the thief. If they are all to be deemed in joint possession of them, the possession of the thieves would be different in kind from that of the receiver; for in him it would be treated as a receiving, and in them as an asportation."

Patterson, J., said: "I do not consider a manual possession or even a touch essential to a receiving. But it seems to me that there must be a control over the goods by the receiver which there was not here."

Parke, B., said: "Receiving must mean a taking into possession actual or constructive, which I do not think there was here. The prisoner took the thieves into the stable, but he never accepted the goods in any sense of the word except upon a contingency, which, as it happened, did not arise. I think the possession of the receiver must be distinct from that of the thief, and that the mere receiving a thief with stolen goods in his possession would not alone constitute a man a receiver."

In R. *v.* Woodward (L. & C. 122) the actual delivery of the stolen property was made by the principal felon to the prisoner's wife in the absence of the prisoner, and she then paid sixpence on account, but the amount to be paid was not then fixed. Afterwards the prisoner and the principal met and agreed on the price, and the prisoner paid the balance. It was objected on the part of the prisoner that the guilty knowledge must exist at the time of receiving, and that this was the time of the delivery to the wife; and that when the wife received the stolen property, guilty knowledge

could not have come to the prisoner. The objection was overruled, and the jury convicted the prisoner. On the point being reserved, the Court of Crown Cases Reserved affirmed the conviction.

Erle, C. J., said: "The thief brought the goods to the prisoner's house, and left them there, receiving sixpence on account. That was no complete receipt. Subsequently the thief found the husband, who then acquired a guilty knowledge, and with such knowledge struck a bargain with the thief, and paid for the goods. If the offer had not been satisfactory, the thief might have reclaimed the goods."

Keating, J., said: "The agreement for the sale of the goods was not complete until the husband met the thief. Then the transaction was complete. What took place then amounted to a receipt by the husband with a guilty knowledge. If that were not so, it would be almost impossible to convict any receiver who was absent at the time when the goods were actually delivered."

In R. *v.* Payne ([1906] 1 K. B. 97) the Court of Crown Cases Reserved held that an indictment charging as a misdemeanour the receipt by a person of money in fact stolen by a wife from her husband, knowing the money to have been stolen, is good, inasmuch as the stealing by a wife of her husband's property does not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but is made a criminal offence by the Married Women's Property Act, 1882, and therefore the receiving of such stolen property is not a felony within the meaning of s. 91 of the Act of 1861; and as there is no other statute making such receipt a felony, it is a misdemeanour only. It is not necessary, although it may be better, to insert in the indictment an allegation that the money belonged to the husband and that it had been stolen from him by the wife.

By the Larceny Act, 1896 (59 & 60 Vict. c. 52), it is enacted that if any person without lawful excuse receives, or has in his possession, any property stolen outside the United Kingdom knowing such property to have been stolen, he shall be liable to seven years' penal servitude, and may be indicted in any county or place in which he has, or has had, the property.

Vide also 24 & 25 Vict. c. 96, ss. 92, 93, 94, 96, 97; the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19.

Cases on this subject are:—R. *v.* Ritson, 15 Cox, C. C. 478;

R. *v.* Drage, 14 Cox, C. C. 85; R. *v.* McMahon, 13 Cox, C. C. 275; R. *v.* Langmead, 9 Cox, C. C. 464; R. *v.* Davis, L. R. 1 C. C. R. 272; R. *v.* Smith, 1 Leach, 288; R. *v.* Gruncell and Hopkinson, 9 C. & P. 365.

As to the indictment for receiving goods obtained by false pretences, *vide* R. *v.* Mackay and Ball, 17 Cox, C. C. 713; and, *contrà*, Taylor *v.* The Queen, 18 Cox, C. C. 45.

Recent Possession.

[93] **R. *v.* PARTRIDGE.** (1836)

[7 C. & P. 551.]

This case showed that the question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen. The prisoner was indicted for stealing two ends of woollen cloth, the property of John Figgins Marling. It appeared that the cloth was missed on the 23rd of January, 1836, it then being in an unfinished state; and that part of it was on the 21st of March left by the prisoner at the house of a person named Porter, and that on the 30th of the same month the prisoner sent the residue of it to be shorn. It further appeared that, the prisoner being in the custody of a constable, the latter said to the prosecutor, Mr. Marling, "You must not use any threat or promise to the prisoner," and immediately after this Mr. Marling said to the prisoner, "I should be obliged if you would tell us what you know about it; if you will not, we of course can do nothing; I shall be glad if you will." The statement then made by the prisoner was not admitted in evidence; and counsel for the prisoner submitted that the length of time that had elapsed

since the loss of the goods was so great that there was no presumption of guilt raised against the prisoner by the possession of it.

Patteson, J., said: "I think the length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time, but here that is not so. It is a question for the jury."

[C. Phillips for the prisoner.]

The doctrine of "recent possession," which is that when a person is found in possession of stolen property shortly after it has been stolen, and is unable to give any reasonable or probable account of how he became possessed of it, he is presumed to have come by it dishonestly, is obviously one to be applied with great caution and forbearance. On the one hand, it is very easy for a prisoner to say that he got the goods from a person whom he had never seen beforehand and has never seen since; that he paid a fair price for them, and that he had not the slightest idea they were stolen; but, on the other hand, that may really be the true explanation. When, therefore, he goes so far as actually to name the person from whom he purchased them, it is generally incumbent on the prosecution to secure his presence in order to show the falsehood of the prisoner's assertion. It must be a question, however, in each case, under the particular circumstances of the case, whether it is necessary to call the third party vouched by the prisoner. The case for the prosecution may be so clear that justice may be done to the prisoner without such evidence being given.

In R. *v.* Cooper (3 C. & K. 318), where a stolen horse was found in the possession of the prisoner six months after it was stolen, and there was no other evidence against him, the judge would not call on him for his defence, as the possession was not sufficiently recent.

In R. *v.* Ritson (15 Cox, C. C. 478), the prisoner was charged with receiving some leather, knowing it to have been stolen. His account of it, given at the time when the leather was found in his possession was, that he had bought it from a Mr. Reeves, who

was a tradesman in the same town. It was held that it was not necessary for the prosecution to call this gentleman, because there were other circumstances in the case from which the jury might fairly infer the falsehood of the prisoner's story.

"It is clear," said Grove, J., "there was sufficient evidence in this case without calling the tradesman mentioned by the prisoner. To hold otherwise would be to hold that in every case, however strong the circumstances might be against the prisoner, if he said he had received the goods from a third party, that party must be called; but that cannot be laid down as necessary."

In R. *v.* Langmead (L. & C. 427), the prisoner was charged with stealing and receiving sheep. It was proved that a few days after the theft he was in possession of the sheep, and he gave no explanation to account for this possession. The jury found the prisoner guilty of receiving, and the Court of Crown Cases Reserved affirmed the conviction.

Blackburn, J., said: "When it has been shown that property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it; and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances."

In R. *v.* Crowhurst (1 C. & K. 370), the prisoner was indicted for stealing a piece of wood, which was found in the prisoner's shop about five days after it was lost. The prisoner stated that he had bought it from a person named Nash, who lived about two miles off. Nash was not produced as a witness for the prosecution, and the prisoner did not call any witness.

Alderson, B., in summing up, said: "In cases of this nature you should take it as a general principle that where a man in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that that account is false. But if the account given by the prisoner is unreasonable or improbable on the face of it, the onus of proving its truth lies on him."

Other cases in point are:—R. *v.* Wilson, Dears. & B. C. C. 157;

R. *v.* Smith, 3 F. & F. 123; R. *v.* Knight, 9 Cox, C. C. 437; R. *v.* Evans, 2 Cox, C. C. 270; R. *v.* Harris, 8 Cox, C. C. 333; R. *v.* Exall, 4 F. & F. 922; R. *v.* Harmer, 2 Cox, C. C. 487; R. *v.* Hughes, 39 L. T. 292; R. *v.* Coots, 2 Cox, C. C. 188.

"*Other Property Stolen.*"

R. *v.* CARTER. (1884) [94]

[12 Q. B. D. 522; 15 Cox, C. C. 448; 53 L. J. (M. C.) 96; 50 L. T. 432, 596; 32 W. R. 663; 48 J. P. 456.]

The prisoner was indicted for stealing a mare, the property of Alfred Smith, on the 20th of May, 1883, and there was a second count for receiving. It was shown that he was in possession of it shortly after it had been stolen, for he sold it on or about May 26th. It was held that evidence could not be given by the prosecution to the effect that a few days before May 20th the prisoner had been selling another mare which had been stolen from one Harry Broyd on the 22nd of October, 1882. The 19th section of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), requires that the "other property stolen," of which evidence can sometimes be given, must have been actually in the possession of the prisoner at the time when he was found in possession of the property mentioned in the indictment.

The case was reserved from the Essex Quarter Sessions, and counsel for the prisoner contended that the evidence was inadmissible apart from the section, and that R. *v.* Oddy (2 Den. C. C. 264, and 5 Cox, C. C. 210), a case decided before the enactment relied on, was a distinct authority to that effect; and that the above section did not apply, because the mare

first stolen was not "found" in the prisoner's possession at the same time with the mare the subject of the indictment, or indeed "found" in his possession at all. He also cited and relied on R. *v.* Drage, 14 Cox, C. C. 85.

Counsel for the prosecution argued that the section applied if the accused had at any time any property stolen within the previous twelve months in his possession, and that the mare first stolen was thus "found" in the prisoner's possession. He also cited R. *v.* Harwood, 11 Cox, C. C. 388.

Lord Coleridge, C. J., said: "I am clearly of opinion that this evidence was improperly received. The case of R. *v.* Drage (14 Cox, C. C. 85) is directly in point, and was, in my opinion, rightly decided; the facts in that case are almost identical with the present, and Bramwell, L. J., there held the case not within the words of the Act of Parliament, and he declined even to reserve the point for consideration. His decision was a right one, and is decisive of the present matter."

Hawkins, J., said: "The prisoner was in possession of the mare first stolen in the month of May, but before the crime, the subject-matter of the present indictment, was committed. I cannot think that a case falling within the section relied on; the true construction of the section appears to me to be that of Bramwell, L. J. [*vide* note]. If you find other stolen property in the possession of the person charged as a receiver at the same time that you find the property with regard to which you are charging him with receiving, you can prove that you did so find such property, if it be property stolen within twelve months preceding. I do not mean to say that you must find the property the subject of the indictment, and the property with regard to which you are seeking to give evidence, at the same identical moment. It would be enough, I should say, if a police constable, after finding one quantity of stolen property, took it away with him and then came back to the premises of

the accused, where he had found the first lot, for a further search, and on such search succeeded in finding there more stolen property, stolen within the required period, that is substantially a finding at the same time, but here in the present case there is nothing of the kind."

[Grubbe for the prosecution ; Wedderburn for the prisoner.]

In R. *v.* Drage (14 Cox, C. C. 85), a case which was tried at the Northampton Assizes in 1874, Bramwell, L. J., held that in order to show guilty knowledge under 34 & 35 Vict. c. 112, s. 19, it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner. It must be proved that such "other property" was found in the possession of the prisoner at the time when he is found in possession of the property which is the subject of the indictment. The prisoner was indicted for receiving stolen goods. To show guilty knowledge evidence was tendered, under 34 & 35 Vict. c. 112, s. 19, to show that a short time previously the prisoner had sold for half its value and had otherwise disposed of other property stolen within the preceding period of twelve months. It was held that the words of the statute 34 & 35 Vict. c. 112, s. 19, did not extend to such evidence, which was therefore inadmissible.

The 19th section of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), provides that where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then, if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of

such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen: provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction: and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.

Upon the trial of an indictment for larceny and receiving evidence of "other property stolen" may be given under the Act, although such other property is the subject of another indictment against the prisoner. (R. *v.* Jones and Haynes, 14 Cox, C. C. 3.)

In R. *v.* Bromhead (71 J. P. 103), the prisoner was indicted for stealing and receiving lace. Evidence was given that some of the stolen lace was found in his possession. Evidence was tendered by the prosecution of the prisoner's conviction within the preceding five years for an offence involving fraud, the requisite notice in that behalf having been given. This was objected to by counsel for the prisoner on the ground that sect. 19 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), applied only where the charge of receiving stood alone, and that where, as here, it was coupled with another charge—namely, stealing—the section did not apply. The Deputy-Recorder admitted the evidence, and the prisoner was convicted. On the point being reserved the Court of Crown Cases Reserved affirmed the conviction.

Embezzlement—"Clerk or Servant."

[95] **R. *v.* NEGUS.** (1873)

[L. R. 2 C. C. R. 34; 42 L. J. (M. C.) 62; 28 L. T. 646; 21 W. R. 687; 12 Cox, C. C. 292.]

The prisoner was engaged by the prosecutors to solicit orders for them, and he was to be paid by a commission on

the sums received through his means. He had no authority to receive money, but, if any was paid to him, he was to hand it over at once to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty, he applied for payment of a certain sum, and, having received it, he applied it to his own purposes, and denied that it had been paid to him. On these facts it was held that the prisoner was not a "clerk or servant," and could not be convicted of embezzlement under 24 & 25 Vict. c. 96, s. 68.

Bramwell, B., said: "This conviction ought to be quashed unless we can see that the prisoner, on the facts stated, must have been a clerk or servant within the meaning of the Act of Parliament. I am of opinion that on the facts we cannot do so. Looking to principle, we find that the statute was intended to apply, not to cases where a man is a mere agent, but where the relationship of master and servant, in the popular sense of the term, may be said to exist."

"The test," said Blackburn, J., "is very much this, viz.: whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but, if bound to devote his whole time to it, that would be very strong evidence of his being under control. This case differs in nothing from the ordinary one of a commission agency, except in the sole statement that the prisoner was not to work for others. But I do not think that circumstance by itself alone enables us to say that he was a servant of the prosecutor."

[F. H. Lewis for the Crown.]

By 24 & 25 Vict. c. 96, s. 68, whosoever being a clerk or servant, or employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money or valuable security which shall be delivered to or received, or taken

in possession by him for or in the name or on account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money or security was not received into the possession of such master or employer otherwise than by the actual possession of the clerk, servant or other person so employed.

A person indicted for embezzlement must be shown either to have been "a clerk or servant," or, at all events, to have been "employed for the purpose, or in the capacity, of a clerk or servant." A son who lives with his father, and performs for him duties usually performed by a clerk, is within the statute, though he receives no salary, and though there is no contract binding him to go on doing those duties. (R. *v.* Foulkes, L. R. 2 C. C. R. 150 and 13 Cox, C. C. 63.) "If it had been necessary," said Pollock, B., "to say absolutely that the prisoner was a clerk or servant, I should have hesitated. But I think the words 'employed for the purpose, or in the capacity of a clerk or servant,' are wider, and that there is evidence to bring the case within them."

The statute is not confined to the clerks and servants of persons in trade, but extends to the clerks and servants of all persons whatsoever, if they are employed to receive money, &c. (R. *v.* Squire, R. & R. 349.)

The mode by which the prisoner was remunerated for his service is immaterial. Thus, a commercial traveller who is paid by commission only, getting no definite salary whatever, is within the statute if he is bound to go where his employer tells him, and to devote his whole business time to his service. But where the prisoner was employed by the prosecutors as their agent for the sale of coals on commission, and to collect moneys in connection with his orders, but was at liberty to dispose of his time as he liked, and to get or abstain from getting orders as he chose, he was held not to be "clerk or servant." (R. *v.* Bowers, L. R. 1 C. C. R. 41.)

It is not necessary that the employment should be of a permanent kind. Thus, where a drover, who was employed to drive two cows to a purchaser, and receive the purchase-money, embezzled it, he was held to be a servant. (R. *v.* Hughes, 1 Moo. C. C. 370.)

A mere unpaid treasurer of a friendly society is not a clerk or

servant of the trustees in whom the moneys of the society are vested, and cannot be indicted for embezzlement. (R. *v.* Tyree, L. R. 1 C. C. R. 177.) "I believe that there is no case," said Bovill, C. J., "to show that the treasurer of a friendly society can be indicted for embezzlement. The essence of the indictment in this case is, that the prisoner was a clerk or servant of the trustees. The trustees have all moneys of the society vested in them by Act of Parliament, as well as by one of their rules, and the prisoner must account to them; but this does not make him their servant. The treasurer is an accountable officer, but not a servant."

The prisoner was indicted for embezzling the moneys of the inhabitants of the township of Hasbury, in Worcestershire, while acting as assistant overseer. His nomination, however, to that office did not specify as one of the duties he was to perform the duty of collecting or receiving money; and it was held that, inasmuch as under 59 Geo. III. c. 12, s. 7, an assistant overseer can only be appointed by justices for such purposes as are specified in the nomination, he could not be convicted of embezzling rates collected by him as clerk or servant of the inhabitants within the meaning of 24 & 25 Vict. c. 96, s. 68. (R. *v.* Coley, 16 Cox, C. C. 226.)

The prisoner was local secretary of an unregistered friendly society, some of whose rules were in restraint of trade, and it was contended that, for that reason, he could not be convicted of embezzling the funds of the society. It was held, however, that while such rules may be void as being against public policy, they are not criminal, and therefore that the conviction was proper. (R. *v.* Stainer, L. R. 1 C. C. R. 230, and 11 Cox, C. C. 483.)

In R. *v.* Hunt (8 C. & P. 642), however, it was held that a person could not be convicted of embezzlement as clerk or servant to a society which, in consequence of administering an unlawful oath to its members, was an unlawful combination and confederacy.

In R. *v.* Tankard ([1894] 1 Q. B. 548, and 17 Cox, C. C. 719) the Court of Crown Cases Reserved held that the prisoner was properly convicted of embezzling the money of a trading club, although the club was an unregistered association of more than twenty persons such as is prohibited from being formed by sect. 4 of the Companies Act, 1862.

In R. *v.* Stuart ([1894] 1 Q. B. 310, and 17 Cox, C. C. 723), the Court of Crown Cases Reserved held that a director of a limited company, who is also employed as a servant to collect moneys for them, is liable to be convicted of embezzlement as a "clerk or servant" of the company under 24 & 25 Vict. c. 96, s. 68.

Lord Coleridge, C. J., said: "In this case I think that the proper direction was given to the jury, and that they came to a proper conclusion. The prisoner here filled two capacities. He was a director and also a servant of the company, of which he was a member. He was a servant, not to himself, but to the company; and why the two distinct capacities of director and servant should not be filled by one person I do not understand. If the argument of the prisoner's counsel were good, it would apply to every shareholder of the company, and no person who held a share in the company could be convicted of embezzlement where he was employed as a clerk or servant to collect money for the company. It does not follow that because a person is a director he cannot be employed in the capacity of a servant. Here the prisoner was so employed; he misappropriated money received by him, and he was rightly convicted."

In R. *v.* Bailey (12 Cox, C. C. 56) the prisoner was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. He had no salary, but was paid by commission. He might get the orders when and where he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time—the whole of every day to their service. The Court held that he was a clerk and servant within 24 & 25 Vict. c. 96, s. 68.

In R. *v.* Chater (9 Cox, C. C. 1) the prisoner was indicted for embezzling moneys received by him by virtue of his employment as clerk to North and others, his masters. It is for the jury to say if the relation of master and clerk existed between the prosecutor and the prisoner.

Other cases on this subject are:—R. *v.* Graham, 13 Cox, C. C. 57; R. *v.* Hall, 1 M. C. C. 474; R. *v.* Tite, L. & C. 29; R. *v.* McDonald, L. & C. 85; R. *v.* Harris, 17 Cox, C. C. 656; R. *v.* Barnes, 8 Cox, C. C. 129; R. *v.* Spencer, R. & R. 299;

R. *v.* Tongue, 8 Cox, C. C. 386; R. *v.* Winnall, 5 Cox, C. C. 326; R. *v.* May, L. & C. 33; R. *v.* Hoare, 1 F. & F. 647; R. *v.* Callahan, 8 C. & P. 154; R. *v.* Carpenter, 2 C. C. R. 29; R. *v.* Jenson, 1 Moo. C. C. 434; R. *v.* Carr, R. & R. 198; R. *v.* Nettleton, 1 Moo. C. C. 259; R. *v.* Goodbody, 8 C. & P. 665; R. *v.* Walker, D. & B. 600; R. *v.* Murphy, 4 Cox, C. C. 101.

The Embezzling.

R. *v.* CULLUM. (1873) [96]

[L. R. 2 C. C. R. 28; 42 L. J. (M. C.) 64; 28 L. T. 571; 21 W. R. 687; 12 Cox, C. C. 469.]

The prisoner was indicted, as a servant to George Smeed, for stealing 2*l.*, the property of his master. The prisoner was employed by Mr. Smeed of Sittingbourne, Kent, as captain of one of Mr. Smeed's barges. The prisoner's duty was to take the barge with the cargo to London, and to receive back such return cargo and from such persons as his master should direct. The prisoner had no authority to select or return cargo, or take any other cargoes but those appointed for him. The prisoner was entitled by way of remuneration for his services to half the earnings of the barge after deducting half his sailing expenses. Mr. Smeed paid the other half of such expenses. The prisoner's whole time was in Mr. Smeed's service. It was the duty of the prisoner to account to Mr. Smeed's manager on his return home after every voyage. By direction of Mr. Smeed the prisoner took a load of bricks to London. In London he met Mr. Smeed, and asked if he should not, on his return, take a load of manure to Mr. Pye, of Caxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye, and directed him

to return with his barge empty to Burham. Notwithstanding this prohibition, the prisoner took a large load of manure from London down to Mr. Pye, at Caxton, and received from Mr. Pye's men 4*l.* as the freight. It was not proved that he professed to carry the manure or to receive the freight for his master. The servant who paid the 4*l.* said that he paid it to the prisoner for the carriage of the manure, but that he did not know from whom. In answer to the manager's inquiries, the prisoner stated that he had not brought back any manure in the barge from London, and he never accounted for the 4*l.* received from Mr. Pye for the freight for the manure. The jury found the prisoner guilty as servant to Mr. Smeed, of embezzling 2*l.*, but the Court of Crown Cases Reserved quashed the conviction.

Bovill, C. J., said: "The prisoner here, contrary to his master's order, used the barge for his (the servant's) own purposes, and so earned money which was paid to him, not for his master, but for himself; and it is expressly stated that there was no proof that he professed to carry for the master and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property, and so earning money for himself and not for his master. Under these circumstances the money would not be received 'for,' or 'in the name of,' or 'on account of,' his master but for himself, in his own name and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed."

Bramwell, B., said: "The use of this barge by the prisoner was a wrongful act, yet not dishonest, in the sense of stealing. But I will add that I do not think this case even within the words of the statute. The servant undoubtedly did not receive the money 'for' his master, nor 'on account of' his master, nor 'in the name' of his master."

Blackburn, J., said: "The common law requires for the

offence of larceny not only *animus furandi*, but that there should be a taking, and it was held, on the narrow distinctions of the common law, that when the property only became the master's by coming into the hands of his servant and not otherwise, the servant could not be said to take his master's property because it came into his hands at the moment it was so received. It was to meet this difficulty that the Legislature said: 'He who embezzles shall be guilty of stealing although the property has not become the master's except by the possession of the servant'; and in the original Act were the words 'by virtue of his employment,' which have been expressly omitted from the more recent statute; yet still the essence of the matter is that the servant shall be deemed to have stolen the master's property, if it be his master's property, although not received otherwise than in the prisoner's capacity of clerk or servant. That is, I take it, the key to the meaning of the whole enactment—the technical objection as to the possession is removed."

Archibald, J., said: "The only doubt in my mind was, whether the money earned by the use of the barge might not have been the money of the master—that is, if, instead of cash payment, the manure had been carried on credit, there might not have been an implied contract to pay for the carriage to the master. But on reflection I think that, although carried in the master's barge, yet, as it was against his will and carried by the servant in his own name, the contract must be taken to have been with the servant, so that, under these circumstances, no action by the owner against the proprietor of the manure could have been maintained, and that there was no receipt of the freight 'for,' or 'on account of,' or 'in the name of' the master."

[E. T. Smith and Moreton Smith for the prosecution.]

"The offence of embezzlement cannot be committed by the appropriation of property which does not belong to the master of the alleged offender, although such property may have been

obtained by such alleged offender by the improper use of the property entrusted to him by his master, but property which does belong to the master of the offender may be embezzled, although the offender received it in an irregular way. The distinction between embezzlement by a clerk or servant and other kinds of theft is, that in other kinds of theft the property stolen is taken out of the possession of the owner, whereas, in embezzlement by a clerk or servant, the property embezzled is converted by the offender whilst it is in the offender's possession on account of his master and before that possession has been changed into a mere custody." (Stephen's Digest of the Criminal Law.)

In R. *v.* Gale (2 Q. B. D. 141) it was part of the duties of the prisoner, as head manager of a fire insurance company at the head office, to receive remittances and cheques sent to the head office from the managers of district branches. These cheques were usually drawn on the local bank and made payable to prisoner's order. On receipt it was also part of his duty to indorse them and hand them over to the cashier, who paid them in to the company's bankers and accounted for them in his books. He received two cheques for the company from district managers of the amounts respectively of 400*l.* and 200*l.* Instead of handing them over to the cashier, he indorsed and cashed the cheques through private friends of his own, and later in the day paid the amount, viz., 600*l.* to the cashier to be put against his salary account, which was overdrawn to that amount. The cashier did so, and returned him I.O.U.'s to that amount. After some interval of time the fraud was discovered. The prisoner was indicted for embezzling the two sums of 400*l.* and 200*l.* The Court of Crown Cases Reserved held that he had been guilty of embezzlement of the money notwithstanding that the cash was paid to him by his friends on his own account. Cockburn, C. J., said: "The difficulty arises from the fact that, instead of cashing the cheques at the bank, the prisoner obtained money for them from friends of his own, who having given him the money, paid the cheques to their own bankers. Now the prisoner is liable under the statute if he received the money on account of his masters. Mr. Torr (the defending counsel) ingeniously suggests that he cannot have done so, because the persons who gave him the money knew nothing of his masters. But the question is not whether those persons paid on account of

his masters, but whether he received on account of his masters. And he did so because it was his duty to pay over the proceeds at once, in whichever way he received them. It is the same case as if, being on his way to cash the cheques, he had met a friend in the street who cashed them for him, to save him the trouble of going to the bank. The prisoner, then, having received the money on account of his masters, and having dealt with it as he did, with the intention of appropriating it to his own use, was rightly convicted of embezzlement."

If a servant receives from his master goods, and sells and appropriates them to his own use, he is guilty of larceny and not embezzlement. (R. *v.* Hankins, 4 Cox, C. C. 224.)

Embezzlement necessarily involves secrecy and concealment. If, therefore, instead of denying the appropriation of the property, the prisoner, in rendering his account, admits the appropriation, alleging a right to himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping is no embezzlement. (R. *v.* Norman, Car. & M. 501.)

If a servant receives money on his employer's account, and embezzles it, he is guilty of a felony, although they had no right to it, and were wrongdoers in receiving it. (R. *v.* Beacall, 1 C. & P. 312; and R. *v.* Wellings, 1 C. & P. 454, 457.)

In R. *v.* Hoggins (R. & R. C. C. 145) the prisoner worked for Burbidge & Co., who were turners, and was paid according to what he did. It was part of his duty to receive orders for jobs, and to take the necessary materials from his master's stock, to work them up, and deliver out the articles and receive the money for them, and then his business was to deliver the whole of the money to his masters and to receive back at the week's end a proportion of it for working up the articles. The jobs were commonly paid for as soon as they were executed, it being a ready-money part of the business. On the 27th of January, 1809, the prisoner received an order from one Jonathan Mallett for six dozen of coffee-pot handles. The order was given to him in his character of servant to Burbidge & Co. He took the wood for the handles from their stock, and turned them on their premises, and with their machinery. He then delivered them to Mr. Mallett, and received the price, which was three shillings, but he concealed the whole transaction from Burbidge & Co., and kept the whole money. His

own share of the price would have been a third, viz., one shilling. The jury convicted the prisoner, and the Court of Crown Cases Reserved affirmed the conviction.

Some specific sum must be proved to have been embezzled. It will not suffice to prove a general deficiency in the prisoner's accounts. (R. *v.* Lloyd-Jones, 8 C. & P. 288; R. *v.* Wolstenholme, 11 Cox, C. C. 313.)

In R. *v.* Murray (1 Moo. C. C. 278) the indictment stated that the prisoner, being a clerk in the employ of A., did by virtue of such employment receive and take into his possession the sum of 3*l.* for and on account of the said master, and did afterwards fraudulently and feloniously embezzle 10*s.*, part of the sum above mentioned, and further stated that the prisoner did feloniously steal, take, and carry away from the said A. the said sum of 10*s.* of the moneys of the said A. The prisoner was proved to be a clerk in the employ of A.; he received from another clerk 3*l.* of A.'s money that he might pay (among other things) for inserting an advertisement in the Gazette. The prisoner paid 10*s.* for the insertion and charged A. 20*s.* for the same, fraudulently keeping back the difference, which he converted to his own use. The prisoner was convicted, and the Court of Crown Cases Reserved quashed the conviction on the ground that A. had had possession of the money by the hands of his other clerk, and that the conviction was therefore wrong.

In R. *v.* Orlando Masters (1 Den. 332) the prisoner, a clerk to one William Holliday, was indicted for embezzling three sums of money received by him for and on account of his master, the prosecutor. It appeared in evidence, that the course of business adopted by the house was for the customers to pay moneys into the hands of certain persons, who paid them over to a superintendent; he accounted with the prisoner, and paid over such moneys to him; and the prisoner, in his turn, accounted with cashiers, and paid over the moneys to them, he having no other duty to perform with respect to such moneys than to keep an account which might act as a check on the superintendent and the cashiers, their accounts being in like manner checks upon him. These four parties to the receipt of the moneys were all servants of the prosecutor. With respect to the three sums in question, it was proved that they passed in due course from the customers, through the hands of the

immediate receivers and the superintendent, to the prisoner, who wilfully and fraudulently retained them. On behalf of the prisoner it was objected, on the authority of R. *v.* Murray, that the moneys having, before they reached the prisoner, been in the possession of prosecutor's servants, did in law pass to the prisoner from his master; and that consequently the charge of embezzlement could not be sustained. For the Crown it was answered, that the prisoner having intercepted the moneys in their appointed course of progress to the master, this case was not governed by that of R. *v.* Murray, where the prior possession of the master having been as complete as it was intended to be, the money might reasonably be considered as passing from the master to the prisoner, whereas, in the present case, it was in course of passage through the prisoner to the master. The prisoner was convicted, and the Court of Crown Cases Reserved affirmed the conviction. Pollock, C. B., said: "This case is quite different from that of R. *v.* Murray. Because there the master had had possession of the money by the hands of another servant; and when it was given to the prisoner by that servant to be paid away on account of the master, it must be deemed in law to have been so given to the prisoner by his master; the fraudulent appropriation of it, being thus a tortious taking in the first instance, was not embezzlement but larceny. But here the money never reached the master at all; it was stopped by the prisoner on the way to him. The original taking was lawful, and, therefore, the fraudulent appropriation was embezzlement.

In R. *v.* Lord (69 J. P. 467), the prisoner was convicted under sect. 1, sub-sect. 1 (b) of the Larceny Act, 1901, for having received for and on account of the prosecutor from a customer of the prosecutor certain sums of money, and fraudulently converted the same to his own use and benefit. It appeared that the prisoner was employed on the terms that he should collect for the prosecutor the debts of customers set forth in a list, and that he should account for the moneys so collected at the end of each week, after deducting 5 per cent. for his own remuneration. The prisoner collected various sums, failed to pay them over to the prosecutor, and fraudulently converted them to his own use. The Court of Crown Cases Reserved held that the conviction was right.

Other cases in point are:—R. *v.* Sullens, 1 Moo. 129; R. *v.* Hayward, 1 C. & P. 518; R. *v.* Aitken, Sessions Paper, C. C C., Vol. 97,

p. 336; R. *v.* Wilson, 9 C. & P. 27; R. *v.* Smith, R. & R. 267; R. *v.* Hodgson, 3 C. & P. 422; R. *v.* Jackson, 1 C. & K. 384; R. *v.* Lister, D. & B. 118; R. *v.* Glover, L. & C. 466; R. *v.* Beaumont, Dears. 270; R. *v.* Hawkins, 1 Den. C. C. 584; R. *v.* Wright, D. & B. 431; R. *v.* Chipchase, 2 Leach, 699; R. *v.* Norval, 1 Cox, C. C. 95; R. *v.* Abrahams, 2 East, P. C. 569.

It may be mentioned here that in R. *v.* Bazeley (2 Leach, 835; 2 East, P. C. 571), the prisoner, who was a banker's clerk, and whose business it was to receive notes over the counter and put them in a drawer, received a note for 100*l.* from the servant of a customer, and appropriated it to his own use without putting it into the drawer. The Court of Crown Cases Reserved held that this was not felony, inasmuch as the note was never in the possession of the prosecutors; although it would have been otherwise if the prisoner had deposited it in the drawer, and had afterwards taken it. This case occasioned the passing of the 39 Geo. III. c. 85, now re-enacted in substance by 24 & 25 Vict. c. 96, s. 68.

In cases of embezzlement it is a common practice to indict also for falsification of accounts under 38 & 39 Vict. c. 24.

What may be Embezzled.

[97] **R. *v.* READ.** (1878)

[3 Q. B. D. 131; 47 L. J. (M. C.) 50; 37 L. T. 722; 26 W. R. 283; 14 Cox, C. C. 17.]

The prisoner was indicted for stealing eighteen rabbits, the property of Arthur Smith, his master. The evidence showed that the prisoner was the gamekeeper of Smith, and was employed to look after a wood in which the game and rabbits and rights of sporting had been granted to Smith by the owner. The prisoner was not at liberty to kill or take rabbits in the wood for his own use. He did take and kill and

remove eighteen wild rabbits in and from the wood, and had bargained to sell them when they were seized in the possession of the purchaser's agent. The capturing, killing, removing, and selling, were parts of one continuous action.

Counsel for the defence required the Court to stop the case, because there was not any evidence to go to the jury that the rabbits had ever, as subjects of larceny, been in the possession of Smith, and therefore the prisoner could not be guilty of stealing or embezzling them.

Counsel for the prosecution insisted that when the rabbits were captured and killed by the prisoner, they were, by that act, reduced into the possession of his master, and became subjects of larceny or embezzlement.

Reg. *v.* Townley (L. R. 1 C. C. R. 315) and Reg. *v.* Cullum (L. R. 2 C. C. R. 28) were cited.

The case was left to the jury, the Court telling them that the criminal offence of the prisoner (if any) was embezzlement, and not larceny, and that if, in their opinion, the prisoner being the servant of Smith captured and killed the rabbits, although against the orders of his master, they so came into the possession of the prisoner for or on behalf of his master, and the prisoner converting them to his own use was guilty of embezzlement.

The jury found the prisoner guilty, and the question reserved was, whether the prisoner, by capturing and killing the rabbits against his master's orders, did so bring them into the possession of his master that he could by appropriating them be guilty of embezzling them.

The Court of Crown Cases Reserved quashed the conviction.

[E. D. Greene for the prosecution; P. Howard Smith for the prisoner.]

In R. *v.* Barnes (8 Cox, C. C. 129) the prisoner, being in difficulties, assigned all his book debts, estate and effects to trustees for the benefit of his creditors. He was employed by the trustees

at a salary to manage the business and to collect the debts for them. He received the amount of two of the debts, but did not account for the sums received. The Court held that, inasmuch as the debts, being choses in action, could not be legally assigned, he had received only money which was in law, though not in equity, his own; and, therefore, that he could not be guilty of embezzling it.

In R. *v.* Mead (4 C. & P. 535) it was held that the halves of country bank-notes, sent in a letter, are goods and chattels; and a person who embezzles them is indictable for such embezzlement.

In R. *v.* Aslett (2 Leach, C. C. 954, 958) the Court held that if an indictment charges the prisoner with having embezzled "certain bills, commonly called Exchequer bills," and it appears that the person who signed them on the part of the Government was not legally authorized so to do, the indictment is bad; for they are not the things which they are averred to be.

In R. *v.* Clarke (69 J. P. 150), the Court of Crown Cases Reserved held that the prisoner, being indicted for the embezzlement of a sum of money, could not be convicted of embezzling goods.

Embezzlement—Evidence.

[98] **R. *v.* RICHARDSON.** (1861)

[8 Cox, C. C. 448; 2 F. & F. 343.]

The indictment charged the prisoner with having embezzled three sums of 2*l.*, the moneys of his employers, he being a clerk or servant. Evidence was given of the embezzlement of these sums, and it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled, to show that if it should be contended the sums

charged in the indictment were subjects of a mistake in the keeping the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the jury in determining what value was to be attached to the suggestion. It was held that such evidence was admissible.

Williams, J., said: "When several felonies are part of the same transaction, evidence of the whole is admissible, though all the felonies are not included in the indictment before the Court." He then referred to R. *v.* Cleaves (4 C. & P. 223) and R. *v.* Geering (18 L. J. (M. C.) 215), both of which cases were charges of murder.

[O'Malley, Q.C., and L. Hollam Mills for the prosecution; Power, Q.C., and Naylor for the prisoner.]

In R. *v.* Proud (9 Cox, C. C. 22) a member of a friendly society was employed to receive weekly payments made by other members, and appropriated certain sums thus paid. Upon the trial, the books of the society were tendered generally in evidence and received, although it was objected that the evidence ought to be confined to the entries forming the subject of the indictment. The Court held that they were rightly admitted.

In R. *v.* Wolstenholme (11 Cox, C. C. 313) it was held that to support a charge of embezzlement against the secretary of a company, whose duty it was to receive moneys and pay wages, &c. out of the moneys, and to account for the balance, proof must be given of a specific appropriation of a particular sum of money.

In R. *v.* Jones (7 C. & P. 833) the prisoner was indicted for embezzling a sum of 6*l.* 13*s.* 6*d.* received on account of George Bettis, his employer, from George Lindsay Walker. There was another count as to a sum of 19*l.* 9*s.* received from Benjamin Smith.

It appeared that Mr. Bettis was a slate merchant at Carnarvon, who, by means of the prisoner as his clerk, carried on the slate trade at a wharf at Gloucester. It further appeared that the course of business was for the prisoner to sell the slates and to convey them to the customers in their own boats, as Mr. Bettis had no boats; the prisoner being also a coal merchant on his own

account. It was proved that these sums had been received by the prisoner; but it further appeared that the prosecutor and prisoner had had no adjustment of accounts for two years, and that, on Mr. Bettis calling for the prisoner's books, he could not find these sums entered. It was stated by Mr. Bettis that he had never specifically asked the prisoner to account for either of these two sums, and that the accounts of the prisoner for these two years amounted to ten or twelve thousand pounds.

Bolland, B., said: "There is no felonious conversion. I will take it that the prisoner put the money into his own pocket, and has made no entry; that is not sufficient. Had he denied the receipt of the money the case might have been different. If the mere fact of not entering a sum was enough to support an indictment for embezzlement, every clerk who, through carelessness, omitted an entry, would be liable to be convicted of felony. The prisoner must be acquitted."

In R. *v.* Sarah Williams (7 C. & P. 338) the prisoner was indicted for embezzlement. It appeared that she was sent by her master's daughter to receive rent which was due to her master, and that on having received the rent the prisoner went off to Ireland and never returned to her master's service. The prisoner was convicted.

Coleridge, J., said: "I think that the circumstances of the prisoner having quitted her place, and gone off to Ireland, is evidence from which you may infer that she intended to appropriate the money; and if you think that she did so intend, she is guilty of embezzlement."

Other cases in point are:—R. *v.* Hodgson, 3 C. & P. 422; R. *v.* Essex, 7 Cox, C. C. 384; R. *v.* Keena, L. R. 1 C. C. R. 113; R. *v.* King, 12 Cox, C. C. 73.

Embezzlement—Indictment.

R. *v.* BALLS. (1871) [99]

[L. R. 1 C. C. R. 328; 12 Cox, C. C. 96; 40 L. J. (M. C.) 148; 24 L. T. 760; 19 W. R. 876.]

The prisoner was a member of a co-partnership trading under the title of The Alliance Industrial and Provident Coal Society, Limited. It was his duty to receive money for the co-partnership, and once a week to render an account and pay over the gross amount received during the previous week. During each of three several weeks, within six months, the prisoner received various small sums, and failed to account for them at the end of the week, or to pay over the gross amount, but embezzled the money. The Court held that he might properly be charged with embezzling the weekly aggregates; that three acts of embezzlement of such weekly aggregates within six months might be charged and proved under one indictment; and that evidence of the small sums received during each week was admissible to show how these aggregates were made up.

Cockburn, C. J., said: "I am of opinion that this conviction is right, and must be affirmed. It is quite true that if a man receives a number of separate sums and has to account for each of them separately, only three instances of failure to account can be proved under one indictment. Thus, if there were to be one accounting on Monday, and one on Tuesday, and one on Wednesday, and so on, only three defaults could be charged and proved; though, even in such a case, evidence of other instances might be given in order to show that the instances charged were not merely accidental, but that what

was done was done intentionally and fraudulently. But here no difficulty of this nature arises. I agree that the prisoner might have been indicted for embezzling any of the separate small sums received by him. But it appears upon the case that his duty was to receive the small sums from time to time; to send in the weekly accounts every Tuesday; and every Tuesday to pay the gross amount received by him during the preceding week into a bank. It is true that each of the small sums received had to be accounted for; but he might well be charged with embezzling the aggregate amount. And evidence of the individual terms was admissible to show how this aggregate was made up. It would be very mischievous if, in such cases as these, servants could not be indicted for embezzling the aggregate amounts for which they fail to account. No doubt, in such cases, there is an embezzlement of each of the smaller sums going to make up the total not accounted for; but there is not the less an embezzlement of the whole."

[Besley for the prosecution; Collins for the prisoner.]

By 24 & 25 Vict. c. 96, s. 71, for preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or dispostion, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against Her Majesty, or against the same master or employer, within the space of six months from the first to the last of such acts.

And in every such indictment where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security.

And such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled or fraudulently applied or disposed of any amount,

although the particular species of coin or valuable security of which such amount was composed shall not be proved.

Or if he shall be proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly.

In R. *v.* Adey (1 Den. C. C. 571) it was held that a collector of poor rates employed by the overseers is properly charged with embezzlement as servant to the overseers, although there are churchwardens in the same parish who took part in making the rate.

In R. *v.* Smallman ([1897] 1 Q. B. 4, and 18 Cox, C. C. 451) it was held that an assistant overseer, appointed by a parish council, is properly described in an indictment for embezzlement as the servant of the inhabitants of the parish.

In R. *v.* Rogers (3 Q. B. D. 28) the prisoner was a clerk whose duty it was to remit at once to his employers in Middlesex all moneys collected by him as their clerk, collected at York on April 18, a sum of money as such clerk, but never remitted any portion of it. On April 19 and 20 he wrote and posted from places in Yorkshire to his employers in Middlesex letters making no mention of the money so collected, and on April 21 he wrote and posted at Doncaster in Yorkshire to his employers in Middlesex a letter which was intended to make them believe that he had not then in fact collected the money in question. These letters were duly received by the employers in Middlesex. The Court of Crown Cases Reserved held that the receipt of the letter of April 21 in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex. Lindley, J., said: "A material part of the offence was committed or took place in Middlesex. I do not mean to say that the prisoner could not have been indicted in Yorkshire; on the contrary, I think he could have been there indicted. The letter of April 21 was meant to reach the masters in London. It was a fraudulent failure to account when posted, and it operated as a fraudulent failure to account when received." Manisty, J., said: "In this case there was a fraudulent non-accounting in

Middlesex. He was well indicted in that county, although he might also, I think, have been indicted in the county of York."

Other cases in point are:—R. *v.* Woolley, 4 Cox, C. C. 251; R. *v.* Carpenter, 10 Cox, C. C. 246.

Embezzlement and Fraud by Trustees.

[100] R. *v.* **TOWNSHEND.** (1884)

[15 Cox, C. C. 466.]

The prisoner, a fruit broker, applied to his bankers for an advance as against certain goods which had been consigned to him and were then at sea, he depositing with them the indorsed bills of lading. Before making the advance the bankers required him to sign a letter of hypothecation by which he undertook to hold the goods in trust for the bankers, and to hand over to them the proceeds, "as and when received," to the amount of the advance. The Court held that this letter contained a declaration of an express trust such as would make the giver of it a trustee of the proceeds within the meaning of sect. 80 of the Larceny Act, and his appropriation of them to his own use an offence against that section. The Court also held that such hypothecation note was a bill of sale within the definition in the Acts of 1878 and 1882 as being a declaration of trust without transfer, and is required to comply with the provisions of those Acts as to form and registration; but that the goods not having arrived at the date of its execution, it came within the exception as to "goods at sea" contained in the Bills of Sale Acts, and so was not affected by these provisions.

[C. Russell, Q.C., McConnell and Pickford for the prosecution; Gully, Q.C., and Walton for the prisoner.]

By 24 & 25 Vict. c. 96, s. 80, whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of another person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, or for the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of, or destroy such property, or any part thereof, shall be guilty of a misdemeanour.

In R. *v.* Fletcher (L. & C. 180) the prisoner, who was trustee, treasurer and secretary of a savings bank, was indicted for misappropriation as a trustee. As secretary he received the money deposited, which by the rules of the savings bank it was his duty to hand over to the treasurer, who was required by the Savings Bank Acts to pay it over, when demanded, to the trustees, whose duty, as defined by the rules, was to vest it in the public funds in the names of the commissioners for the reduction of the national debt. He falsified the accounts, and appropriated to his own purpose part of the money so deposited with him as secretary, with intent to defraud. The Court held, first, that there was an express trust created by the rules, although they were made before the appointment of the trustee and the existence of the trust deed. Secondly, that the rules of the savings bank were an instrument in writing.

In R. *v.* Pike ([1902] 1 K. B. 552), the Court of Crown Cases Reserved held that a statement of affairs prepared by a debtor in the course of his bankruptcy under sect. 16 of the Bankruptcy Act, 1888, is admissible in evidence against him on a charge, under 24 & 25 Vict. c. 96, s. 80, of misappropriation of money of which he was a trustee.

Forgery—The Instrument.

[101] **R. *v.* RILEY.** (1895)

[[1896] 1 Q. B. 309; 18 Cox, C. C. 285; 65 L. J. (M. C.) 74; 74 L. T. 254; 44 W. R. 318; 60 J. P. 519.]

The prisoner was indicted under sect. 38 of the Forgery Act, 1861, for obtaining certain money by means "of a certain forged instrument, to wit, a forged telegram." It appeared that the prisoner, who was a clerk in a post office, sent to a bookmaker a telegram offering a bet on a certain horse for a certain race. The telegram purported to have been handed in prior to the running of the race, and the bookmaker accepted the bet and ultimately paid the amount won on that understanding. In reality the telegram was despatched by the prisoner after he had received the news that the race had been won by the horse in question. The Court of Crown Cases Reserved held that the telegram was a forged instrument within the meaning of sect. 38, and that the indictment was good.

Hawkins, J., said: "In Blackstone's Commentaries, 247, forgery at common law is defined as 'the fraudulent making or alteration of a writing to the prejudice of another man's right.' I seek for no other definition for the purposes of the present discussion. That a postal telegram is a writing is to my mind clear. It originates in a written message addressed and signed by the sender, and delivered by him into the post office of despatch for the express purpose that it shall, in the very words in which it is penned, be transmitted by means of an electric wire to another post office, which I will call the arrival office, and that it shall there again on its arrival be

committed to writing *verbatim et literatim*, and that such last-mentioned writing shall be handed to the person to whom it is addressed. The writing delivered in at the office of despatch is the authority of the postmaster to transmit the message, and of the postmaster at the arrival office to commit it to writing and to deliver it to the addressee as the sender's written message to him. This message sent out from the arrival office is, in my opinion, as binding upon the sender as though he had written it with his own hand. . . . Now, can this telegram properly be called an instrument? I am not aware of any authority for saying that in law the term 'instrument' has ever been confined to any definite class of legal documents. . . . Assuming the document to be an 'instrument,' I come to the only remaining question, whether it is such within the meaning of sect. 38 of the statute. Why should it not be so? It is contended that the section has reference only to such instruments as are mentioned in the earlier sections of the statute, and that sect. 38 applies only to those forged instruments which are punishable as felonies. Such a construction is, I think, erroneous. There is no definition of the word 'instrument' in the statute to fetter us in giving to it the ordinary and general interpretation. It was clearly the intention of the Legislature by sect. 38 to create a new offence."

[Sir R. B. Finlay, S.-G., McCall, Q.C., and Casserley for the Crown; F. H. Mellor for the prisoner.]

Forgery is the false making of an instrument which purports on the face of it to be good and valid for the purposes for which it was created, and with a design to defraud any person or persons. A forgery must be of some document or writing; but there need not be an exact resemblance; it is sufficient if the instrument is *primâ facie* fitted to pass for a true instrument. Statutory forgery is a felony, and consists of the fraudulent making or alteration of any writing or seal specified by Act of Parliament. Common law forgery is a misdemeanour, and consists of forging any document

not comprised among those specified by statute, by which some persons may be injured.

In R. *v.* Morton (L. R. 2 C. C. R. 22, and 12 Cox, C. C. L. 456), it was held that a letter of orders under the seal of a bishop is not a "deed, bond, or writing obligatory" within 24 & 25 Vict. c. 98, s. 20.

In R. *v.* Etheridge (19 Cox, C. C. 676) it was held that "Record" in sect. 28 of 24 & 25 Vict. c. 98, means record of a court of competent jurisdiction, and forgery of a document which, although an official document, is not kept in pursuance of any statutory authority, does not constitute an offence within that section. Consequently uttering as a certificate of letters of ordination a document purporting to be a copy of the register of ordinations, to which the signature of the registrar of the diocese was forged, is not indictable under that section, the register of ordinations not being kept under any statutory authority.

In R. *v.* Elizabeth Dunn (1 Leach, 57) the prisoner was indicted at the Old Bailey on the statute 2 Geo. II. c. 13, s. 1, for forging and uttering a promissory note for the payment of money, in the words and figures following :—

"London, July 27, 1765.

"I promise to pay Mr. Edward Hooper, or order, the sum of three (omitting the word 'pounds') thirteen shillings and sixpence, seven days after date, value received by me.

"Witness, John Whettall,

her

"Mary X Wallace."

mark

with intention to defraud the said Edward Hooper.

The second count laid it to be with intent to defraud the person entitled to receive the wages due for the service of John Wallace, deceased, late seaman on board His Majesty's ship "l'Epreuve."

It appeared upon the evidence that Mr. Hooper was a prize agent, and that the prisoner in June, 1765, applied to him, at his office for receiving seamen's wages, in the name of Mary Wallace, with the probate, or pretended probate, of the will of her husband, John Wallace, in which probate Mary Wallace was named his executrix; in consequence of which he made search, and found there were wages due to John Wallace; but he refused to pay her until she

produced a certificate of her being the Mary Wallace named in the will. She, however, pleaded poverty, and prevailed on him to lend her five shillings. She afterwards produced the certificate; but as the money could not be immediately got, she begged he would let her have a little more on the credit of the wages due to John Wallace. In consequence of her importunity he advanced three guineas and a half. He then wrote the body of the promissory note above described, and called his lad, who saw her make her mark. Hooper then asked her what name he must write over her mark; to which she answered: "You know my name well enough; I told you before it was Mary Wallace." Hooper then wrote over her mark "Mary Wallace, her mark," and his lad witnessed it. It was, however, clearly proved that her name was Elizabeth Dunn, and not Mary Wallace, and that the whole account she had given was a fabrication.

The jury found the prisoner guilty; but the Recorder having doubts whether, as the note, though made by the prisoner in an assumed name and character, was her own note, made and offered as her own, and not as the note of another in contradiction to herself, the offence was a forgery, he postponed the sentence, and reserved the case for the opinion of the judges.

Ten judges met to consider the case, and nine of them were of opinion that this was a capital forgery. They agreed, that in all forgeries the instrument supposed to be forged must be a false instrument in itself; and that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit being there wholly given to himself, without any regard to the name, or without any relation to a third person. But they thought that an instrument which is altered as the act and instrument of another, and in that light obtains a superior credit, when, in truth, it is not the act of the person represented, is strictly and properly a false instrument; for in that case the party deceived does not advance his money or accept the instrument upon the personal credit of the party producing it, but upon the name and character of a third person whose situation and circumstances import a superior security for the debt; and, therefore, if in truth it is not the instrument of that third person, whose name and situation induced the credit, it is certainly a false instrument, and the intention fraudulent to the party imposed upon by it; for he

believed, when he accepted the security, that he had a remedy upon it against the third person in whose name it was given, and on whom he relied when he advanced the money; but this being false, he has no such remedy, and therefore is materially deceived. In this respect the case is very different from that of a person borrowing money upon his own note, and merely assuming a fictitious name, without any relation to a different party; for there the whole credit is given to the party himself; the lender accepts the security as the security of that person only; he has no other remedy in view, but merely against the man he is dealing with, and the security itself is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has therefore a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded. If an instrument be false in itself, and by its purporting to be the act of another a credit is obtained which would not otherwise have been given, it is a forgery, though the name it is given in be really a nonentity. Upon the whole the nine judges were of opinion that the prisoner was liable to a sentence of death, but they agreed to recommend her to mercy.

In R. *v.* Closs (D. & B. 460), in which the prisoner, a picture dealer, was indicted for procuring and selling a copy of one of the pictures of the artist John Linnell, on which the artist's signature was forged, the Court of Crown Cases Reserved held that a forgery must be of some document or writing, and therefore the painting an artist's name in the corner of a picture in order to pass it off as an original picture by that artist is not a forgery; but that if a man in the course of his trade or business, openly carried on, puts a false mark or token upon a spurious article so as to pass it off as a genuine one, and the article is sold and money obtained by means of the false mark or token, he is guilty of a cheat at common law.

In R. *v.* Boult (2 C. & K. 604) it was held that the forgery of a railway pass to allow the bearer to pass free on a railway is a forgery at common law.

In R. *v.* Moah (7 Cox, C. C. 503) the Court of Crown Cases Reserved held that the forgery of a letter of recommendation of character, with intent fraudulently to obtain a situation as a police constable, is an offence at common law.

In R. *v.* Toshack (1 T. & M. 207) the Court of Crown Cases Reserved held that to forge a certificate of service, sobriety and good conduct at sea, with intent to deceive and defraud, is an indictable offence at common law.

In R. *v.* Smith (D. & B. 566) the prisoner was convicted at the Central Criminal Court of forgery. It appeared that one Borwick, the prosecutor, sold powders called "Borwick's Baking Powders," and "Borwick's Egg Powders," which powders he sold in packets wrapped up in printed papers. The prisoner procured 10,000 wrappers to be printed similar, with some exceptions, to Borwick's wrappers. In these wrappers the prisoner inclosed powders of his own which he sold for Borwick's powders; and it was for the forgery and uttering of these wrappers that the prisoner was indicted. The jury found that the wrappers so far resembled Borwick's as to deceive persons of ordinary observation, and to make them believe them to be Borwick's, and that they were procured and used by the prisoner with intent to defraud. The Court of Crown Cases Reserved held that the conviction was wrong. Pollock, C. B., said: "The defendant may have been guilty of obtaining money by false pretences, of that there can be no doubt; but the real offence here was the inclosing of the false powder in the false wrapper. The issuing of this wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery, nor could the man who printed them be indicted. The real offence is the issuing them with the fraudulent matter in them. . . . They are merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things together as alike which are essentially different. It might as well be said that if one tradesman used brown paper for his wrappers, and another tradesman had his brown paper wrappers made in the same way, he could be accused of forging the brown paper." Willes, J., said: "I agree in the definition of forgery at common law, that it is the forging of a false document to represent a genuine document. . . . This is not one of the different kinds of instruments which may be made the subject of forgery. It is not made the subject of forgery simply by reason of the assertion of that which is false." Bramwell, B.,

said: "Forgery supposes the possibility of a genuine document, and that the false document is not so good as the genuine document, and that the one is not so efficacious for all purposes as the other. In the present case one of these documents is as good as the other—the one asserts what the other does—the one is as true as the other, but one gets improperly used."

In connection with the decision in the leading case it may be mentioned that by the Post Office Protection Act, 1884 (47 & 48 Vict. c. 76), it is enacted (sect. 11) that every person who forges or wilfully and without due authority alters a telegram or utters a telegram knowing the same to be forged, or wilfully and without due authority alters, or who transmits by telegraph, any message or communication which he knows to be not a telegram, shall, whether he had or had not an intent to defraud, be guilty of a misdemeanour, and shall be liable, on summary conviction, to a fine not exceeding ten pounds, and, on conviction on indictment, to imprisonment with or without hard labour for a period not exceeding twelve months.

The Forging.

[102] R. *v.* WILLIAM RITSON AND SAMUEL RITSON. (1869)

[L. R. 1 C. C. R. 200; 11 Cox, C. C. 352: 39 L. J. (M. C.) 10; 21 L. T. 437; 18 W. R. 73.]

The prisoners were indicted under 24 & 25 Vict. c. 98, s. 20, for forging a deed with intent to defraud J. Gardiner. W. Ritson was the father of S. Ritson. He had been entitled to certain land which had been conveyed to him in fee, and he had borrowed of the prosecutor, J. Gardiner, on the security of this land, more than 730*l.*, for which he had given, on the 10th of January, 1868, an equitable mortgage by written agreement and deposit of title deeds.

On the 5th of May, 1868, W. Ritson executed a deed of assignment under the Bankruptcy Act, 1861, conveying all his real and personal estate to a trustee for the benefit of creditors; and on the 7th of May, 1868, by deed between the trustees and W. Ritson and the prosecutor, reciting, amongst other things, the deed of assignment and the mortgage, and that the money due on the mortgage was in excess of the value of the land, the trustee and W. Ritson conveyed the land and all the estate, claim, &c., of the trustee and W. Ritson therein, to the prosecutor, his heirs and assigns for ever. After the execution of this conveyance the prosecutor entered into possession of the land. Subsequently S. Ritson claimed title to the land, and commenced an action of trespass against the prosecutor. The prosecutor then saw the attorney for S. Ritson, who produced the deed charged as a forged deed, and the prosecutor commenced this prosecution against W. and S. Ritson.

This deed was dated the 12th of March, 1869, the date being before W. Ritson's deed of assignment and the conveyance to the prosecutor, and purported to be made between W. Ritson of the one part and S. Ritson of the other part. It recited the original conveyance in fee to W. Ritson, and that W. Ritson had agreed with S. Ritson for a lease to him of part of the land conveyed to the prosecutor as mentioned above, for the term of 999 years from the 25th of March then instant. The deed contained no notice of any title, legal or equitable, of the prosecutor, and contained the usual covenants between a lessor and lessee. It was executed by both W. and S. Ritson.

The deed had in fact been executed after the assignment to W. Ritson's creditors, and after the conveyance to the prosecutor, and the deed had been fraudulently ante-dated by W. and S. Ritson for the purpose of overreaching the conveyance to the prosecutor. It was contended, on behalf of the prisoners, that the deed could not be a forgery as it was really executed by the

parties between whom it purported to be made. The Court of Crown Cases Reserved affirmed the conviction.

Kelly, C. B., said: "The definition of forgery is not, as has been suggested in argument, that every instrument containing false statements fraudulently made is a forgery; but by adopting the correction of my brother Blackburn, that every instrument which fraudulently purports to be that which it is not is a forgery, whether the falseness of the instrument consists in the fact that it was made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed. I adopt this definition. It is impossible to distinguish this case in principle from those in which deeds made in a false name are held to be forgeries. There is no definition of forgery in 24 & 25 Vict. c. 98, but the offence has been defined by very learned authors, and we think this case falls within their definitions."

Blackburn, J., said: "When an instrument professes to be executed at a different date from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at common law."

Lush, J., said: "If the parties to this deed had inserted the true date in the first instance and had subsequently altered it, there is no question that it would have been a forgery. The offence would then have fallen within the letter of 24 & 25 Vict. c. 98, s. 20, which says: 'Whoever with intent to defraud shall forge or alter . . . any deed,' &c., shall be guilty of felony. It would be absurd to hold that an alteration might constitute a forgery, but that an original false making would not. We could not yield to such a distinction unless we were obliged. I am satisfied that 'forge' in sect. 20 of 24 & 25 Vict. c. 98, should be understood in the sense in which that word is used in the authorities, new and old, on the subject. To make a deed appear to be that which it is not, if done with a fraudu-

lent intent to deceive, is a forgery, whether the falsehood consists in the name or in any other matter."

[Addison for the prosecution; Torr for the prisoner.]

In Comyns' Digest forgery is defined as "where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another."

In Bacon's Abridgement there is the following definition: "The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal . . . but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have."

It may be forgery for an agent merely to exceed his authority in making a writing, or to add to the name of one of the parties to the writing the address of a different person of the same name. It may be forgery to make a writing in the name of an imaginary person. In Mead *v.* Young (4 T. R. 28) it was held that if a bill of exchange, payable to A. or order, gets into the hands of another person of the same name as the payee, and such person, knowing that he was not the real person in whose favour it was drawn, indorses it, he is guilty of forgery.

In R. *v.* Martin (5 Q. B. D. 34) the prisoner, Robert Martin, in payment for a pony and cart purchased by him from the prosecutor, drew a cheque in the name of William Martin, in the presence of the prosecutor, upon a bank at which he, the prisoner, had no account, and gave it to the prosecutor as his own cheque drawn in his own name. At the time he drew the cheque, the prisoner knew that it would be, as in fact it was, dishonoured. The prosecutor received the cheque in the belief that it was drawn in the prisoner's own name.

On the point being reserved, the Court of Crown Cases Reserved quashed the conviction. Cockburn, C. J., said; "The case is concluded by authority. In Dunn's Case (1 Leach, 57, *vide ante*, p. 414), it was agreed by all the judges that in all forgeries the instrument supposed to be forged must be a false instrument in itself, and

that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person. Upon authority, as well as upon principle, it is clear that this conviction should be quashed."

In R. *v.* Jones (1 Douglas, 300), in which case the prisoner was indicted for forgery, the Court held that a representation made by the prisoner after the note was made could not alter the purport of the instrument.

Where a prisoner had fraudulently used the name of another person for the purposes of his trade, and had afterwards accepted a bill in that name, the Court held that he could not be convicted of forgery unless, when he first assumed the fictitious name, he contemplated the making of that specific bill. (R. *v.* White, 5 Cox, C. C. 290.)

A request to send an article to be looked at was held not to be a forged order within the meaning of the statute. (R. *v.* Parker, Sessions Paper, C. C. C., Vol. 87, p. 350.) Signing a name of a non-existing person was held to be a forgery. (R. *v.* White, Sessions Paper, C. C. C. Vol. 72, p. 225.) In R. *v.* Cook (Sessions Paper, C. C. C., Vol. 53, p. 388) the Court held that the depositing a forged note with a stakeholder, in a bet, is not a sufficient uttering.

As to forgery of an order for admission to a theatre, *vide* R. *v* Bennett, Sessions Paper, C. C. C., Vol. 73, p. 95.

Other cases are:—R. *v.* Harper, 7 Q. B. D. 78; R. *v.* French, L. R. 1 C. C. R. 217; R. *v.* Brackenridge, L. R. 1 C. C. R. 133; R. *v.* Kay, L. R. 1 C. C. R. 257; R. *v.* Chambers, L R. 1 C. C. R. 341; R. *v.* Bolland, 1 Leach, 83; R. *v.* Bateman, 1 Cox, C. C. 186; R. *v.* Blenkinsop, 2 C. & K. 531; R. *v.* Lewis, Forster's Crown Law, 116; R. *v.* Griffiths, D. & B. 584; R. *v.* Sheppard, 1 Leach, 226; R. *v.* Parkes, 2 Leach, 775; R. *v.* Mahony, 6 Cox, C. C. 487; R. *v.* Collins, 2 M. & R. 461; R. *v.* Chadwick, 2 M. & R. 545; R. *v.* Murphy, 2 East, P. C. 949; R. *v.* Hawkeswood, 2 East, P. C. 955; R. *v.* Elliot, 2 East, P. C. 951; R. *v.* Sharman, Dears. C. C. 285.

The statute on the subject is the Forgery and False Personation Act, 1861 (24 & 25 Vict. c. 98). This statute deals with a very large number of forgeries, such as transfer of stock, false entries in

books of the public funds, East India bonds, exchequer bills, bank notes, deeds and bonds, wills or codicils, bills of exchange, cheques, and other matters.

Forgery—The Intent to Defraud.

R. *v.* HILL. (1838) [103]

[8 C. & P. 274; 2 Moo. 30.]

The prisoner, who was a farmer, had, on the 26th of May, 1837, given a forged bill to a Mr. Minor in payment for some barren cows, and, after it had come back dishonoured, Mr. Minor and a Mr. Harris went to the prisoner, and the former said to him, speaking of the persons named in the bill, "Tell me where I can find any one of them," and the prisoner said he could not; and on Mr. Minor replying, "Do you mean to tell me that they are all forgeries?" the prisoner answered, "Oh, no; the bankers have done it."

The learned Judge who tried the case said, in summing up to the jury: "There are two questions of fact which I shall leave to you. First, did the prisoner utter this bill to Mr. Minor as a true bill, and meaning that he should take it as such; and, second, when he did so, did he know it to be forged? If you think that he did, you ought to find, as a necessary consequence of law, that he meant to defraud. I say that you ought to infer it if you are satisfied on the two other points. A man must be taken to intend the consequences of his own acts, and must intend to defraud if he pays another a false note instead of a real one." The jury convicted the prisoner, but the case was reserved, and the

Court of Criminal Appeal, consisting of fifteen judges, affirmed the conviction.

[Corbett and J. G. Phillimore for the prosecution; C. Phillips and F. W. Lee for the prisoner.]

By 24 & 25 Vict. c. 98, s. 44 (The Forgery and False Personation Act, 1861), it shall be sufficient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud. (Similar former enactment 14 & 15 Vict. c. 100, s. 8.)

"An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact; nor by the fact that he had, or thought he had, a right to the thing to be obtained by the false document.

"The presumption may be rebutted by proof that at the time when the false document was made there was no person who could be reasonably supposed by the offender to be capable of being defrauded thereby; but it is not necessarily rebutted by proof that there was no person who could in fact be defrauded thereby.

"It is uncertain whether, in the absence of any evidence as to the existence of any person who can be defrauded by a false document, an intent to defraud will or will not be presumed from the mere making of the document." (Stephen's Digest of the Criminal Law.)

In R. *v.* Hodgson (D. & B. 3), the prisoner was indicted at common law for forging and uttering a diploma of the College of Surgeons. He procured a diploma actually issued by the College of Surgeons, erased the name of the person mentioned in it, and substituted his own, changed the date, and made other alterations

to make it appear to be a document issued by the College to him. He hung it up in his dining-room, and onbeing asked by two other medical practitioners whether he was qualified, he said he was, and produced this document to prove his assertion. When a candidate for an appointment as vaccinating officer, he stated he had his qualification, and would show it if the person inquiring (the clerk of the guardians who were to appoint to the office) would go to his (the prisoner's) gig. He did not, however, then produce or show it. The jury convicted the prisoner, and the Court of Crown Cases Reserved quashed the conviction.

Jervis, C. J., said: "The recent statute for further improving the administration of criminal justice (14 & 15 Vict. c. 99) alters and affects the forms of pleadings only, and does not alter the character of the offence charged. The law as to that is the same as if the statute had not been passed. This is an indictment for forgery at common law. I will not stop to consider whether this is a document of a public nature or not, though I am disposed to think that it is not a public document; but whether it is or not, in order to make out the offence there must have been, at the time of the instrument being forged, an intention to defraud some person. Here there was no such intent at that time, and there was no uttering at the time when it is said there was an intention to defraud."

Wightman, J., said: "I am entirely of the same opinion, Before the late statute it was necessary to allege an intent to defraud someone, and there must be an intention to do so now. In this case it does not appear that at the time when the forgery was committed there was an intention to defraud anyone."

It may be mentioned that although the Court of Crown Cases Reserved quashed the conviction for forgery in the above case, the date of the case being 1856, the same matter was dealt with two years later in the Medical Act, 1858 (21 & 22 Vict. c. 90). Section 40 of this statute enacts that any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, &c., shall be liable on summary conviction to a fine of 20*l.*

In R. *v.* Trenfield (1 F. & F. 43) it was held that it is sufficient, upon an indictment for forgery and uttering a bond, to lay the intent generally to defraud; and the prisoner may be convicted,

although it does not appear that he had any intention ultimately to defraud the party whose signature he had forged, he having defrauded the party to whom he uttered the instrument.

In R. *v.* Marcus (2 C. & K. 356) it was held that in forgery it is not required, in order to constitute in point of law an intent to defraud, that the party committing the offence should have had present in his mind an intention to defraud a particular person, if the consequences of his act would necessarily or possibly be to defraud any person; but there must at all events be a possibility of some person being defrauded by the forgery.

In R. *v.* Cooke (8 C. & P. 582) the Court held that if a person, at the time he uttered a bill of exchange with a forged acceptance on it, knew that acceptance to be forged, and meant the bill to be taken as a bill with a genuine acceptance upon it, the inevitable conclusion is, that he intended to defraud. So it is a consequence, and almost a consequence of law, that he must intend to defraud the person to whom he pays the bill, and also the person whose name is used; as everything which is the natural consequence of the act must be taken to be the intention of the prisoner.

In R. *v.* Wilson (2 C. & K. 527) A. gave to B., his clerk, a blank cheque, and directed him to fill it up with the amount of a bill and expenses (for which A. had to provide, and which amount B. was to ascertain), and get the cheque cashed, and pay the amount to Mr. W., and take up the bill. The bill was for 156*l.* 9*s.* 9*d.*, the expenses about 10*s.* B. filled up the cheque with the sum of 250*l.* got it cashed, and kept the whole of the amount, alleging that it was due to him for salary. The Court of Crown Cases Reserved held that this was forgery, and that this was so even if B. *bonâ fide* believed that 250*l.* were due to him from A., or even if it were really due to him. In this case the name "John M'Nicoll," signed to the forged instrument, was, in the setting out of the forged instrument in the indictment, written John M'Nicole. Held not to be a variance.

In R. *v.* Mary Mazagora (R. & R. 291), the prisoner was indicted for disposing of a forged bank note, with intent to defraud the Governor and Company of the Bank of England. It appeared in evidence, that the prisoner sold this note, and eight others, with a full knowledge that they were all forged. An inspector from the bank proved that the notes were such as would be likely to impose

upon any persons who were not inspectors of the bank, but that they were not likely to impose upon any of the inspectors there. He stated also that notes were never paid at the bank until after they had been examined by an inspector. It was not a probable consequence therefore of the prisoner's act that the bank would be defrauded by means of these notes. The prisoner was convicted, and the jury in returning their verdict stated that they thought the prisoner had the intention to defraud whoever might take the notes, but that the intention of defrauding the bank in particular did not enter into her contemplation. The opinion of the judges was taken upon the following question, whether an intention to defraud the bank ought to be inferred where that intention was not likely to exist in fact in the prisoner's mind, and where the caution ordinarily used would naturally protect the bank from being defrauded? The judges were unanimously of opinion that the prisoner, upon the evidence in this case, must be taken to have intended to defraud the bank, and consequently that the conviction was right.

In R. *v.* Geach (9 C. & P. 499) the Court held that if a person knew the acceptance of a bill of exchange to be forged, and uttered it as true, and believed that his bankers, to whom he uttered it, would advance money on it, which they would not otherwise, that is ample evidence of an intent to defraud, and evidence upon which a jury ought to act; and a person is not the less guilty of forgery because he may intend ultimately to take up the forged bill, and may suppose that the party whose name is forged will be no loser, and the fact that the bill has since been paid by the prisoner will make no difference, if the offence has once been complete at the time of the uttering.

Other cases in point are:—R. *v.* Nash, 2 Den. 503; R. *v.* Todd, 1 Cox, C. C. 57; R. *v.* James, 7 C. & P. 553; R. *v.* Hoatson, 2 C. & K. 777; R. *v.* Taff, 1 Den. 319.

Falsification of Accounts.

[104] **R. *v.* WILLIAMS.** (1899)

[19 Cox, C. C. 239; 79 L. T. 739; 63 J. P. 103.]

The defendant, who was a collector of poor rates, whose duties included the keeping of the overseer's receipt and payment book, stated the account showing a balance to be due from the overseer to the inhabitants. This balance, which was correct as to the difference between receipts and expenditure, he stated as "balance in hand." He, however, was unable to produce this amount. The Court of Crown Cases Reserved held that the words "in hand" did not make the entry false, the account being a correct record of receipt and expenditure, and that the collector could not therefore be convicted of falsification of accounts even if he had misappropriated the amount.

[Horace Avory for the prosecution; T. W. Chitty for the prisoner.]

In R. *v.* Birt (53 J. P. 328), it was held that if a director or manager of a public company publishes a false statement of account, knowing that it is false, with the intent that it shall be acted upon by those whom it reaches, he is guilty in law of publishing such statement with intent to defraud.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), it is enacted that directors, &c., of any body corporate or public company fraudulently appropriating property, or keeping fraudulent accounts, or wilfully destroying books, &c., or publishing fraudulent statements, shall be guilty of a misdemeanour (sects. 81, 82 and 83).

By 38 & 39 Vict. c. 24 (the Falsification of Accounts Act, 1875), it is enacted:—

That if any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs

to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud, make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document or account, then in every such case the person so offending shall be guilty of a misdemeanour.

In R. *v.* Palin ([1906] 1 K. B. 7), the prisoner, a servant, was convicted under sect. 1 of the Falsification of Accounts Act, 1875, on an indictment which charged him with making a false entry in an account. It was proved that the account in question did not belong to and was not in the possession of the employer. The Court of Crown Cases Reserved held that the conviction must be quashed, since the intention of the Legislature, as manifested in the preamble to the Act, was to punish the falsification by clerks, officers, servants, or others, of their employer's accounts.

In R. *v.* Oliphant ([1905] 2 K. B. 67, and 21 Cox, C. C. 192) the defendant was employed by a firm, carrying on business in London, to manage their branch establishment in Paris. It was his daily duty to enter on slips an account of all sums received by him in Paris for his employers, and to transmit these slips to them in London in order that the amounts might be entered up in a cash-book kept in London. On a certain date the defendant received three sums in Paris which he fraudulently appropriated to his own use, and omitted to enter the receipt thereof on the slips sent by him on that day to London, knowing and intending that the same would in consequence be omitted from the cash book, as was the case. The defendant was indicted at the Central Criminal Court under sect. 1 of the Falsification of Accounts Act, 1875, for omitting, or concurring in omitting, material particulars from the cash book, and convicted. The Court of Crown Cases Reserved held that the Court had jurisdiction to try the case, and that the defendant was rightly convicted.

In R. *v.* Drewett (69 J. P. 37) the Court of Crown Cases Reserved held that in a charge of falsification of accounts it is necessary to show not merely false entries in the books or accounts, but that such false entries were made with intent to defraud, and the question of the intent with which such entries was made is for the jury.

Burglary—Breaking and Entering.

[105] **R. *v.* HUGHES.** (1785)

[1 Leach, 406.]

The prisoner, with the intention of breaking into a house in the night-time to steal, bored a hole with an instrument called a "centre-bit" through the panel of the house door near to one of the bolts by which it was fastened. Some of the pieces of the broken panel were found inside the threshold of the door, but it did not appear that any instrument, except the point of the centre-bit, or that any part of the prisoner's body, had been inside, or that the aperture made was in fact large enough to admit a man's hand. It was held that there was a sufficient breaking, but that there was here no sufficient entry to constitute burglary.

[No counsel appeared.]

Burglary is the breaking and entering a dwelling-house between 9 p.m. and 6 a.m. with intent to commit a felony, or the breaking out after having committed one inside, or after having gone in with the intention of committing one. There must be a breaking. The prisoner has "broken" not only if he effected his entrance by violence, but also if he got in by pushing up a closed but unfastened window, or if he came down the chimney. But he has not broken if he entered by a hole in the roof, or through an open window, even though he had to raise it a little to squeeze through. The distinction here between the chimney and the hole in the roof is, that the chimney is a necessary opening, while the hole ought not to be there, and the householder must take the consequences of his imprudence. Even if the prisoner has gained admission into the house without breaking, yet his breaking open inner doors will be sufficient. It is a doubtful point, however, whether it would be sufficient to show that he broke open the door of a cupboard attached to the freehold. Breaking open

moveable chests would certainly not be enough. The breaking may be constructive, as, for instance, where the prisoners obtain admission by knocking at the door as if their intentions were honest. So if a servant lets a thief into the house at night, both of them are guilty of burglary. There is a constructive breaking, too, where the owner of the house himself opens the door to the thieves in consequence of their threats, or in order the better to repel them. A mere entry, if obtained by deceit, is in law a constructive breaking; but not an entry which follows upon a mere unsuccessful attempt to deceive.

There must be an entry; but it need not be on the same night as the breaking. (R. *v.* Smith, R. & R. C. C. 417.)

Where no part of the prisoner's body entered the house, but he introduced an instrument, whether that introduction was such an entry as to make him guilty of burglary depends on the object with which the instrument was employed. Thus, if the instrument was employed not merely for the purpose of making the entry, but for the purpose of committing the contemplated felony, it will be held to have been an entry, as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand is not in, this is an entry.

In R. *v.* Rust (1 Moo. C. C. 183), where the prisoner threw up a window and introduced a crow-bar to force the shutters, which were three inches from the window, but no part of his hand was within the window, this was held not to be an entry, although the jury found that the prisoner did it with the intent to steal.

Though a thief enters a dwelling-house at night through an open door or window, yet if, when within, he breaks or opens an inner door with intent to commit felony, it is burglary. (R. *v.* Johnson, 2 East, P. C. 488.)

Removing the fastening of a window by the hand introduced through a partially broken pane of the window and thereby opening the window and entering is a breaking; not by breaking the residue of the pane, but by unfastening and opening the window. (R. *v.* Robinson, 1 M. C. C. 327.)

If there is an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary (R. *v.* Lewis, 2 C. & P. 628); nor, if a window is a little open and the prisoner pushes it wide open and then enters, is it a sufficient breaking.

(R. *v.* Smith, 1 M. C. C. 178.) But it is a sufficient breaking if the prisoner breaks a pane of glass of a window and puts his hand in for the purpose of opening the shutter, although he did not succeed in doing so. (R. *v.* Perkes, 1 C. & P. 300.) Lifting the flap of a cellar usually kept down by its own weight is a sufficient breaking for the purposes of burglary. (R. *v.* Russell, 1 M. C. C. 377.) Where the prisoner had entered through the upper part of a window, which the prosecutor had closed a short time before, and which the prisoner had opened by pushing down the upper sash, the Court held that this was a sufficient breaking (R. *v.* Haines, R. & R. 451); and the breaking of even an inner door suffices. (R. *v.* Wenmouth, 8 Cox, C. C. 348.) If a person commits a felony in a house, and breaks out of it in the night time, this is burglary although he might have been lawfully in the house. (R. *v.* Wheeldon, 8 C. & P. 747.) Unlocking and opening a hall door and running away, is a sufficient breaking out of the house to constitute a burglary. (R. *v.* Lawrence, 8 C. & P. 231.)

Where the breaking with intent to commit a felony is proved, but there is no proof of entry, the prisoner may be convicted of the attempt to commit burglary. (R. *v.* Spanner, 12 Cox, C. C. 155.)

By 24 & 25 Vict. c. 96, s. 51, whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or, being in such dwelling-house, shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary.

By sect. 53, no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of the Act, unless there shall be a communication between such building or dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.

By sect. 54, whosoever shall enter any dwelling-house in the night with intent to commit any felony therein shall be guilty of felony.

By sect. 55, whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provisions hereinbefore mentioned, or

being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony.

By 59 & 60 Vict. c. 57, burglary is triable at Quarter Sessions.

As to owner facilitating the taking for purposes of detection, *vide* R. *v.* Egginton, Leach, 913.

Burglary—What is a Dwelling-house.

R. *v.* WESTWOOD. (1822) [106]

[R. & R. C. C. 495.]

The prisoner was indicted before Mr. Justice Park at the Summer Assizes for the county of Surrey in 1822 for a burglary in the dwelling-house of John Bailey at Epsom, and stealing various articles. Of the existence of the usual circumstances to constitute burglary and grand larceny there was no question, and the prisoner was capitally convicted. But a doubt arose in the mind of the learned Judge (there being no counsel for the prisoner), whether the place in which the felony was committed could be considered as a parcel of the dwelling-house of Mr. Bailey, the prosecutor, and the learned judge respited the judgment until the following Assizes.

The house of the prosecutor was in the High Street at Epsom. At the back of the house was a common passage or street, through which all the King's subjects passed by day and night, being a footway of the width of nine feet. Across this passage and opposite to the dwelling-house were several buildings and rooms used by Mr. Bailey for the purposes of his house, namely, one for a kitchen, another for a coach-house, adjoining to which were a larder and brewhouse. Over the brewhouse, a servant-boy always slept, but no others of

Mr. Bailey's family ever slept there, and this was the room, by breaking into which the offence was committed. There was no communication between the dwelling-house and these buildings, nor anything to connect them, except that there was a kind of canopy or awning reaching over the common passage or footway to prevent the rain from falling on the victuals in their conveyance from the kitchen to the dwelling-house, but not at all obstructing the highway.

The question submitted to the learned judges (Crown Cases Reserved) was whether the place in question could be considered as part of the dwelling-house of the prosecutor. A great majority of the judges were of opinion that the room in question was not parcel of the dwelling-house in which Mr. Bailey dwelt, because it did not adjoin it, was not under the same roof, and had no common fence. Graham, B., was of opinion that it was parcel of the house. But all the judges, except Park, J., were of opinion that it was a distinct dwelling-house of Mr. Bailey's, and the indictment having described it as his, the conviction was right.

[No counsel appeared.]

The premises broken and entered must be a dwelling-house. By "dwelling-house" is meant any building which is an habitual residence, provided that it is of a permanent character, and not a mere tent or booth. Even if the person who usually resides there is temporarily absent, and nobody is sleeping there at all, it is still a "dwelling-house." Buildings attached to a dwelling-house can only be entered burglariously if they are connected by a closed internal communication. Chambers in a college or an inn of court are "dwelling-houses" for this purpose. A building which, though occupied, is not slept in is not a dwelling-house, even though the tenant intends to sleep there soon; but if occupied by a household habitually, it remains a dwelling-house even during their temporary absence.

The crime of house-breaking differs from burglary in two important respects. It is not material between what hours it is committed, and, secondly, it is not confined to dwelling-houses,

but extends to out-houses, shops, school-houses, &c. In other respects the evidence required is much the same as when the crime charged is burglary. It should be added that, though house-breaking with intent to commit a felony is only punishable with seven years' penal servitude, if the felony is actually committed, the prisoner can get fourteen.

Sacrilege is the breaking into a place of divine worship and committing a felony therein, or breaking out after committing one, and is punishable with penal servitude for life. If only the intent to commit the felony after breaking in is proved, the maximum punishment is seven years' penal servitude. It has been held that the vestry, being part of the fabric, is a "place of divine service." (R. *v.* Evans, Car. & M. 298.)

Other crimes connected with burglary are, being found armed by night with intent to break into a dwelling-house and commit a felony therein, having house-breaking implements by night without lawful excuse, and being disguised by night with intent to commit a felony.

Vide R. *v.* Oldham, 5 Cox, C. C. 551; R. *v.* Bailey, 6 Cox, C. C. 241; R. *v.* Jarrald, 9 Cox, C. C. 307; R. *v.* Thompson, 11 Cox, C. C. 362.

Arson.

R. *v.* CHILD. (1871) [107]

[L. R. 1 C. C. R. 307; 40 L. J. (M. C.) 127; 24 L. T. 556; 19 W. R. 726; 12 Cox, C. C. 64.]

The prisoner, from ill-will and malice against the prosecutrix, broke up her chairs, tables, and other furniture, made a pile of them and her clothes on the stone floor of the kitchen of her lodgings, and lit them at the four corners, so as to make a bonfire of them. The building would almost certainly have been burned in consequence had not the police, who

were sent for, succeeded in extinguishing the bonfire which the prisoner had kindled before the house was actually ignited. The prisoner was indicted under 24 & 25 Vict. c. 97, s. 7, which provides that "whosoever shall unlawfully and maliciously set 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, shall be guilty of felony." The verdict of the jury was "Guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious." On this finding, it was held that the prisoner was entitled to have his conviction quashed.

Bovill, C. J., said: "The evidence was that the prisoner, from ill-will and malice against the owner of goods in a house, set fire to those goods, under such circumstances that the house would almost certainly have been burned if the fire had not been extinguished. But, in fact, the house was not set on fire. Upon these facts the learned judge left it to the jury to say whether, if the house had caught fire, the setting fire to it would have been malicious and with intent to injure. And he told them that if they thought the prisoner was aware that what he was doing would probably set the building on fire, and so necessarily injure the owner, and was at best reckless whether he did so or not, they ought to find that if the house had caught fire the offence would have been felony. The jury found the prisoner guilty, but not so that if the house had caught fire the setting fire to it would have been wilful and malicious. By that finding, I think they negatived the whole of what the learned judge left to them, and found, in effect, that the prisoner was not aware that what he was doing would probably set fire to the house, and so injure the owner, and was not reckless whether he did so or not. The only finding of the jury, therefore, is that the goods were set on fire with intent to injure the owner of the goods. Now,

there is no section in the Act which makes the wilful and malicious setting fire to goods felony. The only section which could be applicable to the case is sect. 7; and if we were to hold the case to be within that section, we should be rejecting the words 'under such circumstances that if the building were thereby set fire to the offence would amount to felony.' I think that, to come within those words, the facts must have some relation to the house; and that they point to circumstances under which, if the house caught fire, the offence would fall within some of the earlier sections of the Act. But the case does not fall within any of them. It is a simple case of wilfully and maliciously setting fire to goods, and no more felony than setting fire to a box of matches on a stone floor."

"I reserved the question for this Court," said Blackburn, J., "because I thought the framers of the section in question intended to include this case. But they have failed to express their intention. The earlier enactment, 14 & 15 Vict. c. 19, s. 8, made it felony wilfully and maliciously to set fire to goods 'being in any building the setting fire to which is made felony, &c.' And under those words the prisoner might have been convicted of felony under both counts. But the Consolidating Act uses different words. It speaks of setting fire to goods in a building under such circumstances that if the building were thereby set fire to, the offence would amount to felony."

[No counsel appeared.]

A person who maliciously set fire to his own goods in his own house, to defraud an insurance company, but did not set fire to the house, might be convicted of felony under an indictment framed upon 14 & 15 Vict. c. 19, s. 8, and 7 Will. IV. & 1 Vict. c. 89, s. 3. (R. *v.* Lyons, Bell, C. C. 38, and 8 Cox, C. C. 84.)

24 & 25 Vict. c. 97, s. 7, enacts that "whosoever shall unlawfully and maliciously set 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, shall be

guilty of felony, and, being convicted thereof, shall be liable at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years; or to be imprisoned for any term not exceeding two years with or without hard labour, and if a male under the age of sixteen, with or without whipping."

Wilfully throwing a light into a post-office letter-box in a house with the intention of burning the letters, but not the house, is not a felony within 24 & 25 Vict. c. 97, ss. 7, 8. (R. *v.* Batstone, 10 Cox, C. C. 20.)

In the well-known case of the men who stole the picture called "The Monarch of the Meadows," and then set fire to the empty frame in order to destroy the evidence of the theft, the prisoner was indicted under 24 & 25 Vict. c. 97, s. 7, for wilfully and maliciously setting fire to a picture frame in a building under such circumstances as, if the building were thereby set fire to, would amount to a felony. The jury found that prisoner did not set fire to the house apart from the frame, that he did set fire to the frame, that the probable result would be setting fire to the floor of the house, that he did not intend to set fire to the house, that he was not aware that what he did would probably set the house on fire and so injure the owner, and that he was not reckless or indifferent whether the house was set on fire or not. Upon these findings, a verdict of Not Guilty was directed by the judge. (R. *v.* Harris, 15 Cox, C. C. 75.)

A servant girl entered on her service on the 2nd day of January, and on the 18th received notice to leave at the end of the month. On the 15th a sheet was discovered burning on a chair in front of, but four feet from, the kitchen fire. The girl was in the kitchen, and either could not or would not give any account of the occurrence. Later on in the same day, the prisoner's apron was on fire, although it was hanging on the kitchen wall, ten feet away from the fire. At 5 p.m. on the same day, there was a third fire, and at 7 p.m. the bed and bedding in the nursery were on fire, the girl being there at the time. No part of the house was actually burnt. —Held, that upon the above facts the girl could not be indicted for the felony under 24 & 25 Vict. c. 97, s. 7, for setting fire to things in a building under such circumstances that, if the building were thereby set fire to, would amount to felony. Held, also, that if a

person maliciously, with intent to injure another by merely burning his goods, sets fire to such goods in his house, that does not amount to a felony under 24 & 25 Vict. c. 97, s. 7, even although 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, in which case there would be abundant evidence that he intended to bring about the probable consequence of his act, viz., the burning of the house. (R. *v.* Nattrass, 15 Cox, C. C. 73.)

In R. *v.* Faulkner (11 Ir. Rep. C. L. 8, and 13 Cox, C. C. 550) the prisoner was indicted, under 24 & 25 Vict. c. 97, for arson of a ship, the "Zemindar." The indictment contained two counts: the first charged that the prisoner feloniously, unlawfully, and maliciously did set fire to the ship with intent thereby to prejudice the owners of the ship; the second was similar, but charged the intent to be to prejudice the owners of the goods and chattels on board the ship. It was proved that the "Zemindar" was on her voyage home with a cargo of rum, sugar, and cotton; that the prisoner was a seaman on board; that he went into the forecastle hold, opened the sliding door in the bulkhead, and so got into the hold where the rum was stored. He had no business there, and no authority to go there, and went for the purpose of stealing some rum. He bored a hole in the cask with a gimlet; when trying to put a spike in the hole out of which the rum was running, he had a lighted match in his hand, and the rum caught fire. The prisoner himself was burned on the arms and neck, and the ship caught fire and was completely destroyed. The jury convicted the prisoner, but on the point being reserved the Irish Court of Crown Cases Reserved quashed the conviction.

In a case tried at the Central Criminal Court, Mr. Justice Charles proposed to ask the jury their opinion as to the prisoner's act: if in what he did he acted with a reckless disregard whether the house was set on fire or not, that would be in accordance with the ruling of Mr. Justice Blackburn in Child's case, and would constitute a sufficient intention to injure to justify a verdict of Guilty; a mere intent to injure the owner of the goods destroyed would not be sufficient. The prisoner was convicted. (R. *v.* Turrell, Sessions Paper, C. C. C., Vol. 109, p. 473.)

A prisoner may be indicted under 24 & 25 Vict. c. 97, s. 2, with setting fire to a dwelling-house, a person being therein, though the prisoner himself, who set fire to the house, is the only person therein at the time. (R. *v.* Pardoe, 17 Cox, C. C. 715.)

In R. *v.* Satchwell (L. R. 2 C. C. R. 21, and 12 Cox, C. C. 449) the prisoner was indicted under 24 & 25 Vict. c. 97, s. 17, for setting fire to a stack of straw. It was proved that he set fire to a quantity of straw, amounting to 22 cwts., which was packed on a lorry. The straw had been placed on the lorry to convey it to market, and brought six or seven miles on the way. The horses had been removed, and the lorry with the straw on it left for the night in the yard of an inn, ready to be taken on to market next morning. The Court of Crown Cases Reserved held that the prisoner could not be convicted.

As to evidence of other arsons, *vide* R. *v.* Bailey, 2 Cox, C. C. 311; and R. *v.* Gray, 4 F. & F. 1102.

Malicious Damage to Property.

[108] R. *v.* **WILLIAM FISHER.** (1865)

[L. R. 1 C. C. R. 7; 10 Cox, C. C. 146; 13 L. T. 380.]

The prisoner had been engaged as engine-driver and servant to the prosecutor, and in consequence of a difference between him and the prosecutor, the prisoner left the prosecutor's service.

The prisoner plugged up the feed-pipe of a steam-engine, which had been under the prisoner's care as engine-driver, and was the property of the prosecutor, and displaced other parts of the engine in such a way as rendered it temporarily useless, and would have caused an explosion if the obstruction had not been discovered and removed. It was held that he was guilty

of damaging the engine with intent to render it useless, within the meaning of 24 & 25 Vict. c. 97, s. 15.

"It is like the case of spiking a gun," said Pollock, C. B., "where there is no actual damage done to the gun, although it is rendered useless. The case falls within the expression 'damage with intent to render useless.' Can it be said that the machine was not damaged when it was placed in such a position that, if the water had gone on boiling, the boiler would have burst? Moreover, great injury may be done to a machine by the displacement of its parts; and in this case, until the parts were replaced, the machine was useless. Surely the displacement of the parts was a damage within the 15th section, if done with intent to render the machine useless."

[Orridge for the Crown; J. H. Mills for the prisoner.]

So, under the repealed statute, 28 Geo. III. c. 55, it was held that the taking out and carrying away a part of a stocking-frame, without which the frame would not work, was "damaging" the frame, although the part taken out was not injured, and the replacing it would make the frame all right again. (R. *v.* Tacey, R. & R. 452.)

In Gardner *v.* Mansbridge (19 Q. B. D. 217), the Queen's Bench Division held that in order to constitute the offence of wilfully or maliciously committing damage, injury, or spoil to or upon any real property under s. 52 of the Malicious Injuries to Property Act, 1861, there must be proof of actual damage to the realty itself, and mere damage to uncultivated roots or plants growing upon the realty is insufficient to justify a conviction. The respondent gathered mushrooms in a field belonging to the appellant. They were of value to the latter, but they grew spontaneously, and were entirely uncultivated. No damage was done by the respondent to the grass or the hedges. The Court held that, upon the above facts, the respondent had not been guilty of an offence within sect. 52 of the Act.

In Laws *v.* Eltringham (8 Q. B. D. 283, and 15 Cox, C. C. 22) the soil of a town moor was vested in the corporation of the town

in fee, but freemen and widows of deceased freemen of the town were under statute entitled to the "full right and benefit of the herbage" of the town moor for two milch cows. The respondent was charged with unlawfully and wilfully committing damage, injury, and spoil to or upon certain grass and herbage then growing on the town moor. On a case stated the Queen's Bench Division held that this right to the herbage was not "any real or personal property whatsoever" within the meaning of the Malicious Injuries to Property Act (24 & 25 Vict. c. 97), s. 52, which applies only to tangible property and not to a mere incorporeal right.

In the case of R. *v.* Pembliton (L. R. 2 C. C. R. 119) the prisoner threw a stone at some persons with whom he had been fighting in a street at Wolverhampton, but missed his aim, and broke a valuable plate-glass window. As the jury, while convicting him for breaking the window, acquitted him of all malicious intention, the conviction was quashed.

In Gayford *v.* Chowler ([1898] 1 Q. B. 31, and 18 Cox, C. C. 702) the appellant, a trespasser, walked across a field of the respondent. The grass was long, and the appellant did damage to the grass to the value of 6*d*. The Court held that he was liable to be summarily convicted under sect. 52 of the Malicious Injuries to Property Act, 1861, which makes it an offence to "wilfully or maliciously commit any damage, injury or spoil to or upon any real or personal property whatsoever . . . for which no punishment is hereinbefore provided."

In Roper *v.* Knott ([1898] 1 Q. B. 868) it was held that a milk-carrier who damages his employer's milk by adding water to it, with no intention of injuring his employer, but in order to make a profit for himself by increasing the bulk of the milk, is guilty of an offence under sect. 52 of the Malicious Injuries to Property Act, 1861.

On the trial of an indictment for malicious damage to property under 24 & 25 Vict. c. 97, s. 51, where the defence set up is a claim of right, the proper direction to the jury is: Did the defendants do what they did in the exercise of a supposed right? adding that if, on the facts before them, the jury came to the conclusion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection

of that right, then the jury may properly, and ought to, find the defendants guilty of malicious damage under sect. 51. (R. *v.* Clemens, [1898] 1 Q. B. 556.)

B. was the owner of Gilltown House and demesne in the county of Kildare. The house had been burnt down except the kitchen, where some furniture, including a picture and two mirrors, was stored. M., a military chaplain at the Curragh Camp, obtained leave to bring some of the band boys stationed at the Curragh to the demesne for a day's holiday. Some of the boys strolled over to the building, and from curiosity to see what was in it, smashed open the doors and windows, and five of them entered. One of them in struggling to get out broke the two mirrors. The Court held that the acts were malicious, and were punishable as a crime under the Malicious Damage Act, 1861. (In re Borrowes, [1900] 2 Ir. R. 593.)

As to amount of injury done to trees, under 24 & 25 Vict. c. 96, s. 32, it was held in R. *v.* Shepherd (L. R. 1 C. C. R. 118, and 11 Cox, C. C. 119), that in estimating the amount of the injury, the injuries done to two or more trees may be added together, provided the trees are damaged at one and the same time, or so nearly at the same time as to form one continuous transaction.

Wounding cattle, 24 & 25 Vict. c. 97, s. 40. Upon an indictment under the statute for maliciously wounding a horse, it is not necessary to prove that an instrument was used to inflict the wound. (R. *v.* Bullock, L. R. 1 C. C. R. 115, and 11 Cox, C. C. 125).

In R. *v.* Welch (1 Q. B. D. 23, and 13 Cox, C. C. 121) the prisoner was indicted under 24 & 25 Vict. c. 97, s. 40, for unlawfully and maliciously killing, maiming, and wounding a mare. It was proved that the prisoner caused the death of the mare through injuries inflicted by his inserting the handle of a fork into her vagina, and pushing it into her belly. There was no evidence that the prisoner was actuated by illwill towards the owner of the mare or spite towards the mare, or by any motive except the gratification of his own depraved taste. The jury found that the prisoner did not in fact intend to kill, maim, or wound the mare; but that he knew what he was doing would or might kill, maim, or wound the mare, and nevertheless did what he did recklessly and not caring whether the mare was injured or not. The jury convicted

the prisoner, and the Court of Crown Cases Reserved held that there was sufficient malice, and that the conviction was right.

Vide also R. *v.* Faulkner, *ante*, p. 439, as to injury to property by setting fire to a ship.

Vide also R. *v.* Vasey and Lally, [1905] 2 K. B. 748, as to poisoning fish.

In McDowell *v.* Corporation of Dublin ([1903] 2 Ir. R. 541), a thief for the purpose of committing a larceny, for which he was subsequently convicted, broke a window pane the property of the owner of the stolen goods. The Irish Court of Appeal held that the breaking of the window pane was a crime punishable on indictment under the Malicious Damage Act, 1861.

As to shooting a dog under a *bonâ fide* belief that the act was necessary for the protection of property, *vide* Miles *v.* Hutchings ([1903] 2 K. B. 714), and Armstrong *v.* Mitchell (20 Cox, C. C. 497).

Poaching.

[109] **OSBOND *v.* MEADOWS.** (1862)

[12 C. B. N. S. 10; 31 L. J. (M. C.) 238; 8 Jur. N. S. 1079; 6 L. T. (N. S.) 290; 10 W. R. 537.]

An information was laid by Osbond, a gamekeeper, against Meadows for trespass in pursuit of game. It was proved at the hearing that Meadows, being upon his own land, or land upon which he was privileged to shoot, fired at and killed a pheasant in the land of a farmer named Underhill, and went upon Underhill's land without leave and picked it up. The justices dismissed the case, considering they ought to do so, having regard to R. *v.* Pratt (1 Dears. & P. C. C. 502), and R. *v.* Halloway (1 C. & P. 128). The question for the Court of Common Pleas was whether the justices were right in point of law in dismissing the case. The Court held that it was a

trespass in search or pursuit of game within 1 & 2 Will. IV. c. 32, s. 30, the whole being one continuous act.

Erle, C. J., said: "I am satisfied to give my judgment for the appellant, on the ground that, in substance and reality, the shooting the bird and going upon the land to pick it up was one transaction. The respondent, being upon the land of an adjoining owner, fires at a bird and kills it, and he immediately steps upon the land to pick up the dead bird. The act of going on the land to pick up the bird relates to the act of shooting, and the whole was one transaction. I therefore think that the justices would have been well warranted in coming to the conclusion that the respondent had been guilty of the act of trespass charged against him."

Byles, J., said: "If I were called upon to decide whether or not dead game was within the meaning of the clause in question, I should have desired time to consider. But I entirely agree with the rest of the Court in thinking that the pursuit commenced with the act of firing, and terminated with the act of picking up the dead bird. There was a pursuit of game and there was a trespass. It would be highly inconvenient if we were to inquire in every case whether the bird had breathed its last or not at the time it was picked up. The appellant is clearly entitled to succeed."

[E. Bennett for the appellant.]

By 1 & 2 Will. IV. c. 32, ss. 30, 31, it is a penal offence to trespass in the daytime upon lands in search of game, punishable by a fine before a justice of the peace; and all such trespassers may be required to quit the land, and to tell their names and places of abode, and in case of refusal may be arrested. These provisions, however, do not apply to persons hunting or coursing, or claiming or exercising a right of free warren, nor to gamekeepers; nor do they preclude or prevent any person from proceeding by way of action to recover damages for trespasses, except that when proceedings have been taken under the Act, no action is maintainable for the same trespass.

The 1 & 2 Will. IV. c. 32, s. 30, which imposes a penalty for trespass in search or pursuit of game, means in search or pursuit of wild game; and to constitute the offence of trespassing upon land in search or pursuit of game under the statute, there must be a bodily entering or being of the person upon the land upon which the trespass is alleged to have taken place; and there may be a trespass within the Act, though, at the time, the person is upon a highway. Firing at game from a highway is a trespass in pursuit of game. The leave and licence of the occupier, to be an answer to such complaint, must precede the act of trespass. It has been held that putting down a snare on a day before Sunday, for the purpose of killing game, and keeping it set on Sunday, was using an engine or an instrument on Sunday.

An information for trespass in pursuit of game need not be laid by a person having an interest in the land, but may be laid by a common informer.

By 24 & 25 Vict. c. 96, s. 17, whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be enclosed or not, shall be guilty of a misdemeanour.

And whosoever shall unlawfully and wilfully, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, take or kill any hare or rabbit in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or rabbits, shall, on conviction thereof, before a justice of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the justice shall seem meet; provided that nothing in this section contained shall affect any person taking or killing in the day-time any rabbits on any sea-bank or river-bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank.

Armed Poaching by Night.

R. *v.* SUTTON AND OTHERS. (1877) [110]

[13 Cox, C. C. 648.]

The prisoners were indicted for night poaching, armed, on land in the occupation of the prosecutor, under 9 Geo. IV. c. 69, s. 9, which enacts that if any persons to the number of three or more together shall by night unlawfully enter or be on any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every such person shall be guilty of a misdemeanour. The prisoners had sticks of the ordinary thickness of rustic walking sticks. The prisoner Sutton had a small pitchfork, and he and some of the other prisoners threw stones. It was held that the poachers carrying things not apparently weapons, but capable of being used as such, and brought out to serve for both harmless and offensive purposes, are "armed" within the meaning of the statute. It was also held that a variance between the allegation of the occupation of land in an indictment for night poaching and the proof of the occupation, will, if not such as to have misled the prisoners, be amended at the trial.

Lindley, J., said: "In the first place, it is not necessary that all should be armed. Sutton had the fork, Slater a stick, and Upton a stick. What a bludgeon is, I do not know. It is a thick stick; and where the degree of thickness begins which makes it a bludgeon, I cannot tell. If the instruments were not taken out for offensive purposes, the prisoners would not be armed. But if you are satisfied that they were taken out for poaching purposes, for carrying nets,

and also for resisting the keepers, the prisoners would be armed. It does not follow that because an instrument can be used for another purpose the person carrying it would not be armed."

The prisoners were found guilty.

[Boddam for the Crown; John Rose and C. J. Darling for the prisoners.]

The 9 Geo. IV. c. 69, s. 9, creates two distinct offences. First, the entering in the night on land to the number of three, some one of them being armed; and second, the being in the night on land to the number of three, some one of them being armed. (R. *v.* Kendrick, 7 C. & P. 184.)

In R. *v.* Lines ([1902] 1 K. B. 199) the Court of Crown Cases Reserved held that on an indictment for a third offence two previous convictions under sect. 1 of the Night Poaching Act, 1828 (9 Geo. IV. c. 69) must be alleged and proved, and that a previous conviction under sect. 9 of the Act of the misdemeanour of entering upon land by night armed and to the number of three or more for the purpose of taking game was not a previous conviction within sect. 1.

If nets are hung on the twigs of a hedge within a close, it is an entry, though the parties are in a lane outside the hedge; and it is not necessary to constitute the offence of three or more persons entering land in the night time to take game, that all the three persons should be in one close, or that the land should be in the occupation of one person. The essence of the crime is that the persons who enter the land by night for the purpose of taking game or rabbits should be armed with such offensive weapons as they intend to use in the event of their being disturbed. If one of them is so armed, with the knowledge of the rest, they can all be convicted. Night means the time from the expiration of the first hour after sunset to the beginning of the last hour before sunrise. A prosecution for this crime must be commenced within twelve months after the alleged commission of it. Large stones are offensive weapons, within 9 Geo. IV. c. 69, s. 9, if the jury is satisfied that the stones are of a description capable of inflicting serious injury if used offensively, and were brought and used for that

purpose. An indictment alleged that the defendant and others were armed with bludgeons and other offensive weapons, and the evidence was that they had sticks. It was held that a stick was not necessarily an offensive weapon, in the absence of evidence of its size, &c., even though it had been used offensively. A gamekeeper, or other person lawfully authorized under 9 Geo. IV., c. 69, s. 2, may apprehend persons found offending under that Act, without calling on them to surrender, if the circumstances are such as to constitute notice of his purpose; and a person who is employed by a lord of a manor, as a watcher of his game preserves, is a person having authority to apprehend night poachers, and he need not have any authority from the lord of the manor.

Fraudulent Bankruptcy.

R. *v.* **PETERS.** (1886) [111]

[16 Q. B. D. 636; 16 Cox, C. C. 36.]

This case decided that, in order to convict an undischarged bankrupt under 46 & 47 Vict. c. 52, s. 31, of the offence of "obtaining credit to the amount of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt," it is not necessary that there should be a stipulation to grant credit in the contract between the parties; it is sufficient if a credit in fact is obtained.

The prisoner, an undischarged bankrupt, living in Newcastle-on-Tyne, bought a horse from the prosecutor, a farmer in Ireland, for 22*l.*, free of expense to the vendor, who, by the prisoner's direction, delivered the horse on board a steamer at Larne; no stipulation was made as to the time or mode of payment, and the prisoner did not disclose the fact that he was an undischarged bankrupt. The prisoner paid for the

carriage of the horse on its delivery to him at Newcastle, and immediately sold it, and refused to pay the price to the prosecutor.

The Court of Crown Cases Reserved held that there was evidence to go to the jury of an obtaining credit by the prisoner within the meaning of sect. 31 of the Bankruptcy Act, 1883, and that the offence was committed in Newcastle-on-Tyne.

Lord Coleridge, C. J., said: "The question for us is whether this undischarged bankrupt did obtain credit. . . . The words of the section are 'obtains credit.' Did the prisoner obtain credit? It is said that he did not, because he did not stipulate for it; but the Act does not say that there must be a stipulation for credit; or that it must be obtained on a specific contract to give credit. In such a case as the present, where a man obtains goods and does not pay for them for a substantial period of time, I am not prepared to say that we ought to limit the plain meaning of the words in the Act of Parliament. The prisoner has obtained credit, and has had it, whether or no he stipulated for it at the time of the purchase."

[Joel for the prosecution; J. Lawson Walton for the prisoner.]

In R. *v.* Juby (16 Cox, C. C. 160) it was held that the offence of obtaining credit to the extent of 20*l.* or upwards by an undischarged bankrupt, is committed where the bankrupt receives and keeps goods of the value of 20*l.* or upwards without paying for them, or informing the creditor of the fact of his being an undischarged bankrupt, or repudiating the contract, although the goods were sent in execution of an order for goods of a less value than 20*l.*

"It is felony, punishable with two years' imprisonment, for any person, who has become a bankrupt, or in respect of whose estate a receiving order has been made, or who liquidates by arrangement, after the presentation of the bankruptcy petition by or against him, or within four months before such event, to abscond, or make

preparations for absconding, from this country with property to the amount of 20*l.* or upwards, which ought by law to be divided amongst his creditors. A bankrupt, or person in respect of whose estate a receiving order has been made, or who liquidates by arrangement after the presentation of a bankruptcy petition by or against him, commits a misdemeanour, rendering him liable to two years' imprisonment, if he is guilty of any of the following irregularities, unless, indeed, the jury is satisfied that he had no intention to defraud :—

"(1.) If he does not fully discover and deliver up to the trustee administering his estate all the property, which he is required by law to deliver up, together with the books and documents relating thereto; or if he does not to the best of his knowledge explain to the trustee the circumstances under which he has disposed of any part of the property.

"(2.) If after the presentation of a bankruptcy petition by or against him, or the commencement of the liquidation, or within four months of the presentation or commencement thereof, he fraudulently conceals or removes any part of his property to the value of 10*l.* or upwards, or conceals any debt due to or from him, or conceals, destroys, or is privy to the falsification of any books or documents relating to his affairs; or if, within this period of four months, he, by any false representation or other fraud, has obtained property on credit and has not paid for it.

"(3.) If he has within the said period of four months obtained, under false pretence of carrying on business, and dealing in the ordinary way of trade, any property on credit, and has not paid for it; or if within this period he has pawned, pledged or disposed of, otherwise than in the ordinary way of his trade, property which he has obtained on credit and has not paid for.

"(4.) If, knowing that a false debt has been proved against the estate, he fails for the period of a month to inform the trustee. Such false claim amounts, on the part of the proving creditor, to a misdemeanour punishable with one year's imprisonment.

"(5.) If he is guilty of any fraud for the purpose of obtaining

the consent of any of his creditors to an agreement with reference to his affairs.

"And now, by 46 & 47 Vict. c. 52, s. 31, as shown in the leading case, it is a misdemeanour punishable with two years' imprisonment for an undischarged bankrupt to obtain credit to the extent of 20*l.* or upwards from any person without informing such person that he is an undischarged bankrupt.

"Even though a debtor has obtained his discharge, or has compounded, he is not exempt from criminal liability if he has been guilty of any criminal offence." (Shirley's Criminal Law.)

Vide the Fraudulent Debtors Act, 1869, and the Bankruptcy Acts of 1883, 1889, and 1890.

In R. *v.* Wilson (5 Q. B. D. 29) the prisoner was convicted under s. 12 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for that he, within four months before the presentation of a bankruptcy petition against him, upon which he was adjudged bankrupt, quitted England, taking with him, with intent to defraud, property exceeding 20*l.*, which ought by law to have been divided amongst his creditors. At the time when he quitted England and when he was adjudged bankrupt the prisoner was an infant. The debts proved against his estate were trade debts, contracted since the passing of the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), and it did not appear that any debts for necessaries supplied to him existed. The Court of Crown Cases Reserved held that the conviction could not be upheld.

In R. *v.* Rowlands (8 Q. B. D. 530) A., B. & C. were convicted, under sect. 13, sub-sect. 3, of 32 & 33 Vict. c. 62, of having, with intent to defraud the creditors of A., removed the property of A. since the date of an unsatisfied judgment against A. The evidence was, that on the next night after a judgment, which was still unsatisfied, had been obtained against A., the property of A. was removed from his house by A., B. & C., in order to defeat the creditor who had obtained the judgment, and to prevent him from levying thereon to satisfy the judgment. There was no evidence that A. had any other creditors, or that there was any intention to defeat the claims of any creditors of A. other than this particular creditor. No petition in bankruptcy had been presented against A., nor had any proceedings been taken to have his affairs liquidated by arrangement. The Court of Crown Cases Reserved

held that the absence of proceedings in bankruptcy or for liquidation was not material; that the provisions in question of the above statute applied to all persons; but that the conviction must nevertheless be quashed, inasmuch as an intent to defraud creditors was charged but not proved.

Denman, J., said: "The section applies not only to bankrupts but to all fraudulent debtors. With regard to the second objection, defrauding a particular creditor may, under some circumstances, afford evidence of intention to defraud creditors generally; but that is very different from saying that it must do so. In the present case there was no evidence on which this Court can say there was a general intent proved and found by the jury to defraud creditors, and that is what is charged by the indictment. There is only evidence of defeating and delaying one creditor.

Cases in point are:—R. *v.* Cole, Sessions Paper, C. C. C., Vol. 104, p. 571; R. *v.* Powis, Sessions Paper, C. C. C., Vol. 99, p, 781; R. *v.* Hemming, Sessions Paper, C. C. C., Vol. 93, p. 432; R. *v.* Moriggia, Sessions Paper, C. C. C., Vol. 88, p. 352; R. *v.* Creese, L. R. 2 C. C. R. 105; R. *v.* Widdop, L. R. 2 C. C. R. 3; R. *v.* Robinson, L. R. 1 C. C. R. 80; Re Burden, 21 Q. B. D. 24; R. *v.* Beck, 16 Cox, C. C. 718; R. *v.* Griffiths, [1891] 2 Q. B. 145; R. *v.* Pierce, 16 Cox, C. C. 213; R. *v.* Dyson, 18 Cox, C. C. 1; R. *v.* Erdheim, [1896] 2 Q. B. 260, and 18 Cox, C. C. 355; R. *v.* Hopkins and Ferguson, [1896] 1 Q. B. 652; R. *v.* Humphris, [1904] 2 K. B. 89.

Personation.

R. *v.* HAGUE. (1864) [112]

[9 Cox, C. C. 412; 4 B. & S. 715; 33 L. J. (M. C.) 81.]

This was a case stated by the Quarter Sessions of the West Riding of Yorkshire, upon an appeal, whereby a conviction by

justices of the defendant, for inducing one James Fogle to personate a voter at an election of town councillors, was affirmed.

The Court of Queen's Bench held that the offence of inducing another to personate a voter at a municipal election under 22 Vict. c. 35, s. 9, is complete upon the personator tendering the voting paper, although, on being asked if he is the person whose name is signed to the voting paper, he answers, "No," and the vote is accordingly rejected.

Blackburn, J., said: "I take it that as soon as a man holds himself out to be the person entitled to vote, and does so in the name of another, he commits the offence; and that it is utterly immaterial that he is stopped before he succeeds in his object. Upon his tendering his voting paper, he has done sufficient to warrant the conclusion that he personated."

[Maule for the appellant; Fowler for the respondent.]

The offence of personation consists of many kinds, such as personating holders of stock, seamen or soldiers, voters at parliamentary or municipal elections, bail, &c.

In R. *v.* Hearn (Sessions Paper, C. C. C., Vol. 103, p. 365) the accused, having three qualifications, gave three separate votes, and the Court held that even if he did not know that he was doing wrong, he had committed an offence.

Other cases on this subject are:—R. *v.* Bent, 1 Cox, C. C. 356; R. *v.* Parr, 1 Leach, C. C. 434; R. *v.* Brown, 2 East, P. C. 1007; R. *v.* Tannet, R. & R. C. C. 351; R. *v.* Cramp, R. & R. C. C. 327; R. *v.* Martin, R. & R. C. C. 324; R. *v.* Potts, R. & R. C. C. 353; R. *v.* Lake, 11 Cox, C. C. 333; R. *v.* Vaile, 6 Cox, C. C. 470; Wickham *v* Phillips, 47 J. P. 612; Whiteley *v.* Chappell, L. R. 4 Q. B. 147; R. *v.* Pringle, 2 Moo. C. C. 127; R. *v.* Bowler, Car. & M. 559; R. *v.* Ellis, Car. & M. 564; R. *v.* Thompson, 2 M. & Rob. 355; R. *v.* Haslam, 1 Den. 73; R. *v.* Goodman, 1 F. & F. 502; R. *v.* Turner, 12 Cox, C. C. 313; R. *v.* Fox, 16 Cox, C. C. 166.

There are a very large number of statutes dealing with the various offences of personation, namely:—31 Geo. II., c. 10; 54 Geo. III., c. 93; 57 Geo. III., c. 127; 7 Geo. IV., c. 16; 2 Will. IV.,

c. 53; 14 & 15 Vict. c. 105; 22 Vict. c. 35; 24 & 25 Vict. c. 98; 26 & 27 Vict. c. 73; 28 & 29 Vict. c. 36; 28 & 29 Vict. c. 124; 30 & 31 Vict. c. 131; 33 & 34 Vict. c. 58; 35 & 36 Vict. c. 33; and 37 & 38 Vict. c. 36 (The False Personation Act).

Intimidation.

SMITH *v.* THOMASSON. (1890) [113]

[16 Cox, C. C. 740; 62 L. T. 68; 54 J. P. 596.]

By sect. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), it is enacted that "every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—

"(1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or

"(2) Persistently follows such other person about from place to place; or

"(3) Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or

"(4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or

"(5) Follows such other person with two or more other persons in a disorderly manner in or through any street or road shall" be liable to a penalty, &c.

The appellant, who was on strike, was posted outside works,

at which he had been engaged, as a picket; and when the workmen who had taken the place of the strikers, and amongst whom was the respondent, came out of the works, the respondent was silently followed by the appellant at a short distance down two streets. A crowd which had been waiting outside the works also followed the respondent with hostile words and gestures. The justices convicted the appellant under the above section, and, on appeal, the Queen's Bench Division held that the justices were right in their decision.

Pollock, B., said: "The legislature does not intend in the second sub-section to deal with intimidation by a crowd of people. The act of one person is sufficient to constitute an offence. Further, it is very clear that the legislature intended to prevent mere acts, though done without any expressed intention. It was for the magistrates to say whether the act complained of was in fact an act of intimidation. There was here plenty of evidence that the defendant in silently dogging the footsteps of the workman committed the act which the statute defines as 'persistently following.' There were the further facts before the magistrates that many other persons were pursuing a common course with the appellant.

[J. H. Tickell for the appellant; Henn Collins, Q.C., for the respondent.]

In Judge *v.* Bennett (36 W. R. 103; 52 J. P. 247) it was held that an intimation conveyed in a letter to an employer that his shop would be picketed, in language so threatening as "to make such employer afraid," amounts to "intimidation" within the meaning of sect. 7, sub-sect. 1, of the Conspiracy and Protection of Property Act, 1875; whether the picketing amounts to an unlawful watching or besetting within sub-sect. 4 or not.

Three very important cases decided by the Court of Crown Cases Reserved are:—Connor *v.* Kent, Gibson *v.* Lawson, and Curran *v.* Treleaven ([1891] 2 Q. B. 545, and 17 Cox. C. C. 554).

In Connor *v.* Kent, a case was stated by the Recorder of Newcastle-on-Tyne on the appeal of Thomas Connor, who had been convicted

at the petty sessions of having "wrongfully and without legal authority intimidated" William Preston Kent, within the meaning of sect. 7, sub-sect. 1, of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). The Recorder confirmed the conviction subject to the case, from which it appeared that at the hearing before him the appellant had been examined and cross-examined, and that his decision was to some extent the result of the evidence thus admitted. The Court of Crown Cases Reserved held that, as it appeared from the case that the evidence upon which the conviction had been obtained was in part illegal, the conviction must be quashed, and refused to hear the appeal.

Gibson *v.* Lawson was a case stated by the justices of Northumberland under sect. 33 of the Summary Jurisdiction Act, 1879, on the appeal of Robert William Gibson against the dismissal by them of a summons charging the respondent, Oswald Lawson, with having "wrongfully and without legal authority intimidated" the appellant, within the above-named sub-section of the Conspiracy and Protection of Property Act, 1875.

In delivering the judgment of the Court, Lord Coleridge, C. J., said: "The respondent was employed as a fitter in the yard of an iron shipbuilding company; the appellant was employed in the same capacity in the same yard. The respondent was a member of a society called the Amalgamated Society; the appellant was a member of a society called the National Society. On December 3rd, 1890, a meeting of the Amalgamated Society was held, at which it was resolved that the members of that society would strike unless the appellant left his society and joined theirs. The respondent communicated this resolution to the foreman of the shipbuilding company, who communicated it to the appellant. Thereupon the appellant had an interview with the respondent. In the result the respondent informed the appellant that the Amalgamated Society were determined to carry their resolution into effect, but gave him till the morning of Saturday, December 6th, to make up his mind. The appellant adhered to his own society, and the shipbuilding company, in order to avoid a strike, dismissed him from their yard. It is expressly found in the case that no violence or threats of violence to person or property were used to the appellant; but he swore that he was afraid, because of what the respondent had said, that he would lose his work, and would not get employment

anywhere where the Amalgamated Society predominated numerically over his own society. These are the whole of the material facts, and on these facts the magistrate dismissed the summons, and, we think, rightly."

Curran *v.* Treleaven was a case stated by the Recorder of Plymouth upon the appeal of Curran and two other secretaries of trade unions, who had been convicted at petty sessions of intimidation under sect. 7, sub-sect. 1, of the above-named Act.

Lord Coleridge, C. J., said : " The circumstances were very much like those in the last case on which we have just decided. In order to prevent the employment by Mr. Treleaven of non-union men, the three secretaries told him that if he did not cease to employ non-union men they, the secretaries, would call off from their employment by him all the members of their respective unions. Mr. Treleaven refused compliance with their demands, and thereupon the secretaries called off their respective union men, who, in obedience to the call, struck work."

The Court of Crown Cases Reserved quashed the conviction.

Other important cases on the question of intimidation are :— Allen *v.* Flood, [1898] A. C. 1 ; Lyons *v.* Wilkins, [1889] 1 Ch. 255 ; Charnock *v.* Court, [1899] 2 Ch. 35 ; Walters *v.* Green, [1899] 2 Ch. 696 ; and Farmer *v.* Wilson, 69 L. J. Q. B. 496.

Sect. 16 of the above Act is as follows :—" Nothing in this Act shall apply to seamen or to apprentices to the sea service." In Kennedy *v.* Cowie (17 Cox, C. C. 320) it was held that this does not exempt a person who is not a seaman from being charged with, and being liable to punishment under the Act for an offence committed by him against a seaman. And in R. *v.* Lynch ([1898] 1 Q. B. 61) the Court of Crown Cases Reserved held that sect. 16 does not exempt from the punishments prescribed by the Act persons whose calling or occupation is the sea, but who are not actually so employed or engaged.

In Smith *v.* Moody ([1903] 1 K. B. 56, and 20 Cox, C. C. 369), the appellant was convicted under sect. 7 of the Conspiracy and Protection of Property Act, 1875, the conviction stating that the appellant, on February 4, 1902, " with a view to compel " the respondent " to abstain from working for Messrs. J. B. and Partners, Limited, at F. Colliery, which he had a legal right to do, wrongfully and without legal authority did injure the property "

of the respondent. The Court held that the act, which the appellant sought to compel the respondent to abstain from doing, was sufficiently specified in the conviction; but that the conviction was bad on its face, and must be quashed, in that it did not specify what property of the respondent had been injured.

Moreover, the Summary Jurisdiction Act, 1879, s. 39, sub-s. 1, which provides that in proceedings before courts of summary jurisdiction "the description of any offence in the words of the Act . . . creating the offence, or in similar words shall be sufficient in law," does not do away with the necessity of setting out in a conviction facts which are a necessary ingredient of the particular offence in question.

As to commitment, *vide* Ex parte Wilkins, 18 Cox, C. C. 161.

As to the form of conviction and statement of offence, *vide* R. *v.* Mackenzie ([1892] 2 Q. B. 519), in which the defendant was summarily convicted under sect. 7 of the Conspiracy and Protection of Property Act, 1875, the conviction stating that he wrongfully and without legal authority followed the informant in a disorderly manner, with two or more other persons, in certain streets, "with a view to compel him to abstain from doing acts which he had a legal right to do." The Court held that these acts ought to have been specified in the conviction, and that it must be quashed.

Other cases on the question of trade combinations are:—R. *v.* Bykerdyke, 1 M. & Rob. 179; R. *v.* Hewitt, 5 Cox, C. C. 162; R. *v.* Duffield, 5 Cox, C. C. 404; R. *v.* Rowlands, 5 Cox, C. C. 436; R. *v.* Druitt, 10 Cox, C. C. 592; R. *v.* Shepherd, 11 Cox, C. C. 325; R. *v.* Bunn, 12 Cox, C. C. 316; R. *v.* Hibbert, 13 Cox, C. C, 82; R *v.* Edmondes, 59 J. P. 776.

Extradition.

[114] **In re CASTIONI.** (1890)

[(1891) 1 Q. B. 149; 17 Cox, C. C. 225.]

A number of the citizens of Ticino, one of the cantons of the Swiss Republic, being dissatisfied with the administration of the government of the canton, rose against it, arrested several members thereof, seized the arsenal, from which they provided themselves with arms, attacked, broke open, and took forcible possession of, the municipal palace, disarmed the gendarmes, imprisoned some of the members who had been arrested, and established a provisional government. On entering the municipal palace the prisoner Castioni, who had taken an active part in the disturbance throughout, shot with a revolver, and killed, a member of the government. He escaped to England, where he was arrested and committed for extradition on a charge of murder.

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (1), "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character."

On a motion for *habeas corpus*, the Court held that the true meaning of this expression is that suggested in Sir James Stephen's History of the Criminal Law, Vol. II., p. 71, and, therefore, that to bring an offence within the meaning of the words "of a political character," it must be incidental to, and form part of, political disturbances.

The Court also held that the offence which the prisoner had committed was incidental to, and formed part of, political disturbances, and therefore was an offence of a political character within the meaning of the statute, and the prisoner could not

be surrendered, but was entitled to be discharged from custody; and that the decision of a magistrate, who commits a prisoner for extradition, that the offence charged is not of a political character, is subject to review by the Court on an application for *habeas corpus*, so that the Court was not bound by the decision of the magistrate on the facts before him, but had power to consider the whole matter, and to receive fresh evidence.

[Sir R. Webster, Q.C., A.-G., and R. S. Wright for the Crown; Sir E. Clarke, Q.C., S.-G., and R. Woodfall for the Swiss Government; Sir C. Russell, Q.C., J. P. Grain, and Eldridge for the prisoner.]

"A fugitive criminal is any person accused or convicted of an extradition crime within any foreign State who is in or is suspected of being in some part of her Majesty's dominions.

"A requisition for the surrender of a fugitive criminal of any foreign State who is in or is suspected of being in the United Kingdom must be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign State.

"A Secretary of State may, by order under his hand and seal, signify to any one of the Bow Street police magistrates that such requisition has been made, and require him to issue his warrant for the apprehension of such criminal.

"If the Secretary of State is of opinion that the offence is one of a political character, he may, if he thinks fit, refuse to send any such order, and he may also at any time order a fugitive criminal accused or convicted of such an offence to be discharged from custody.

"The police magistrate at Bow Street must receive any evidence which may be tendered to show that the crime of which the prisoner is accused is an offence of a political character, or not an extradition crime." (Stephen's Criminal Procedure.)

Where the surrender of a fugitive criminal is demanded by the government of a friendly State for offences within the provisions of the Extradition Act, 1870, and of the extradition treaty with that State, the Court has no jurisdiction to inquire whether the demand for surrender is made in good faith and in the interests of justice.

The provision of sect. 3, sub-sect. 1, of the Extradition Act, 1870, by which a fugitive criminal shall not be surrendered if he proves to the satisfaction of the Court that the requisition for his surrender has been made with a view to try or punish him for an offence of a political character applies only to an offence of a political character which has been already committed. (*In re* Arton, [1896] 1 Q. B. 108). In the same case it was held that the offence in English law of fraudulent falsification of accounts by a director, public officer, or member of a public company, is an offence within article 147 of the French Code Pénal, and is covered by the expression " faux en écritures de commerce " in that article. Although it may not amount to forgery according to English law, that offence is an extradition crime within the French version of article 3 (2) of the Extradition Treaty with France, and within the English version of article 3 (18) of the same treaty, and also within the Extradition Acts. (*In re* Arton (No. 2) [1896] 1 Q. B. 509.)

Upon the argument of a rule for a *habeas corpus* obtained by a fugitive criminal against whom the magistrate has upon the evidence before him made an order of committal under the Extradition Act, 1870, the Court has no jurisdiction to review the decision of the magistrate upon the ground that since the order of committal was made further evidence had been obtained which might have affected his decision. The only question which the Court can entertain is the question of jurisdiction—that is, that the crime alleged is outside the Extradition Act altogether, or that there was absolutely no evidence upon which the magistrate could properly commit; but if the magistrate have jurisdiction, and if there be evidence before him upon which he could properly commit, the Court cannot review his decision ; and if further evidence be obtained after the order of committal, it is entirely a matter for inquiry by the Secretary of State before making an order for the surrender of the accused. (*Ex parte* Siletti, 20 Cox, C. C. 353.)

A prisoner committed for extradition on two charges of committing anarchist outrages in France by causing explosions at a café and at certain barracks, applied for a writ of *habeas corpus*. The two charges were included in one committal. The Court held that if the charges had depended on the uncorroborated evidence of an accomplice (which was not the case), there would not be a ground for discharging the prisoner, for absence of

corroboration was not conclusive in favour of a prisoner's right to acquittal, but the magistrate had a discretion as to whether the evidence was sufficient to justify a committal, that separate committals were not necessary, that the outrage at the barracks was not an offence of a political character within the meaning of sect. 3 sub-sect. 1 of the Extradition Act, 1870, for to constitute a political offence there must be two or more parties in the State, each seeking to impose the government of their own choice on the other, which was not the case with regard to anarchist crimes, and therefore the prisoner was liable to extradition.

Cave, J., said: "In the present case there are not two parties in the State, each seeking to impose the government of their own choice on the other; for the party with whom the accused is identified, by the evidence, and by his own voluntary statement, namely, the party of anarchy, is the enemy of all governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular government; but anarchist offences are mainly directed against private citizens." (*In re* Meunier [1894] 2 Q. B. 415; and 18 Cox, C. C. 15.)

In order to justify the extradition of the subject of a foreign State there must be evidence of an act committed by him in the foreign country, amounting to an offence against the law of such country, and which if committed in England would amount to an offence against English law.

A warrant was issued in France for the arrest of a French subject accused of having embezzled or misappropriated money delivered to him in his capacity of notary. He escaped from France, and was arrested in English territory, and his extradition was demanded by the French authorities. A magistrate committed him for extradition on a warrant describing him as accused of the crime of fraud by a bailee and fraud as an agent. The French warrant specified nineteen separate charges. On an application for a *habeas corpus*, the Court came to the conclusion that as to fifteen of the charges, the evidence disclosed no crime punishable by English law. With regard to the other four charges, there was evidence that in each case money was intrusted, without any direction in writing, to the prisoner as a notary, with a view to re-investment as soon as either he or his customer

should have found a suitable investment, and that he had misappropriated such money. The Court held that the offences charged were sufficiently described, both in the French and in the English warrant, and that the warrants were consistent with each other; that the fact that, as to some of the charges in the French warrant, the evidence did not disclose any crime against English law, was no answer to the claim for extradition; that as to the four charges last above mentioned, there was evidence of offences within the meaning of article 408 of the French Penal Code, and article 3, clause 18, of the Extradition Treaty, and evidence that the prisoner had been intrusted as an attorney or agent with money for safe custody within the meaning of 24 & 25 Vict. c. 96, s. 76, and therefore there was evidence of offences against English law, and extradition ought to be granted. The Court also held that there was no evidence of offences against 24 & 25 Vict. c. 96, s. 75, because the first part of that section requires that the money should have been intrusted with a direction in writing, and the second part does not apply to money. (*In re* Bellencontre, [1891] 2 Q. B. 122.) This, of course, was prior to the Larceny Act, 1901, which renders direction in writing unnecessary.

Cases on this subject are:—R. *v.* Bernard, Annual Register for 1858, p. 310; *Ex parte* Huguet, 29 L. T. N. S. 41; R. *v.* Maurer, 10 Q. B. D. 513; Attorney-General of Hong Kong *v.* Kwok-a-Sing, 12 Cox, C. C. 565; R. *v.* Weill, 9 Q. B. D. 701; R. *v.* Ganz, 9 Q. B. D. 93; *In re* Counhaye, L. R. 8 Q. B. 410; *Re* Woodhall, 16 Cox, C. C. 478; *In re* Guerin, 58 L. J. (M. C.) 42; R. *v.* Walton, Sessions Paper, C C. C., Vol. 84, p. 364; R. *v.* Cargalis, Sessions Paper, C. C. C., Vol. 84, p. 56; R. *v.* Howard, Sessions Paper, C. C. C., Vol. 84, p. 625; R. *v.* Wilson, 3 Q. B. D. 42; *Ex parte* Windsor, 10 Cox, C. C. 119; R. *v.* Lavaudier, 15 Cox, C. C. 329; *Re* Pinter, 17 Cox, C. C. 498; *Ex parte* Otto, [1894] 1 Q. B. 420; and 17 Cox, C. C. 754: *Re* Galwey, 18 Cox, C. C. 213; R. *v.* Spilsbury, [1898] 2 Q. B. 615: R. *v.* Hole, 62 J. P. 616; *Ex parte* Salaman, [1902] 2 K. B. 312.

The statutes on this subject are:—The Extradition Act, 1870 (33 & 34 Vict. c. 52); the Extradition Act, 1873 (36 & 37 Vict. c. 60); and the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69).

Admiralty Jurisdiction.

R. *v.* KEYN. (1876) [115]

[2 Ex. D. 63; 13 Cox, C. C. 403; 46 L. J. (M. C.) 17.]

This was the famous case of the "Franconia," a German ship which ran down a British ship, the "Strathclyde," a couple of miles off Dover, and drowned a passenger named Jessie Young. The prisoner, a German, was in command of the "Franconia," and the question was whether the Central Criminal Court had jurisdiction to try him for manslaughter. This question, after most elaborate discussion, was decided in the negative, on the ground that prior to 28 Hen. VIII. c. 15, the Admiral had no jurisdiction to try offences committed by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, and that that and the subsequent statutes only transferred to the common law courts and the Central Criminal Court the jurisdiction formerly possessed by the Admiral.

[Sir H. Giffard, S.-G., Poland, C. Bowen, and Straight for the Crown; Benjamin, Q.C., Cohen, Q.C., Phillimore, and Stubbs for the prisoner.]

The judgment in this case led to the passing of 41 & 42 Vict. c. 73 (the Territorial Waters Jurisdiction Act, 1878), the second section of which statute enacts that "an offence committed by a person, whether he is or is not a subject of her Majesty on the open sea within the territorial waters of her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board, or by means of, a foreign ship; and the person who committed such offence may be arrested, tried, and punished accordingly."

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 in foreign rivers "as far as great ships go"; although the municipal authorities of the foreign country may have concurrent jurisdiction.

An American citizen, serving on board a British ship, caused the death of another American citizen serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river Garonne, within French territory, at a place below bridges, where the tide ebbed and flowed and great ships went. It was held that the ship was within the Admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Old Bailey. (R. *v.* Anderson, L. R. 1 C. C. R. 161.) "There is no doubt," said Bovill, C. J., "that the place where the offence was committed was within the territory of France, and that the prisoner was, therefore, subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that vessel as a part of the crew, and as such he must be taken to have been under the protection of the British law, and also amenable to its provisions. It is said that the prisoner was an American citizen, but he had embarked by his own consent on board a British ship, and was at the time a portion of its crew." "The ship," said Byles, J., "being a British ship, was, under the circumstances, a floating island, where the British law prevailed. . . . The only consequence of the ship being within the ambit of French territory is, that (the vessel not being an armed vessel) there might have been concurrent jurisdiction, had the French law claimed it."

The later case of R. *v.* Carr (10 Q. B. D. 76) is to the same effect. Some bonds were stolen from a British ocean-going merchant ship whilst she was lying afloat in the ordinary course of her trading in the river at Rotterdam, in Holland, moored to the quay, and were afterwards wrongfully received in England by the prisoners with a knowledge that they had been thus stolen. The place where the ship lay at the time of the theft was in the open river, sixteen or eighteen miles from the sea, but within the ebb and flow of the tide. There were no bridges between the ship and the sea, and the place where she lay was one where large vessels usually lay. It did not appear who the thief was, or under what circumstances he was on board the ship. It was held

that the prisoners could be properly tried at the Old Bailey, the larceny having taken place within the jurisdiction of the Admiralty. "The whole question is," said Stephen, J., "was the theft within the jurisdiction of the Admiralty of England? Ever since the time of Richard II. its jurisdiction has extended to where great ships go. . . . I see no reason founded on expediency or authority to induce us to say that a ship at anchor is within the jurisdiction, and that a ship moored to the land is not, or to introduce intricacies as to the mode of attachment to land, or to inquire when the flag is lowered or when hoisted. Such rules would be to make law without meaning, and to narrow well-founded and beneficial jurisdiction. I prefer the obvious and wholesome principle that jurisdiction and protection in these cases are co-extensive."

The Admiralty jurisdiction, however, does not extend to any cinque port, haven, or pier; or to any creek, river, or port within the body of a country, that is to say, so far land-locked as that a man standing on either side can perceive what is doing on the other.

It may be mentioned here that British subjects who commit murders or manslaughters on land in foreign countries are triable in this country by virtue of 24 & 25 Vict. c. 100, s. 9.

The sailing under the British flag and the owners being British subjects held to be sufficient proof for Admiralty jurisdiction. (R. *v.* Allen, Sessions Paper, C. C. C., Vol. 64, p. 361; *vide*, also, R. *v.* Bjornsen, 34 L. J. (M. C.) 180; and Cox, C. C. 74; and R. *v.* Lyons, Sessions Paper, C. C. C., Vol. 39, p. 291.)

By 30 & 31 Vict. c. 124 (the Merchant Shipping Act, 1867), s. 11, "if any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any Court of justice in her Majesty's dominions which would have had cognizance of such crime or offence, if committed on board a British ship within the limits of the ordinary jurisdiction of such Court, shall have jurisdiction to hear and determine the case, as if the said crime or offence had been committed as last aforesaid."

In R. *v.* Armstrong (13 Cox, C. C. 185) it was held that a hulk retaining the general appointments of a ship, registered as a British ship, and hoisting the British ensign, although only used

as a floating warehouse, is *primâ facie* sufficiently a British ship to be within the 17 & 18 Vict. c. 104, s. 267, and a crime committed thereon is within the jurisdiction of the Admiralty.

By the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), s. 7, "territorial waters of her Majesty's dominions" means any part of the open sea within one marine league of the coast, measured from low-water mark.

Other cases on this subject are :—R. *v.* Serva, 1 Cox, C. C. 292; R. *v.* Lopez, and R. *v.* Sattler, 7 Cox, C. C. 431; R. *v.* Lesley, 8 Cox, C. C. 269; R. *v.* Jones, 2 C. & K. 165; R. *v.* Sven Seberg, L. R. 1 C. C. R. 264; and 11 Cox, C. C. 520.

Trial of Peers of the Realm.

[116] R. *v.* LORD AUDLEY. (1631)

[3 Cobbett's State Trials, 402.]

In this extraordinary trial, which took place on April 25th, 1631, before Lord Coventry, Lord Keeper of the great Seal of England, who was appointed Lord High Steward for that day, Mervin, Lord Audley, Earl of Castlehaven, was indicted for a rape upon his own wife, whom he held by force, while one of his servants lay with her. There were two other indictments charging him with an unnatural offence with his servants Fitz-Patrick and Broadway. Lord Audley was convicted and beheaded, and FitzPatrick and Broadway were subsequently tried upon their own admissions, which they made in giving evidence against Lord Audley, and both were hanged. Amongst other matters which were decided at the trial of this most revolting and remarkable case, the following points are important to be remembered :—

(1) That a peer could not be tried by a common jury, but must be tried by his peers.

(2) That a peer could not challenge any of his peers.

(3) That a husband may be found guilty of a rape on his own wife if he was giving assistance to the person actually committing the crime.

(4) That the wife, in a case of rape, might give evidence against her husband, because she was the party wronged.

[Sir Robert Heath, A.-G., Sir Richard Shelton, S.-G., Sir John Finch, Queen's A.-G., and Sir Thomas Crew, King's Serjeant-at-Law, for the Crown.]

It is only in cases of treason and felony that a peer is entitled to be tried by his brother peers. For a misdemeanour he is tried just like a commoner. If a peer of Parliament, indicted for felony, is arraigned elsewhere than before the House of Lords, or in the Court of the Lord High Steward, he may plead his peerage in abatement. When a charge of treason or felony is made against a peer, the indictment is found in the ordinary way by a grand jury, and removed thence by *certiorari*. The privilege of being tried before the House of Lords, or in the Court of the Lord High Steward, depends not on the right to sit and vote in the House of Lords, but on nobility of blood. Therefore, a peer who is a minor, a peeress, or a Scotch or Irish non-representative peer, can claim such a trial, while a bishop cannot.

It is enacted by sect. 20, sub-sect. 2 of the Criminal Appeal Act, 1907 (7 Edw. VII., c. 23) that the Act "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."

Arrest.

R. *v.* CUMPTON. (1880) [117]

[5 Q. B. D. 341; 49 L. J. (M. C.) 41; 42 L. T. 543; 28 W. R. 539 44 J. P. 489.]

The prisoner was convicted of an assault on two police constables of the county police of Worcestershire in the execution

of their duty. The constables were apprehending the prisoner within the city of Worcester under a warrant, issued by two county justices, for his commitment to prison for default in payment of a fine. Worcester is a city and county, having a separate commission of the peace, with exclusive jurisdiction, and a separate police force. The warrant was not backed by any city justice. The prisoner was not pursued from the county of Worcestershire, but found in the city. The Court for Crown Cases Reserved held that the conviction was wrong, as the constables were not acting in the execution of their duty in so executing such warrant.

Lord Coleridge, C. J., said: "Now it is the fact that Worcester is a borough, and a county of a city. It was contended that something turned upon this latter fact of Worcester being a county of a city. We, however, think that nothing does turn upon such fact, and our judgment is upon the statutes dealing with Worcester as a borough. The argument is that Worcester is a borough situate in Worcestershire, and that the county constables may execute warrants either there or in the county or shire by virtue of 19 & 20 Vict. c. 69, s. 6. Now even if sect. 6 of 19 & 20 Vict. c. 69, stood alone, I think it would be doubtful whether the execution of a warrant of commitment, issued by a justice not having authority within the jurisdiction where it was to be executed, came within the 'powers and privileges' or 'duties and responsibilities' mentioned in the section referred to; but when we look at the provisions of this section, as expounded by the Municipal Corporations Act (5 & 6 Will. 4, c. 76), the matter becomes quite clear. The section in question is in its provisions the same, *mutatis mutandis*, as sect. 76 of the Municipal Corporations Act; but sect. 101 of that Act provides that the borough police may execute certain specified summonses and warrants beyond the jurisdiction of the person issuing them, although not 'backed.' It is admitted that a warrant of commitment is not one of the

orders specified in that section. By inference the police have no power to execute unbacked warrants outside their jurisdiction in cases other than those specified, and the warrant in this case is, therefore, not one which the borough justices could authorize the borough police to execute in the county. Now, it is admitted that the later Act only empowers the county justices to authorize the execution within the borough of such process as the borough justices could authorize the execution of within the county. Therefore, in this case the constables were not acting in the execution of their duty, and the conviction must be quashed."

Grove, J., said: "I think this conviction cannot be sustained without unduly straining the words of the statutes. This warrant is clearly not one of those specified in 5 & 6 Will. IV., c. 76, s. 101; for the prisoner cannot be said to be a person 'charged with any offence,' nor is that section in any way enlarged by sect. 76, which relates to the duties of constables only. Sect. 101 relates to the duties and powers of justices; sect. 76 to those of constables."

[H. Matthews, Q.C., and R. H. Amphlett for the Crown; J. J. Powell, Q.C., and P. Evans for the prisoner.]

The liberty of the subject is so jealously guarded by our laws that all prescribed formalities must be carefully complied with before an arrest can be recognised as legal. Thus, in Codd *v.* Cabe (1 Ex. Div. 352; and 13 Cox, C. C. 202), it was held, following Galliard *v.* Laxton (2 B. & S. 363), and R. *v.* Chapman (12 Cox, C. C. 4), that when a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest, otherwise there cannot be a conviction for assaulting the police officer in the execution of his duty. "I have always held it to be clear law," said Baron Bramwell, "that a person not charged with a felony shall have the opportunity of seeing the warrant when he is taken into custody." So, in R. *v.* Chapman, above referred to, it was held not to be murder, but only

manslaughter, where the arrest of a poacher was attempted by an officer, who had seen the warrant, but had not got it with him at the time, and the poacher killed the officer. But "cases may be imagined where the absence of a warrant might be no defence, as where the murder was premeditated." (Per Lindley, J., in R. *v.* Carey, 14 Cox, C. C. 214.)

In R. *v.* Marsden (L. R. 1 C. C. R. 131) the prisoner assaulted a police constable in the execution of his duty. The constable went for assistance, and after an interval of an hour returned with three other constables, when he found that the prisoner had retired into his house, the door of which was closed and fastened; after another interval of fifteen minutes the constables forced open the door, entered, and arrested the prisoner, who wounded one of them in resisting apprehension. The Court of Crown Cases Reserved held that, as there was no danger of any renewal of the original assault, and as the facts of the case did not constitute a fresh pursuit, the arrest was illegal.

Interrogation of Prisoners by the Police.

[118] **R. *v.* MICK.** (1863)

[3 F. & F. 822.]

The prisoner was indicted for feloniously wounding with intent to do grevious bodily harm. On being taken into custody by the police on this charge, the prisoner said, "I have done no harm to anyone." When at the police-station the superintendent of police said to the prisoner, "At the time you were taken into custody you stated you had done no harm to anyone. I am now told that you have made a different statement." The prisoner then said, "Yes, sir, I will tell the truth." The superintendent said, "Stop; you must understand you

need not say anything unless you like, and it may be given in evidence against you." The prisoner then made a statement of what he had done.

Mellor, J., said to the witness: "I think the course you pursued in questioning the prisoner was exceedingly improper. I have considered the matter very much; many Judges would not receive such evidence. The law does not intend you, as a policeman, to investigate cases in that way. I entirely disapprove of the system of police officers examining prisoners. The law has surrounded prisoners with great precautions to prevent confessions being extorted from them, and the magistrates are not allowed to question prisoners, or to ask them what they have to say; and it is not for policemen to do these things. It is assuming the functions of the magistrates without those precautions which the magistrates are required by the law to use, and assuming functions which are entrusted to the magistrates, and to them only. The evidence is admissible, but I entirely disapprove of this way of obtaining it."

[J. Smith for the prosecution.]

In R. *v.* Stokes (17 Jur. 192) a policeman deposed to certain statements of the prisoner when in his custody. It appeared that they were made in consequence of various questions put to him by the witness.

Alderson, B., said to the witness: "You should not have questioned the prisoner in the way you have done. I am not one of those who think that policemen should be blind and deaf to all prisoners do or say in their presence; but then they ought not, in general, to ask questions of prisoners, for we are not always certain that that is done fairly. It is a more difficult thing to ask questions than you imagine, and still more so to hear the answers; for when you get an answer you twist it in your own mind so as to make it bear on the guilt of the prisoner. You merely ask questions to compromise the man, not questions to let him off. If you do either, you should do both."

In R. *v.* Dickinson (1 Cox, C. C. 27) the counsel for the defence asked the policeman: "Did you not think it right to caution the prisoner against making any statements?" Patterson, J., who tried the case, said: "I decidedly think it is not the duty of the policeman to do so. It is a great error, though a very general one, to suppose that where a statement is made quite voluntarily on the part of a prisoner, it should be discouraged by the officer." The learned Judge afterwards said: "The object of a prosecution is to get at the truth. It is neither to obtain an acquittal nor a conviction, irrespective of the real merits of the case. If, when a prisoner is apprehended, he is disposed to speak, the telling him not to do so is prejudicial in every respect. It is provided that he may be able to clear himself at once, by showing, for instance, that he is not the party, or that it was a mistake, and by these means may possibly avoid standing at the bar as a criminal, and being tried as such. Formerly, constables may have tried to get at evidence, and entrap parties by asking questions, and in some instances by giving hopes of pardon, or perhaps by threats. This is at all times to be condemned. But where a prisoner voluntarily, without either threats or promises, seeks to make a statement, in my opinion it ought not to be prevented. It is a different thing when an accused party is before a magistrate. He is then called upon and expected to give an explanation—he is, as it were, upon his trial; and it is, therefore, proper that, before answering, he should be warned as to the consequences of what he may do."

In R. *v.* Gavin (15 Cox, C. C. 656) Smith, J., held that after a prisoner is in custody, the police have no right to ask him questions, and an admission or confession obtained in that way is inadmissible in evidence; and where one of several prisoners in custody makes a statement admitting his guilt and also incriminating the other prisoners, and such statement is afterwards read over to the others by the constable, who asks them what they have to say to that, this is in the nature of a cross-examination of the prisoners, and such statement and their answers are not admissible as evidence against them on their trial.

Secus when the prisoners are not in custody.

In R. *v.* Brackenbury (17 Cox, C. C. 628) Day, J., held that there is no rule excluding admissions made by a prisoner in answer

to questions put by a policeman, and expressly dissented from the ruling of Smith, J., in R. *v.* Gavin; but in R. *v.* Male and Cooper (17 Cox, C. C. 689), Cave, J., appears to have agreed with the decision of Smith, J., in R. *v.* Gavin. In this case the prisoners, Harriet Male and Mary Cooper, were indicted for performing an illegal operation on a woman named Esther Woodhouse. Esther Woodhouse, who was the only witness called to speak to the facts, stated in cross-examination that an inspector of police had come to see her, and that on the inspector stating that she had better tell the truth, and that if she did not do so, she would be prosecuted, she had made a statement which he took down in writing, and she signed. The police inspector proved the arrest of the prisoner Cooper under a warrant upon another similar charge. On her arrest, he cautioned her, and on the road to the station asked her questions, and informed her that Esther Woodhouse had made a statement, which, at her request, he read to her, and at the police station he charged her with this offence, for which no warrant had been taken out. Counsel for the defence objected to the statement made by the prisoner to the inspector, on hearing Woodhouse's statement read, being given in evidence. Cave, J., allowed the objection, and said the police had no right to ask questions, or to seek to manufacture evidence, or to charge the prisoner with an offence for which they had no warrant. In summing up the case to the jury he said: "It is quite right for a police constable, or any other police officer, when he takes a person into custody to charge him, and let him know what it is he is taken up for, but the prisoner should be previously cautioned, because the very fact of charging induces a prisoner to make a statement, and he should have been informed that such statement may be used against him. The law does not allow the Judge or the jury to put questions in open Court to prisoners," [except where prisoners elect to give evidence] "and it would be monstrous if the law permitted a police officer to go without anyone being present to see how the matter was conducted, and put a prisoner through an examination, and then produce the effects of that examination against him. Under these circumstances, a policeman should keep his mouth shut and his ears open. He is not bound to stop a prisoner in

making a statement; his duty is to listen and report, but it is quite another matter that he should put questions to prisoners. A policeman is not to discourage a statement, and certainly not to encourage one. It is no business of a policeman to put questions, which may lead a prisoner to give answers on the spur of the moment, thinking perhaps he may get himself out of a difficulty by telling lies. I do not mean these remarks to apply only to this case; the jury must decide it on the evidence before them."

In Rogers *v.* Hawken (19 Cox, C. C. 122) the Queen's Bench Division held that a statement made by an accused person in answer to a question put by a constable is admissible in evidence against the accused as a voluntary statement, provided that such statement has not been brought about by any inducement or threat.

Vide also R. *v.* Miller, 18 Cox, C. C. 54; and R. *v.* Histed, 19 Cox, C. C. 16.

Other cases on this subject are:—R. *v.* Thornton, 1 M. C. C. 27; R. *v.* Kerr, 8 C. & P. 176; R. *v.* Day, 2 Cox, C. C. 209; R. *v.* Priest, 2 Cox, C. C. 378; R. *v.* Berriman, 6 Cox, C. C. 388; R. *v.* Bodkin, 9 Cox, C. C. 403.

Confessions of Prisoners.

[119] **R. *v.* FENNELL.** (1881)

[7 Q. B. D. 147; 14 Cox, C. C. 607; 50 L. J. (M. C.) 126; 44 L. T. 687; 29 W. R. 742; 45 J. P. 666.]

The prisoner was accused of larceny as a servant. Previously to being charged, he had been taken into a room with the prosecutor and a police inspector. The prosecutor then said, "The inspector tells me you have been making house-breaking implements; if that is so you had better tell the truth, it may be better for you." The prisoner was convicted mainly upon

admissions made by him in the presence of the prosecutor and the police inspector, before he was charged. The Court of Crown Cases Reserved, consisting of Lord Coleridge, C. J., Grove, Hawkins, Lopes, and Stephen, JJ., held that the confession was not admissible in evidence.

Lord Coleridge, C. J., said: "The rule laid down in Russell on Crimes is, that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

[Prankerd for the Crown; Mews for the prisoner.]

In order that evidence of a confession by a prisoner may be admissible it must be affirmatively proved that such confession was free and voluntary, that is, was not preceded by any inducement to the prisoner to make a statement held out by a person in authority, or that it was not made until after such inducement had clearly been removed. If the confession was made in consequence of an inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority, it cannot be used.

Inducements in the nature merely of religious or moral exhortations do not render confessions inadmissible. "Now kneel down," said a man once to a boy, just apprehended on a charge of murder. "I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty." It was held that the lad's subsequent confession could be given in evidence against him, no inducement of a temporal nature referring to the charge against him having been held out to him. (R. *v.* Wild, 1 Moo. C. C. 452.)

It is to be observed also that an inducement held out by a person not in authority does not exclude a confession. Prosecutors, constables, searchers, gaol surgeons, &c., are persons in authority. The prisoner's master is a person in authority only if it is against him that the crime has been committed. (R. *v.* Hannah Moore, 5 Cox, C. C. C. 555.)

Notwithstanding that a threat or promise may have been

made use of, a confession is to be received if it has been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence on the prisoner's mind. (R. *v.* Clewes, 4 C. & P. 221.)

It is no objection to the admissibility of a confession that it was made under a mistaken supposition that some of the prisoner's accomplices were in custody, even though such a supposition was created by artifice, with a view to the obtaining of the confession. (R. *v.* Burley, 1 Phil. Ev. 420.) *Vide* also R. *v.* Derrington, 2 C. & P. 418.)

A statement made by a prisoner when he is drunk is admissible, even though he was cunningly plied with liquor in the hope of his making admissions. (R. *v.* Spilsbury, 7 C. & P. 187.)

In R. *v.* Jarvis, L. R. 1 C. C. R. 96, and 10 Cox, C. C. 574), the prisoner was called up by his master and told: "You are in the presence of two police officers, and I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue. The master afterwards added: "Take care, we know more than you think." Held, that the prisoner's subsequent statement was admissible.

"You had better, as good boys, tell the truth." Statement held admissible. (R. *v.* Reeve and Handcock, L. R. 1 C. C. R. 362, and 12 Cox, C. C. 179.)

In R. *v.* Thompson ([1893] 2 Q. B. 12), the prisoner was tried for embezzling the money of a company. It was proved at the trial that, on being taxed with the crime by the chairman of the company, he said, "Yes, I took the money," and afterwards made out a list of the sums which he had embezzled, and, with the assistance of his brother, paid to the company a part of such sums. The chairman stated that at the time of the confession no threat was used, and no promise made as regards the prosecution of the prisoner, but admitted that, before receiving it, he had said to the prisoner's brother, "It will be the right thing for your brother to make a statement." And the Court drew the inference that the prisoner, when he made the confession, knew that the chairman had spoken those words to his brother. The Court of Crown Cases Reserved held that the confession of the prisoner had not been

satisfactorily proved to have been free and voluntary, and that therefore evidence of the confession ought not to have been received.

Other cases in point are :—R. *v.* Olpin, Sessions Paper, C. C. C., Vol. 87, p. 406 ; R. *v.* Croydon, 2 Cox, C. C. 67 ; R. *v.* Langher, 2 Cox, C. C. 134 ; R. *v.* Harris, 1 Cox, C. C. 106 ; R. *v.* Horner, 1 Cox, C. C. 364 ; R. *v.* Collier, 3 Cox, C. C. 57 ; R. *v.* Garner, 3 Cox, C. C. 175 ; R. *v.* Gilham, 1 Moo. C. C. 186 ; R. *v.* Kingston, 4 C. & P. 387 ; R. *v.* Richards, 5 C. & P. 318 ; R. *v.* Howes, 6 C. & P. 404 ; R. *v.* Hirst, 18 Cox, C. C. 374 ; R. *v.* Rose, 18 Cox, C. C. 717 ; Rogers *v.* Hawken, 67 L. J. Q. B. 526 ; R. *v.* Knight, 20 Cox, C. C. 711.

Notice to Produce.

R. *v.* ELWORTHY. (1867) [120]

[L. R. 1 C. C. R. 103 ; 10 Cox, C. C. 579 ; 37 L. J. (M. C.) ; 3 ; 17 L. T. 293 ; 16 W. R. 207.]

The prisoner, a solicitor, was indicted for perjury for having falsely sworn that there was no draft of a certain statutory declaration made by a client. No notice to produce the draft had been given to the prisoner, and upon his trial it was proved to have been last seen in his possession. It was held that, in the absence of such notice, secondary evidence of its contents was inadmissible.

" It is very important," said Kelly, C.B., " to conform to the rules of law which protect the accused from the admission of evidence of a doubtful and uncertain character when certain evidence can be obtained. Here the perjury assigned was, that there was no draft of the statutory declaration. In the course of the trial the exact contents of that draft became essential, because on them depended the materiality of the perjury assigned ; and the prosecution proceeded to give evidence that

such a draft existed and was in the defendant's hands, and then to give secondary evidence of its contents without having given any notice to produce it, on the principle that in this case notice might be dispensed with. Now, to take first of all the example of a civil action, it has been held that, in an action in trover for a deed or other writing, notice may be dispensed with, on the ground that the action itself is notice to the defendant of the nature and contents of the document. That doctrine is inapplicable here. Secondly, in a criminal prosecution for stealing a document, it has been held unnecessary to give notice to produce. In Aickles' Case (1 Leach, 294) it is said: 'If it had been in the prisoner's possession, the next best evidence to the bill itself would have been admissible; for, as a prisoner cannot be compelled, or even legally required, to produce any evidence which may operate against himself, the next best evidence which it is in the power of the prosecutor to produce is always admitted.' But there is also another reason, that by the form of the indictment the prisoner has notice that he is charged with the possession of the very document, and will be required to produce it. This reason is inapplicable in this case. The defendant swore there was no draft, and there was nothing on the form of indictment to show that the draft necessarily came into his possession, or remained in it, so as to entitle the prosecution to say that he ought to have produced it. It was necessary to prove that the defendant swore there was no draft, that he knew that to be false, and that the perjury was material to the issue; and he might in reality have alluded to another document. This, therefore, is different from the other cases where this principle alluded to has been applied; and under these circumstances there is nothing to call upon us to apply it here. I think, for myself, that the principle of admitting evidence which is not the best evidence, ought not to be extended."

Bramwell, B., said: "If the question had been only as to the existence of the draft, it might have been different, but here the prosecution gave evidence of the alterations and contents in order to show wilful perjury. These contents, therefore, became material; and the general rule then applied that you must give the best evidence. The exception suggested is, that the indictment itself was notice, but that exception does not apply here, as the prosecution might have contented themselves with proving the existence of the draft, and no more; whereas they did, in fact, give evidence of its contents."

[Besley for the Crown; Carter for the prisoner.]

The general rule, both in civil and criminal cases, is, that where a written instrument, of which it is desired to make use at the trial, is in the hands of the opposite party, it is necessary to serve him, or his solicitor, with a notice to produce it. If, after that has been done, it is not produced at the trial, then, upon proving the service of the notice, secondary evidence may be given. But a notice to produce is not required where, from the nature of the case, the prisoner must be aware that he is charged with the possession of the document in question. Thus, upon an indictment for stealing a bill of exchange, parol evidence of its contents may be given without any proof of a notice to produce (R. *v.* Aickles, 1 Leach, 294); and so, upon an indictment for administering an unlawful oath, where it appeared that the defendant read the oath from a paper, parol evidence of what the defendant in fact said was held to be sufficient without giving him notice to produce the paper. (R. *v.* Moors, 6 East, 419, n.)

Notice to produce need not be given in writing (Smith *v.* Young, 1 Camp. 440), though, of course, it had better be. It must be served within a reasonable time; but what is a reasonable time must depend on the circumstances of each case. (R. *v.* Ellicombe, 5 C. & P. 522.) In R. *v.* Kitson (Dears C. C. 187) the prisoner was indicted at Cambridge Assizes for arson in setting fire to his own house with intent to defraud an insurance office. Notice to produce the policy was given him about the middle of the day preceding the trial. The prisoner's residence, where the fire happened, was thirty

miles from Cambridge. It was held that proper notice to produce had not been given, and that secondary evidence of the policy was not admissible. But in R. *v.* Barker (1 F. & F. 326) a notice to produce policies of insurance, served on the prisoner's attorney on a Tuesday evening, the policies being then twenty miles off, and the trial taking place on the Thursday, was held sufficient, it being shown that there was an opportunity of procuring the policies if the prisoner had chosen to do so. "No general rule," said Bramwell, B., "can be laid down. Every case must be governed by particular circumstances, and as in this case there had been an opportunity of obtaining the policies, the notice is sufficient."

There are no degrees of secondary evidence. Therefore, if secondary evidence can be given at all, a party may give parol evidence of the contents of a letter of which he has kept a copy, and is not bound to produce the copy. (Brown *v.* Woodman, 6 C. & P. 206.)

Amendment of Indictment.

[121] R. *v.* **WELTON**. (1862)

[9 Cox, C. C. 297.]

The indictment charged the prisoner with attempting to murder a child named "Annie Welton." The prosecution, however, failed to prove that the child had ever borne such a name. It was held that the indictment could be amended under 14 & 15 Vict. c. 100, s. 1 (The Criminal Procedure Act, 1851), by striking out the words "Annie Welton," and substituting "a certain female child whose name is to the jurors unknown."

"The Act which gives power of amendment," said Byles, J., "states in the preamble that 'offenders frequently escape conviction on their trials by reason of the technical strictness of

criminal proceedings in matters not material to the merits of the case.' Here the amendment cannot prejudice the prisoner in her defence, and I consider the variance not 'material to the merits of the case.' A statute of this kind should have a wide construction, and I shall not interpret it in favour of technical strictness."

[Ribton and Oppenheim for the prosecution; Sleigh for the prisoner.]

So in R. *v.* Western (L. R. 1 C. C. R. 122), where in an indictment for perjury at petty sessions the magistrates were described as county magistrates, when really they were for a borough, it was held that this was a proper subject for amendment. So, also, as in R. *v.* Gumble (L. R. 2 C. C. R. 1), where the statement in the indictment was, that the prisoner stole nineteen shillings and sixpence, whereas the proof was that he stole a sovereign, or, as in R. *v.* Neville (6 Cox, C. C. 66), where the indictment charged perjury committed on a trial for burning a barn, whereas the proof was that the offence was really setting fire to a stack of barley, and it appearing that the offence was, in fact, the same, the barn and the stack having been destroyed by one fire, an amendment was allowed.

But an amendment which alters the nature or quality of the offence charged will not be made; and so in R. *v.* Wright (2 F. & F. 320), where the defendant was indicted for a forgery charged as a statutory felony, whereas the offence turned out to be forgery at common law, and therefore, only a misdemeanour, it was held that the word "feloniously" could not be struck out of the indictment.

In R. *v.* Murray ([1906] 2 K. B. 385, and 21 Cox, C. C. 250), the Court of Crown Cases Reserved held that where goods which were the separate property of a wife were stolen from the house of her husband, in which she was residing, it is not sufficient to lay them in the indictment as the property of the husband; but in delivering his judgment Lord Alverstone, C. J., said: "I think it right to express our strong opinion that the leave to amend the indictment, which was asked for, ought to have been granted. The case falls distinctly within the language of sect. 1 of 14 & 15 Vict. c. 100, which in express words allows an amendment in the ownership of

any property described in the indictment, and it is difficult to see on what ground it could be contended that such an amendment would unfairly prejudice the prisoners, merely because the true ownership of the goods was incorrectly stated in the indictment."

In R. *v.* Byers (71 J. P. 205) the prisoner was indicted for having obtained a sum of money from F. W. D. by the false pretence that she had made funeral arrangements with, and had paid the sum in question to, a named undertaker for the burial of a nurse child, G. S., who had died under her care. The evidence showed that the false pretence was made as to the arrangements for the funeral of another nurse child, W. D. It was held that the Court had power to amend the indictment by substituting the name of W. D. for G. S.

An indictment for false pretences is bad and incapable of amendment if it omits to allege in express words an "intent to defraud." (R. *v.* James, 12 Cox, C. C. 127.)

The statutes connected with this subject are:—11 & 12 Vict. c. 46; 12 & 13 Vict. c. 45; 14 & 15 Vict. c. 100 (The Criminal Procedure Act, 1851).

Other cases in point are:—R. *v.* Rymes, 3 C. & K. 326; R. *v.* Frost, 6 Cox, C. C. 526; Gregory *v.* Reg. (in error), 15 Q. B. 957; R. *v.* Harris, Dears. C. C. 344; R. *v.* Larkin, Dears. C. C. 365; R. *v.* Pritchard, 8 Cox, C. C. 461; R. *v.* Marks, 10 Cox, C. C. 367; R. *v.* Vincent, 5 Cox, C. C. 537; R. *v.* Tymms, 11 Cox, C. C. 645; R. *v.* Sturge, 3 El. & Bl. 734; R. *v.* Orchard, 8 C. & P. 565; R. *v.* Vebster, L. & C. 77; R. *v.* Titley, 14 Cox, C. C. 502.

The Counts of an Indictment.

[122] R. *v.* CASTRO. (1880)

[5 Q. B. D. 490.]

The prisoner was the notorious "claimant" to the Tichborne title and estates, and had been convicted upon an indictment

for perjury containing two counts. In one count the offence was alleged to have been committed in an action of ejectment in the Court of Common Pleas, and in the other in an affidavit sworn before the Court of Chancery; but the proceedings in both counts had one object. It was held that two consecutive terms of seven years' penal servitude might be lawfully passed notwithstanding that seven years' penal servitude is the maximum punishment for perjury.

"It was contended," said James, L. J., "that there was one fraud and one imposture by which the plaintiff in error endeavoured to pass himself off as some other person with the view of obtaining certain lands, and therefore that any number of false statements made on any number of occasions in any number of suits constituted only one perjury, and that one perjury alone could form the subject of a legal sentence. To my mind it is only necessary to state the proposition in order to dispose of it. It is simply monstrous to suppose that the law allows a man to be punished only once for any number of perjuries which he may commit, merely because they are committed in furtherance of one fraudulent scheme and design. A modified form of this objection was that the alleged perjuries were committed in only one suit, but it is quite obvious that they were committed in two distinct suits: the one suit was brought in the Court of Chancery for one specific object, although it might be ancillary to the action at common law, and in that suit one set of false statements was uttered in violation of an oath taken in the course of it; the other set of false statements was uttered in another place, at another time, in violation of an oath taken before another tribunal, namely, the Court of Common Pleas, during the trial of an action of ejectment. It is perfectly idle to suggest that these two sets of false statements constituted but one and the same perjury, or that there is no legal power to pass more than one sentence for those distinct perjuries."

"I will suppose a case like the present," said Bramwell, L. J., "where the perjuries, although committed upon different occasions, relate to the same subject-matter, and I will suppose that each of the offences is deserving of seven years' penal servitude. Is the Crown to prosecute for one offence, and after the defendant has been convicted to wait for seven years before it prosecutes for the other? This, however, is the preposterous result of the argument for the plaintiff in error. Or is the Crown to prosecute upon two separate indictments? And, if it does, what is to happen then? Is judgment to be respited upon the second indictment until the first period of imprisonment is over? Surely the Crown ought to do what is reasonable and consistent—what it has done in the present case—namely, when two offences of the same character are alleged to have been committed, to join them in separate counts of the same indictment, and it cannot be said that the defendant, if convicted, ought to receive the punishment for one offence only."

[Sir H. James, A.-G., Sir F. Herschell, S.-G., Poland, and A. L. Smith for the Crown; Benjamin, Q.C., Atherley Jones, Hedderwick, and Spratt for the prisoner.]

Indictments for misdemeanours may contain several counts for different offences; and although, where two separate felonies are charged in separate counts of the same indictment, it is almost a matter of course for the Judge, upon application, to compel the prosecutor to elect upon which charge he will proceed, it is by no means a matter of course for him to do so where two separate misdemeanours are similarly charged; and it continually happens that in "long firm" cases, a very large number of separate frauds are comprised in one indictment against several prisoners, the number of counts sometimes exceeding a hundred, all of which counts are tried simultaneously. Where, however, two defendants were indicted for a conspiracy, and also for a libel, and at the close of the case for the prosecution there was evidence against both as to the conspiracy, but no evidence against one as to the libel, Coleridge, J.,

put the prosecutor to his election on which charge he would proceed before the counsel for the defendants entered upon their defence. (R. *v.* Murphy, 8 C. & P. 297.)

It seems that the joinder of a count for felony with a count for misdemeanour would be held bad on demurrer, or, after a general verdict, on motion in arrest of judgment; for the challenges and incidents of trial are not the same in felony and misdemeanour, and therefore they could not be tried together. But where an indictment contains a count for felony, and also a count for misdemeanour, and the prisoner is convicted of the felony alone, such joinder of counts for felony and misdemeanour furnishes no ground for arresting the judgment. (R. *v.* Ferguson, Dears. & P. 427.)

In the leading case the Lords Justices followed R. *v.* Wilkes (4 Burr. 2527), where the Judges, in answer to a general question by the House of Lords, whether a sentence of imprisonment, to commence from and after the termination of an imprisonment to which the defendant had been before sentenced for another offence, was good in law, replied that it was good.

So, also, where an indictment contained two counts for passing bad shillings to two different people on the same day, and the prisoner was sentenced to two years' imprisonment, this sentence was held to be wrong; but the Judges said that a sentence of one year's imprisonment might have been passed for each offence, and that the commencement of the second might be postponed until the termination of the first. (R. *v.* Robinson, 1 Moo. C. C. 413.)

Vide also R. *v.* Edmondes, 59 J. P. 776.

In R. *v.* Bayard ([1892] 2 Q. B. 181) an indictment containing several counts, charging different misdemeanours, was removed into the High Court by *certiorari*, the prosecutors entering into a recognizance, under 16 & 17 Vict. c. 30, s. 5, upon condition to pay to the defendant, in case she should be acquitted upon the indictment, her costs incurred subsequent to the removal. The defendant was convicted on some of the counts, and acquitted on others. On a rule to tax the costs to be paid by the prosecutors to the defendant in respect of the counts on which she had been acquitted, the Court held that the defendant had not been "acquitted upon the indictment," within the meaning of the recognizance, and therefore was not entitled to costs.

Defect in Indictment cured by Verdict.

[123] R. *v.* **GOLDSMITH.** (1873)

[L. R. 2 C. C. R. 74; 12 Cox, C. C. 479.]

The prisoner was indicted under 24 & 25 Vict. c. 96, s. 95, for unlawfully receiving goods knowing them to have been obtained by false pretences. The indictment did not set out the false pretences. At the close of the case for the prosecution the objection was taken, on behalf of the prisoner, that the indictment was bad because it did not set out the false pretences. The prisoner having been convicted, it was held that the objection must be taken to have been made after verdict in arrest of judgment, and that after verdict the indictment was good.

"The objection here raised," said Bramwell, B., "is that the indictment shows no offence. In strictness the objection was taken at the wrong time. A question as to an indictment may be raised by demurrer, by motion to quash, or by motion in arrest of judgment. Had the present objection been taken on demurrer or motion to quash, I am not prepared to say the count would have been good. But upon principle the defect, if any, is cured by verdict. The rule is laid down in Serjeant Williams' note on Stennel *v.* Hogg, 1 Notes on Saunders by Williams, at p. 261: 'Where there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is

cured by the verdict by the common law.' . . . My ground of decision is that the defect, if any there be, is cured by verdict. If the matter were one in our discretion, I should not arrest the judgment. I think that it would be better that such objections should be formally taken by motion to arrest judgment."

"This," said Cleasby, B., "is at most the case of a defective averment, and it must be taken after verdict to have been proved in the only sense in which it ought to have been averred."

[Metcalfe, Q.C., and Straight for the Crown; Giffard, Q.C., and Poland for the prisoner.]

It is a general rule of pleading at common law,—and where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases,—that where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court, after verdict, that the verdict could not have been found on this issue, without proof of this averment, then, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict. (Heyman *v.* R., L. R. 8 Q. B. 102; and see R. *v.* Aspinall, 2 Q. B. D. 58.)

The leading case was followed in the case of R. *v.* Stroulger (16 Cox, C. C. 85), where the prisoner was indicted for that, at an election for members of Parliament (the Ipswich election of November, 1885), he was "guilty of corrupt practices against the form of the statutes in that case made and provided." The jury found the prisoner guilty of corrupt practices by offering money for votes, and after verdict it was objected that the indictment was bad because it did not sufficiently describe the nature of the offence charged. Upon a motion in arrest of judgment, it was held that if the objection had been taken before the verdict, it would have been fatal, but that the defect in the indictment was such as could be supplemented by the verdict or the evidence; and that, the prisoner having been found upon the evidence to have been guilty of bribery, the indictment was cured by such verdict. "I think,"

said Field, J., "that the principle of R. *v.* Goldsmith, which has been cited on behalf of the prosecution, is applicable to this case." "There are many cases," said Lord Coleridge, C. J., "in which, if objection were taken to the indictment at the proper time, it would have been fatal, but where, if conviction follows before objection is taken, the defect in the indictment is cured by verdict"; and the learned Chief Justice proceeded to refer with approval to the statement of Wms. Saunders, Vol. I. p. 261, in a note to the case of Stennel *v.* Hogg.

By 14 & 15 Vict. c. 100, s. 25, it is enacted that "Every objection to any indictment, for any formal defect apparent on the face thereof, shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards."

Autrefois Acquit.

[124] R. *v.* O'BRIEN. (1882)

[15 Cox, C. C. 29; 46 L. T. 177.]

Two men were tried at the Worcestershire Quarter Sessions upon an indictment charging them with larceny at common law, and in a second count, with receiving "the goods aforesaid." They were acquitted, on the ground that the alleged goods were a fixture in a building. They were then charged upon a second indictment, under 24 & 25 Vict. c. 96, s. 31, for stealing the fixture, and to that they set up a plea of *autrefois acquit*. The presiding chairman at sessions held that plea not to be proved, and the prisoners then pleaded not guilty, but were convicted. On the question being reserved, the Court for Crown Cases reserved held that the ruling of the chairman was right, and that the prisoners had not been in peril on the count for receiving in the first indictment.

Lord Coleridge, C. J., said: "The count for receiving in the first indictment was for receiving the goods and chattels aforesaid before then feloniously stolen, that is, stolen in the sense of the common law. That count does not apply to a charge of receiving stolen property, which is only made an offence by statute. The prisoners, therefore, were never in jeopardy in respect of the count for receiving in the first indictment. The conviction was right."

[J. D. Sims for the prosecution; F. Forester Goold for the prisoners.]

So it was held in R. *v.* Gilmore (15 Cox, C. C. 85), that an acquittal upon an indictment under 24 & 25 Vict. c. 97, s. 35, and 24 & 25 Vict. c. 100, s. 32, charging the prisoner with the felony of obstructing a railway, with intent to endanger the safety of passengers, &c., was no bar to a subsequent indictment under sects. 36 and 34 of the same statutes respectively, preferred on the same facts charging him with the misdemeanour of endangering the safety of passengers, &c., by an unlawful act

It is a clear principle of our law that a person cannot be indicted again for a crime of which he has already been acquitted. The only question is whether he was really in jeopardy on the former occasion. If he was, so that the jury might have convicted instead of acquitting him, he can successfully set up this plea. Thus, a person acquitted on a charge of murder could not afterwards be tried for manslaughter upon the same facts, nor could a man acquitted on an indictment for robbery be subsequently indicted for an assault with intent to rob. On the other hand, if a man, charged with the murder of a girl whose miscarriage he had sought to procure, and who, after the operation, died, is found not guilty upon the indictment for murder, he may still be tried and convicted of an attempt to procure abortion.

Other cases on this subject are: R. *v.* Sheen, 2 C. & P. 634; R. *v.* Vandercom, 2 East, P. C. 519; R. *v.* Gould, 9 C. & P. 364; R. *v.* Connell, 6 Cox, C. C. 178; R. *v.* Clark, 1 B. & B. 473; R. *v.* Salvi, 10 Cox, C. C. 481, n.; R. *v.* Bird, 5 Cox. C. C. 11; R. *v.* Gisson, 2 C. & K. 781; R. v. Emden, 9 East, 437; R. *v.* Green, 7 Cox. C. C. 186; R. *v.* Plant, 7 C. & P. 575; R. *v.* Dann, 1 M. C. C.

424; R. *v.* Taylor, 3 B. & C. 502: R. *v.* Knight, 9 Cox, C. C. 437; R. *v.* Roche, 1 Leach, C. C. 134; R. *v.* Parry, 7 C. & P. 836; Holcroft's case, 2 Hale, 245; R. *v.* Scott, 1 Leach, 404; Ryley *v.* Brown, 17 Cox, C. C. 79; R. *v.* Edmondes, 59 J. P 776.

Autrefois Convict.

[125] **R. *v.* MILES.** (1890)

[24 Q. B. D. 423; 17 Cox, C. C. 9; Sessions Paper, C. C. C., Vol. 111, p. 177; 59 L. J. (M. C.) 56; 62 L. T. 572; 38 W. R. 334; 54 J. P. 549.]

At the Sessions of the Central Criminal Court held on December 16, 1889, the prisoner was arraigned on an indictment which charged him in the first count with unlawfully and maliciously wounding Charles Living; second count, unlawfully inflicting grevious bodily harm on the said Charles Living; third count, assaulting the said Charles Living, and thereby occasioning him actual bodily harm; fourth count, a common assault on the said Charles Living; fifth count, a common assault on Harry Anstey.

Counsel for the prisoner put in a plea of *autrefois convict*, which alleged that the prisoner had already been tried and convicted before a Court of summary jurisdiction for the same offence as that contained in the first four counts of the indictment. The evidence offered in support of this plea consisted of an examined copy of a record of the Court of summary jurisdiction sitting at West Ham, and evidence that the offences charged in the first four counts of the indictment related to the same matter as the offence mentioned in the record.

The counsel for the prosecution did not dispute that the first four counts of the indictment referred to the same matter as the

offence mentioned in the record, but argued that the said record did not disclose any conviction within the meaning of 24 & 25 Vict. c. 100, s. 45, on the ground that the Court had neither ordered the defendant to pay a fine nor to be imprisoned, the prisoner having been discharged on recognizances for good behaviour only, and not having been required to come up for judgment. He cited, in support of this contention, the case of Hartley *v.* Hindmarsh, L. R. 1 C. P. 553.

The counsel for the defence argued that by 42 & 43 Vict. c. 49. s. 16, sub-s. 2, express power was given to the magistrate, upon convicting a person of assault, to discharge him conditionally on his giving security to be of good behaviour, and that 24 & 25 Vict. c. 100, s. 45, must now be read with the section of 42 & 43 Vict. c. 49, above referred to, and that, consequently, the case of Hartley *v.* Hindmarsh was not in point. The defendant was ultimately convicted on the first four counts of the indictment, and acquitted on the fifth count, and the question reserved was whether the proceedings before the Court of summary jurisdiction against the defendant in respect of the assault upon Charles Living were a bar to the proceedings against him at the Central Criminal Court for the same offence.

The Court for the Consideration of Crown Cases Reserved quashed the conviction.

Hawkins, J., said: "In the case before us, the doubts I once entertained are removed—the one and same assault of which the defendant was convicted is the sole foundation upon which the conviction at the Central Criminal Court is rested, although aggravations are added to it which, at first sight, make the offences appear different—more particularly the count for wounding; but I find it alleged and found as a fact that that wounding formed part of the assault and battery of which the defendant was convicted, as well it might, without amounting to an unlawful and malicious wounding, which is purely an indictable offence under sect. 20 of 24 & 25 Vict. c. 100. This

is recognised law: see R. *v.* Taylor, L. R. 1 C. C. R. 194. For the reasons I have given, I am now satisfied that the conviction before us ought to be quashed."

Charles, J. (in a judgment read by Lord Coleridge, C. J.), said: "The defendant was convicted on the first four counts of the indictment, and the Recorder reserved the following question for the opinion of the Court: 'Whether the proceedings before the Court of summary jurisdiction against the defendant in respect of the assault on Charles Living were a bar to the proceedings against him at the Central Criminal Court for the same offence?' The answer to this question does not, in my opinion, in any way depend on the construction of the 45th section of 24 & 25 Vict. c. 100, and the 16th section of 42 & 43 Vict. c. 49. I think the proceedings were a bar apart from any statutory provision, and that the conviction should be quashed in accordance with the well-established rule at common law—that where a person has been convicted for an offence by a Court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence. This rule has been acted on again and again, and I can see no reason why it should not be acted on in this case. It cannot be material that a magistrate has power by statute to deal with a convicted person otherwise than by fine or imprisonment, for it is the conviction, and not the nature of the sentence, which constitutes the bar. The principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. This being the view which I take of the case, it is unnecessary to decide whether the defendant is entitled to the protection provided by 24 & 25 Vict. c. 100, s. 45."

[Lockwood, Q.C., and Besley for the prosecution; Poland, Q.C., and Warburton for the prisoner.]

"The defendant may plead that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment.

"The plea should be on parchment, signed by counsel in a proper form, but such a plea is, in point of form, sufficient if the defendant says when called upon to plead that he has been lawfully convicted or acquitted of the offence charged in the indictment.

"In order to prove a plea of *autrefois convict*, the defendant must show that he was previously convicted, either of the offence charged in the indictment to which the plea is pleaded, or of an offence of which he might be convicted on that indictment, and such proof is not made out by proof that the defendant was convicted on an indictment set aside on writ of error." (Stephen's Digest of Criminal Procedure.)

In R. *v.* Morris (L. R. 1 C. C. R. 90, and 10 Cox, C. C. 480) it was held that a conviction for assault by justices at petty sessions, at the instance of the person assaulted, and imprisonment consequent thereon, are not, either at common law or under the 24 & 25 Vict. c. 100, s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault.

In R. *v.* King ([1897] 1 Q. B. 214) it was held that a defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods.

Cases on this subject are:—Wemyss *v.* Hopkins, L. R. 10 Q. B. 378; R. *v.* Tancock, 13 Cox, C. C. 217; R. *v.* Chamberlain, 6 C. & P. 93; R. *v.* Bowman, 6 C. & P. 101; R. *v.* Lea, 2 M. C. C. 9; R. *v.* Walker, 2 M. & R. 446; R. *v.* Elrington, 1 B. & S. 688; Holden *v.* King, 46 L. J. Ex. 75; R. *v.* Phillips, 1 Jur. 427; R. *v.* Stanton, 5 Cox, C. C. 324; Wilkinson *v.* Dutton, 32 L. J. (M. C.) 152; In re Thompson, 30 L. J. (M. C.) 19; R. *v.* Friel, 17 Cox, C. C. 325; R. *v.* Blaby, 18 Cox, C. C. 5; R. *v.* Grimwood, 60 J. P. 809. *Vide* also Previous Convictions, *post*, p. 535.

Witnesses unable to Travel.

[126] R. *v.* STEPHENSON. (1862)

[L. & C. 165; 9 Cox, C. C. 156; 31 L. J. (M. C.) 147; 8 Jur. N. S. 522; 6 L. T. 334.]

The prisoner was tried for obtaining money by false pretences from a woman named Mary Smith. The female servant and the brother of Mary Smith proved that the latter was daily expecting her confinement; and the brother stated that she was "poorly otherwise," and that she was therefore too ill to travel from her place of residence to the place of trial, a distance of about twenty-five miles.

The counsel for the prosecution then proposed to give in evidence the deposition of Mary Smith, duly taken before the committing magistrate, to which the prisoner's counsel objected, on the ground that the illness, if any, ought to have been proved by a medical man, and that the expectation of her confinement was not an illness contemplated by sect. 17 of 11 & 12 Vict. c. 42, which authorized the deposition being given in evidence on the trial. On the prisoner being convicted and the point being reserved, the Court of Crown Cases Reserved affirmed the conviction.

Erle, C. J., said: "It was contended on behalf of the prisoner, that an approaching confinement was not such an illness as was contemplated by that section. We cannot affirm any proposition of that sort. There may be incidents attending an approaching parturition of such a nature as to bring the case within the statute. We are all of opinion that the question, whether the illness proved is or is not within the statute, is a question for the determination of the presiding Judge; and that if to his mind, exercising his discretion upon the facts proved,

the evidence of illness is sufficient, this Court ought not to interfere with his decision."

The other Judges concurred, on the ground that it was a question for the presiding Judge to determine, and that if he thought the evidence of the illness sufficient within the statute, it was for him to act upon his discretion.

[No counsel appeared.]

In the case of R. *v.* Wellings (3 Q. B. D. 426), the principal witness for the prosecution was in hourly expectation of being confined, and the question was whether her deposition could be read at the trial on the ground that she was so ill as to be unable to travel. It was clear from the evidence of her husband that she was very ill, and under the particular circumstances of the case it was held that her deposition was rightly received in evidence under 11 & 12 Vict. c. 42, s. 17.

Coleridge, C. J., said: "We all think that this conviction should be affirmed. Pregnancy may be a source of such illness as to render the witness unable to travel, and be an illness within the statute. It is in each case a matter for the presiding Judge to determine. The presiding Judge has in this case decided that the evidence was sufficient to satisfy him that the deponent was 'so ill as not to be able to travel,' and we see nothing to lead us to the conclusion that he was wrong."

This decision is manifestly consistent with reason and common sense. No doubt, as Willes, J., is reported to have said in R. *v.* Walker (1 F. & F. 534), "illness from confinement is an ordinary state, and not such an illness as is contemplated by the statute"; but that is only the presumption, and if it can be shown that, as a matter of fact, the woman is "so ill as not to be able to travel," and that the other conditions of 11 & 12 Vict. c. 42, s. 17, have been complied with, her deposition ought to be received. R. *v.* Wellings was followed in the later case of R. *v.* Goodfellow (14 Cox, C. C. 326).

By the above-named statute (after directing justices to take, in manner therein mentioned, the statement on oath or affirmation of the witnesses appearing against any person charged before them with an indictable offence), it is enacted that, if afterwards, "upon the trial of the person so accused, it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as

not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

In R. *v* Welton (9 Cox, C. C. 296), Byles, J., said: "I am of opinion, that to make this deposition admissible, there should be the evidence of a medical man upon oath, or other evidence upon oath, which the Court might think of equal value to sworn medical testimony. The constable Harris says he has been told King is suffering from fever; how can he know the illness is of such a nature as to render the witness 'so ill as not to be able to travel'? A medical man is the proper witness of that fact, and no medical man is called. The deposition cannot be read."

In R. *v.* Lynch (Sessions Paper, C. C. C., Vol. 113, p. 511), a police constable said he had seen the witness ill in bed, and he produced a medical certificate. This was considered sufficient evidence, and the deposition of the absent witness was allowed to be read.

In R. *v.* Butcher (64 J. P. 808), it was held that proof by a police sergeant that a witness is apparently very close indeed to her confinement, is not sufficient evidence of her inability to attend the Court so as to allow her depositions taken before the coroner to be read. It was further held that coroners' depositions stand on the same footing as depositions taken before magistrates, and the provisions of 11 & 12 Vict. c. 42, apply.

Other cases on this subject are:—R. *v.* Harris, 4 Cox, C. C. 440; R. *v.* Riley, 3 C. & C. 116; R. *v.* Phillips, 1 F. & F. 105; R. *v.* Croucher, 3 F & F. 285; R. *v.* Wilton, 1 F. & F. 309; R. *v.* Bull, 12 Cox, C. C. 31; R. *v.* Tait, 2 F. & F. 553; R. *v.* Heeson, 14 Cox, C. C. 40; R. *v.* Farrell, L. R. 2 C. C. R. 116; R. *v.* Thompson, 13 Cox, C. C. 181; R. *v.* Marshall, Car. & M. 147; R. *v.* Scaife, 5 Cox, C. C. 243; R. *v.* Clements, 5 Cox, C. C. 191; R. *v.* Wilshaw, Car. & M. 145; R. *v.* Day, 6 Cox, C. C. 55; R. *v.* Williams, 12 Cox, C. C. 101; R. *v.* Wicker, 18 Jur 252; R. *v.* Wilson, 8 Cox, C. C. 453; R. *v.* Cockburn, 7 Cox, C C. 265; R. *v.* Hazell, 8 Cox, C. C. 443; R. *v.* Williams, 4 F. & F. 515.

Evidence of Character.

R. *v.* ROWTON. (1865) [127]

[L. & C. 520; 10 Cox, C. C. 25.]

The defendant was indicted for indecently assaulting a boy of fourteen. On the part of the defendant several witnesses were called as to his good character. On the part of the prosecution it was proposed to contradict this testimony; and a witness was called for that purpose. After the witness had stated that he knew the defendant, the following question was put to him:—"What is the defendant's general character for decency and morality of conduct?" His reply was, "I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers, who were also pupils of his, is that his character is that of a man capable of the grossest indecency and most flagrant immorality." The jury convicted the prisoner, and the questions reserved for the Court were:—

(1) Whether, when witnesses have given a defendant a good character, any evidence is admissible to contradict?

(2) Whether the answer made by the witness in this case was properly left to the jury?

The Court of Crown Cases Reserved held that if evidence of good character is given on behalf of a prisoner, evidence of bad character may be given in reply. But in either case the evidence must be confined to the prisoner's general reputation; and the individual opinion of the witness as to his disposition, founded upon his own experience and observation, is inadmissible.

Cockburn, C. J., said: "There are two questions to be decided. The first is whether, when evidence of good character

has been given in favour of a prisoner, evidence of his general bad character can be called in reply. I am clearly of opinion that it can be. . . . Assuming, then, that evidence was receivable to rebut evidence of good character, the second question is, was the answer which was given in this case, in reply to a perfectly legitimate question, such an answer as could properly be left to the jury? Now, in determining this point, it is necessary to consider what is the meaning of evidence of character. Does it mean evidence of general reputation or evidence of disposition? I am of opinion that it means evidence of general reputation. What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged; but no one has ever heard the question—what is the tendency and disposition of the prisoner's mind?—put directly. The only way of getting at it is by giving evidence of his general character founded on his general reputation in the neighbourhood in which he lives. That, in my opinion, is the sense in which the word 'character' is to be taken, when evidence of character is spoken of. The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried. . . . It is quite true that evidence of character is most cogent, when it is preceded by a statement shewing that the witness has had opportunities of acquiring information upon the subject beyond what the man's neighbours in general have; and in practice the admission of such statements is often carried beyond the letter of the law in favour of the prisoner. It is, moreover, most essential that a witness who comes forward to give a man a good character, should himself have a good opinion of him, for otherwise he would only be deceiving the jury; and so the strict rule is often exceeded. But when we consider what, in the strict interpretation of the law, is the limit of such

evidence, in my judgment it must be restricted to the man's general reputation, and must not extend to the individual opinion of the witness. Some time back, I put this question—Suppose a witness is called who says that he knows nothing of the general character of the accused, but that he has had abundant opportunities of forming an individual opinion as to his honesty or the particular moral quality that may be in question in the particular case. Surely, if such evidence were objected to, it would be inadmissible.

"If that be the true doctrine as to the admissibility of evidence to character in favour of the prisoner, the next question is, within what limits must the rebutting evidence be confined? I think that that evidence must be of the same character and confined within the same limits—that, as the prisoner can only give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description, shewing that the evidence which has been given in favour of the prisoner is not true, but that the man's general reputation is bad. . . . I find it uniformly laid down in the text-books that the evidence to character must be general evidence of reputation; and, dealing with the law as I find it, my opinion is that the answer given in this case was inadmissible, and that the conviction ought not to stand."

[Tayler for the prosecution; Sleigh for the prisoner.]

In R. *v.* Brown and Hedley (L. R. 1 C. C. R. 70 & 10 Cox, C. C. 453), the prisoners were tried for conspiring to assault and inflict grievous bodily harm on a man named Robinson. At the close of the case for the prosecution, the counsel for the prisoners, after having called several witnesses to character, proposed to call witnesses to prove that they would not believe the witnesses for the prosecution on their oaths. The Court decided on refusing to receive such evidence, and the prisoners were convicted, the question being reserved as to whether the evidence tendered by the prisoners' counsel ought to have been received or not. The Court of Crown Cases Reserved, quashed the conviction,

observing that all the text writers were agreed that the evidence could be given, and that the practice was so ancient, and hitherto so undoubted, that it could not be altered now, unless by the authority of the Legislature.

In R. *v.* Bispham (4 C. & P. 392), it was held that it is not essential that witnesses, who state that they would not believe another person on his oath, should have ever heard such person give evidence upon oath; as the real question is, whether the witnesses have such a knowledge of the person's character and conduct as enables them conscientiously to say that it is impossible to place any reliance on any statement that such person may make.

If a prisoner's counsel elicits, by his cross-examination of the witnesses for the prosecution, a statement that the prisoner has borne a good character, evidence may be given of a previous conviction, just the same as if witnesses to character had been called on his behalf. (R. *v.* Gadbury, 8 C. & P. 676. *Vide* also R. *v.* Shrimpton, 5 Cox, C. C. 387.)

The proper question to ask of a witness called as in the leading case is, "From your knowledge of his general character, would you believe him on his oath?"

By the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), it is enacted as follows (sect. 1, sub-sect. 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 shew 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 shew that he is guilty of the offence wherewith he is then charged; 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, 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; or

(iii) he has given evidence against any other person charged with the same offence.

In R. *v.* Marshall (63 J. P. 36), the prisoner was indicted for the wilful murder of Eliza Roberts. At the close of the case for the prosecution the prisoner gave evidence on her own behalf for the defence. Her evidence was to the effect that she had not killed the deceased woman, but that she had been killed by her husband, who had been called as a witness for the prosecution. Darling, J., held that this was an imputation on the character of a witness, and allowed the prisoner to be cross-examined as to several previous convictions for wounding and for assaults. *Vide post*, p. 517.

Vide also R. *v.* Rouse [1904] 1 K. B. 184; and R. *v.* Bridgwater [1905] 1 K. B. 131, *post*, pp. 517, 518, for decisions under the Criminal Evidence Act, 1898.

Duty of Counsel when Conducting Prosecutions.

R. *v.* BERENS, HOLCHESTER AND OTHERS. (1865) [128]

[4 F. & F. 842; 10 Cox, C. C. 226.]

This was a case tried at the Central Criminal Court. Ballantine, Serjt., opened the case briefly; and at the close of the evidence for the prosecution, the counsel for the prisoners defended by counsel did not call witnesses, and severally addressed the jury. One of the prisoners, who was not defended by counsel, called a witness and addressed the jury. Ballantine, Serjt., then proposed to exercise the right given him by Denman's Act (28 & 29 Vict. c. 18), and sum up the evidence for the prosecution.

Blackburn, J., interposing, said, as he understood the Act, it was not the duty of the counsel for a prosecution to sum up, at all events, whether there was need for it or not. He thought the rule that counsel ought to follow was not to sum up unless

there was some necessity for it, and then to make the summing-up as brief as possible. He only, however, threw that out as a general principle.

Ballantine, Serjt., said he submitted that counsel must use his own discretion in such matters, and he was sure the Bar would not take advantage of the power given them by the Act. Whatever views the learned Judge enunciated on this subject would, no doubt, be serviceable, but from his own long experience in Criminal Courts, he would submit that the effect of the recent alteration in the practice would be this—the opening address in criminal cases would be comparatively terse and short, as was now the case in civil actions, and that, after the evidence had been given, many circumstances which had been elicited would afford occasion for comment by the counsel for the prosecution, which, under the former custom, would have been dwelt upon by him in opening the case to the jury. He need hardly say, in conducting this case on the part of the Crown, the object to be attained by counsel ought to be nothing except justice, and as far as possible to perform that duty temperately, and in that spirit he would endeavour to conduct the present case. After this observation, the learned Serjeant proceeded to sum up the evidence for the Crown.

Blackburn, J., before summing up the case to the jury, took occasion first to comment upon Denman's Act, and said that it seemed to him that the object of the Act had been misunderstood, and that if counsel proceeded to act on it in the way for which some appeared to contend—though no harm had resulted from the exercise of the privilege in this case—it would either be necessary to repeal the Act, or the course of criminal justice might be seriously injured. It had always hitherto been the supposition in the administration of criminal justice, as a general rule, that the prosecuting counsel was in a kind of judicial position; that while he was there to conduct

his case, he was to do it at his discretion, but with a feeling of responsibility—not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury, and nothing more. At Nisi Prius, the counsel was at liberty to try to get his client a verdict, if possible, by fair and proper means. In a Court of criminal judicature, the counsel for the prosecution was in a different position. The Act did not make it the duty, as he thought, of the prosecuting counsel in criminal cases to sum up, but gave him the power to sum up where that had become exceptionally necessary, in order to set right something that had come out in the course of the case, and might seem to him to require explanation. If that course were followed,—if, in other words, the prosecuting counsel, when the evidence had been adduced, were to say nothing, unless something different from what he had opened had been elicited, and it was necessary, therefore, that he should give some explanation,—then it might be deemed the counsel for the prosecution would have rightly appreciated the meaning and intention of the Act, and the course of criminal justice would go on as it ought to do, the prosecuting counsel regarding himself really as part of the Court, and acting in a *quasi* judicial capacity. But if the practice was, as he understood it had become in this Court, to regard the summing-up by the prosecuting counsel as a duty, the course that obtained at Nisi Prius, which was a contest between party and party, might creep in, and the prosecuting counsel in a criminal case, forgetting that he himself was a kind of minister of justice, might at the end of his case address an urgent appeal to the jury, and make himself a mere partisan. In that case, it would be a positive duty and necessity for the Judge, instead of regarding the counsel for the prosecution as assisting him, to watch and see that there was no unfair advantage taken by him to catch a verdict, apart from the merits. He quite agreed that it was in the discretion of a prosecuting counsel

whether he would sum up or not; but he thought that it should be exercised only in exceptional cases, and not as a rule.

[Ballantine, Serjt., Gifford, and Sleigh for the prosecution; Robinson, Serjt., Metcalfe, Ribton, Cooper, Straight, C. A. Turner, and Collins for the prisoners.]

A similar ruling was laid down by the Court in R. *v.* Hursfield, 8 C. & P. 269.

By 6 & 7 Will. IV. c. 114, s. 1, persons tried for felonies after the close of the case for the prosecution, may make full answer and defence thereto by counsel.

By sect. 2, in all cases of summary conviction, persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel. (Repealed by 11 & 12 Vict. c. 43, s. 36, but replaced by the same Act, s. 12.)

By 28 & 29 Vict. c. 18, s. 2, it is enacted that if any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding Judge at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanour, whether the prisoner or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening, or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded, to sum up the evidence respectively, and the right of reply and practice and course of proceedings, save as hereby altered, shall be as at present.

The Court may properly request counsel to give his honorary services to a prisoner. It is otherwise with a solicitor. But the Court will recommend that in such cases the Crown should pay the fees both of counsel and solicitor, as assigned. (R. *v.* Fogarty, 5 Cox, C. C. 161.)

On a trial for murder, the Court refused to allow counsel to appear for a prisoner without his expressed assent. (R. *v.* Yscuado, 6 Cox, C. C. 386.)

The counsel for the prosecution ought not, in summing up the evidence, to make observations on the prisoner's not calling witnesses, unless at all events it has appeared that he might be fairly expected to be in a position to do so. Neither ought counsel to press it upon the jury that if they acquit the prisoner they may be considered to convict the prosecutor or prosecutrix of perjury. (R. *v.* Puddick, 4 F. & F. 497.)

It is improper for counsel when defending a prisoner to suggest to the jury to recommend the prisoner to mercy. (R. *v.* McIntyre, 2 Cox, C. C. 379.)

Other cases on the subject of the duties of counsel are :—R. *v.* Page, 2 Cox, C. C. 221 ; R. *v.* Littleton, 9 C. & P. 671 ; R. *v.* Brice, 2 B. & A. 606 ; R. *v.* Gurney, 11 Cox, C. C. 414 ; R. *v.* Orrell, 1 M. & Rob. 467 ; R. *v.* Gascoigne, 7 C. & P. 772 ; R. *v.* Courvoisier, 9 C. & P. 362 ; R. *v.* Gardner, 9 Cox, C. C. 332 ; R. *v.* Barber, 1 C. & K. 434 ; Duncombe *v.* Daniell, 8 C. & P. 222 ; R. *v.* Burdett, Dears. C. C. 431.

Order of Counsel addressing Jury—Reply.

R. *v.* BURNS AND OTHERS. (1887) [129]

[16 Cox, C. C. 195.]

The prisoners were charged with wilful murder. The death of the deceased was caused in what is known in the district of Manchester, where the case was tried, as a "scuttling" affray.

The evidence was involved and conflicting. Two of the counsel for the defence, calling no witnesses for their respective clients, claimed the right of finally addressing the jury, although a third counsel defending another prisoner called witnesses, and therefore gave the Crown a right of reply upon him. The Court (Day and Wills, JJ.), having consulted, ruled that each case must be judged by its special circumstances, and, refusing to lay down any inflexible rule, held that the counsel for the Crown had the right to reply to the counsel for the prisoners who called witnesses, but that the counsel for the remaining prisoners had the right of final reply.

[West, Q.C., G. W. Heywood, and Scott for the prosecution ; Cottingham, Foard, and McKeand for the prisoners.]

This is made a leading case because it is a decision of two of her Majesty's Judges; the rule, however, as here laid down had been generally observed at the Central Criminal Court prior to the date of the above case.

Where on an indictment against several defendants one of them calls evidence which is applicable to the cases of all, it seems that the prosecution has a general right of reply, although the other defendants call no witnesses; but where such evidence is applicable only to the case of the defendant calling it, and does not apply to the cases of the other defendants, the right of the prosecution to reply is confined to the case of the defendant calling the evidence. (R. *v.* Trevelli and others, 15 Cox, C. C. 289.)

In R. *v.* Kain (15 Cox, C. C. 388), in which case only one of four prisoners called witnesses, Stephen, J., ruled that there was no general right of reply, and said that the most convenient course would be for the counsel for the prosecution to sum up the case generally and reply upon the evidence called by the one prisoner, before the counsel for the other prisoners addressed the jury.

Vide also R. *v.* Maslin, Sessions Paper, C. C. C., Vol. 98, p. 190; R. *v.* Vass, Sessions Paper, C. C. C., Vol. 98, p. 363 ; R. *v.* Serné and Goldfinch, Sessions Paper, C. C. C., Vol. 107, p. 147 ; R. *v.* Hayes, 2 M. & R. 155 ; R. *v.* Jordan, 9 C. & P. 118 ; R. *v.* Scorey, Sessions Paper, C. C. C., Vol. 111, p. 602; R. *v.* Barber, 1 C. & K.

434; R. *v.* Hazell, 2 Cox, C. C. 220; R. *v.* Martin, 3 Cox, C. C. 56; R. *v.* Belton, 5 Jur. (N. S.) 276; R. *v.* Meadows, 2 Jur. (N. S.) 718; R. *v.* Holman, 3 Jur. (N. S.) 722; R. *v.* Thomas, 3 Jur. (N. S.) 272; R. *v.* Wood, 6 Cox, C. C. 224; R. *v.* Burdett, Dears. C. C. 431; R. *v.* Copley, 4 F. & F. 1097; R. *v.* Bernard, 1 F. & F. 240; R. *v.* Heere Shah and others, Sessions Paper, C. C. C. Vol. 118, p. 1428.

At a meeting of the Judges in December, 1884, it was resolved that in those Crown cases in which the Attorney or Solicitor-General is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed as of right to the counsel for the Crown, and in no others. (State Trials, New Series, Vol. 5, p. 3, note (c).)

The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), enacts as follows:—

Sect. 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.

Sect. 3.—In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

The following is the procedure in criminal trials:—

(1) Where the prisoner is undefended and calls no witness, although he himself gives evidence, the counsel for the prosecution can only open his case to the jury, and has no right of summing up the evidence, or of reply.

(2) Where an undefended prisoner calls a witness the prosecution has the right of reply.

(3) Where a defended prisoner does not give evidence, and calls no witness, the counsel for the prosecution has the right of summing up his case before the counsel for the defence addresses the jury.

(4) Where a defended prisoner himself gives evidence, but calls no witness, the counsel for the prosecution may sum up the case at the close of the prisoner's evidence, and the defence has the last word.

(5) Where a defended prisoner gives evidence and also calls a witness or witnesses, the counsel for the accused has the right of two speeches, one in opening his defence and another in summing it up. The counsel for the prosecution replies. It is not necessary that the prisoner should be called immediately after the close of the case for the prosecution when other evidence for the defence is to be given; the order in which the prisoner and his witnesses are called is a matter for the discretion of counsel for the defence.

Strictly and technically speaking, it would appear that witnesses to character have the same effect as witnesses to fact in the matter of reply, but this somewhat questionable right is never used by counsel for the prosecution. *Vide* R. *v.* Dowse, 4 F. & F. 492.

Statement of Prisoner although defended by Counsel.

[130] R. *v* DOHERTY. (1887)

[16 Cox, C. C. 306.]

This was a trial for murder, and upon the completion of the case for the prosecution, the prisoner's counsel stated that the prisoner wished to make a statement to the jury; he was allowed to do so, on the understanding that he should make his statement before the speech of his counsel, and that the counsel for the Crown would have the right to reply. In summing up to the jury, Stephen, J., who tried the case, said: "Down to the year 1836, prisoners were not allowed, in cases of felony, to be defended by counsel, although they might have counsel to cross-examine witnesses. The effect of that course was that a prisoner was obliged, in the nature of the case, to speak for himself. The Prisoners' Counsel Act was passed in 1836, and this declared that a person had a right to

make a full defence by counsel, and accordingly that has since been done. It has been considered by some of the Judges that the effect of this Act is to take away from the prisoner any right to make any statement on his own account. I do not think that that is the effect of the Act, and I think so for various reasons, but there is one to which I attach much importance. This reason is, that in trials for high treason, prisoners were not allowed to be defended by counsel, and it was only by an Act passed in the reign of William III., and afterwards supplemented by an Act passed in the beginning of the reign of Queen Anne, that prisoners were allowed to be defended by counsel in cases of high treason. Now, it was the practice, as can be seen by anyone who looks into the State Trials at the time when prisoners were by statute allowed to be defended by counsel, to ask a prisoner, after his counsel had addressed the jury on his behalf, whether he wished to say anything himself, and prisoners either did make statements, or abstained from doing so, as they thought fit. In the famous case of the Cato Street conspiracy, Thistlewood and several others, after they had been defended by counsel, and before the Judge summed up the case, were asked whether they wished to add anything to what their counsel had said, and at least one of the prisoners availed himself of the privilege (*a*). I do not think that that was done in the case of the trial of Frost, the Chartist, for high treason, at a later period, nor in the few cases of high treason which have since been tried. But it was certainly the practice in England, down to the Cato Street conspiracy trial, that prisoners were allowed, in cases of high treason, to make statements, and I cannot see why the Act of 1836, the Prisoners' Counsel Act, should be regarded as taking from prisoners the right to make

(*a*) Four of the prisoners, namely, Brunt, Ings, Davidson, and Tidd, addressed the jury after two speeches by their counsel, Mr. Curwood and Mr. Adolphus.

a statement in cases of felony, while a similar Act does not take away the right in cases of high treason."

[Poland and C. W. Mathews for the prosecution ; Sir Charles Russell, Q.C., Besley, and Gill for the prisoner.]

The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), enacts as follows :—

Sect. 1.—(h) Nothing in this Act shall affect the provisions of sect. 18 of the Indictable Offences Act, 1848, or the right of the person charged to make a statement without being sworn.

In R. *v.* Pope (18 Times Law Reports, 717) it was held that a prisoner who is defended by counsel can make a statement to the jury without being sworn before his counsel addresses the jury, instead of giving evidence under the Criminal Evidence Act, 1848. Phillimore, J., who tried the case, in the course of his summing-up pointed out to the jury " that seventy years ago prisoners were not entitled to have counsel to represent them, and made whatever statement they could to the jury on their own behalf. The law was then changed, and prisoners were allowed to retain counsel for their defence, and the learned Judges at that time decided that the prisoners still retained their right to make a statement to the jury. Since the passing of the Criminal Evidence Act, 1898, a prisoner could go into the witness box and give evidence on his own behalf if he wished to do so. This further right, in his opinion, did not do away with the former privilege, and he therefore allowed the prisoner to make his statement and followed the practice laid down by Mr. Justice Stephen as to the time when it should be made."

Since the passing of the Criminal Evidence Act, 1898, it has been more usual, whether a prisoner is defended by counsel or not, for him to give evidence on oath instead of making a statement not upon oath, and the above case of R. *v.* Pope appears to be the only reported decision on the subject since the passing of the Criminal Evidence Act, 1898. The following decisions, however, will shew the state of the law as it stands at the present time.

In R. *v.* Dyer (1 Cox, C. C. 113), Baron Alderson said : " I would never prevent a prisoner from making a statement, though he has counsel. He may make any statement he pleases before his

counsel addresses the jury, and then his counsel may comment upon that statement as part of the case. If it were otherwise, the most monstrous injustice might result to prisoners. If the statement of the prisoner fits in with the evidence, it would be very material, and we should have no right to shut it out."

In R. *v.* Williams (1 Cox, C. C. 363), Baron Rolfe followed the decision of Baron Alderson in the last case, and in R. *v.* Collins (5 C. & P. 305), the same course was taken. The report (from the *Yorkshire Post*) of a case tried before Mr. Justice Hawkins, at the Leeds Assizes, in February, 1880, contains the following passage :— "His Lordship, in reply to Mr. Atkinson, said that though it had been the almost invariable practice for the statements of prisoners charged with criminal offences to be made either before the magistrate or through their counsel at assizes, he, for his part, could see no reason why prisoners should not be permitted to give, not upon oath, their version of occurrences directly to the jury. Were he sitting at those assizes alone, he should at once allow the prisoners, if they and the learned counsel who represented them so desired, to make their statements to the jury. He would, however, confer with Mr. Justice Lush on the point. After a brief conference, his Lordship said he was very happy to find that Mr. Justice Lush not only entirely agreed with him, but had already, in criminal cases, acted upon the principle. Expressions of individual Judges to the effect that prisoners defended by counsel were not at liberty to make their own statements were set forth in books, though perhaps the individual circumstances in these cases were not fully stated. He, for one, did not feel bound by any dicta of that sort, for there was no ruling of the Court of Criminal Appeal upon the point. As a general principle, he had not a shadow of doubt in his own mind that though a man placed upon his trial must not, according to the criminal law of this country, be examined upon oath, he must always be allowed an opportunity of defending himself or of making his own statement. It would be a barbarous state of the law if he were not permitted to give his own explanation when he was charged with an offence which might cost him his life. It might require consideration whether that statement should be made by the prisoner or by his counsel, but as a general principle he believed that statements might be given to the jury either directly from the dock or through his counsel."

In R. *v.* Shimmin (15 Cox, C. C. 122) it was held that a prisoner on his trial, defended by counsel, is not entitled to have his explanation of the case to the jury made through the mouth of his counsel, but may, at the conclusion of his counsel's address, himself address the jury, and make such statements, subject to this, that what he says will be treated as additional facts laid before the Court, and entitling the prosecution to the reply.

In R. *v.* Millhouse (15 Cox, C. C. 622) it was held by Lord Coleridge, C. J. (in accordance with the resolution of the majority of the Judges), that a prisoner, after his counsel's address to the jury, may be allowed to make a statement of facts to the jury; but when it is proposed to call witnesses for a prisoner, it will not be competent for him to make any statement to the jury in addition to his counsel's address.

In R. *v.* Everett (Sessions Paper, C. C. C., Vol. 97, p. 335) Mr. Justice Hawkins said: "Counsel for a prisoner cannot in his speech be permitted to state matters of fact not in evidence nor proposed to be proved by evidence, but only alleged by counsel to be instructions from, and assertions by, the prisoner himself. The rule formerly rigidly adhered to by many Judges was that a prisoner who had the services of counsel to defend him could not be allowed either to speak for himself or to make any statement of fact. That rule, however, has for some years past been considered by, I believe, most if not all the Judges to be a hard rule. And it has been modified to this extent, that although a prisoner cannot have counsel to speak for him and also make a speech for himself, he may make a statement of such facts as he relies on for his defence, but he must be strictly confined to such statement. If a prisoner avails himself of this privilege to state new facts, the Judge has, in my opinion, a discretion as to allowing the prosecuting counsel to reply, not generally on the whole case, but only on the allegations of fact introduced by the prisoner. I desire to lay down no general rule as to the time when a prisoner's statement of fact should be made; my own opinion is that it is discretionary with the Judge to determine whether it shall be before or after the counsel's speech. In the present case I will permit the prisoner to make any statement of fact he may desire to make at once, before his learned counsel proceeds with his address."

In R. *v.* Dahle (Sessions Paper, C. C. C., Vol. 98, p. 545) the prisoner, although defended by counsel, was allowed by Mr. Justice Day to make his own statement to the jury; and in R. *v.* Ross (Sessions Paper, C. C. C., Vol. 100, p. 31) the same thing was permitted by Mr. Justice Stephen; and again allowed by Mr. Justice Hawkins in R. *v.* Perry (Sessions Paper, C. C. C., Vol. 100, p. 506), and in R. *v.* Cunningham and Burton (Sessions Paper, C. C. C., Vol. 102, p. 154).

In R. *v.* Nally (Sessions Paper, C. C. C., Vol. 102, p. 345) the prisoner's counsel was directed to make his speech in the first instance.

In R. *v.* Reiglehuth (Sessions Paper, C. C. C., Vol. 103, p. 464) Mr. Justice Stephen laid down the same ruling as in R. *v.* Ross; and in R. *v.* Arthur Teasel (Norwich Summer Assizes, July, 1889), a case in which the prisoner was on his trial for murder, Lord Coleridge, C. J., allowed the prisoner to make a statement before his counsel addressed the jury.

Other cases on this subject are:—R. *v.* Boucher, 8 C. & P. 141; R. *v.* Malins, 8 C. & P. 242; R. *v.* Walking, 8 C. & P. 243; R. *v.* Rider, 8 C. & P. 539; R. *v.* Manzano, 2 F. & F. 64; R. *v* Taylor, 1 F. & F. 535; R. *v.* Stephens, 11 Cox, C. C. 669; R. *v.* Teste, 4 Jur. N. S. 244; R. *v.* Weston, 14 Cox, C. C. 346; R. *v.* Parkins, 1 C. & P. 548; R. *v.* White, 3 Camp. 97; R. *v.* Valli, Sessions Paper, C. C. C., Vol. 111, p. 377; R. *v.* Beezer, Sessions Paper, C. C. C., Vol. 117, p. 723; R. *v.* Sheriff, 20 Cox, C. C. 334.

Criminal Evidence Act, 1898.

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R. *v.* GARDNER. (1898) [131]

[[1899] 1 Q. B. 150; 68 L. J. Q. B. 42; 79 L. T. 358; 47 W. R. 77; 62 J. P. 743; 19 Cox, C. C. 177.]

In this case it was held by the Court of Crown Cases Reserved that where upon the trial of an indictable offence

the person charged gives evidence in his own behalf, but does not call witnesses, the counsel for the prosecution is entitled, immediately after the person charged has given his evidence, to sum up the case for the Crown, and in so doing to comment upon the evidence given by the person charged.

Hawkins, J., said: "If we construe strictly the provisions of Denman's Act, applying it to the present state of circumstances when prisoners are competent witnesses in their own behalf, I think that on the strictest construction of the language used, the counsel for the prosecution would have the right to comment on the evidence given by the prisoner. In sect. 2 of that Act the counsel for the prosecution is given the right of addressing the jury a second time 'in support of his case, for the purpose of summing up the evidence against such prisoner.' Where a prisoner gives evidence on his own behalf, his object is to lessen the force of the evidence for the prosecution; and the object of the summing-up is to take the evidence of the prisoner and comment upon it, and show that the effect of the evidence given on behalf of the prosecution ought not to be disturbed."

[Biron for the prosecution; Turrell for the prisoner.]

The following are decisions on various questions arising out of the construction of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36):—

In R. *v.* Rhodes ([1899] 1 Q. B. 77, and 19 Cox, C. C. 182) it was held that the Act does not confer on a prisoner the right of giving evidence on his own behalf before the grand jury, nor does it deprive the Court of the right to comment on the failure of the prisoner to give evidence at the trial.

In R. *v.* Saunders (63 J. P. 24) it was again held, as in R. *v.* Rhodes, that a person charged with an offence has no right to give evidence on his own behalf before the grand jury. Also, that the Judge ought to inform an undefended prisoner of his right, on his trial, to address the jury on his own behalf, but the omission of the Judge to do so does not invalidate the conviction.

In R. *v.* Bird (19 Cox, C. C. 180) it was held that the statement which a prisoner makes in giving evidence before the magistrates by whom he is committed for trial may be used as evidence against him at the trial, and the disposition containing such statement may be put in evidence at the trial, although he then declines to give evidence. If also, having given evidence before the magistrates, he replies to the question put to him under the Indictable Offences Act (11 & 12 Vict. c. 42, s. 18), whether he desires to say anything in answer to the charge, by saying that his evidence already given is true, the whole of that evidence and his reply to the question may be given in evidence against him as a statement under that Act.

In R. *v.* Boyle (20 T. L. R. 192) the same ruling was followed, and it was held by Jelf, J., that if a prisoner has elected to give evidence before the magistrate, and is committed for trial, the prosecution can at the trial, before closing their case, put in the evidence given by the prisoner on oath before the magistrate.

In R. *v.* Kate Marshall (63 J. P. 36) it was held that where a prisoner makes a statement on oath in her own defence, to the effect that one of the witnesses for the prosecution committed the offence for which she is indicted, the nature of the defence is such as to involve imputations on the character of that witness within the meaning of sect. 1 of the Criminal Evidence Act, 1898, even though such statement relates only to facts material to the actual charge for which the prisoner is then being tried, and not to any antecedent facts, and is not made for the purpose of casting imputations, but only as a necessary part of the defence.

In R. *v.* Holmes (The Times, 31st January, 1899) it was held by Day, J., at the Lancashire Assizes, that to suggest that the prosecutrix is a "drunken wastrel" involves an imputation on her character within the meaning of sect. 1 (f) (ii.) of the statute 61 & 62 Vict. c. 36 (the Criminal Evidence Act, 1898).

In R. *v.* Fisher (The Times, 31st January, 1899) it was also held by Day, J., at the same Assizes, that to suggest in a case of an indictment for attempted rape that the prosecutrix consented to what was done involves an imputation on her character within the meaning of the Act.

In R. *v.* Rouse and another ([1904] 1 K. B. 184, and 20 Cox, C. C. 592) upon the trial of an indictment for conspiracy by false pretences to induce the prosecutor to sell a mare, the prosecutor gave

evidence that one of the defendants had previously offered to buy the mare on credit. The defendant in question was called as a witness for the defence and was asked in cross-examination, "Did you ask the prosecutor to sell you the mare in April, or has he invented all that?" To which he replied, "No, it is a lie, and he is a liar." Counsel for the prosecution was thereupon allowed to cross-examine the defendant as to previous convictions. The Court of Crown Cases Reserved held that the defendant's answer amounted only to an emphatic denial of the truth of the charge against him; that the nature or conduct of the defence was not such as to involve imputations on the character of the prosecutor within the meaning of s. 1, sub-s. (f), (ii.), of the Criminal Evidence Act, 1898, and that therefore the defendant was not liable to be cross-examined as to his previous character.

In R. *v.* Bridgwater ([1905] 1 K. B. 131, and 20 Cox, C. C. 737) a prisoner who was arrested in possession of stolen property, said in answer to the charge, that he was acting under instructions from a detective, and at the trial at quarter sessions, the detective was cross-examined as to whether he had not employed the prisoner as an informer. The Court of Crown Cases Reserved held that the nature or conduct of the defence was not such as to involve imputations on the character of the witnesses for the prosecution under s. 1, sub-s. (f), (ii.), of the Criminal Evidence Act, 1898, so as to render the prisoner liable when called in his own defence to be cross-examined as to previous convictions.

In R. *v.* Hodgkinson (64 J. P. 808) it was held that a prisoner is not entitled to give evidence on oath in mitigation of his sentence after he has pleaded guilty.

In Charnock *v.* Merchant ([1900] 1 Q. B. 474) the appellant was charged before a Court of summary jurisdiction with an offence under the Prevention of Cruelty to Children Act, 1894, and gave evidence on his own behalf as that Act permits. He was asked in cross-examination whether he had not been previously convicted of a similar offence, and answered that he had. The Court of summary jurisdiction convicted the appellant, and the Queen's Bench Division held that sect. 1 of the Criminal Evidence Act, 1898, applied; that the evidence of the appellant's previous conviction was wrongly admitted, and therefore, that the conviction was bad.

In R. *v.* Hadwen and Ingham ([1902] 1 K. B. 882, and 20 Cox, C. C. 206) it was held that where one of two prisoners, jointly indicted, gives evidence under sect. 1 of the Criminal Evidence Act, 1898, and, in doing so, incriminates the other prisoner, the latter is entitled to cross-examine the former. *Vide* also Hackston *v.* Millar (8 F. Just. Cas. 52 Ct. of Justy.).

In R. *v.* Sheriff (20 Cox, C. C. 334) it was held that an unsworn statement made by a defended prisoner who calls no evidence must be made before, and not after, the speech made by counsel for the prosecution in summing up his evidence.

Effect of Misreception of Evidence.

R. *v.* GIBSON. (1887) [132]

[18 Q. B. D. 537; 16 Cox, C. C. 181.]

The prisoner was found guilty of unlawful wounding by throwing a stone at the prosecutor. In giving his evidence the prosecutor said, but not in answer to any specific question put to him, "Immediately after I was struck by the said stone, a lady going past, pointing to the prisoner's door, said, 'The person who threw the stone went in there.'" It was admitted that the prisoner could not have heard this, and yet it was allowed to go to the jury as part of the evidence for the prosecution. It was held that the conviction was bad, notwithstanding that there was other evidence before the jury properly admitted and sufficient to warrant a conviction.

"I am of opinion," said Lord Coleridge, C. J., "that this conviction must be quashed. At the trial the statement of a passer-by as to where the prisoner had gone was received in evidence as tending to his identification. It is admitted that the statement was not made in the prisoner's hearing, and therefore could not legally be given in evidence against him.

The prisoner was defended by counsel, who in the exercise of his discretion did not object to the admissibility of the evidence at the time it was given. It is immaterial to consider whether counsel exercised his discretion rightly or wrongly. The Chairman of Quarter Sessions frankly states that in his summing-up he directed the jury's attention to the evidence with respect to the statement made by the person who was passing by. After the jury had retired the prisoner's counsel objected that the Chairman ought not to have left that evidence to the jury. The Chairman refused to withdraw it from their consideration. It is not necessary to express any opinion whether he could then have withdrawn it. The jury convicted the prisoner, and the question for this Court is, whether or not a conviction so obtained can be allowed to stand. It is clear that a verdict so obtained in a civil case would not formerly have been allowed to stand, because, until the passing of the Judicature Acts, the rule was that, if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial, because the Courts said that they would not weigh evidence. Where, therefore, such evidence had gone to the jury, a new trial was granted as a matter of right. Can it be contended that, by the law as it stood at the time of the passing of the Judicature Acts, there was any difference between civil and criminal trials with respect to the result of a finding of the jury arrived at upon evidence which was partly legal and partly illegal? The consequences in each case no doubt would be different. In civil cases a new trial was ordered; in criminal cases this, for other reasons, could not be done; but both in civil and in criminal cases the verdict would be vitiated by reason of the illegal evidence having been left to the jury. I think, therefore, upon principle the verdict of the jury in the present case cannot stand. . . . The true principle which governs the present case is that it is the duty

of the Judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows. Here evidence which was at law inadmissible was allowed to go to the jury."

Pollock, B., said: "In the present case I am clearly of opinion that this Court has no power to say that the evidence of the identification of the prisoner was sufficient to warrant a conviction without the statement of the woman who was passing at the time the offence was committed. The result would follow that in every case where inadmissible evidence had been received, it would become the office of the Court to decide in what way the jury ought to have acted upon the evidence before them which was legally admissible."

Mathew, J., said: "We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not. In either case, it is the duty of the Judge to warn the jury not to act upon evidence which is not legal evidence against the prisoner. Here the Chairman of Quarter Sessions did leave such evidence to the jury, and I am of opinion that their verdict ought not to stand."

"If a mistake had been made by counsel," said Wills, J., "that would not relieve the Judge from the duty to see that proper evidence only was before the jury. It is sometimes said—erroneously, as I think—that the Judge should be counsel for the prisoner; but, at least, he must take care that the prisoner is not convicted on any but legal evidence."

[Shand for the Crown.]

The decision in this case is obviously of great importance, for it explains the law on the subject with extreme clearness. It is remarkable that prior to 1887 there appears to have been no reported case on this subject; the three cases quoted at the hearing before the Court for the Consideration of Crown Cases Reserved, namely, R. *v.* Ball (1 Camp. 324); R. *v.* Fuidge (L. & C. 390); and Margaret's Tinckler's case (1 East, P. C. 354), having little or no bearing upon the question at issue.

It may be here stated that where, in a criminal case, it is sought to give in evidence the contents of a telegram sent by the prisoner to a witness, it is absolutely necessary that the original message handed in at the post-office should be produced, or proof given that it is destroyed, and the copy received by a witness cannot be given in evidence till it is proved that the original cannot be produced. (R. *v.* Regan, 16 Cox, C. C. 203.)

Where two prisoners jointly indicted have been convicted, and a question has been reserved for the consideration of the Court of Crown Cases Reserved on behalf of one of them, the Court has power, under 11 & 12 Vict. c. 78, s. 2, if it shall be of opinion that the objection raised is valid and that it affects the conviction of both prisoners, to quash the conviction of the other prisoner as well as that of the prisoner on whose behalf the question has been reserved. (R. *v.* Saunders, [1899] 1 Q. B. 490.)

Dying Declarations.

[133] **R. *v.* JENKINS.** (1869)

[L. R. 1 C. C. R. 187; 11 Cox, C. C. 250; 38 L. J. (M. C.) 82; 20 L. T. 372; 17 W. R. 621.]

On the night of the 16th of October, 1869, a woman was found almost drowned in a very deep part of the River Avon. She was rescued from the water, but in an exhausted condition, and she became, according to the medical evidence, in great danger. The next day she said she did not think she should get over it, and asked that some one should be sent for to pray with her. Later in the day, the magistrate's clerk came, and found her in bed, breathing with considerable difficulty, and moaning occasionally. He administered an oath,

and received from her a written statement to the effect that she had gone for a walk with the prisoner, and he had pushed her into the river. At about 11 o'clock on the morning of the next day after making this statement the woman died, and the question was, whether her statement could be received in evidence. At the time she made it, she was no doubt in imminent danger, and in the statement she said: "From the shortness of my breath, I feel that I am likely to die, and I have made the above statement with the fear of death before me, and with no hope at present of my recovery." The words "at present" had been inserted at the woman's own suggestion, and were not in the first draft. It was held that the statement could not be received in evidence, because at the time she made it there was evidently a faint hope of recovery still lingering in the woman's mind.

"The result of the decisions," said Kelly, C. B., "is that there must be an unqualified belief in the nearness of death—a belief, without hope, that the declarant is about to die. If we look at reported cases, and at the language of learned Judges, we find that one has used the expression, 'every hope of this world gone' (*per* Eyre, C. B., Woodstock's case, 1 Leach, C. C. 502); another, 'settled hopeless expectation of death' (*per* Willes, J., R. *v.* Peel, 2 F. & F. 22); another, 'any hope of recovery, however slight, renders the evidence of such declarations inadmissible' (*per* Tindal, C. J., R. *v.* Hayward, 6 C. & P. 160). We, as Judges, must be perfectly satisfied, beyond any reasonable doubt, that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution. If the present case had rested upon the expression, 'I have made the above statement with the fear of death before me, and with no hope of my recovery,' a difficult question might have been raised. But when these words were read over to the declarant, she desired

to put in the important words 'at present'; and the statement so amended is, 'with no hope at present of my recovery.' We are now called upon to say what is the effect of these words, taking into consideration all the circumstances under which they were put in. The counsel for the prosecution has argued that the words 'at present' do not alter the sense of the statement. We think, however, that they must have been intended to convey some meaning, and we must endeavour to give effect to that meaning. . . . The deceased was asked in express terms by the clerk 'to correct any mistake that he might have made.' She then said, 'Put in the words "at present."' Even if this were not a criminal case, this would be sufficient to show that the omission of 'at present' was a mistake—that she meant 'no present hope' as distinguished from 'no hope.' She therefore intended the words to have some substantial meaning; and if they have any meaning at all, they must qualify the absolute meaning which the declaration must contain in order to render it admissible evidence."

"Dying declarations," said Byles, J., "ought to be admitted with scrupulous, and I had almost said with superstitious, care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subjected to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions, and of unintentional misrepresentations, both by the declarant and the witness, as this case shows. In order to make a dying declaration admissible there must be an expectation of impending and almost immediate death from the causes then operating. The authorities show that there must be no hope whatever. In this case the deceased said originally she had no hope at present. The clerk put down that she had no hope. She said in effect when the statement was read over to her, 'No, that is not what I said, nor what I mean. I mean that at present I have no hope,' which is, or

may be, as if she had said, 'If I do not get better I shall die.' The conviction must be quashed."

[T. W. Saunders and Bailey for the Crown; Collins and Norris for the prisoner.]

But in R. *v.* Hubbard (14 Cox, C. C. 565) it was held by Mr. Justice Hawkins, at Ipswich Assizes, that a declaration made under a belief of impending death was admissible in evidence, even though the declarant at a later period of the day took a more cheerful view of her position, and thought she should recover.

In order to render dying declarations admissible in evidence five conditions must be complied with, viz.:

(1) The prisoner against whom the declaration is proposed to be given must be on his trial for the murder or manslaughter of the declarant.

(2) The declaration must have been made by a person who, if alive, would have been a competent witness against the prisoner.

(3) At the time he made the declaration, the declarant must have been in actual danger of death.

(4) At the time he made the declaration, the declarant must have given up all hope of recovery.

(5) The declaration must have reference to the circumstances of the transaction which resulted in the declarant's death.

In R. *v.* Katz (64 J. P. 807) a deposition of a dying person was taken by a magistrate at a hospital in the presence of the accused person, and all the requirements of sect. 17 of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), were complied with. It was held that the deposition was admissible in evidence on the trial of the accused person for murder, although the requirements of sect. 6 of Russell Gurney's Act (30 & 31 Vict. c. 35) had not been complied with.

Cases in point are:—R. *v.* Dalmas, 1 Cox, C. C. 95; R. *v.* Perkins, 2 Moo. C. C. 135; R. *v.* Cleary, 2 F. & F. 850; R. *v.* Smith, 16 Cox, C. C. 170; R. *v.* Brooks, 1 Cox, C. C. 6; R. *v.* Thomas, 1 Cox, C. C. 52; R. *v.* Howell, 1 Cox, C. C. 151; R. *v.* Taylor, 3 Cox, C. C. 84; R. *v.* Mooney, 5 Cox, C. C. 318; R. *v.* Mead, 2 B. & C.

605; R. *v.* Osman, 15 Cox, C. C. 1; Margaret Tinckler's case, 1 East, P. C. 354; R. *v.* Mitchell, 17 Cox, C. C. 503; R. *v.* Gloster, 16 Cox, C. C. 471; R. *v.* Whitmarsh, 62 J. P. 680, 711; R. *v.* Smith, 65 J. P. 425; R. *v.* Abbott, 67 J. P. 151; R. *v.* Curtis, 21 T. L. R. 87; R. *v.* Simpson, 62 J. P. 825; R. *v.* Cowle, 71 J. P. 152.

Exclamations as Part of the Res Gestæ.

[134] **R. *v.* BEDINGFIELD.** (1879)

[14 Cox, C. C. 341.]

The prisoner was indicted for the murder of a woman at Ipswich. It appeared that the prisoner had relations with the deceased woman, and had conceived a violent resentment against her on account of her refusing him something he very much desired, and also as appearing to wish to put an end to these relations. He had uttered violent threats against her, and had distinctly threatened to kill her by cutting her throat. She carried on the business of a laundress, with two women as assistants; the prisoner living a little distance from her. On the night before the day on which the act in question occurred, the deceased, from something that had been said, entertained apprehensions about him, and desired a policeman to keep his eye on her house. At ten at night he, being near, heard the voice of a man in great anger. Early next morning the prisoner came to her house, earlier than he had ever been there before, and they were together in a room some time. He went out, and she was found by one of the assistants lying senseless on the floor, her head resting on a footstool. He went to a spirit-shop and bought some spirits, which he took

to the house, and went again into the room where she was, both the assistants being at that time in the yard. In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something, pointing backwards to the house. In a few minutes she was dead. In the course of the opening speech for the prosecution it was proposed to state what she said. It was objected on the part of the prisoner that it was not admissible.

Cockburn, C. J., said: "I have carefully considered the question, and am clear that it cannot be admitted, and, therefore, ought not to be stated, as it might have a fatal effect. I regret that according to the law of England, any statement made by the deceased should not be admissible. Although made in the absence of the prisoner, could it be admissible as part of the *res gestæ?* It is not so admissible, for it was neither part of anything done, nor was it something said while something was being done; it was something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was overheard. . . . Anything uttered by the deceased at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as 'Don't, Harry!' But here it was something stated by her after it was all over, whatever it was, and after the act was completed. The statement is not admissible as a dying declaration, because it does not appear that the woman was aware that she was dying, although she might have known it if she had had time for reflection. Here that was not so, for at the time she made the statement she had no time to consider and reflect that she was dying; there is no evidence to show that she knew it, and I cannot presume it. There is nothing to show that she was under the sense of impending death, so the statement is not admissible as a dying declaration."

In spite of the rejection of the statement of the deceased woman, the prisoner was convicted.

[Carlos Cooper and Blofield for the Crown; Simms Reeve for the prisoner.]

"After the conviction of Bedingfield, there was a strong movement in favour of the prisoner, on the ground that the woman's statement had been rejected, and that it might have been in his favour, or that its falsehood might have been shown; and if the circumstances had been less conclusive, it is possible the movement might have been successful. The prisoner, however, was executed; but there was considerable discussion on account of the rejection of the evidence. It must not be presumed that the question should be discussed upon the supposition that the statement is inimical to the accused, for, supposing it to be in his favour, the objection, if valid, would equally apply. In the present case the words sworn to on the depositions were: 'See what Harry has done!' which, as the Lord Chief Justice said, would probably have been fatal to the prisoner; but suppose they had been, 'See what he has driven me to!' they would have been sufficient, probably, to secure an acquittal. And it was impossible to say what on cross-examination the words might have appeared to be. Mr. Pitt Taylor, the author of the well-known Treatise on the Law of Evidence, publicly impugned this ruling, and published a letter in the *Times*, pointing out that it was contrary to the doctrine laid down in decided cases, and that what was said by a person on the instant, and in consequence of something first done to her, might be considered as part of the *res gestæ*, as much so as if uttered an instant before, while it was being done." (14 Cox, C. C. 345.)

The general rule is, that the declarations of a person robbed, ravished, or murdered, made immediately after the assault, are good evidence, and there is considerable doubt whether the ruling of Cockburn, C. J., in the leading case was correct.

It appears, however, to have been given after consultation with Field and Manisty, JJ., who agreed with him, and it was followed by Hawkins, J., in R. *v.* Goddard, 15 Cox, C. C. 7.

In R. *v.* Foster (6 C. & P. 325), where the prisoner was on his trial for manslaughter by driving a cabriolet over a man named

Ferrall, it was proposed to give in evidence against him a statement made by the deceased, immediately after he was knocked down, as to how the accident happened. Mr. C. Phillips, for the prisoner, objected that "what the deceased said in the absence of the prisoner, as to what had caused the accident, was not receivable in evidence." Baron Gurney, however, replied, "What the deceased said at the instant, as to the cause of the accident is clearly admissible," and the rest of the Court (Park, J., and Patteson, J.) concurring, the evidence was received.

Thompson *v.* Trevanion (Skin. 402) is to the same effect; but of both these cases it is said in Roscoe's Criminal Evidence (13th ed. p. 25) that they are "difficult to reconcile with established principles," and that "it seems to require much consideration whether, as a general rule, the statements of a deceased person as to the circumstances of the injury which caused his death, made immediately after the injury, but not under circumstances which entitle them to be considered as dying declarations, are receivable in evidence."

Restoration of Property on Conviction.

VILMONT *v.* BENTLEY. (1887) [135]

[57 L. J. Q. B. 18; 12 App. Cas. 471.]

This was an interpleader issue, Bentley, the defendant, being a person who had in a *bonâ fide* manner, in the ordinary way of business, and in market overt, bought some goods which a man named Hodder had obtained by false pretences. Hodder was prosecuted to conviction, and, that being so, it was held that, in virtue of 24 & 25 Vict. c. 96, s. 100, Bentley must restore the goods to the people who had been swindled out of them.

The case was taken up to the House of Lords by way of

appeal from a decision of the Court of Appeal, which reversed one of Denman, J.

Between January and March, 1885, Hodder bought from Messrs. Galpin & Crochard, of Amiens, merino and cashmere goods. The contract of sale was induced by false pretences made by Hodder. Between March and May the goods, which had been delivered to Hodder, were pledged by him with one Dobree, and by Dobree placed in a shop or warehouse of a person named Starbuck, in the city of London. The goods were offered for sale at Starbuck's shop, and sold in the ordinary course of business to the appellant Bentley on the 30th of May, 1885. In September of the same year, Hodder was indicted, on the prosecution of Galpin & Crochard and convicted of obtaining the goods by false pretences. An order for restitution was applied for by Galpin & Crochard at the trial, but refused. They claimed the goods from Starbuck, who had retained possession. He interpleaded, and an issue was directed to try the right to the goods, the respondent, Vilmont, as trustee in liquidation of Galpin & Crochard, being plaintiff in the issue. Denman, J., considering himself bound by Moyce *v.* Newington (4 Q. B. D. 32), decided in favour of the appellant Bentley. The Court of Appeal held that the property in the goods re-vested upon the conviction in Galpin & Crochard, and that Vilmont was entitled to judgment. The House of Lords affirmed the decision of the Court of Appeal, thereby deciding that when a contract for the sale of goods has been induced by false pretences, and the owner of the goods has prosecuted the thief to conviction, the property in the goods re-vests in the owner on and at the date of the conviction, and he can then recover them from the person in whose possession they are, even though that person had, before the conviction, bought them in market overt, or otherwise, without notice of the fraud.

[Sir R. Webster, Q.C., A.-G., Jelf, Q.C., and Attenborough

for the appellant; Charles, Q.C., and C. W. Mathews for the respondent.]

The leading case overrules Moyce *v.* Newington (4 Q. B. D. 32. and 14 Cox, C. C. 182), where it was held that sect. 100 only applied to cases in which possession had been obtained without the property passing.

See the case of R. *v.* JJ. of the Central Criminal Court (17 Q. B. D. 598), as to the power of Courts before which convictions take place to order the restitution of the proceeds of the goods as well as of the goods themselves.

Under 24 & 25 Vict. c. 96, s. 100, which enacts that if any person guilty, *inter alia*, of obtaining any property by false pretences is convicted thereof, in such case the property shall be restored to the owner or his representative, and in every such case the Court before whom any such person shall be tried, shall have power to order the restitution thereof in a summary manner. The Court has jurisdiction to entertain an application for the restitution of the proceeds of the property as well as of the property itself. Such an application ought only to be granted if the proceeds are in the hands of the convict or of an agent who holds them for him. Lord Coleridge, C. J., said: "An application for the restitution of property stolen or obtained by false pretences is rightly made to the Court before which the felon or misdemeanant is convicted; and, if the goods have been sold, an application may be made for the restitution of the proceeds, which, if they are in the hands of the criminal or of an agent who holds them for him, should be granted. If the person holding the goods does not hold them for the criminal, the application should not be granted; but the fact that the Court may have come to a wrong decision does not establish an excess of jurisdiction. It is a very common mistake to suppose that it does; but, where a Court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in point of law or of fact."

The Act of 21 Hen. VIII. c. 11, provided: "If any felon hereafter do rob or take away any money, goods, or chattels from any of the King's subjects, from their person or otherwise, within this realm, and thereof the said felon or felons be indicted, and after

arraigned of the same felony and found guilty thereof, the party so robbed, or owner, shall be restored to his said money, goods and chattels, and the justices before whom the felon is found guilty are empowered to award writs of restitution for the said money, goods and chattels, in like manner as though any such felon were attainted at the suit of the party in appeal."

This Act was repealed by 7 & 8 Geo. IV. c. 27, but was in substance re-enacted by sect. 57 of 7 & 8 Geo. IV. c. 29, and its provisions extended to cases of misdemeanour. The Act 7 & 8 Geo. IV. c. 29, was repealed by 24 & 25 Vict. c. 95.

By 24 & 25 Vict. c. 96, s. 100, "If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the Court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: Provided, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the Court shall not award or order the restitution of such security."

By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), it is enacted that where goods have been stolen, and the offender is convicted, the property in the stolen goods re-vests in the owner, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise (sub-sect. 1); but where any goods have been obtained by fraud, not amounting to felony, the

property in such goods shall not re-vest in the owner of the goods by reason only of the conviction of the offender (sub-sect. 2).

In Moss *v.* Hancock ([1899] 2 Q. B. 111) a thief stole from the respondent a five-pound gold piece (which by royal proclamation had been made current coin of the realm) and changed it with the appellant, who was a dealer in curiosities, for five sovereigns. The Court held that under the circumstances the coin had not been received by the appellant as current coin, and that an order might be made under s. 100 of the Larceny Act, 1861, ordering the appellant to restore it to the respondent.

Cases on the subject are:—Horwood *v.* Smith, 2 T. R. 750; Scattergood *v.* Sylvester, 15 Q. B. 506; Parker *v.* Patrick, 5 T. R. 175; Peer *v.* Humphrey, 2 A. & E. 495, 499; Walker *v.* Matthews, 8 Q. B. D. 109; R. *v.* Stancliffe, 11 Cox, C. C. 318; Lindsay *v.* Cundy, 1 Q. B. D. 348; and 13 Cox, C. C. 162, 583, and 14 Cox, C. C. 93; Nickling *v.* Heaps, 21 L. T. N. S. 754; White *v.* Garden, 10 C. B. 919; Babcock *v.* Lawson, 4 Q. B. D. 294; R. *v.* Horan, Ir. Rep. 6 C. L. 293.

New Trials.

R. *v.* DUNCAN. (1881) [136]

[7 Q. B. D. 198; 14 Cox, C. C. 571; 50 L. J. (M. C.) 95; 44 L. T. 521; 30 W. R. 61; 45 J. P. 456.]

On an indictment, found at Quarter Sessions, removed into the Queen's Bench Division, and tried at Winchester Assizes, for obstructing a highway, the defendant was acquitted, and it was held that a new trial on the ground of misreception of evidence, misdirection, and that the verdict was against evidence, could not be granted.

"The practice of the Courts," said Lord Coleridge, C. J., "has been settled for centuries, and is, that in all cases of a criminal kind, where a prisoner or defendant is in danger of

imprisonment, no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted. The one case in which a new trial was granted in a purely criminal case, on the ground of misdirection or misreception of evidence (R. *v.* Scaife, 17 Q. B. 238), was a case not of misdemeanour, but of felony. At that time, there was an important distinction between misdemeanours and felonies. The importance of it has since been destroyed by the legislature, the distinction as regards the effect of a conviction upon the family and property of the felon having been abolished. R. *v.* Scaife stands unreversed, and, if it had been followed, it would have worked a revolution in criminal practice. But that case took no root in our jurisprudence, and has never been followed."

[Charles, Q.C., and Bullen showing cause; Collins, Q.C., and Warry in support of rule.]

Although the leading case is still law, the whole question of Criminal Procedure is affected by the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), of which the following are among the more important provisions:—

3. A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—

(*a*) against his conviction on any ground of appeal which involves a question of law alone; and

(*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

(*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.

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:

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.

20.—(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.

Previous Convictions.

R. *v.* **PENFOLD.** (1902) [137]

[[1902] 1 K. B. 547; 20 Cox, C. C. 161; 71 L. J. K. B. 306; 86 L. T. 204; 50 W. R. 671.]

The prisoner was indicted for an offence under s. 7 of the Prevention of Crimes Act, 1871, and at the trial, evidence having been given of the prisoner having been found in the

places in question under circumstances which raised the suspicion that he was about to commit a felony, it was proposed to call evidence of the previous conviction. Counsel for the prisoner objected, and contended that under sect. 116 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which was applied to the Prevention of Crimes Act, 1871, by sect. 9 of the latter Act, evidence of previous conviction ought not to be given until the jury had found that the prisoner had been found at the places in question under circumstances showing that he was about to commit a felony. He cited in support of this view a decision of the Recorder of London, in Rex *v.* Brown (65 J. P. 136). The Chairman overruled the objection and admitted the evidence, and the prisoner having been convicted, reserved the point. The Court of Crown Cases Reserved affirmed the conviction, and, in delivering judgment, Lord Alverstone, C. J., said : "It appears that there has been some doubt as to the practice which ought to prevail where there is a trial on an indictment under sect. 7 of the Prevention of Crimes Act, 1871. Of course, in cases where a crime which is complete in itself is charged in an indictment which also charges a previous conviction, but different degrees of punishment may be inflicted in accordance with the antecedents of the prisoner, evidence of the previous conviction ought not to be given until the subsequent charge has been proved. To prevent any difficulty, sect. 116 of 24 & 25 Vict. c. 96 was passed, which provides that the offender shall in the first instance be arraigned on so much of the indictment as charges the subsequent offence, and after the inquiry into the subsequent offence is concluded he shall then, and not before, be asked whether he had previously been convicted as alleged in the indictment.

" Then came the Prevention of Crimes Act, 1871, which by some of the sub-sections of sect. 7, provided that a state, or rather a combination, of circumstances should create an offence which would be no offence at all but for the offender having been

previously convicted within a certain time. The indictment in this case alleges all the necessary ingredients of the offence. Had the prisoner been tried summarily before the magistrate, the whole story must have been gone into and the previous convictions must have been proved. The prisoner, however, elected to be tried by a jury, and, in my opinion, it is right that the ingredients which are necessary to constitute the offence should be proved before whatever tribunal has to try the case. The offence here is a statutory offence, and it is not complete unless the particular circumstances, the previous convictions, and the time are all proved; and these necessary ingredients, as I have called them, should therefore all be given in evidence before the tribunal, whether it be a Court of summary jurisdiction or a jury. It seems to me that no distinction can be made between trial before magistrates and that before a jury.

"No doubt sect. 9 of the Prevention of Crimes Act, 1871, applies the practice laid down in sect. 116 of 24 & 25 Vict. c. 96, in regard to proceedings upon an indictment for an offence committed after previous conviction, to 'any indictment for committing a crime as defined by this Act after previous conviction for a crime'; but sect. 20 of the Act of 1871 defines both 'crime' and 'offence,' and it is plain that the set of circumstances contemplated by sect. 7 are 'offences' as distinguished from 'crimes' by those definitions. It seems to me that the right practice has been followed in this case, and that the conviction should be affirmed. I ought to add that we are unable to agree with the opinion to the contrary effect expressed by the Recorder of London in Rex *v.* Brown (65 J. P. 136)."

Ridley, J., said: "When the nature of the offence necessitates the proof of the previous conviction, and the offence is incomplete unless there is a previous conviction, then I think it is right that it should be given in evidence before the jury in the first instance. In any other case it is not desirable that the

previous conviction should be known to the jury until the subsequent offence has been proved."

Bigham, J., said: "It seems to me sufficient to say that in this case evidence of the previous conviction was necessary in order to prove the offence with which the prisoner was charged, and that it was therefore rightly admitted."

[H. Sutton for the prosecution.]

It is an exception to the usual practice of English Criminal Law to allow evidence of a previous conviction to be given during a trial, but it is admitted as rebutting evidence when the prisoner has put his character in issue, and under certain statutes.

A count alleging a previous conviction may be inserted in indictments for felonies, uttering or passing counterfeit coin, obtaining goods by false pretences, conspiring to defraud, or being found at night armed with intent to break into a dwelling-house, or with housebreaking implements, and the statutes bearing upon these points are 24 & 25 Vict. c. 96, ss. 7, 8, 9, 116; 24 & 25 Vict. c. 99, ss. 12, 37; and 34 & 35 Vict. c. 112, ss. 8, 9, 20.

As to charge of previous conviction under the Prevention of Crimes Act, 1871, in cases of receiving stolen goods, *vide ante*, p. 389.

In Faulkner *v.* R. ([1905] 2 K. B. 76) the prisoner was indicted at quarter sessions for attempting to commit larceny, and a subsequent count in the indictment charged a previous conviction. The prisoner was arraigned upon and pleaded to both counts. Objection was taken on his behalf to the arraignment as contravening the provisions of sect. 116 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), which require that upon an indictment for an offence after a previous conviction the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and that until he be found guilty of that offence he shall not be called upon to plead to the charge of the previous conviction. The Recorder accordingly adjourned the trial to the next sessions. At that sessions the prisoner was tried. There was no fresh arraignment, but his former plea was treated as standing. He was, however, given in charge to the jury upon the first count only, and was found guilty and sentenced

on that count. The Court held that although the arraignment did not take place at the sessions at which the prisoner was tried, and although the fact of the previous conviction was not disclosed to the jury by whom he was convicted, either by the manner of giving him into their charge or otherwise, the fact that the arraignment did not comply with the provisions of the section was such a substantial defect as could not be cured by verdict, and that the conviction must be quashed.

Kennedy, J., said: "There was no fresh arraignment, and the prisoner's original pleas to the whole indictment were treated as standing good. He was, however, given in charge to the jury this time upon the first count only, and he was found guilty and sentenced upon that count. Under these circumstances the prisoner has moved to have the conviction quashed for error on the record, in that he was arraigned upon and called upon to plead to, and did plead to, the three counts in the indictment at one and the same time, contrary to the provisions of sect. 116 of the Larceny Act. It was contended for the Crown that the danger of unfairness in the trial which that section was intended to provide against did not exist here, inasmuch as the trial took place before a different jury, who had not heard the arraignment and did not know of the fact that the prisoner had pleaded to the whole indictment. But that, in my opinion, makes no difference. The section has not been complied with, and we are not at liberty to dispense with compliance. To the general rule laid down by that section, that no mention shall be made of the previous conviction until after conviction of the subsequent offence, there is, so far as I know, only one exception, namely, where the previous conviction is a necessary ingredient in the offence, as in the offences created under sect. 7 of the Prevention of Crimes Act. On the trial of an indictment for an offence under that section it is proper that the previous conviction should be disclosed to the jury at the outset. (Rex *v.* Penfold, [1902] 1 K. B. 547.) But in all other cases the provisions of sect. 116 must be strictly followed, and the neglect to follow them constitutes a sufficiently substantial defect in the proceedings to entitle the prisoner to have the conviction quashed upon a writ of error. A defect of that kind is not one that can be cured by verdict."

Ridley, J., said: "The language of sect. 116 of the Larceny Act,

assuming that it applies to this case, is express, and we are not entitled to disregard a non-compliance with the provisions of that section merely because we may think that under the circumstances no injustice has been done. We must bear in mind what was said by Whiteside, C. J., in R. *v.* Maria Fox (10 Cox, C. C. 502), namely, that 'this enactment was intended to prevent the previous conviction being mentioned even by accident before a verdict of Guilty of the subsequent offence was delivered.' It is enough that, in consequence of the procedure indicated by the section not being followed, the fact of the previous conviction might come to the ears of the jury, however remote that contingency might be. Then do the provisions of sect. 116 apply to this case? I am of opinion that they do. It may be that the offence of attempting to commit a larceny is not an offence punishable under the Larceny Act, but that, in my opinion, is immaterial. The section says: 'And the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows.' The words 'any offence' are perfectly general. They ought not, I think, to be treated as limited to 'any offence punishable under this Act,' but as extending to offences of all kinds, including that with which the prisoner was here charged—the offence of attempting to commit larceny."

In R. *v.* Blaby ([1894] 2 Q. B. 170) the prisoner was tried for feloniously uttering counterfeit coin upon an indictment under 24 & 25 Vict. c. 98, s. 12, which, after charging her with the misdemeanour of unlawfully uttering a counterfeit coin in 1894, proceeded to charge her with a previous conviction in 1888 for a similar offence, and concluded in the usual form, that the prisoner had feloniously uttered the counterfeit coin on the second occasion. She was given in charge to the jury upon the first part of the indictment only, which charged her with the unlawful uttering in 1894; to this charge she pleaded guilty. She was then given in charge upon the second part of the indictment, charging the previous conviction, to which she pleaded not guilty. A police officer was called who stated that he was present in Court when the prisoner was convicted, and produced a certificate of her conviction, from which it appeared that she had been released upon finding a recognizance to come up for judgment when called upon. The prisoner's counsel thereupon submitted that, in order to con

stitute a conviction, there must be both verdict and judgment; that the certificate showed that no judgment had been pronounced against the prisoner, but only an order empowering her to be released upon finding a recognizance to come up for judgment, and that there was, therefore, no case to go to the jury. The objection was overruled, and the jury found that the prisoner was the person named in the certificate.

By 24 & 25 Vict. c. 99, s. 9, a person who utters counterfeit coin is guilty of a misdemeanour, "and being convicted thereof" is liable to imprisonment. By sect. 12, a person who has been convicted of a misdemeanour under sect. 9, and afterwards commits a misdemeanour mentioned in that section, is guilty of felony, "and being convicted thereof" is liable to penal servitude. By sect. 37, a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence is made sufficient evidence of the previous conviction. The Court of Crown Cases Reserved held that the expression "convicted," as used in sects. 9 and 12, must be taken to refer only to the finding of a verdict of Guilty or a plea of Guilty, and not to include the sentence or judgment of the Court; and that therefore, upon the trial of an indictment for felony under sect. 12, a previous conviction under sect. 9 was sufficiently proved by the production of a certificate which showed that the prisoner had been released upon finding a recognizance to come up for judgment when called upon.

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